No. 23-1257, 23-1261 and 23-1265

Mille Lacs Band of Ojibwe, et al.

Plaintiffs-Appellees,

v.

Erica Madore, in her official capacity as Mille Lacs County Attorney;
County of Mille Lacs, Minnesota;
Kyle Burton, in his official capacity as Mille Lacs County Sheriff,

Defendants-Appellants,

On Appeal from the United States District Court for the District of Minnesota
Civil No. 0:17-cv-05155-SRN-LIB

BRIEF OF PLAINTIFFS-APPELLEES MILLE LACS BAND OF OJIBWE, et al.

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SUMMARY OF THE CASE

The Mille Lacs Band and two Band police officers sued Mille Lacs County and its County Attorney and Sheriff to prevent ongoing interference with Band law enforcement authority. The District Court found Defendants unlawfully prohibited the exercise of such authority on non-trust lands within the Mille Lacs Reservation, the investigation of state-law violations on trust lands, and the investigation of non-Indians. The Court's declaratory judgment confirms the Band's inherent and federally delegated law enforcement authority extends to all lands in the Reservation and the Band's inherent authority includes authority to investigate state-law violations and conduct limited investigations of non-Indians.

Defendants argue the District Court lacked subject matter jurisdiction; the Band's law enforcement authority is limited to trust lands because the Reservation was disestablished; and the Court's declaratory judgment was otherwise erroneous. However, the Band has a federal cause of action to prevent interference with its sovereign authority, which is within the District Court's jurisdiction. Because Congress never disestablished the Reservation, the Band's law enforcement authority extends throughout the Reservation. The District Court correctly defined and properly entered a declaratory judgment confirming that authority.

Each side should be given 30 minutes for argument.

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I. JURISDICTION

Defendants appeal from the final judgment of the District Court, dated January 10, 2023. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362. Defendants filed timely Notices of Appeal, dated February 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1291, but Plaintiffs contend the case is moot. *See* Appellees' Motion to Dismiss Appeal as Moot (June 5, 2023). This brief addresses issues raised in Defendants' appeals should this Court determine otherwise.

II. ISSUES

1. Did the District Court have subject-matter jurisdiction?

   United States v. Lara, 541 U.S. 193 (2004)

   Bishop Paiute Tribe v. Inyo Cnty., 863 F.3d 1144 (9th Cir. 2017)

2. Does the Mille Lacs Reservation still exist?

   McGirt v. Okla., 140 S. Ct. 2452 (2020)

3. Did the District Court properly define the Band's inherent law enforcement authority?

   United States v. Cooley, 141 S. Ct. 1638 (2021)

   United States v. Terry, 400 F.3d 575 (8th Cir. 2005)

III. STATEMENT OF THE CASE

A. The Mille Lacs Reservation

1. The Treaties

a. 1855 Treaty

In an 1855 treaty, the Mississippi, Pillager and Lake Winnibigoshish Bands of Chippewa (today known as Ojibwe) 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" within a defined tract, and to "further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." Treaty with the Chippewa art. 1, 10 Stat. 1165 (Feb. 22, 1855).

Article 2 set aside six tracts for the Mississippi Bands' "permanent homes." The first "embrace[d]" about 61,000 acres in four fractional townships and three islands in Mille Lacs Lake and became known as the Mille Lacs Reservation. 1855 Treaty, art. 2. The other five were located at Gull, Pokegama, Rabbit, Rice, and Sandy Lakes. *Id.* Additional tracts were reserved for the Pillager and Lake Winnibigoshish Bands. *Id*.

The Mille Lacs Ojibwe had deep ancestral, spiritual and cultural connections to the Mille Lacs Lake region. They occupied villages along the lakeshore, clearing

land, planting crops, and harvesting abundant fish, wild rice, maple sugar, geese, ducks, deer, and other game throughout the Reservation. In 1868, Rev. Sterling McMasters wrote "there is no place like Mille Lac for the Mill [sic] Lac Bands." In 1895, the Chippewa Commission's Chairman described the Reservation as "the Indian paradise."[1]

b. 1863 Treaty

In 1862, a Dakota uprising led to the deaths of several hundred Minnesota settlers. During the uprising, Gull Lake Ojibwe Chief Hole-in-the-Day gathered warriors to launch his own campaign. When Mille Lacs learned Hole-in-the-Day planned to attack Fort Ripley, they refused to participate and sent warriors to protect the fort and nearby settlements. Indian Affairs Commissioner Dole, who was at Fort Ripley, praised their actions as going "far in enabling us finally to effect a settlement of the Chippewa difficulties without a resort to arms."[2]

After the uprisings, federal officials wanted the Mississippi Bands to cede their 1855 reservations and remove north to a reservation near Leech Lake. In

[1] Appellees' Appendix ("Aple.-App.") 385, 696, 965-966, 1101-1141, 1147, 1204-1213, 1392-1395; District Court Record Document ("R.Doc.") 227-14, at 2; R.Doc. 231-26, at 4; R.Doc. 235-1 at 87-88; R.Doc. 237-1, at 22-62, 68, 140-149, 328-331. All record document pin cites are to ECF page numbers.

[2] Aple.-App. 713-714, 920; R.Doc. 232-3, at 1-2, R.Doc. 235-1, at 42; Appellants' Appendix ("Aplt.-App.") 237-238, 240-241; R.Doc. 242-1, at 67-68, 70-71.

January 1863, at treaty negotiations in Crow Wing, Mille Lacs Chief Shaboshkung refused, scuttling the negotiations. Bishop Henry Whipple wrote to Dole:

> The Mille Lac Indians … 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 [man's] friend. They say that you [Dole] promised them that they should be protected and rewarded[.].[3]

Negotiations resumed in Washington in late February. Interior Secretary Usher and Dole acknowledged Mille Lacs' refusal to join Hole-in-the-Day and their defense of Fort Ripley. Usher stated the Government expected they

> would be reluctant to agree to this Treaty, because they had a good home where they were, and were peaceable and had done no harm. Your Great Father has no complaint to make against you.

However, Usher argued removal would offer a reprieve from flooding caused by lumber dams and interference by settlers. Shaboshkung complained about being "coupled with guilty parties" and asserted his people "can live at peace" with whites. He and other delegates proposed enlarging the Mille Lacs Reservation and bringing other Mississippi Bands there.[4]

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[3] Aple.-App. 922-926, 1149-1154; R.Doc. 235-1, at 44-48, R.Doc. 237-1, at 85-90; Aplt.-App. 245-246; R.Doc. 242-1, at 75-76.

[4] Aple.-App. 926-932, 1083, 1154-1157; R.Doc. 235-1, at 48-54, R.Doc. 236-1, at 47, R.Doc. 237-1, at 90-93; Aplt.-App. 246-247; R.Doc. 242-1, at 76-77.

Dole expressed concern that concentrating *all* the Bands at Mille Lacs would provoke nearby settlers but conceded Mille Lacs might remain, perhaps *forever*:

> 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.

(Emphasis added). As negotiations continued, Dole repeated Mille Lacs "have earned this from the Government that they might … be allowed to remain where they are at least for the present." Shaboshkung insisted they had adhered to the 1855 treaty stipulations and demanded they "be allowed to live on our Reserves."[5]

Minnesota Senator Henry Rice joined the negotiations, met privately with the Indians and concluded a treaty. There is no record of Rice's meetings with the Indians. He wrote to Whipple that "[e]very 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." He asserted "the Indians all left [Washington] satisfied with the treaty."[6]

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[5] Aple.-App. 932-935, 1158-1160; R.Doc. 235-1, at 54-57, R.Doc. 237-1, at 94-96; Aplt.-App. 248-249; R.Doc. 242-1, at 78-79.

[6] Aple.-App. 935-938, 1092-1093, 1160-1162; R.Doc. 235-1, at 57-60, R.Doc. 236-1, at 56-57, R.Doc. 237-1, at 96-98.

Article 1 of the Treaty provides "[t]he reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the [1855 Treaty], are hereby ceded to the United States," except one-half section of land at Gull Lake for a missionary. Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands art. 1, 12 Stat. 1249 (Mar. 11, 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 the Ojibwe's removal from their "present reservations" contingent on the United States fulfilling its obligations but exempted Mille Lacs from removal so long as they did not interfere with whites:

> 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 (emphasis added).

c. 1864 Treaty

Hole-in-the-Day complained the new reservation was not suitable for the bands required to relocate there and proposed "his people" be removed "as far away

from whites as possible." Mille Lacs did not agree with his plan "'in regard to removing the Indians but wish[ed] to stick to the treaty of last winter" and pledged to "be friendly to the whites as long as we live.'"[7]

Dole invited Hole-in-the-Day and Misquadace of Sandy Lake to Washington. No other Bands were represented and there is no record of the ensuing negotiations. The result was a new treaty superseding the 1863 Treaty but largely identical to it. Treaty with the Chippewa, Mississippi, Pillager and Lake Winnibigoshish Bands, 13 Stat. 693 (May 7, 1864); Article 1 again ceded the Mississippi Bands' 1855 reservations but set apart a section of land at Gull Lake, Sandy Lake, and Mille Lacs for Chiefs Hole-in-the-Day, Misquadace, and Shaboshkung, respectively. Article 2 slightly expanded the new reservation at Leech Lake. Article 12 retained the proviso that the Mille Lacs Ojibwe "shall not be compelled to remove" so long as they behaved well but 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."[8]

d. 1867 Treaty

In 1867, the Mississippi Bands ceded part of the reservation near Leech Lake

[7] Aple.-App. 938-939, 1173; R.Doc. 235-1 at 60-61, R.Doc. 237-1, at 109; Aplt.-App. 256-257; R.Doc. 242-1, at 86-87.

[8] Aple.-App. 940, 1175; R.Doc. 235-1, at 62, R.Doc. 237-1, at 111; Aplt.-App. 257-258, 1424; R.Doc. 242-1, at 87-88; R. Doc. 313 at 11; County's Addendum ("Cnty.-Add.") 11.

established in the 1863 and 1864 Treaties[9] and received a new 36-township reservation at White Earth. Treaty with the Chippewa of the Mississippi arts. 1 & 2, 16 Stat. 719 (Mar. 19, 1867). The 1867 Treaty did not mention the Mille Lacs Reservation or the Article 12 proviso in the 1863 and 1864 Treaties.[10]

e. Contemporaneous Understandings

The Mille Lacs Ojibwe understood the Treaties preserved their reservation and their exclusive right to live on it during good behavior. Upon returning from Washington in 1863, they described the negotiations to former Indian Agent Joseph Roberts:

> [T]he interpreter told us that the Government wanted the other bands to sell their lands to avoid any future trouble, and we were asked to do the same. We told the interpreter we did not come there to sell our homes, we could not, we had no authority to trade or sell any part of our land. But he (the interpreter) said the great father did not want the lands of the good Indians, he did not want our land but if we would sign with all the Chippewas he (the great father) would give us back our land, at once which was done, and in the treaty read to us the great father said because we had always been his friends we were to keep our homes forever.[11]

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[9] The remainder of this reservation became known as the White Oak Point or Mississippi Chippewa Reservation. Aplt.-App. 641; R.Doc. 242-6, at 135.

[10] Aple.-App. 952-953, 1181; R.Doc. 235-1, at 74-75, R.Doc. 237-1, at 117; Aplt.-App. 260-261; R.Doc. 242-1, at 90-91.

[11] Aple.-App. 409, 1579-1580; R.Doc. 228-5, at 2; R.Doc. 270-1, at 66-67 (testimony of *Defendants'* expert).

After the 1863 and 1864 Treaties, local settlers and government officials sought to remove the Mississippi Bands, occasionally including Mille Lacs. Mille Lacs resisted removal on multiple grounds, including the Article 12 proviso prohibiting their removal during good behavior. In 1867, Mille Lacs chiefs recalled that, after the 1863 negotiations, President Lincoln assured them that, "if we would behave ourselves as we have done before that we should be let alone on the land we had before [occupied] for a hundred years or a thousand years or as long as we do not commit any depredations"—assurances they recalled repeatedly in ensuing years. In 1870, Roberts explained the chiefs "claim the right under the treaty of 1863 or 4 that they should be allowed to remain at that reservation … providing they would commit no depredations, which they claim they did not."[12]

Others familiar with the Treaties shared the chiefs' understanding. In 1866, Indian Agent Clark noted a congressional appropriation for removal did not include Mille Lacs, who could "not to be compelled to remove so long as they did not" interfere with the whites. Bishop Whipple opposed Mille Lacs' removal because they had been "pledged peaceable possession of their *present reservation*" (emphasis added). In 1868, Peter Roy, who interpreted at the 1863 negotiations, wrote that the

[12] Aple.-App. 342, 352-353, 465-466, 927-928, 943-949, 962-963, 976, 1164-1168, 1172-1203; R.Doc. 226-12, at 3, R.Doc. 226-14, at 1-2, R.Doc. 229, at 25-26; R.Doc. 235-1, at 49-50, 65-71, 84-85, 98, R.Doc. 237-1, at 100-104, 108-139.

Government had no right to ask the Band to remove because the Treaty allowed the Band "to remain at Mille Lac as long as they are not injuring the interest of the whites." After investigating, General Alfred Terry reported Mille Lacs, "in consideration of the fidelity to the whites which they manifested in 1862, are permitted to remain where they now are, so long as they give no annoyance to settlers[.]" In 1869, Chippewa Agent and Brevet Captain J.J.S. Hassler reported all the Mississippi Chippewa were to remove "except the Mille Lac bands, who were permitted to remain on the land ceded by them during good behavior."[13]

2. The Reservation from the 1860s to the 1880s

a. Indian Occupancy

The vast majority of Mille Lacs Ojibwe remained at Mille Lacs in the 1870s and 1880s, where, according to Defendants' expert, they were the Reservation's *sole* occupants.[14]

b. Public Entries Prohibited

In 1870, Minnesota's Surveyor General authorized a survey of the Reservation and billed the Department of the Interior ("Interior"). The Taylors Falls

[13] Aple.-App. 317-318, 325-326, 348, 949-950, 967-968, 1199-1202; R.Doc. 226-8, at 3-4, R.Doc. 226-9, at 1-2, R.Doc. 226-13, at 2, R.Doc. 235-1, at 71-72, 89-90, R.Doc. 237-1, at 135-138.

[14] Aple.-App. 1199-1208; R.Doc. 237-1, at 135-144, Aplt-App. 988; R.Doc. 242-10, at 25.

Land Office ("Taylors Falls") interpreted the bill's payment as authorization to open the Reservation to public entry. Indian Agent Edward Smith objected:

> 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.

Smith stated "settlers and lumber men [were] taking possession of this Indian Reserve." Their entries were "largely fraudulent" and being made "for lumbering purposes." Smith requested they "be canceled as without authority of law" and requested authorization "to protect this reservation from any encroachments until the Indians are removed."[15]

Indian Affairs Commissioner Parker, "seeing the impropriety of permitting white settlers to go upon the reservation while the Indians were still in occupation," wrote to General Land Office ("GLO") Commissioner Drummond, requesting that "no part of said reservation should be considered as subject to entry or sale as public lands." Drummond instructed Taylors Falls that the lands were "still occupied by the Indians" and "not subject to disposal"; that "all settlements and entries thereon are illegal"; and that it should "allow no Entries on these lands until so ordered" by the GLO. Interior Secretary Delano concurred; because there was no evidence of Indian misbehavior, the Indians were "entitled to remain at present unmolested on

[15] Aple.-App. 977-979; R.Doc. 235-1, at 99-101 (alteration omitted).

their reservation[.]" Attorney General Akerman instructed the U.S. Attorney "to compel squatters to vacate the Mille Lac lands they have taken from the Indians in violation of treaty stipulations," constituting (per the *Minneapolis Tribune*) "authoritative action by the national authorities, maintaining the claims of the Indians to the Mille Lac lands in this state as against the white settlers."[16]

c. Removal Pressures

Because the Reservation was "rich in pine lands," Smith predicted lumbermen would continue to seek "sufficient pretext … to enforce [the Indians'] removal." He proposed selling the pine, "leaving the fee in the Government and the right of occupying in the Indians until their removal to White Earth." "[W]hen the reservation is once laid bare of its tempting wealth it will be no longer in demand for pretended settlement[.]" Alternatively, 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.[17]

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[16] Aple.-App. 355, 418, 979-980, 983-984; R.Doc. 226-20, R.Doc. 228-6, at 6, R.Doc. 235-1, at 101-102, 105-106. Before receiving Parker's request, the GLO patented swamplands within the Reservation to Minnesota, which the Governor refused to relinquish. Aple.-App. 813, 981; R.Doc. 233-12, at 2, R.Doc. 235-1, at 103.

[17] Aple.-App. 359, 360; R.Doc. 227, at 12, 18.

In 1872, Indian Affairs Commissioner Walker reported Mille Lacs, "who continue to occupy the lands ceded by them in 1863, with reservation of the right to live thereon during good behavior, [were] indisposed to leave their old home." Walker also noted removal pressures arising from pine on their "present reservation" and recommended its sale as a solution.[18]

When Smith became Indian Affairs Commissioner in 1873, he expressed reluctance to make "permanent improvements" on the Reservation unless "title" could be restored to the Band. In 1875, he told Band leaders "[y]ou have not lost [your right at Mille Lac] so long as you behave yourself and nobody can find any fault with you." However, without "title," the Band's position was precarious, because a few bad actions could trigger everyone's removal. This was so even though Smith knew "of no other Indians … who are better disposed to the white people than the Mille Lacs." Shaboshkung told Smith they wanted to remain at Mille Lacs and "will do nothing wrong to the whites and will be friendly to them."[19]

d. The Sabin-Wilder Scheme

In 1876, Minneapolis lumberman Amherst Wilder and future Senator Dwight Sabin schemed to acquire the Reservation's timber. They would hire someone to

[18] Aple.-App. 1463; R.Doc. 242-5, at 96.

[19] Aple.-App. 364-366, 370; R.Doc. 227-5, at 1-3, R.Doc. 227-6, at 2; Aplt-App. 545; R.Doc. 242-5, at 101.

make a preemption entry on reservation farmlands and, after its rejection by the local land office, appeal to Washington. If successful, they would use soldiers' additional homestead rights to enter reservation pinelands. Simultaneously, William Folsom, a Minnesota legislator, would push for the Band's removal.[20]

Sabin hired Folsom's son, Frank, to make the preemption entry. Taylors Falls and the GLO rejected it because the Reservation was closed. Interior Secretary Chandler overturned their decisions. He asserted the United States had fulfilled its treaty obligations and title to the land therefore rested "absolutely in the United States." Although the Band could not be compelled to remove, this did not prevent the sale or disposal of the lands by the Government: the Article 12 proviso "anticipated … that these lands would be settled upon by white persons" and that the Band "might remain, not because they had any right to the lands, but simply as a matter of favor." However, because the Indians still occupied the Reservation and no appropriation was available for their removal, Chandler suspended his decision "until the close of the next regular session of Congress[.]"[21]

[20] Aple.-App. 1229-1232, 1241-1242; R.Doc. 237-1, at 165-168, 177-178. In calling for removal, Folsom noted some "one thousand" Indians lived on or near the Reservation. Aple.-App. 1238-1239; R. Doc. 237-1, at 174-175.

[21] Aple.-App. 380-382, 1232-1236; R.Doc. 227-10, at 2-4, R.Doc. 237-1, at 168-172.

Chandler's successor, Interior Secretary Schurz, instructed Taylors Falls to permit no entries on the Reservation 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 Lacs Reservation … shall have been determined." However, on March 12, 1879, Taylors Falls permitted Sabin and Wilder's agents, working overnight, to make 285 entries on Reservation pinelands using soldiers' additional homestead rights. Schurz cancelled the 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."[22]

In response to renewed complaints about the Indians, Lieutenant Constant Williams investigated and found "the white settlers of that region have no more to fear of these Indians than they have from each other." "Many white men are desirous of cutting timber there but owing to the fact that the Indians hold the country they cannot do so until the Indians molest the whites." "[N]o further attention should be given the matter, unless it may be, in the future, to protect the Indians."[23]

After learning about the Sabin-Wilder entries, Mille Lacs' leaders travelled to Little Falls. Recalling the 1863 negotiations, Mozomany stated he "saw great men

[22] Aple.-App. 427, 1240-1246, 1255-1257; R.Doc. 228-6, at 15, R.Doc. 237-1, at 176-182, 191-193.

[23] Aple.-App. 1248-1249; R.Doc. 237-1, at 184-185.

in Washington, and they promised us that as long as we behaved ourselves, we could remain on our reservation." Kegwedosay believed "we were about to be robbed of what little we had" and that "some person had entered the best part of our reservation."[24]

A citizens' committee headed by Nathan Richardson prepared a petition describing the Band's assistance during the Dakota uprising and its "uniform good behavior" since then. Asserting "an extensive and deep laid plot has been formed, including men of high authority, for the purpose of taking from them the pine that is on their reservation[,]" it asked "proper authorities [to] take immediate steps to secure to said Indians their reservation and home at Mille Lacs." Band leaders added that in 1863 "our Great Father in Washington … made us a promise that we should inherit our home on the beautiful and, to us, lovely Mille Lacs forever, or so long as we behaved ourselves well toward our white neighbors."[25]

In 1880, Acting Indian Affairs Commissioner Brooks informed Richardson's committee "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." The *Princeton Union* reported Secretary Schurz, who was "very

[24] Aple.-App. 386-387, 1258-1260; R.Doc. 227-14, at 3-4, R.Doc. 237-1, at 194-196.

[25] Aple.-App. 390-392, 1259-1263, R.Doc. 227-15, at 1-3, R.Doc. 237-1, at 195-199.

obnoxious to the [pineland] ringsters[,]" had blocked their game so far but would soon be leaving office.[26]

In 1882, Indian Affairs Commissioner Price reported to Interior Secretary Teller that the Article 12 proviso was "a separate and additional immunity or franchise" conferred upon the Mille Lacs Indians for their conduct during the Dakota uprising. Their removal "was not required, as in the case of the others, but was made dependent upon their continued good conduct." Disagreeing with Chandler, Price held the noninterference clause did not contemplate the Reservation's opening; it referred to whites occupying the *surrounding* country because "there could have been no whites lawfully living upon the reservation at that time, and it was hardly intended in anticipation of the entry and settlement of whites upon the reservation[.]" Until the Indians were removed, "either by their own consent or by reason of the forfeiture of their right of occupancy[,] the whites manifestly must keep out."[27]

Price found no evidence the Indians had violated the good-conduct condition. However, because their reservation was "rich in pine lands," pressure for their removal would continue. Given their "feeble" tenure, he proposed "they should be

[26] Aple.-App. 1263-1267; R.Doc. 237-1, at 199-203.

[27] Aple.-App. 417; R.Doc. 228-6, at 5.

removed (with their consent) or, lastly, lands in severalty should be allotted to them where they are at the earliest practicable moment."[28]

GLO Commissioner McFarland reported the only outstanding entries on the Reservation were Shaboshkung's 1864 Treaty allotment and homestead entry, swamplands patented to the State in 1871, and Frank Folsom's entry; all others had been cancelled. Price confirmed the Indians had "continued in occupation of the reservation since the cession of 1863," and Interior had "seen the importance of protecting them in their right of occupancy, as guaranteed to them by said treaty, and to that end [had] refused to allow settlements to be made in their midst."[29]

Secretary Teller's response acknowledged Article 12's proviso "gave to this band of Indians the right to remain on the reservation until they should voluntarily remove therefrom." Because there was no clear evidence they forfeited their right to remain, he presumed they were "rightfully on the reservation and entitled to the protection of the Government in all that was given them" by Article 12's proviso. However, Teller asserted (without citing any treaty provision or other law), "[i]t is not claimed [the Band] originally occupied the entire reservation, or that it is now necessary to exclude white settlers therefrom to keep in good faith the treaty with

[28] Aple.-App. 418-421; R.Doc. 228-6, at 6-9.

[29] Aple.-App. 422; R.Doc. 228-6, at 10.

them." He directed Price to ascertain the quantity of land needed for the Indians so it "may be reserved from the operation of the homestead and pre-emption laws, [and] the remainder of the reservation may be occupied by the settlers who have in good faith attempted settlement thereon.[30]

Sabin and Wilder's attorneys soon wrote to McFarland asking him to reinstate their 1879 entries. McFarland demurred; although the Reservation, which had been "maintained for the occupation of these Indians in accordance with the treaty stipulation[, was] to be reduced to the reasonable quantity needed for their support[]" he was reluctant to reinstate the entries until the land needed for the Indians was determined. However, Teller wanted the entries "reinstated for an examination as to their *bona fide* character," such action being necessary "to save the rights of [the] persons [making the entries] and prevent a conflict with others." The GLO's ensuing examination found many of the entries conflicted with older railroad claims and the cancelled 1871 entries. It issued patents for some but sought guidance as to others.[31]

At the same time, without authorization, Taylors Falls permitted *new* entries. A Special Indian Agent reported the new entrants were "pretended settlers" employed by lumber companies to claim land they would later transfer to their

[30] Aple.-App. 424-425; R.Doc. 228-6, at 12-13.

[31] Aple.-App. 428-431, 1290; R.Doc. 228-6, at 16-19, R.Doc. 237-1, at 226.

employers. Commissioner Price believed their settlements were "the merest sham" and they should "be forcibly ejected from the reservation." Congressman Knute Nelson agreed "[t]he settlers if any are merely men hired by the pine land operators" and the "clamor for the [Band's] removal comes from the pine land interest and not from [any] bona fide settlers." One entrant, David Robbins, claimed his was the first entry "by an actual settler" and was allowed because, "although the local land office did not have any order to open, it reasonably concluded that if a senator [Sabin] could scrip half of [the Reservation] a common settler could have a [160-acre] tract." Learning there was another "move to steal our land[,]" Band leaders were adamant: "We had soon government would send and kill us all, as to have to leave our home."[32]

In 1884, the House of Representatives requested a report on the Reservation, including whether any lands "heretofore recognized as within [its] limits" had been sold or entered. After receiving Price and McFarland's reports, Congress provided "the lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians on the White Earth reservation, 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. In August 1884, the GLO withdrew all lands

[32] Aple.-App. 398, 403-404, 431, 1276-1278, 1290-1292; R.Doc. 228-3, at 3, R.Doc. 228-4, at 3-4, R.Doc. 228-6, at 19, R.Doc. 237-1, at 212-214, 226-228.

within the Mille Lacs Reservation from disposal, again officially closing it to entry. Acting Secretary Muldrow explained that, despite the mistaken reference to White Earth, which did not exist in 1864, the 1884 Act was "clearly" intended to protect the Mille Lacs Ojibwe in their right of occupancy of their reservation, as stipulated in Article 12 of the 1864 Treaty.[33]

3. The Nelson Act

a. Legislative History

In 1886, Interior sought legislation authorizing negotiations with the Minnesota Ojibwe for their removal to White Earth. The Indians' consent was needed because their reservations were "treaty reservations." The Mille Lacs Reservation was among the "reservations" Interior proposed "to abandon and dispose of." It reported the Band had ceded the Reservation in 1863 but reserved "the right to remain there during good behavior," and had "thus far managed to avoid a forfeiture" of that right. Interior respected "their right of occupancy" despite strong pressure for their removal "owing to the fact that the reservation is rich in pine timber."[34]

[33] Aple.-App. 414, 478, 540-541; R.Doc. 228-6, at 2, R.Doc. 229-1, at 4, R.Doc. 229-13, at 3-4.
[34] Aple.-App. 433-437; R.Doc. 228-8, at 1-5

Congress authorized negotiations "for such modification of existing treaties with the [Minnesota Ojibwe] and such change of their reservations as may be deemed desirable by said Indians and the Secretary[.]" Act of May 15, 1886, 24 Stat. 29, 44. The Secretary appointed the Northwest Indian Commission, which concluded two agreements but failed at Mille Lacs. It repeated the Government's arguments for removal: the Band had ceded its title to the Reservation and retained only the right of occupancy during good behavior; the Government could do nothing for the Band at Mille Lacs; and "false reports" could cause the loss of their rights. Mille Lacs denied ever ceding their reservation and declared "they would never consent to remove therefrom." Shaboshkung and Mozomany recalled the promises made by President Lincoln and Commissioner Dole in 1863. Ayndusokeshig said: "We will not go anywhere. This is why we reserve this land to make a living on. We shall never go anywhere else."[35]

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[35] Aple.-App. 441-442, 457-459, 466, 1304-1307; R.Doc. 229, at 1-2, 17-19, 26, R.Doc. 237-1, at 240-243. Also in 1886, Joseph Roberts reported new entries on the Reservation by "agents and employees of a lot of land jobbers and speculators who tell the Indians they have no right on the reservation" and must get off "peacefully" or they will be put off "by force." Band leaders "protest[ed] against all this and ask[ed] that all this be cancelled and leave us in peace." They thought the best solution would be to sell the pine, with proceeds used to build houses and educate their children. Aple.-App. 1301; R.Doc. 237-1, at 237.

In 1888, Band leaders stated they occupied a "reservation on Lake Mille Lac" and were firm in their determination to remain there. They denied ever intentionally ceding their reservation but requested that, if they retained only "the right to occupy it during good behavior[,]" the Great Father "let us remain at Mille Lac and give to

In 1888, a House Committee reported on the Commission's agreements and a bill that would become the Nelson Act. It "describe[d] in detail the several reservations and Indian lands affected by [the] measures [under consideration]." A table showing "the name of each Indian reservation," its acreage, and the number of Indians occupying it included Mille Lacs, comprising 61,014 acres and 942 Indians. According to the Committee, "[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."[36]

Although the Committee objected to the Commission's agreements, it supported legislation to remove Indians on "outlying and scattered reservations" to White Earth, where they would receive allotments. The bill was "a proposal to the Indians, and if not accepted by them is inoperative and nugatory."[37]

The bill was amended on the House floor to allow the Indians to remain and take allotments on their existing reservations rather than remove to White Earth. This was a departure from previous efforts to persuade the Indians to abandon their reservations and remove to White Earth, a proposal repeatedly rejected at Mille Lacs

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us in severalty, the lands on this reservation, not disposed of[.]" They asked him to "sell the timber that we have no use for at Mille Lac … to make ourselves more comfortable homes where we are." Aple.-App. 485-486; R.Doc. 229-2, at 6-7.

[36] Aple.-App. 491-492; R.Doc. 229-3, at 1-2.

[37] Aple.-App. 495-496; R.Doc. 229-3, at 5-6.

and elsewhere. Congressman Nelson reiterated the bill was "nothing but a proposal," the effectiveness of which depended entirely on the Indians' consent.[38]

Senator Sabin brought the bill to the Senate floor with a new provision stating it did not authorize the sale or disposal of any tract upon which there was a "subsisting valid preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid patents shall issue thereon." The provision's undisclosed purpose was to secure Sabin and Wilder's Mille Lacs entries. Unaware of its import, Congressman Nelson assured the House that "frauds that have transpired in the past in the lumber regions in Minnesota … [cannot] be perpetrated here, because no pine lands can be taken under the homestead law or pre-emption law under this bill."[39]

b. Statutory Language

The Nelson Act established a commission to negotiate with Minnesota's Ojibwe "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

[38] Aple.-App. 512-514, 633; R.Doc. 229-5, at 2-3, R.Doc. 230-1, at 29.

[39] Aple.-App. 520-523, 530, 558, 998-999, 1317-1318; R.Doc. 229-6, at 1-2, R.Doc. 229-9, at 3, R.Doc. 229-15, at 2, R.Doc. 235-1, at 189-190, R.Doc. 237-1, at 253-254.

the White Earth and Red Lake Reservations …, for the purposes and upon the terms hereinafter stated." Act of Jan. 14, 1889, 25 Stat. 642 ("Nelson Act"), § 1. The cession was contingent on the assent of two-thirds of the male adults of each band "occupying and belonging to such reservations" and the President's approval, which would "operate as a complete extinguishment of the Indian title … for the purposes and upon the terms in this act provided." *Id.*

After securing the cessions, all Minnesota Ojibwe, except those at Red Lake, would be removed to White Earth and receive allotments there. *Id.* § 3. However, a proviso gave them the option of remaining on the reservation where they currently resided instead of moving to White Earth:

> 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 White Earth Reservation.

Id.

Ceded lands were to be surveyed and categorized as "pine lands" or "agricultural lands," with "pine lands" sold for at least their appraised values. *Id.* §§ 4-5. Agricultural lands "not allotted under this act nor reserved for the future use of said Indians" would be disposed under the homestead laws, subject to Senator Sabin's proviso governing lands with "subsisting, valid, pre-emption or homestead entr[ies.]" *Id.* § 6.

The funds accruing from the lands' disposal—after deducting expenses of making the census, obtaining the cessions, making the removal and allotments, and completing the surveys and appraisals—would be deposited in an interest-bearing "permanent fund" in the Treasury Department. *Id*. § 7. One-fourth of the fund's interest was "devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit" with the remainder distributed to the Ojibwe. *Id.* Congress could appropriate the principal "for the purpose of promoting civilization and self-support among the said Indians[.]" *Id*.

c. Mille Lacs Negotiations

The President appointed a Chippewa Commission (including Henry Rice and Joseph Whiting) to negotiate with the Ojibwe. Instructions prepared by Indian Affairs Commissioner Oberly and approved by Interior Secretary Noble listed the Ojibwe residing on the "Mille Lacs" Reservation among those "within the purview of the act" and explained that, although the Mille Lacs Reservation had been ceded, "[t]he Mille Lacs have never forfeited their right of occupancy, and still reside on the reservation[.]"[40]

[40] Aple.-App. 567; R.Doc. 230, at 2; Aplt.-App. 628-629, 641, 644; R.Doc. 242-6, at 122-123, 135, 138.

Rice, Whiting and Indian Agent Shuler met the Indians on the "Mille Lac Reservation" beginning on October 2, 1889. Rice first discussed the 1863 Treaty, "an old matter that has given you a great deal of trouble." Rice "was there, and [knew] all about it." "It was a wise treaty, and if it had been properly carried out you would have escaped all the trouble that has befallen you." Instead, men "who cared more for themselves than they did for you thought they had found a hole in it" and attempted to "deprive you of your rights" and "drive you from this reservation." However, "the understanding of the chiefs as to the treaty was right. Here is the acknowledgement of the Government that you were right, that 'you have not forfeited your right to occupy the reservation.'"[41]

Rice then explained the Nelson Act was a proposition from Congress and the President, which was "not like an ordinary treaty." The Ojibwe would lose "no rights under the old treaties"; rather, "acceptance of this act will not affect these old matters at all … but, on the contrary, leaves you in a stronger position than before." Rice made an "elaborate [but unrecorded] explanation" of the Act's provisions, which he repeated on October 3. Mozomany thought "this understanding is perfect."[42]

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[41] Aple.-App. 634-635; R.Doc. 230-1, at 66-67.

[42] Aple.-App. 636-637; R.Doc. 230-1, at 68-69. At Grand Portage, the Commission explained the cession required by the Act was necessary so the Government could issue patents for the Indians' allotments: "you must understand that you cede this to

On October 4, Shaboshkung stated they wanted to see maps showing "the size of our reservation, so when we call upon you to show us the extent of our reservation it will be witnessed, not only by the weak eyes of mortal man but by One who sees all things from on high." Rice produced a map "containing all the reservations" and pointed to "the Mille Lacs Reservation, containing three islands in the southern part of the lake[.]"[43]

When discussions turned to allotments, Maheengaunce stated they would take their allotments and remain at Mille Lacs: "[A]s you have uttered the words of the law, stating that an Indian can take his allotment on the reservation where he resides,

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the United States for the purpose of getting a patent for the land in severalty; otherwise he could not give you the patents." Aple.-App. 650; R.Doc. 230-1, at 82. The Commission told the Bois Forte Band this would *strengthen* the Indians' land ownership:

> This land does belong to you. We did not come to take it away, but to make it secure for you. Each man is to get a patent for his own land. That is precisely the difference between the white man's title and the Indian title. That is why I am so glad to be here to-day, to make sure that no one can ever come and take your land from you.

Aple.-App. 651; R.Doc. 230-1 at 83. This explanation reflected the contemporaneous understanding that Indian consent was necessary before Congress could convey lands within a treaty reservation. *See* Aple.-App. 447; R.Doc. 229, at 7 (cessions obtained by Northwest Indian Commission necessary "to enable the United States to sell and convey said lands, and to give good title to the purchasers thereof"). The Supreme Court did not hold Congress could unilaterally convey reservation lands until 1903. *See Solem v. Bartlett*, 465 U.S. 463, 470 n.11 (1984) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)).

[43] Aple.-App. 637; R.Doc. 230-1, at 69.

we make known to you that we wish to take our allotments on this reservation, and not to be removed to White Earth." Rice stated they were entitled to select for allotments "the lands called farming lands, all that can be used as such; we do not ask you to dispose of a foot of that." Nothing would be "done with the lands until you have your allotments." They would have farming lands, hay lands, hard-wood lands, and sugar bush.[44]

That afternoon Rice discussed "a law of Congress authorizing missionaries to use a piece of land upon every reservation," which could be used for a school at Mille Lacs. Maheengaunce inquired about whites making themselves "masters of the meadows inside our reservation" and who cut hay "on our reservation"; the cutting of pine trees "[i]nside this reservation"; and the "many white people who have taken land here[.]" Rice said Agent Shuler would handle hay and timber trespasses, which Shuler promised to stop. As to whites, Rice said it was "a matter to be settled in Washington." Although some had "papers[,]" he did "not think any more will come upon your reservation, and perhaps some who are merely visiting you will leave." Other cases were different and would be carefully looked into, but

[44] Aple.-App. 639; R.Doc. 230-1, at 71.

whatever was done would be "for the best, in the interest of justice and to your satisfaction."[45]

During the final council, Band members and the Commission confirmed that, if Mille Lacs agreed to the Act, they would receive allotments and remain permanently on the Reservation. Maheengaunce urged Band members to accept, stating it was "a settlement of all our past difficulties. … They tell us that we are going to stay here forever, and that they are going to make allotments here to us." Shaboshkung was most pleased by what would be done for Band members "who reside on this reservation." It seemed "as if this reservation was shaking all the time, on account of the excitement and conflicting interests[,]" but they would depend on the Commission to "quell that shaking" by "hav[ing] their allotments made here, and made solid under their seats, solider and solider every move of their bodies[.]" Kegwedosay told Rice that they "heard from your own mouth, from the Commission … that we are going to have our allotments on our old reservation where we have resided." Kegwedosay added that they wanted lands reserved for "a place where our schools, etc., shall be." Rice responded that "it is hoped you will have a

[45] Aple.-App. 640-641; R.Doc. 230-1, at 72-73.

superintendent and blacksmith, a farmer, a man to run your mill, and physician, and that there will also be schools and missionaries."[46]

The Mille Lacs agreement states 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 May 7, 1864," agreed to and accepted the Nelson Act "and each and all of the provisions thereof." It provides that they "grant, cede, relinquish, and convey to the United States" all their "right, title, and interest in and to" the lands not needed for allotments in the White Earth, Mississippi Chippewa and Red Lake Reservations "for the purposes and upon the terms stated in said act" and "hereby forever relinquish to the United States the right of occupancy on the Mille Lacs Reservation, reserved to us by the twelfth article of the Treaty of May 7, 1864[.]"[47]

d. Contemporaneous Reports and Legislation

One week later, Rice informed Indian Affairs Commissioner Morgan that Mille Lacs had "assented to the propositions offered them" and "signified their intention to remain where they are, and will take allotments upon that reservation." He recommended a government sawmill and farmer so they "may have on the Reservation a person competent to advise them [and] to make known to the Agent

[46] Aple.-App. 642-646; R.Doc. 230-1, at 74-78.

[47] Aple.-App. 602-603; R.Doc. 230, at 46-47.

all proper complaints." They had "been constantly intruded upon by whites who have sought to dispossess them of their rightful homes." "Upon this Reservation there are now probably one hundred squatters." Some had taken "the gardens the Indians had made, and built thereon, appropriating to their own use the fields which the Indians had broken and cultivated with much labor[.]" The Indians claimed no patent could legally have been issued on "any land embraced in the Reservation[.]" "As many of the settlers have only board shanties without other improvements, they can leave at any time without serious loss."[48]

The Chippewa Commission's official report stated Mille Lacs were "intelligent, cleanly, and well behaved[.]" Even whites who made claims on the Reservation "testified to the harmless conduct of the Indians[,]" whose principal fault seemed to lie in possessing lands the white man wanted. The 1863 and 1864 Treaties "confirmed the belief that they were not only permanently located, but had the sole occupancy of the reservation." "The Interior Department now holds that—'The Mille Lac Indians have never forfeited their right of occupancy and still reside on the reservation.'" However, white men had been "permitted to rob them of their pine," some whites "had the shameless audacity to take from the Indians land the latter had, with much labor and perseverance, put into cultivation," and "[s]quatters

[48] Aple.-App. 534-535; R.Doc. 229-12 at 2-3.

are now settling upon this reservation, and the interest of the Indians ignored." The Commission believed some well-intentioned "but misled whites" were on the Reservation and urged their right to remain be resolved quickly.[49]

The Commission noted "the various bands" decided to take their allotments on their respective reservations. Although it hoped they would remove to White Earth, it endorsed their request to set aside lands for government buildings and their common use on each reservation. Its schedule showing the "number of acres in the Chippewa reservations" included 61,014 acres in the "Mille Lac" Reservation.[50]

In January 1890, Secretary Noble denied David Robbins' application to patent his 1883 entry under the Nelson Act's Section 6 proviso. Although "the language of the proviso might authorize" the patent, it had to be considered in keeping with the entire Act and the Government's treaty obligations, which were "fully recognized" in Section 1. By providing for "the complete cession and relinquishment of all their title and interest," Congress recognized "the cession by the treaty of 1863 was not a 'complete' cession, but that the Mille Lacs still retained an interest, the right of occupancy during good behavior, by virtue of the proviso to

[49] Aple.-App. 579-580; R.Doc. 230, at 23-24.

[50] Aple.-App. 581-584; R.Doc. 230, at 25-28.

that effect to section twelve of said treaty." No action could be taken until the Band's cession was obtained "and accepted and approved by the President."[51]

Three weeks later Noble transmitted the Commission's report to President Harrison, confirming Mille Lacs' good conduct and hoping their agreement would help resolve the difficulties they confronted on their "reservation." The Act's ceded lands ("except possibly those of the Red Lake Reservation and the four townships ceded in the White Earth Reservation") could not "be offered for sale or settlement until the Indians of the several reservations who elect to remain and take allotments where they are shall have … made their individual selections for allotment." He supported setting aside land on "each reserve for Government buildings," and enclosed a draft bill to pay damages from lumber dams, including "to the Mississippi Band, now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lacs Reservations[.]"[52]

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[51] Aple.-App. 539, 544; R.Doc. 229-13, at 2, 7. "[A]s to who are the 'whites' to whom reference is made in [the Article 12] proviso[,]" Noble disagreed with Chandler and supported Price's view that the proviso did not contemplate white entry onto the Reservation. Aple.-App. at 541-543; R.Doc. 229-13, at 4-6.

[52] Aple.-App. 571-572, 576-578; R.Doc. 230, at 6-7, 11-13. Noble distinguished the lands ceded at Red Lake and White Earth because their agreements differed from those negotiated with the other Bands. At Red Lake, Rice informed the Indians they must not "expect to keep all [their] reservation" and held detailed discussions regarding new, diminished boundaries, which were then incorporated in Red Lake's agreement. Aple.-App. 584-585, 625, 1029, 1031-1032; R.Doc. 230, at 28-29, 81; R.Doc. 235-2, at 3, 5-6. At White Earth, Rice told the Indians that "should your present reservation be reduced[,] should some townships be taken off, that land will

President Harrison approved the agreements on March 4, 1890, noting the Act "authorized any Indian to take his allotment upon the reservation where he now resides[,]" and that the Commissioners reported "quite a general desire was expressed by the Indians to avail themselves of this option." The ceded lands could not be offered for sale "until all of the allotments are made."[53]

Noble prepared a Public Notice on March 5 stating "the Indians generally have indicated their desire and purpose to take allotments under the Act on the reservation where they resided at the time of the negotiations, and the agreements entered into by [the Commissioners] with the Indians, so provide." Consequently, except at Red Lake and White Earth, lands to which Indian title would be extinguished "within the boundaries of the several reservations" could not be determined until the allotments were made, and the reservations, including "Mille Lac," remained closed to entry.[54]

Soon thereafter, Congress granted a railroad right-of-way "through the Mille Lacs Indian Reservation …. upon paying to the United States for the use of said Indians" an amount determined by the Secretary, Act of July 22, 1890, 26 Stat. 290,

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have the same status as the land just ceded at Red Lake[,]" and its agreement also drew new, diminished boundaries. Aple.-App. 594, 627; R.Doc. 230, at 38, 97. No other agreement, including Mille Lacs', drew new reservation boundaries.

[53] Aple.-App. 567-568; R.Doc. 230, at 2-3.

[54] Aplt.-App. 829-831; R.Doc. 242-8, at 9-11.

and provided for lumber-dam damage payments to the Indians, including those residing on the "Mille Lac Reservation[,]" Act of Aug. 19, 1890, 26 Stat. 336, 357.

4. The Reservation After the Nelson Act

a. New Entries, Noble's Decisions and the 1893 Resolution

In January 1890 Nathan Richardson reported squatters entering the Reservation, putting up shanties where Band members had cleared gardens. In February, Richardson wrote squatters claimed "nearly all" reservation lands. Whites told Indians they would be removed, while Indians "submit[ted] to the indignities heaped upon them[,]" believing the Government would fulfill its promises.[55]

In March, Shuler reported the Band was "complain[ing] bitterly" about squatters, with "nearly every quarter section" of the Reservation taken and much of it occupied by whites cutting timber and depriving the Indians of their gardens and meadows. The squatters believed "this Reservation" would soon be opened to settlement and was "now legal plunder"; but the Indians understood "this place should be the home of those who wished to remain and take their allotments[.]" Given "the great number of squatters … and the uncertainty of the situation," Shuler took no action. Noble wrote to Morgan that "[t]he rights of the Indians must be

[55] Aple.-App. 553, 557-558, 1335-1337; R.Doc. 229-14, at 7, R.Doc. 229-15, at 1-2, R.Doc. 237-1, at 271-273.

protected" and directed him to report "what steps are being taken to remedy the evils complained of."[56]

On March 22, Special Agent James Cooper reported about 90 Minnesotans had located within the "Mille Lac reservation." He stated there was no trouble at present and "every white man" would get Noble's March 5 notice. The Indian Office decided no action was necessary as a "special agent has been out and moved settlers from [the Reservation]," and a request had been made for the appointment of a commission "to allot lands to [the] Indians."[57]

In mid-January 1891, Noble ruled on a petition seeking patents for "homestead" entries suspended by the 1884 Act. *Amanda J. Walters*, 12 Pub. Lands Dec. 52 (1891). The entries were made with soldiers' additional homestead rights acquired for Sabin and Wilder—the real parties in interest. Noble held the Nelson Act was the "further legislation" contemplated in the 1884 Act and that the entries, which had been cancelled by Schurz but reinstated by Teller, could be patented under Section 6's proviso.[58]

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[56] Aple.-App. 563-564, 654; R.Doc. 229-17, at 3-4, R.Doc. 230-2, at 2.

[57] Aple.-App. 1002, 1339-1340; R.Doc. 235-1, at 193, R.Doc. 237-1, at 275-276,

[58] Aple.-App.1341-1342; R.Doc. 237-1, at 277-278; Aplt.-App. 834, 836-838; R.Doc. 242-8, at 14, 16-18.

Noble added the Mille Lacs Reservation was not a "reservation" on which Indians could take allotments under the Nelson Act because subsisting valid preemption or homestead entries existed only at Mille Lacs and such entries were to proceed to patent under Section 6's proviso. Noble did not address the Band's right to allotments on reservation lands *not* subject to that proviso asserting, incorrectly, that Band members no longer wanted allotments on the Reservation. Accordingly, a late-January 1891 departmental letter stated "the Mille Lac lands should be disposed of as other public lands under the general laws[.]" *Mille Lacs Lands*, 14 Pub. Lands Dec. 497 (1892).[59]

In September 1891, Noble reversed course. *Northern Pacific Railroad Co.*, 13 Pub. Lands Dec. 230 (1891). The GLO had held Mille Lacs lands were excepted from certain railroad withdrawal orders because they "were already in a state of reservation." Citing *Walters*, the railroads argued that, after the 1863 and 1864 Treaties, "there no longer existed a technical Indian reservation including these lands." Noble disagreed, holding the Article 12 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

[59] Aple.-App. 666; R.Doc. 231-9, at 2; Aplt.-App. 837-838; R.Doc. 242-8, at 17-18.

withdrawal] orders." Thus, reservation lands not subject to Section 6's proviso could only be disposed of under the Nelson Act.[60]

In April 1892, Noble addressed the conflict between the late-January 1891 departmental letter and *Northern Pacific Railroad*. *Mille Lacs Lands*, *supra*. According to Noble, *Northern Pacific Railroad*, as "the later expression of the Department … in a case where the status of these Mille Lac lands was the specific question presented[,]" was controlling and required reservation lands be disposed of under the Nelson Act.[61]

The *Princeton Union* reported this decision, while "root[ing] out" the railroad claims, would "invalidate and set aside all entries made by persons in [the Mille Lacs] reservation since 1889" and give the Mille Lacs Indians the right to select allotments on the Reservation. A House committee reported that between *Walters* and *Mille Lacs Lands*, Taylors Falls accepted entries comprising 31,659.74 acres, all of which would be cancelled by the latter decision. The situation called for prompt action "in behalf of these settlers[.]"[62]

The resulting resolution confirmed *Mille Lacs Lands* was correct, stating it had "definitely determined that … lands [within the Mille Lacs Reservation] …

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[60] Aple.-App. 660-663; R.Doc. 231-4, at 5-8.

[61] Aple.-App. 666-667; R.Doc. 231-9, at 2-3.

[62] Aple.-App. 670, 672-673; R.Doc. 231-10, R.Doc 231-17, at 1-2.

could only be disposed of according to [the Nelson Act.]" J. Res. 5, 53rd Cong., 28 Stat. 576 (Dec. 19, 1893). To protect settlers who relied on the erroneous *Walters* decision, the Resolution provided that "all bona fide pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation" between *Walters* and *Mille Lacs Lands* were "confirmed where regular in other respects, and patent shall issue to the claimants for the lands embraced therein[.]" *Id*.

b. Dispossession and Perseverance

The new entries dispossessed Mille Lacs of much of their land. Inspector James McLaughlin and Agent Simon Michelet reported that, as whites entered the Reservation, they "burned and destroyed the dwellings and other buildings of the Indian, and forced the Indian to leave the land which he considered his own[.]" Once an Indian settled on a new location, "he was subjected to similar treatment and again driven from his home, and in this way became homeless[.]" The "aggressors were not only aided by the county officials, but the Indians were even refused protection" by the Land Office. "The fields they had cleared were appropriated and made use of by the whites and the Indians forced from their locations without receiving any compensation" for their losses. Taylors Falls allowed these entries even though lands in the "possession, occupation and use of Indian inhabitants" were not

"unappropriated public lands" subject to entry. *Ma-gee-see v. Johnson*, 30 Pub. Lands Dec. 125, 127 (1900) (internal quotations omitted).[63]

According to Band leaders, despite the Nelson Act's promise that "our allotments of land would be made on the Mille Lac Reservation," in less than one year whites came upon the Reservation, "took possession of the lands regardless of our improvements, and drove us out of our houses[.]" Ayndusokeshig testified that, instead of being moved off the Reservation, whites "came onto the reservation in big swarms, like mosquitoes, and settled there after the [Nelson Act Agreement] was signed." The whites "took possession of all our property, our little gardens, even our blueberry patches" and "drove us out of our rice fields[.]" Ayndusokeshig "was driven twice out of [his] little house, they did the same thing to all the Mille Lac Chippewas there." When the Indians "didn't go they would take our household stuff and set it on fire and drove us away and scattered us all over."[64]

Nevertheless, Band members remained on the Reservation pursuing their traditional seasonal round. Their population increased, exceeding 1,200 by 1899. When the federal government withheld annuity payments to induce removal, they

[63] Aple.-App. 765, 780-781, 1386-1391; R.Doc. 232-23, at 3, R.Doc. 233-3, at 3-4, R.Doc 237-1, at 322-27.

[64] Aple.-App. 716, 749, 804-805, 1402-1403; R.Doc. 232-3. at 4, R.Doc. 232-20, at 3, R.Doc. 233-10, at 7-8, , R.Doc. 237-1, at 338-339.

protested they had the right to remain. Writing as "your Children who reside on the Mille Lac Reservation[,]" they stated they had "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." They insisted they would "continue to live on our reservation at MilleLac & entertain the hope, that the Great Master of life, will soften the hearts of those" withholding the annuities and "induce them to give us the money that is due us."[65]

Meeting with Chippewa Commission Chairman W. R. Baldwin, Band leaders "firmly declined all … advances towards removal" because of "their attachment to the Mille Lac country" and promises made to them during the Nelson Act negotiations "that they should not be compelled to remove from Mille Lac but have their allotments and home there[.]" Baldwin reported it was "the intention of Government to locate these Indians about the shores of Lake Mille Lac, and this arrangement would have been carried out but for the rascally manipulations of the Pine Land Ring of this State." Interior resumed the annuity payments because,

[65] Aple.-App. 677, 683, 1356-1377; R.Doc. 231-23, at 3, R.Doc. 231-25, at 3, R.Doc. 237-1, at 292-313; Aplt.-App. 990-991; R.Doc. 242-10, at 27-28.

having "never promised or agreed to go to White Earth, [Mille Lacs] were justly entitled to their share of moneys due them under treaty[.]"[66]

c. The 1898 Resolution

Settlers continued entering the Reservation. Interior rejected their plea for homestead entries because, under the Nelson Act, unappropriated reservation land had to be made available for Indian allotments before it could be opened for entry. The new settlers had "no standing under the law, except as trespassers upon reserved Indian lands[.]"[67]

In response, Minnesota Congressman Page Morris introduced proposals to declare lands within the "former" Reservation subject to public entry. GLO Commissioner Hermann opposed the proposals, as did Acting Indian Affairs Commissioner Tonner, believing "the lands must either be allotted to the Indians or sold for their benefit[.]"[68]

Interior reversed course after Morris intervened. A revised report from Hermann quoted the Band's Nelson Act agreement and claimed the last clause, relinquishing the Band's right of occupancy under the 1864 Treaty, was "not

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[66] Aple.-App. 694, 696, 707, 711; R.Doc. 231-26, at 2, 4, R.Doc. 231-31, at 3, R.Doc. 231-32, at 2.

[67] Aple.-App. 701-703; R.Doc. 231-28 at 3-5.

[68] Aple.-App. 719, 722, 726, 1013-1014; R.Doc. 232-7, at 2, R.Doc. 232-8, R.Doc. 232-13, at 3, R.Doc. 235-1, at 227-228.

necessary" to extinguish its title to the lands, "the words occurring before in the agreement being sufficient for that purpose."[69] Hermann claimed the Band had thus "elected … not to take allotments on what was their own particular reservation" and "any hindrance on this account to the passage of the bill [was] removed." Interior Secretary Bliss likewise asserted the Indians "elect[ed] not to take any allotments on [their] reservation, which, under the terms of the Nelson Act, they might have done."[70] He saw no reason why settlers who entered the lands in good faith believing "they were vacant public lands of the United States" should not be allowed to perfect title, because it would not infringe on the Indians' rights. *Id.*[71]

Congress adopted Morris's Joint Resolution declaring "all public lands formerly within the Mille Lac Indian Reservation … subject to entry … under the public land laws" and directing certain homestead and preemption entries be treated

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[69] This was mistaken; the prior clauses in the agreement related to *other* reservations, not Mille Lacs. Aple.-App. 602-603; R.Doc. 230, at 46-47.

[70] This too was mistaken: the Band's election to take allotments on its reservation is unmistakable in the negotiating record. *See* § III.A.3.c, *supra*. Indeed, *no* Nelson Act agreement contained a separate provision in which a band elected to take allotments on its own reservation. Aple.-App. 583-623; R.Doc. 230, at 27-67. Instead, the Bands (including Mille Lacs) reserved this right by accepting "each and all of the provisions" of the Act, *id.*, which included Section 3's proviso allowing them to take allotments on their own reservations, as the Commission, Secretary Noble and President Harrison confirmed. *See* § III.A.3.d, *supra*.

[71] Aple.-App. 732, 736-737; R.Doc. 232-16, R.Doc. 232-17, at 3-4. Bliss' reference to "good faith" entries on "vacant" lands was also mistaken: many settlers entered lands occupied and improved by Indians. *See* § III.A.4.b, *supra*, & § III.A.4.d, *infra*.

"as if made upon any of the public lands of the United States" subject to such entries. J. Res. 40, 55th Cong., 30 Stat. 745 (May 27, 1898). A proviso "perpetually reserved" three 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.*

d. The 1902 Act

In 1889, the Band appointed delegates to present its claims arising from non-fulfillment of the Nelson Act but not "to settle any matter which will relinquish our claims to rights upon this reservation[.]" The Band's young men had "stubbornly refused to leave the reservation and insist[ed] upon the fulfillment of the [Nelson Act agreement], in relation to allotting lands to them at Mille Lac." The Band's continuing presence on the Reservation was confirmed in 1900, when archaeologist Jacob Brower and anthropologist David Bushnell visited the Reservation and documented Ojibwe villages, cultivated ground, natural resource use areas and gravesites throughout the Reservation. Brower commented on removal efforts:

> Why not propose to drown them in Mille Lac, or bury them alive? They have held this region since they drove out the Sioux, and they know no other home. Fathers, mothers, and ancestry are buried here, and men like Na-guan-a-be, who have lived here 100 years, know no other home, are acquainted with no other land.[72]

[72] Aple.-App. 740-741, 749-750,1213, 1392-1395; R.Doc. 232-19, at 2-3, R.Doc. 232-20, at 3-4, R.Doc. 237-1, at 149, 328-331.

Now-Senator Nelson introduced S. 3396 to pay for "improvements of such of the Mille Lac Indians as remove from their reservation" and to permit them to obtain allotments elsewhere. The Senate Indian Affairs Committee supported the bill, but a minority report recommended purchasing lands occupied by whites "upon the Mille Lac Reservation" and restoring them to their "original Indian owners[.]" The minority explained 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." The Band opposed the bill because the payment was inadequate and it would "deprive us of our free and unrestricted action in regard to selecting homes for ourselves individually, either by purchase or otherwise."[73]

Non-Indians continued to enter and dispossess Band members from their lands. In 1901, after the County Sheriff evicted and burned the houses of 25 Band families, David Robbins, the Reservation's first actual settler, asked Interior to stop the "forceable ejection" of Band members "from their houses and lands under color of State laws—and their houses being burnt[.]" Settlers had gone "to the local land offices and by false statements that no one lived [on] or occupied" the lands

[73] Aple.-App. 753-758, 761; R.Doc. 232-21, at 2-7, R.Doc. 232-22, at 2.

"obtained filings and finally proved up by the same kind of false oaths[.]" Although, as noted above, such entries were unlawful, only one was successfully challenged.[74]

In 1902, S. 3396 was reintroduced with an increased appropriation and a proviso allowing Band members who acquired lands within the Reservation to remain while still benefiting from the appropriation. As enacted, it 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 … 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, but shall be entitled to the benefits of said appropriation to all intents and purposes as though they had removed 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.[75]

Inspector McLaughlin and Agent Michelet met Band members in August to secure their agreement. McLaughlin asserted they had no right to lands at Mille

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[74] Aple.-App. 771, 1396-1399; R.Doc. 232-25, at 4, R.Doc 237-1, at 332-335; *see* n.63, *supra*.

[75] Aple.-App. 773, 776; R.Doc. 233-1, at 1, 4.

Lacs but could acquire rights elsewhere under the Act. However, those who had "rights here such as are mentioned in the provision of the act explained, to land that you have acquired from parties having legal title thereto that is a different question." Those rights would "be protected[.]" Band members could also purchase additional "landed rights" on the Reservation.[76]

McLaughlin insisted the Band ceded its rights on "this Mille Lac Reservation" under the Nelson Act, claiming (incorrectly) that allotments were not made at Mille Lacs because all land had been appropriated before the Act's passage. Band leaders disagreed. Wahweyaycumig stated Senator Rice had "pointed to the different directions defining our reservation" and said "this land would be allotted to us," and they would "notice the movement of the whitemen from our territory immediately upon the acceptance of the treaty." Wahweyaycumig did not recognize the act McLaughlin read "as the one that was presented and ratified" in 1889. Others confirmed Wahweyaycumig's account, stating Rice promised there was no way whites "could come and take the land from us." McLaughlin did not disagree but claimed Rice misunderstood the Nelson Act.[77]

[76] Aplt.-App. 898, 901, 912-913; R.Doc. 242-9, at 30, 33, 44-45.

[77] Aplt.-App. 917-918, 925-930; R.Doc. 242-9, at 49-50, 57-62.

McLaughlin and Michelet assured the Indians that accepting the 1902 Act would not affect "any just and legal claims that you have" and they would "[lose] no rights" by agreeing to remove. Band members were afraid the agreement "would impair our rights on the Mille Lac Reservation[,]" but "[a]ll the way through his talk" McLaughlin told them that "if we would take this $40,000 it would not impair our rights in this Mille Lac Reservation." The money was for property lost when "white peopled burn[ed] their houses" and "everything in them."[78]

Band leaders wanted the payment made at Mille Lacs so they could purchase lands there. Ayndusokeshig understood there would be no objection "if any of the Indians wished to take an allotment on any of the other reservations and return to live upon this land[.]" McLaughlin said he could make the payment at Mille Lacs if the Band agreed to remove once it was made. Michelet said individual Band members could purchase land on the Reservation if they became dissatisfied with White Earth. After the Band agreed, McLaughlin and Michelet prepared a list of the Band's improvements, documenting Band settlements appropriated by non-Indians throughout the Reservation.[79]

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[78] Aple-App. 799-800; R.Doc. 233-9 at 12-13; Aplt.-App. 936-937; R.Doc. 242-9, at 68-69.

[79] Aple-App. 1283, 1401-1402, 1446-1459; R.Doc. 237-1, at 219, 337-338, 382-395; Aplt.-App. 874-891, 942-948, R.Doc. 242-9, at 6-23, 74-80.

McLaughlin and Michelet's agreement refers, in places, to the "former" reservation, and provides Band members—"except the excepted classes" under the 1902 Act, *i.e.*, those who acquired lands on the Reservation—would remove once arrangements were made for them elsewhere. It did not prohibit them from returning to Mille Lacs or deprive them "of any benefits to which they may be entitled under existing treaties or agreements not inconsistent with [its] provisions" or the 1902 Act. The Band's resolution declaring how it wanted the moneys disbursed was recorded in the "[m]inutes of a council of the Mille Lac Chippewa Indians occupying the Mille Lac Indian Reservation[.]" The minutes refer repeatedly to the Reservation and, like the 1902 Act itself, make no reference to a "former" reservation.[80]

Thereafter, many Band members left the Reservation, but others remained, and many who left returned. Michelet noted about 43 Band members were "permitted to remain … owing to the fact that they were owners of land on said reservation." In 1908 Wahweyaycumig stated "[a] good many" who came to White Earth "returned to Mille Lac, after having selected allotments at White Earth." In 1909, Indian Agent Howard confirmed many Mille Lacs Indians had returned "to their old home at Mille Lac." In 1912, a Justice Department Special Agent testified he was at the "Mille Lac Reservation" and found 17 tepees or wigwams with perhaps

[80] Aplt.-App. 871-873, 893; R.Doc. 242-9, at 3-5, 25.

three or four families each. An Indian Department Inspector testified most Band members "never desired to settle" at White Earth; after getting allotments they returned "to Mille Lac, in some instances selling their allotments for a mere nominal consideration."[81]

Although the Indian Office maintained separate "removal" and "non-removal" rolls, it inflated the "removal" roll and had no mechanism to transfer individuals who returned to Mille Lacs from the "removal" to the "non-removal" roll. Even so, the rolls show at least two-to-three hundred Band members always remained at Mille Lacs.[82]

e. The Mille Lacs Claims Case

In 1909 Congress authorized the Band to sue the United States in the Court of Claims "on account of losses sustained … by reason of the opening of the Mille Lac Reservation … to public settlement under the general land laws of the United States." Act of Feb. 15, 1909, 35 Stat. 619. The Band filed suit alleging the 1863 and 1864 Treaties preserved the Mille Lacs Reservation and that, after the Band agreed to the Nelson Act, Government officers, rather than allotting reservation land

[81] Aple.-App. 794, 808, 823, 832, 840-841, 1063-1069; R.Doc. 233-6, at 2, R.Doc. 233-11, at 2, R.Doc. 233-13, at 6, 15, 23-24, R.Doc. 235-3, at 8-14.

[82] Aple.-App. 908-909, 1063-1069; R.Doc. 234-13, at 10-11, R.Doc. 235-3, at 8-14; Aplt.-App. 980, 988-992; R.Doc. 242-10, at 17, 25-29.

to Band members under the Act, wrongfully opened the reservation to entry under the general land laws, as a result of which the Band sustained losses and damages. The Government argued the Reservation had been ceded under the 1864 Treaty and, therefore, was not subject to the Nelson Act.[83]

The Court of Claims held the Treaties' Article 12 proviso did not grant the Band "a mere license or favor," but instead "reserved to the [Band] the Mille Lac Reservation." *Mille Lac Band of Chippewa Indians v. United States*, 47 Ct. Cl. 415, 438, 457 (1912) (*MLB I*), *rev'd on other grounds sub nom. United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913) (*MLB II*). The Band remained:

> in open, notorious possession of the [Reservation], 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 to them.

Id. at 458; *see also id.* at 455 (under the Act, the Mille Lacs were "entitled to allotments on their reservation in common with the other Indians"). The court did not decide whether the Nelson Act or subsequent legislation disestablished the Reservation. Instead, having found the United States sold reservation land in violation of the Nelson Act, the court awarded damages to the Band—payable to the

[83] Aple.-App. 1471-1476; R.Doc. 254-4, at 5-10; Aplt.-App. 1160, 1191; R.Doc. 242-10, at 197, 228.

Nelson Act's permanent fund—representing the value of the land sold. *Id.* at 461-62.

The Government appealed. Recognizing "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 [1864] treaty," the Supreme Court held "this controversy was intended to be and was … adjusted and composed" by the Nelson Act. *MLB II*, 229 U.S. at 506. By including Mille Lacs within the Act, "the government … waived its earlier position respecting the status of the reservation, and consented to recognize the contention of the Indians[.]" *Id.* at 507. However, this was done on the condition, stated in Section 6's proviso, that patents would issue on subsisting pre-emption or homestead entries found regular and valid. *Id.*

Because that compromise legitimized valid entries made before the Nelson Act, the Court of Claims erred in including such land in its damage calculation. *Id.* However, the United States' disposal of "the lands not within [Section 6's] proviso … not for the benefit of the Indians, but in disregard of their rights," was "clearly in violation of the trust" created by the Act. *Id.* at 509. This was so notwithstanding the 1893 and 1898 Resolutions, which:

> 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 510.

On remand, the Court of Claims determined 29,335.5 acres came within Section 6's proviso (including swamplands patented to the State in 1871), while 31,692.64 acres were disposed of unlawfully. *Mille Lac Band of Chippewa Indians v. United States*, 51 Ct. Cl. 400, 400-01, 404, 406 (1916) (*MLB III*).

f. Subsequent History

In 1914, Congress appropriated $40,000 to purchase "lands for homeless non-removal Mille Lacs Indians, to whom allotments have not heretofore been made[.]" Act of Aug. 1, 1914, 38 Stat. 582, 591. By 1921, the Indian Office had purchased 813.65 acres within the Reservation and 900 acres in Pine County.[84]

In 1920, the White Earth Indian Agent reported Band members living on the Reservation had "home places[,]" including "residence houses that do very well"; "gardens and truck patches in which they raise corn, beans, potatoes, onions, tomatoes, cabbage and other vegetables"; worked at farms and sawmills; and hunted, fished, made maple sugar, gathered wild rice and picked berries. He rejected a

[84] Aple.-App. 851, 1419-1421; R.Doc. 234-5, R.Doc. 237-1, at 355-357.

petition seeking the Band's removal to White Earth, noting Band members had sold their White Earth allotments and had no lands there.[85]

In 1923, Congress appropriated money to survey, enroll and allot "the homeless nonremoval Mille Lacs Indians[.]" Act of Jan. 24, 1923, 42 Stat. 1174, 1191. By 1925, the Indian Office had allotted 856.35 acres to 156 Band members on lands acquired within the Reservation, reserving other lands for agency and school purposes, and later opened a school.[86]

In the 1930s, the U.S. Attorney's Office prosecuted offenses committed within "the Mille Lac Indian Reservation" under the 1885 Major Crimes Act (23 Stat. 362), which conferred exclusive jurisdiction on the United States for certain crimes committed "within the limits of any Indian reservation." In 1935, Interior's Consolidated Chippewa Agency listed six reservations under its jurisdiction, including "Mille Lac"; in addition to Agency personnel serving all six reservations, a field nurse in Onamia served the "Mille Lacs Reservation." The Agency provided many other services to the Band on the Reservation during these years.[87]

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[85] Aple.-App. 844-848; R.Doc. 234-4, at 2-6.

[86] Aple.-App. 854, 859, 875-897, 1024, 1428-1429; R.Doc. 234-7, at 2, R.Doc. 234-8, at 2, R.Doc. 234-12, at 32-54, R.Doc. 235-1, at 271, R.Doc. 237-1, at 364-365.

[87] Aple.-App. 1485, 1493, 1498, 1500, 1504, 1507-1508, 1545-1574; R.Doc. 254-8, at 1, R.Doc. 254-9, at 3; R.Doc. 254-13, at 2, R.Doc. 254-14, at 1, R.Doc. 254-15, at 1, R.Doc. 254-16, at 1-2, R.Doc. 256-22.

After the "nonremoval Mille Lac Band" and other Minnesota Ojibwe bands organized the Minnesota Chippewa Tribe in 1936, the Government acquired additional lands within the Mille Lacs Reservation under the Indian Reorganization Act. The Tribe's Corporate Charter was subject to ratification by the Indians "living on the [Tribe's] reservations[,]" including the "Mille Lac" reservation. In 1939, the Tribe issued a Charter of Organization to tribal members "residing on the Mille Lacs Reservation and in nearby settlements[.]"[88]

In 1939, Minnesota restricted wild ricing within the Reservation's original boundaries to Indians and "residents of the reservation[.]" Minn. Laws 1939, ch. 231, § 2 (codified at Minn. Stat. § 84.10). Implementing regulations authorized the Band to appoint a committee to manage harvests within the Reservation. Minn. R. 6284.0600, subp. 3.

The Reservation's existence and the Band's continuing presence on it have since been recognized in federal and state statutes and administrative actions. In 2010, 1,598 of the Reservation's 4,907 residents (more than 30%) identified as Indian. About 16% of the Reservation is in Indian ownership; the United States holds about 3,600 acres within the Reservation in trust for the Band, the Minnesota

[88] Aplt.-App. 1310; R.Doc. 242-12, at 66; Aple.-App. 1514, 1517, 1526-1527, 1537, 1542-1543; R.Doc. 254-17, at 5, R.Doc. 254-18, at 1, R.Doc. 255, at 2-3, R.Doc. 255-1, at 2, R.Doc. 255-2.

Chippewa Tribe or individual Indians, while the Band and its members own another 6,100 acres in fee. The Band's government center, housing the Band's executive branch, legislature, courts, administrative agencies and Police Department, is located on the Reservation. The Band also owns and operates schools, health clinics, community centers, housing, water and wastewater infrastructure, a gaming and hotel complex and other businesses on the Reservation.[89]

B. Law Enforcement Dispute

1. Background

Until recently amended, Minn. Stat. § 626.90, subd. 2(c), provided that, if certain requirements were met, the Band would have concurrent law-enforcement jurisdiction with the Mille Lacs County Sheriff: (1) over all persons on trust lands; (2) over Minnesota Chippewa tribal members within the 1855 Treaty boundaries; and (3) over any person who committed or attempted to commit a crime in a Band officer's presence within those boundaries. Subdivision 2(b) provided that "[t]he band shall enter into mutual aid/cooperative agreements with the Mille Lacs County

[89] Aple.-App. 118-119, 215-216; R.Doc. 150-4, at 19-20, R.Doc. 160, at 2-3. The Indian presence on the Reservation is greater than on other extant reservations. *See*, *e.g.*, *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 108 (1998) (Leech Lake Indians owned less than 5% of reservation land); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978) (reservation population comprised 2,928 non-Indians and only 50 tribal members).

sheriff … to define and regulate the provision of law enforcement services under this section[.]" The Band, County and County Sheriff entered an agreement under that provision in 2008 ("2008 Agreement").[90]

In 2013, in response to gang violence and drug trafficking on the Reservation, the Band applied for the assumption of concurrent federal criminal jurisdiction within the Band's Indian country under 18 U.S.C. § 1162(d). For purposes of § 1162(d), Indian country includes "all lands 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[.]" 18 U.S.C. § 1151. The County opposed the application, asserting the Reservation had been disestablished and, therefore, lands within the 1855 boundaries no longer constituted Indian country.[91]

In November 2015 Interior's Solicitor issued an opinion (the "M-Opinion") finding the Reservation, as established in 1855, remained intact. In June 2016, the County terminated the 2008 Agreement because of the M-Opinion.[92]

2. Walsh's Opinion and Protocol

[90] Aple.-App. 270; R.Doc. 217, at 4.

[91] Aple.-App. 100-101; R.Doc. 150-4, at 1-2.

[92] Aple.-App. 135; R.Doc. 150-4, at 36; Aplt.-App. 1511-1512; R.Doc. 349, at 5-6; Cnty.-Add. 98-99.

In July 2016, County Attorney Joseph Walsh issued an Opinion and Protocol describing Band police authority after the 2008 Agreement terminated. Walsh asserted the Band could no longer exercise state-law authority under Minn. Stat. § 626.90, because, as then in force, it required the existence of a cooperative agreement as a condition for exercising such authority. He also asserted the Band's inherent law enforcement authority: (1) was limited to trust lands and did not extend to non-trust lands within the original Reservation boundaries; (2) did not include authority to investigate state-law violations, even on trust lands; and (3) did not include authority to investigate non-Indians.[93]

Walsh sent the Opinion and Protocol to Band police and stated he expected them to adhere to it. The Opinion and Protocol stated Band officers who exercised additional authority could be subject to criminal and civil penalties for unauthorized use of force, obstruction of justice and impersonating a peace officer. The District Court found it "beyond dispute that compliance with the Opinion and Protocol was mandatory."[94]

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[93] Aplt.-App. 97-100, 1513-1522, 1543-1544; R.Doc. 165-1, at 46-49; R.Doc. 349, at 7-16, 37-38; Cnty.-Add. 100-109, 130-131; Aple.-App. 270-271; R.Doc. 217, at 4-5.

[94] Aplt.-App. 105-106, 112, 1522; R.Doc. 165-1, at 54-55, 61; R.Doc. 349, at 16, Cnty.-Add. 109; Aple.-App. 272; R.Doc. 217, at 6.

The Protocol stated County Sheriff's deputies could not lawfully allow Band officers to exercise law enforcement authority except as authorized in the Opinion and Protocol. County Sheriff Brent Lindgren instructed his deputies to follow the Opinion and Protocol. This included: monitoring Band officers' compliance with the Protocol and reporting violations; not referring calls for service to Band officers; and taking control of crime scenes from Band officers to prevent them from conducting investigations. According to the District Court, the record was "replete with evidence that, pursuant to the Opinion and Protocol, County law enforcement officers repeatedly interfered with law enforcement measures undertaken by Band officers."[95]

In December 2016, Walsh wrote that the "County Sheriff's Office has taken on all state law enforcement services provided in the entirety of Mille Lacs County" and a "tenuous status quo has been followed by the … Sheriff's Office and … Band Police Department *based on my Opinion and Protocol*" (emphasis added). When deposed, Walsh agreed the Sheriff took on "the role of investigating violations of state law on trust lands" and "having exclusive responsibility for responding to calls and investigating [state-law] violations on non-trust lands[.]"[96]

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[95] Aplt.-App. 112, 1544; R.Doc. 165-1, at 61; R.Doc. 349, at 38; Cnty.-Add. 131; Aple.-App. 272-278; R.Doc. 217, at 6-12.

[96] Aple.-App. 151-152, 280; R.Doc. 150-37, at 10-11; R.Doc. 217, at 14.

The United States assumed concurrent criminal jurisdiction within the Band's Indian country effective January 1, 2017. In December 2016, the Bureau of Indian Affairs ("BIA") signed a deputation agreement with the Band and issued Special Law Enforcement Commissions ("SLECs") to certain Band officers. The Deputation Agreement and SLECs authorized Band officers to investigate violations of federal law throughout the Band's Indian country (including, according to BIA, all lands within the Reservation) and to make arrests as federal law enforcement officers. However, Walsh did not believe Band officers could exercise SLEC authority on non-trust lands within the Reservation and advised them to continue following his Opinion and Protocol.[97]

3. Law Enforcement Consequences

The District Court found the restrictions imposed on Band officers caused a decline in their morale, reduced their effectiveness in addressing drug crimes and overdoses, and led to several resignations. Although the County assigned extra deputies to the Reservation, they lacked Band officers' intimate knowledge of the community and did not provide the same level of proactive policing. There was an increase in open drug trafficking and use and public safety declined. According to State Corrections Officer Wade Lennox, "[t]here simply [was] not the law

[97] Aple.-App. 138-139, 287; R.Doc. 150-5, at 1-2; R.Doc. 217, at 21.

enforcement presence on the Reservation there had been[.]" The "general perception from the offenders we were working with at the time was kinda free rein"; over time, "there was a general sense that [the Reservation] became almost a safe haven [for drug trafficking]."[98]

C. Procedural History

Plaintiffs filed suit in November 2017 seeking declaratory and injunctive relief defining the scope of and preventing interference with Plaintiffs' inherent and federally delegated law enforcement authority. Plaintiffs asserted the District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1362 because their claims arose under 1331.

All Defendants admitted: (1) the District Court had jurisdiction under 28 U.S.C. § 1331; (2) federal law may define and regulate the scope of inherent tribal law enforcement authority; and (3) the scope of Band law enforcement authority outside trust lands was ripe for judicial resolution. On the merits, Defendants asserted the Reservation was disestablished and the Band's inherent and federal law enforcement authority was limited to trust lands.[99]

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[98] Aple.-App. 171-172, 179-181, 187, 211-212, 280-287; R.Doc. 150-45, at 7-8, 15-17; R.Doc. 150-47, at 3; R.Doc. 156, at 3-4; R.Doc. 217, at 14-21.

[99] Aple.-App. 12-13, 16-19, 47, 49-51, 57-60; R.Doc. 17 at 2-3, 6-9; R.Doc. 19 at 2, 4-6; R.Doc. 21, at 2-5.

The County counterclaimed for a declaratory judgment that the Reservation had been disestablished. The District Court dismissed the counterclaim for lack of standing, leaving only Plaintiffs' claims to adjudicate.[100]

In a Fed. R. Civ. P. 26(f) report, Defendants again asserted the District Court had jurisdiction under 28 U.S.C. § 1331. However, the County Attorney and Sheriff later argued the Court lacked subject-matter jurisdiction and Plaintiffs lacked standing. On summary judgment motions, the District Court held it had subject-matter jurisdiction, Plaintiffs had standing and their claims were ripe and not moot, and the County Attorney and Sheriff's immunity defenses lacked merit.[101] As to standing, the Court held that the Band had "a legally protected interest in exercising its inherent sovereign law enforcement authority" and that the record revealed "numerous actual, concrete, and particularized incidents in which the Band's police

[100] Aple.-App. 23-44, 65-66; R.Doc. 17 at 13-34; R.Doc. 46, at 2-3. In September 2018, the Band, the County and the County Sheriff entered into a new agreement under Minn. Stat. § 626.90. The County and County Sheriff entered into the agreement "in reliance on the Court's determination of the issues raised in the [instant] lawsuit, including the existence and extent of Indian country in Mille Lacs County[.]" At their insistence, the agreement "automatically terminate[s] ninety (90) days after the final resolution, including the exhaustion of all appeals and any proceedings on remand, of the lawsuit[.]" Aple.-App. 206-207; R.Doc. 150-51 at 17-18.

[101] Aple.-App. 91, 219-234, 237-253, 290-312; R.Doc. 48, at 5; R.Doc. 164 at 29-44; R.Doc. 176 at 37-53; R.Doc. 217 at 24-46.

officers [were] restricted from carrying out their law enforcement duties pursuant to the [County Attorney's] Opinion and Protocol."[102]

The Court's ruling on standing did not determine whether Defendants' conduct was illegal, leaving open Defendants' challenge to "the extent and scope of the Band's sovereign law enforcement authority." A "core issue" was whether the original boundaries of the Mille Lacs Reservation remained intact. All parties agreed:

> 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 [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).

The Court resolved this issue on cross-motions for summary judgment, holding that the 1855 boundaries remained intact.[103]

On a final round of summary judgment motions, the Court ruled that the Band's inherent and federally delegated law enforcement authority extended to all

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[102] Aple.-App. 297-298; R.Doc. 217 at 31-32.

[103] Aple.-App. 262, 269, 296-298; R.Doc. 208, at 3; R.Doc. 217 at 3, 30-32; Aplt.-App. 1461-1506; R.Doc. 313, at 48-93; Cnty.-Add. 48-93. The Court's consideration of the merits was delayed by the County Attorney and Sheriff's interlocutory appeal. *See* Aple.-App. 1590-1592; R.Doc. 290, at 9-11. After this Court dismissed the appeal, the District Court again held the case was not moot. Aple.-App. 1603, 1605-1621; R.Doc. 312, at 9, 11-27.

lands within the Reservation, and the Band's inherent authority included the authority to investigate violations of federal, state and tribal law and limited authority to detain non-Indians. The Court held Defendants unlawfully interfered with the Band's authority and entered a declaratory judgment regarding the scope of that authority. It denied without prejudice Plaintiffs' request for injunctive relief.[104]

D. Rulings Presented for Review

Collectively, Defendants challenge the District Court's rulings that it had subject-matter jurisdiction and that the Mille Lacs Reservation remains intact, and certain aspects of the Court's declaratory judgment. Defendants do not challenge the Court's dismissal of the County's counterclaim, its ruling that Plaintiffs had standing and that their claims are ripe and not moot, its rejection of Defendants' immunity defenses, and other aspects of the declaratory judgment.

IV. SUMMARY OF ARGUMENT

The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1362 because Plaintiffs' claims arose under federal law and presented a federal cause of action to prevent interference with the Band's sovereign law enforcement authority. The Court correctly determined the Reservation remains intact: an analysis of the language, surrounding circumstances, Indian understanding, and

[104] Aplt.-App. 1558-1579; R.Doc. 349 at 52-73; Cnty.-Add. 145-166.

subsequent events of each relevant treaty and statute shows Congress never disestablished the Reservation. The District Court also correctly entered a declaratory judgment; substantial case law, recently confirmed by the Supreme Court, establishes the Band has inherent authority to investigate violations of state and federal law within the Reservation and limited authority to detain non-Indians for such violations.

V. ARGUMENT

A. The District Court Had Subject-Matter Jurisdiction.

1. Introduction and Standard of Review

Despite repeatedly admitting otherwise, the County Attorney asserts the District Court lacked subject-matter jurisdiction over Plaintiffs' claims arising from Defendants' interference with Plaintiffs' law enforcement authority. Brief of Appellants Erica Madore and Kyle Burton ("Madore Br.") at 17-18, 20-31. This Court reviews subject-matter jurisdiction de novo. *Barse v. United States*, 957 F.3d 883, 885 (8th Cir. 2020). Because the District Court's ruling was based on the complaint alone, *see* Aple.-App. 290-295; R.Doc. 217, at 24-29, review is limited to whether the Court correctly applied the law to the complaint. *ABF Freight Sys. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011).

2. Plaintiffs' Claims Arose Under Federal Law.

Federal district courts have jurisdiction over "civil actions arising under the

Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also* 28 U.S.C. § 1362 (actions brought by Indian tribes). "[C]laims founded upon federal common law as well as those of a statutory origin" can satisfy section 1331's "arising under" requirement. *Ill. v. City of Milwaukee*, 406, U.S. 91, 100 (1972), *recognized as superseded by statute on other grounds*, *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 419 (2011); *Minn. v. Am. Petroleum Institute*, 63 F.4th 703, 709 (8th Cir. 2023).

The District Court held Plaintiffs' well-pleaded complaint arose under federal common law because it alleged interference with the Band's sovereign law enforcement authority. Aple.-App. 291-294; R.Doc. 217, at 25-28. The Supreme Court has determined, as a matter of federal common law, the scope of "tribes' retained sovereign status" and their "inherent tribal authority." *See United Sates v. Lara*, 541 U.S. 193, 205-07 (2004). In such cases, treaties and statutes "'form the backdrop for the intricate web of *judicially made* Indian law'" defining the tribes' inherent authority. *Id*. at 206 (quoting *Oliphant*, 435 U.S. at 206) (emphasis added in *Lara*); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) ("question whether an Indian tribe retain[ed] the [inherent] power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court [was] one that *must be answered* by reference to federal law and [was] a 'federal question' under § 1331") (emphasis added); *Cnty. of Oneida v. Oneida*

Indian Nation, 470 U.S. 226, 233-37 (1985) (recognizing the "federal common law" component of Indian rights).

The County Attorney cites (Madore Br. at 25) *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701, 712 (2003), in which a tribe asserted a "sovereign right to be free from state criminal processes." Because the tribe had "not explained … what prescription of federal common law enables a tribe to maintain an action" seeking to establish such a right, the Court remanded but did not decide whether tribe's claim arose under federal law. *Id.* Under *Inyo County*, plaintiffs cannot invoke federal-question jurisdiction through general assertions that a claim arises under the federal common law of Indian affairs, but *can* invoke such jurisdiction by pointing to specific federal common law governing the disputed matter. *See Coeur D'Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019) (plaintiff must "articulate a specific rule of federal common law under which the Tribe's case arises"); *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1274-75 (11th Cir. 2010) ("challenge regarding the reach of Indian power" would arise under federal law); *Soboba Band of Luiseño Indians v. County of Riverside*, No. EDCV-17-01141-JGB, 2018 U.S. Dist. LEXIS 228519, *10-12 (C.D. Cal. March 22, 2018) (case arising under federal common law governing scope of tribal law enforcement authority arises under federal law).

Here, Plaintiffs identified specific federal law governing the matter in dispute:

the scope of the Band's inherent and federally delegated law enforcement authority. As all parties acknowledged, the geographic component of the dispute—whether the Band's law enforcement authority extends throughout the Reservation—turns on whether the Reservation continues to exist. Aple.-App. 262; R.Doc. 208, at 3. That question is governed by federal law. *E.g.*, *McGirt v. Okla.*, 140 S. Ct. 2452, 2462 (2020). The County Attorney's counsel conceded the Reservation's existence "is the type of question over which there is … subject matter jurisdiction." Aple.-App. 257-258; R.Doc. 202, at 50-51.

The second component of the dispute—whether the Band's inherent authority encompasses investigations of state-law violations and non-Indians—is also governed by federal law. The extent of a tribe's retained inherent power "must be answered by reference to federal law and is a 'federal question' under § 1331." *Nat'l Farmers Union*, 471 U.S. at 852. Federal courts repeatedly determine the scope of a tribe's inherent law enforcement authority as a matter of federal law. *See*, *e.g.*, *United States v. Cooley*, 141 S. Ct. 1638, 1641-44 (2021); *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997); *Duro v. Reina*, 495 U.S. 676, 696-97 (1990); *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005); *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179-80 (9th Cir. 1975).

In *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1152 (9th Cir. 2017), the court found 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 "Defendants' arrest and charging of [a tribal officer]" allegedly violated such federal common law. (Internal quotation marks omitted.) Here, Plaintiffs similarly alleged "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 [the] Court." Aple.-App. 293; R.Doc. 217, at 27; *see also* Aple.-App. 58; R.Doc. 21, at 3 ¶ 5H (County Attorney's Answer, asserting "federal law may define and limit the scope of tribal law enforcement authority").

3. Plaintiffs Had a Cause of Action.

The County Attorney argues no express provision of federal law creates a cause of action for interference with tribal law enforcement authority. *E.g.,* Madore Br. at 25-26, 29-31. However, tribes may sue to enforce their sovereign rights—whether secured by treaty, statute or common law—despite the absence of an express provision creating a cause of action. *See Mille Lacs Band v. Minn.*, 853 F. Supp. 1118, 1124-25 (D. Minn. 1994) (Band had "direct claim for relief" based on defendants' alleged interference with treaty rights, notwithstanding absence of treaty language creating private cause of action), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999); *accord Swinomish Indian Tribal Cmty. v. BNSF Ry. Co*., 951

F.3d 1142, 1154 (9th Cir. 2020) (treaty rights "self-enforcing" and do not require implementing legislation to bring suit).

Tribes also "'have a federal common-law right to sue to enforce their aboriginal … rights[,]'" despite the absence of statutory language creating a cause of action. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002) (quoting *Oneida*, 470 U.S. at 235). A tribe has a cognizable "claim of injury" in a suit alleging state interference with "tribal self-government[.]" *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 466, 468 n.7 (1976). Tribes also "alleged a valid cause of action[,]" when they alleged defendants "deprived [them] of rights secured under the 'federally-protected inherent right of self-governance.'" *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 552-53 (9th Cir. 1991) (internal quotation marks omitted); *see also Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475-76 (9th Cir. 1989). Here, Plaintiffs have a cause of action to prevent interference with the Band's sovereign rights under the treaties and statutes establishing and preserving the Reservation, including the Band's retained, inherent law-enforcement authority.

The County Attorney argues the absence of a statutory cause of action for interference with tribal law-enforcement authority in the Tribal Law and Order Act ("TLOA") precludes recognition of a common-law cause of action. Madore Br. at 25-28. "The 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.'" Aple.-App. 295; R.Doc. 217, at 29 (quoting *Am. Elec. Power*, 564 U.S. at 423-24); *see also Timpanogos*, 286 F.3d at 1204 (in *Oneida*, 470 U.S. at 235, 237, the Supreme Court held the Nonintercourse Act did not displace tribes' "'federal common-law right to sue to enforce their aboriginal land rights'" because it "'did not establish a comprehensive remedial plan for dealing with Indian property rights'" and there was "'no indication in the legislative history that Congress intended to preempt common-law remedies'").

The County Attorney identifies nothing in the TLOA that displaces a tribe's existing law-enforcement authority[105] or the availability of common-law remedies for interference with that authority. Indeed, there is nothing in the TLOA suggesting Congress contemplated—let alone established "a comprehensive remedial plan for

[105] The County Attorney cites provisions relating to tribal and federal *prosecutions*. Madore Br. at 26, citing 25 U.S.C. § 2801 (note); 18 U.S.C. § 1162(d). Neither addresses or purports to displace pre-existing tribal *police* authority to detain non-Indian offenders within Indian county and transport them to the proper authorities for prosecution, including the authority to investigate violations of federal and state law in Indian country. *See*, *e.g.*, *Cooley*, 141 S. Ct. at 1641-44; *Duro*, 495 U.S. at 696-97; *Terry*, 400 F.3d at 578-79. To the contrary, the Act sought to strengthen tribal authority to "provide public safety in Indian country." Pub. L. 111-211, § 202(b)(3) (codified at 25 U.S.C. § 2801 note).

dealing with"—the type of interference that occurred here. *Oneida*, 470 U.S. at 237.[106]

The County Attorney suggests "the Band could have sought recourse with the [United States Attorney's Office]" for defendants' interference with the Band's law-enforcement authority. Madore Br. at 26-27. However, no TLOA provision authorizes the U.S. Attorney's Office to oversee the actions of a county attorney or sheriff. In 28 U.S.C. § 1362, "Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be, at least in some respects, as broad as that of the United States suing as the tribe's trustee." *Moe*, 425 U.S. at 472-73; *see also Ariz. v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983) (Congress contemplated that § 1362 would be used when the United States was unwilling to bring suit as trustee for Indians). Nothing in the TLOA inverts § 1362 and *requires* a tribe to defer to a U.S. Attorney's enforcement action.

[106] The County Attorney points to the private cause of action created in *Title I* of Pub. L. 111-211. Madore Br. at 27-28. Title I was developed separately from Title II and addressed a different subject matter (Indian arts and crafts). *See* 156 Cong. Rec. 13,552 (2010) (statement of Rep. Hastings). The unique action it created for crafts falsely claiming Indian provenance has no common-law precedent and does not suggest that, *in Title II*, Congress intended to abrogate common-law actions to protect tribal sovereign rights under federal law.

B. The Mille Lacs Reservation Remains Intact.

1. Introduction and Standard of Review

The District Court held the Reservation's boundaries remain intact, rejecting Defendants' arguments that Plaintiffs should be estopped or time-barred from asserting the Reservation still exists and that Congress disestablished the Reservation. Aplt.-App. 1461-1506; R.Doc. 313, at 48-93; Cnty.-Add. 48-93. Defendants do not challenge the Court's rejection of their claim preclusion, issue preclusion and judicial estoppel arguments.[107] However, they contend that Congress disestablished the Reservation; this was confirmed by the Supreme Court; Plaintiffs have asserted the Reservation was ceded; and Plaintiffs are barred by laches and the Indian Claims Commission Act from asserting the Reservation still exists. Brief of Appellant County of Mille Lacs, Minnesota ("Cnty. Br.") at 22-56.

Because the District Court's rulings were made on cross motions for summary judgment, this Court's review is largely *de novo*. *E.g. Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 907 (8th Cir. 2015). As to laches, this Court first determines *de novo* whether there are any issues of material fact and then reviews

[107] Defendants' opening briefs do not mention these arguments or argue the District Court erred in rejecting them, thereby waiving them. *See Rotskoff v. Cooley*, 438 F.3d 852, 854-55 (8th Cir. 2006).

the District Court's application of laches to the facts for abuse of discretion. *A.I.G. Agency, Inc. v. Am. Int'l Grp., Inc.*, 33 F.4th 1031, 1034 (8th Cir. 2022).

2. Legal Standards

The 1855 Treaty, which "reserved and set apart" more than 61,000 acres at Lake Mille Lacs as one of six "permanent homes" for the Mississippi Bands, established an Indian reservation. *See* Aplt.-App. 1476; R.Doc. 313, at 63; Cnty.-Add. 63. Only Congress can alter a reservation's boundaries, and its intent to do so must be clearly expressed. *McGirt*, 140 S. Ct. at 2462-63; *S.D. v. Yankton Sioux Tribe*, 522, U.S. 329, 343 (1998); *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 674-75 (7th Cir. 2020); *New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972).

Conveying title to lands within a reservation—to Indians or non-Indians—does not alter its boundaries. "Once 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." *Solem*, 465 U.S. at 470; *accord McGirt*, 140 S. Ct. at 2464 ("Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others"); *New Town*, 454 F.2d at 125 (opening reservation to homesteading "not inconsistent with its continued existence as a reservation").

Congress's intent to disestablish "must be clear." *Neb. v. Parker*, 577 U.S. 481, 488 (2016). Under the "well settled" *Solem* framework, *id.* at 487, "[t]he most probative evidence of diminishment is … the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). "Common textual indications of Congress' intent to diminish reservation boundaries include 'explicit 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.'" *Parker*, 577 U.S. at 488 (quoting *Solem*, 465 U.S. at 470) (modification normalized). 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); *cf. United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987) (language of cession *without* an unconditional commitment for compensation does not support disestablishment), *vacated in other respects*, 836 F.2d 1088 (8th Cir. 1987) (*en banc*).

The "circumstances underlying [an Act's] passage" may also be considered. *Solem*, 465 U.S. at 469. Such circumstances, "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative reports presented to Congress[,]" can be used to determine whether there was a

"widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation[.]" *Id*. at 471. Post-enactment events, such as "Congress' own treatment of the affected areas, particularly in the years immediately following the opening," may be considered but are of "lesser" significance. *Id*.

Subsequent demographic history may provide "one additional clue as to what Congress expected would happen[,]" *id*. at 471-72, but "is the least compelling [factor]." *Yankton*, 522 U.S. at 356; *cf. Parker*, 577 U.S. at 492 (no diminishment even though tribe "almost entirely absent" from disputed territory for 120 years). To hold otherwise "would mean the United States could break its treaty obligations and lessen Indian sovereignty not because Congress expressed its intent to do so, but because non-Indian settlers were particularly effective in obtaining reservation land, sometimes by fraud or unfair dealing, or simply by taking advantage of Indian poverty." *Oneida Nation*, 968 F.3d at 684.

When an Act and its legislative history "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," the "traditional solicitude" due Indian tribes dictates "diminishment did not take place" and "the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472; *see also Yankton*, 522 U.S. at 344 (courts resolve ambiguities in favor of Indians and

"do not lightly find diminishment"); *Grey Bear*, 828 F.2d at 1289 ("strong presumption prevails that reservation land and boundaries are to remain intact").

McGirt clarified that extrinsic evidence is relevant only to the extent it sheds light on a statute's terms meant "at the time of the law's adoption, not as an alternative means of proving disestablishment[.]" 140 S. Ct. at 2469.

> 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."

Id. (citations omitted); *see Oneida Nation*, 968 F.3d at 675 n.4 (*McGirt* adjusts the *Solem* framework "by establishing statutory ambiguity as a threshold for any consideration of context and later history").

Because Defendants' arguments rest on subsequent treaties and statutes requiring Indian consent, additional interpretative canons apply. An Indian treaty "'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.'" *Wash. v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). "Indian treaties are to be interpreted liberally in favor of the Indians" and "any ambiguities are to be resolved in their favor[.]" *Mille Lacs Band*, 526 U.S. at 200; *accord Herrera v. Wy.*,

139 S. Ct. 1686, 1699 (2019); *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1023-24 (8th Cir. 2021).

These canons apply to "acts to which the Indians must give consent before they become operative[,]" such as the Nelson and 1902 Acts. *United States v. First Nat'l Bank*, 234 U.S. 245, 259 (1914). "The justice and propriety of this method of interpretation is obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign." *Id.*; *accord Rosebud Sioux*, 9 F.4th at 1023 (principle of liberal interpretation in favor of Indians, with ambiguous provisions interpreted to their benefit, applies to statutory construction).

3. The 1863 and 1864 Treaties Preserved the Reservation.

Defendants argue the 1863 and 1864 Treaties disestablished the Reservation, Cnty. Br. at 23-25, but misquote the Treaties and fail to give effect to Article 12's proviso. A fair appraisal of the treaty language and the other *Solem* factors demonstrates the Treaties did not disestablish the Reservation.

a. Treaty Language

The treaty language does not support disestablishment. Article 1 provided for the cession of the six Mississippi Chippewa Reservations established in the 1855

Treaty.[108] Article 12 provided the Mississippi bands were not obligated to remove from their "present reservations" until certain conditions were met, with the proviso that Mille Lacs "shall not be required to remove" as long as they did not interfere with the whites. Because "[t]he 'grammatical and logical scope' of a proviso … 'is confined to the subject-matter of the principal clause' to which it is attached[,]" *Abbott v. United States*, 562 U.S. 8, 25-26 (2010) (quoting *United States v. Morrow*, 266 U.S. 531, 534-35 (1925)), the proviso prohibited Mille Lacs' removal from their "present reservation" while they satisfied the good-conduct provision.

The Treaties' provisions must be read together. *See*, *e.g.*, *Martin v. Fayram*, 849 F.3d 691, 696 (8th Cir. 2017) (court "must construe the statute 'as a whole,' considering its various subparts and the ways in which these subparts relate to one another") (citation omitted); *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987) (separate sections of statute, read *in pari materia* did not reveal clear congressional intent to divest reservation lands of Indian-country status). Read together, the plain meaning of Articles 1 and 12 was to convey title to the six reservations to the United States while reserving to Mille

[108] Contrary to Defendants' argument, the cession language does not refer to "all 'their right, title and interest' to the lands encompassed within the six 1855 reservations." Cnty. Br. at 23. Instead, the Treaties simply provide the reservations are "ceded to the United States." 1863 Treaty, art. 1; 1864 Treaty, art. 1. The District Court corrected Defendants' error, Aplt.-App. 1480; R.Doc. 313, at 67, Cnty.-Add. 67, but they repeat it here.

Lacs alone the right to remain upon and occupy its "present reservation" during good behavior. As the Court of Claims held:

> 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.

MLB I, 47 Ct. Cl. at 440; *see also id.* at 443 ("[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."); *Minn. Chippewa Tribe v. U.S.*, 11 Cl. Ct. 221, 225 (1986) (Article 12 provided Mille Lacs "shall not be compelled to remove [from their reservation to White Earth] so long as they shall not" interfere with whites) (modification by the court); *id*. at 239 ("purpose of the 1863 and 1864 treaties was to assure that the band could keep its reservation because of its 'good conduct'").

Reserving a right of occupancy during good behavior on ceded land preserved the Reservation. First, because the Indians retained a right of occupancy, the Treaties did not provide for "the present and total surrender of all tribal interests" and thus did not evidence an intent to disestablish the Reservation. *Solem*, 465 U.S. at 470. "Until the Indians have sold their lands, *and removed from them in pursuance of the treaty stipulations*, they are to be regarded as still in their ancient possessions,

and are in under their original rights, and entitled to the undisturbed enjoyment of them." *New York Indians*, 72 U.S. 761, 770 (1867) (emphasis added). Unless the Mille Lacs violated the good-conduct condition, they could *not* be removed from their "present reservation" and thus retained their original rights to the "undisturbed enjoyment" of it. This is far from a surrender of all tribal interests and thus did not disestablish the Reservation.

Second, a defined tract where "the fee … [is] in the United States, subject to a right of occupancy by Indians[,]" comprises an Indian reservation. *Minn. v. Hitchcock*, 185 U.S. 373, 389-90 (1902). Under the Treaties' plain language, the United States held fee title to the Reservation subject to Mille Lacs' right of occupancy.[109] Under *Hitchcock* this was an Indian reservation.

Essentially adopting Secretary Chandler's views, Defendants argue Article 12's proviso did not grant the Band "any exclusive use of any lands" or "exclude non-Indians from entering" because the Reservation's lands became "public lands." Cnty. Br. at 26.[110] Like Chandler, Defendants cite no authority for these

[109] Although the Government might convey the fee, the purchaser would not acquire the right of possession until the Indians' right of occupancy was extinguished. *Id*. Thus, as Commissioner Price explained, Interior had "seen the importance of protecting [the Indians] in their right of occupancy, as guaranteed to them by said treaty, and to that end [had] refused to allow settlements to be made in their midst." Aple.-App. 422; R.Doc. 228-6, at 10.

[110] Chandler's views were a distinct minority; they were contrary to previous opinions and orders by Agent and later Commissioner Smith, Commissioner Parker,

propositions, which are inconsistent with the Treaties' language, *New York Indians* and *Hitchcock*. As discussed below, they are also inconsistent with the negotiating record, the Indians' understanding, subsequent treatment of the Reservation by Congress and the Executive Branch, and the demographic history.

b. Surrounding Circumstances and Indian Understanding

Circumstances underlying the Treaties' adoption, especially the way they were negotiated with the Indians, can shed light on what the Treaties' terms meant when adopted. *See McGirt*, 140 S. Ct. at 2468; *Solem*, 465 U.S. at 469, 471; *see also Mille Lacs Band*, 526 U.S. at 1200-01 (historical record "is especially helpful to the extent that it sheds light on" the Indians' understanding "because we interpret Indians treaties to give effect to the terms as the Indians themselves would have understood them"). During the 1863 Crow Wing negotiations, Mille Lacs leaders opposed a treaty that would require them to leave their reservation, insisting they had been promised they could remain because of their assistance during the 1862 uprisings. *See* § III.A.1.b, *supra.* In Washington, American negotiators

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Commissioner Drummond, Secretary Delano, and Attorney General Akerman, and were subsequently rejected by Secretary Schurz, Acting Commissioner Brooks, Commissioner Price, Secretary Noble, treaty drafter Henry Rice and the Court of Claims. Even Secretary Teller acknowledged the Band had a right of occupancy under the Article 12 proviso, which the Government was bound to protect. *See* §§ III.A.2-4, *supra.*

acknowledged their assistance and expected them to oppose a treaty requiring them to leave their reservation. *Id.* When Americans sought to persuade them it would be in their best interests to remove, they again refused, demanding the right to live on their reservation and insisting they could live at peace with neighboring whites. *Id*. Commissioner Dole stated Minnesotans would not consent to allowing *all* Mississippi Bands to remain but acknowledged they might consent to allowing the Indians living at Mille Lacs "to remain there forever if they will become good citizens." *Id.* The repeated demands of Mille Lacs leaders and Dole's concession were reflected in Article 12's proviso, which prohibited removal of the Mille Lacs Band alone from its "present reservation" as long as it did not interfere with the whites. *Id.*

This negotiating record confirms Article 12 meant what it said: the Mille Lacs Band could not be compelled to remove from its reservation as long as it did not interfere with the whites. As the District Court held, Defendants' argument that non-Indians could enter the Reservation, acquire its lands, and displace Band members from their homes "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." Aplt.-App. 1483; R.Doc. 313, at 70; Cnty.-Add. 70.

> As the Court of Claims fittingly asked: Was this proviso, "the reward for the 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?" [*MLB I*], 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.

Id. (footnote omitted); *see also Fellows v. Blacksmith*, 60 U.S. 366, 370-71 (1857) (even where Indians are *obligated* to remove, removal may only be effectuated "under [the Government's] care and superintendence[,]" not by "the irregular force and violence of the individuals who … acquired [the Indians' title]").

Defendants' argument that the Treaties permitted non-Indians to enter the Reservation and displace Band members from their homes is also antithetical to the Indians' understanding. Upon returning to Minnesota, Mille Lacs leaders explained they understood the Treaty to secure their rights to exclusive occupancy of their reservation, while agreeing to the cession demanded of the other Bands. *See* § III.A.1.e, *supra*; *accord MLB I*, 47 Ct. Cl. at 421 (at the time the Treaties were executed, the Band "understood and believed that they were reserving to themselves the right to occupy the Mille Lac Reservation"). As detailed in Sections III.A.1-3, *supra*, Band members repeatedly and consistently maintained this understanding thereafter. Defendants' own expert agreed they understood the Treaty preserved their reservation. Aple.-App. 1579; R.Doc. 270-1, at 66. This understanding

controls under the Indian canons and confirms the Treaties did not disestablish the Reservation.

c. Post-Enactment Events

Under *Solem*, post-enactment events, such as Congress' own treatment of the affected area, may be considered but are of lesser significance. However, they cannot overcome the plain language and contemporaneous understanding of the Treaties. *McGirt*, 140 S. Ct. at 2468-69. Here, they confirm the Treaties did not disestablish the Reservation.

First, with two brief exceptions, from the time of the Treaties until the Nelson Act, a period of more than 25 years, the Reservation was officially closed to public entry. The first exception came when Taylors Falls opened the Reservation in 1871 but that opening was quickly countermanded by the GLO and all entries cancelled. *See* § III.A.2.b, *supra*. The second exception resulted from the Sabin-Wilder scheme, but that opening was stayed by Secretary Schurz and closed when Congress halted disposition of Reservation lands in 1884 "to protect these Indians in their right of occupancy of that territory," as stipulated in the Treaties. *See* Aple.-App. 478; R.Doc. 229-1, at 4; § III.A.2.d, *supra*. As the District Court explained, the decisions opening the Reservation "were quickly reversed or stayed" and, "[w]hen *Congress* addressed the conflicting Interior decisions regarding the reservation's status, it stayed any further disposition of lands" on the Reservation. Aplt.-App. 1485-1486;

R.Doc. 313, at 72-73; Cnty.-Add. 72-73 (citing Act of July 4, 1884, 23 Stat. 76, 89) (emphasis in original).

Following the 1884 Act, Congress and the Executive Branch repeatedly recognized the Reservation's continued existence. In 1886, while seeking legislation authorizing the Northwest Indian Commission's negotiations, Interior described the Mille Lacs Reservation as a "treaty reservation[]" and stated the Government had respected the Indians' right of occupancy on it. *See* § III.A.3.a, *supra*. The 1888 House report on what would become the Nelson Act expressly identified the Mille Lacs Reservation as a subsisting reservation subject to the Act. *See id*.

In implementing the Act, Commissioner Oberly and Secretary Noble listed the Mille Lacs Reservation among those "within the purview of the act[.]" *See* § III.A.3.c, *supra*. During the negotiations, the Commissioners (including the treaty drafter, Henry Rice) affirmed the Band's understanding of the Treaty; conveyed Interior's official position that the Band had not forfeited its right to occupy the Reservation; produced a map depicting the Reservation; and repeatedly referred to and acknowledged its existence. *Id*. The agreement drafted by the Government and approved by President Harrison stated the Band occupied and belonged "to the Mille Lac Reservation" under Article 12's proviso. *Id*. The reports submitted by Rice, the Commission and Noble likewise acknowledged the Reservation's existence, as did

Noble's denial of Robbins' patent application and his March 5, 1890, public notice. *See* § III.A.3.d, *supra*.

Defendants cite *Amanda Walters*' dicta that lands within the Mille Lacs Reservation did not comprise a reservation within the meaning of the Nelson Act. Cnty. Br. at 27 & n.62. However, Noble rejected that conclusion in *Northern Pacific Railroad* and *Mille Lacs Lands*. *See* § III.A.4.a, *supra.* Congress's 1893 Joint Resolution recognized *Mille Lacs Lands* was correct, finding it "definitely determined that … lands [within the Mille Lacs Reservation] … could only be disposed of according to [the Nelson Act.]" 28 Stat. 576. Contrary to the *Amanda Walters*' dicta, the Court of Claims held that the Reservation was preserved by the Treaties and therefore fully subject to the Nelson Act. *See* § III.A.4.e, *supra.* The Supreme Court, without interpreting the Treaties on the merits, held that, subject to Section 6's proviso, Congress in the Nelson Act accepted the Indians' contention that the Reservation still existed and was subject to the Act. *Id.*

Even subsequent demographic evidence—the least compelling *Solem* factor—indicates there was no disestablishment. The Indians remained the Reservation's principal, if not sole, occupants after the Treaties. *See* § III.A.2.a, *supra*. Apart from sham entries by timber companies, the first settler did not enter the Reservation until 1883, 20 years later, at a time when Taylors Falls had no authority to allow entries on the Reservation. *See* § III.A.2.d, *supra*.

In sum, the Treaties' language, the negotiating record, the Indians' understanding, and post-enactment events demonstrate the Treaties did not disestablish the Reservation.

4. The 1867 Treaty Did Not Disestablish the Reservation.

Defendants' misrepresentation of treaty language, *see* n.109, *supra*, is more egregious when it comes to the 1867 Treaty. Contrary to Defendants' argument, the 1867 Treaty does not contain "plain, unambiguous language [in which] the Mississippi Chippewa bands ceded all 'their right, title and interest' to the lands encompassed within the six 1855 reservations." Cnty. Br. at 23; *see also id.* at 25 (asserting "1867 treaty explicitly ceded all 1855 reservations except Leech Lake"). The only lands ceded in the 1867 Treaty comprised a portion of the reservation near Leech Lake established in Article 2 of the 1864 Treaty (proclaimed on March 20, 1865). 1867 Treaty, art. 1 ("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 March 20, 1865, excepting and reserving therefrom the tract bounded and described as follows…."); *see* Aplt.-App. 1487; R.Doc. 313, at 74; Cnty.-Add. 74; § III.A.1.d, *supra*. Because the 1867 Treaty makes no reference to the Mille Lacs Reservation or Article 12's proviso, there is no basis on which to find it disestablished that Reservation. *See McGirt*, 140 S. Ct. at 2469.

5. The Nelson Act Preserved the Reservation.

Citing the Nelson Act's cession language, Defendants argue it disestablished the Mille Lacs Reservation. Cnty. Br. at 27-29. However, as the District Court explained, that language was not unqualified; rather, the Act called for "'the complete cession and relinquishment … of all [the Chippewas'] title and interest in and to all the reservations … *for the purposes and upon the terms*' of the Nelson Act." Aplt.-App. 1489; R.Doc. 313, at 76; Cnty.-Add. 76 (quoting Nelson Act § 1) (emphasis added). Just as Defendants failed to address this qualification in the District Court, *id*., they fail to address it here. Their claim that the "treaties and the Nelson Act together reflect the total extinguishment of any claim by the Band to the land," Cnty. Br. at 34, disregards the Act's provisions for making allotments to Band members on the Reservation, reserving other reservation lands "for the future use of said Indians," and retaining proceeds from the disposition of the lands for the operation of schools "in their midst" and for "promoting civilization and self-support among" the Indians. Nelson Act, §§ 3, 6, 7. The statutory language and the other *Solem* factors demonstrates the Nelson Act did not disestablish the Reservation.

a. Statutory Language

The Nelson Act established a commission to negotiate for the complete cession of Minnesota Ojibwe reservations other than White Earth and Red Lake "for the purposes and upon the terms hereinafter stated." Nelson Act, § 1. Those

purposes were to: allot lands to Indians; sell surplus reservation lands not allotted to or reserved for Indians (other than those subject to prior entries under Section 6's proviso) for the Indians' benefit; and create a permanent fund for the Indians' civilization and benefit. *See* § III.A.3.b, *supra*.[111] As the Supreme Court explained, the Nelson Act was unlike other legislation in which Indians ceded their lands and were to be removed further west. *Hitchcock*, 185 U.S. at 401. In such cases, "the interest of the tribe in the land from which it has been removed ceases, and the full obligation of the government to the Indians is satisfied when the pecuniary or real estate consideration for the cession is secured to them." *Id.* at 401-02. However, instead of removing the Indians "from one reservation to another," the Nelson Act "proceeded upon the theory that the time [had] come when efforts shall be made to civilize and fit them for citizenship." *Id*. at 402. The "purpose of the legislation and agreement was to fit them for citizenship by allotting them lands in severalty and providing a system of public schools." *Id*.; *accord MLB II*, 229 U.S. at 509 (cession of unallotted lands not absolute but in trust for the Indians' benefit).

Such legislation, even when accompanied by the sale of surplus lands, does not disestablish a reservation. *See*, *e.g.*, *Seymour v. Superintendent of Wash. State*

[111] It was understood at the time that the Indians had to cede reservation lands before the Government could allot lands to Indians or sell surplus lands to non-Indians. *See* n.42, *supra*.

Penitentiary, 368 U.S. 351, 356 (1962) (legislation providing for sale of mineral lands and settlement under homestead laws after allotments were made to Indians—like the Nelson Act's provisions for sale of timber lands and settlement under the homestead laws after allotments were made to Indians—"did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial[.]"). In *Mattz v. Arnett*, 412 U.S. 481, 497 (1973), the Court held provisions for allotments and sale of surplus lands are "completely consistent with continued reservation status." It emphasized that, while earlier versions of the legislation there at issue did not provide for Indian allotments and instead provided for removal, the final version "provided for allotments to the Indians and for the proceeds of sales to be held in trust for the maintenance and education, not the removal, of the Indians." *Id*. at 504 (internal quotation omitted). These provisions, which are closely analogous to those in the Nelson Act, "compel[led] the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely." *Id.* Here too, the effort to remove the Ojibwe to White Earth and to "abandon and dispose" of "outlying" reservations, *see* § III.A.3.a, *supra*, failed when the Nelson Act was amended to permit the Ojibwe to take allotments on their existing reservations. Although the Nelson Act retained removal provisions for Ojibwe who *chose* to remove, the Ojibwe had the express right to allotments on the

reservations where they resided "instead of being removed to and taking such allotment[s] on White Earth Reservation." Nelson Act, § 3.

In *Parker*, the Court held legislation that "'merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit'" did "not diminish the reservation's boundaries." 577 U.S. at 489 (quoting *DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 448 (1975)). Rather than providing fixed-sum compensation, the Nelson Act likewise provided money accruing from the disposal of reservation lands, after deducting the Act's implementing expenses, would be placed in a permanent fund for the Ojibwe's benefit. As in *Parker*, the Act provided only "'that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.'" *Id.*; *accord Grey Bear*, 828 F.2d at 1290.

The Nelson Act's language is *unlike* statutes the Court has held disestablished reservations. Unlike the statutes in *DeCoteau*, 420 U.S. at 445-46, and *Yankton*, 522 U.S. at 344-45, the Nelson Act does not contain unqualified cession language and an unconditional commitment to pay a fixed sum for ceded lands. *See Minn. Chippewa Tribe*, 11 Cl. Ct. at 226 ("[T]he 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."); *see also Hitchcock*, 185 U.S. at 401-02

(distinguishing Nelson Act from enactments providing for cession, fixed-sum payment and removal). Unlike *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590-92 (1977), there is no "baseline purpose of disestablishment" derived from an agreement containing a cession and sum certain compensation. Here, Mille Lacs consistently refused to enter into any such agreement and instead sought allotments to secure their rights on the Reservation. *See*, *e.g.*, § III.A.2, *supra*. Unlike the statute in *Hagen*, 510 U.S. at 412, the Nelson Act did not expressly restore any lands to the "public domain." *See Cathcart v. Minn. & M. R. Co.*, 157 N.W. 719, 720 (Minn. 1916); *White v. Wright*, 86 N.W. 91, 93 (Minn. 1901).

Section 6's proviso allowing certain lands within the Reservation to be patented to non-Indians makes no reference to altering reservation boundaries. *See McGirt*, 140 S. Ct. at 2464 ("Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others."); *Solem*, 465 U.S. at 470 (same). The Supreme Court held Congress included Section 6's proviso in resolving the dispute over the Reservation's existence in the Indians' favor, not for purposes of disestablishing the Reservation. *MLB II*, 229 U.S. at 507. And nothing in the Act's legislative history suggests Congress intended the proviso to disestablish the Reservation. *See* § III.A.3.a, *supra*.

As the District Court observed, "[b]ecause the Nelson Act's cession language was not unqualified, it does not reflect the 'present and total surrender of all tribal

interests'" required for disestablishment. Aplt.-App. 1491; R.Doc. 313, at 78; Cnty.-Add. 78 (quoting *Solem*, 465 U.S. at 470); *see also Grey Bear*, 828 F.2d at 1290. Relinquishing the Band's right of occupancy "in trust," *MLB II*, 229 U.S. 509, so the Government could allot lands to Band members and sell surplus lands for their benefit, does not evince an intent to disestablish the Reservation. *See McGirt*, 140 S. Ct. at 2475 (rejecting argument that tribe's receipt of fee title instead of the usual Indian right of occupancy was incompatible with reservation status); *Indian Country, U.S.A.*, 829 F.2d at 975-76 (rejecting argument that treaty provision conferring fee simple title, which was stronger than Indian right of occupancy, left tribal land base with less protection under federal law). Thus, the most important *Solem* factor, the statutory language, does not support disestablishment.

This is settled law. The seminal case held that, in allowing Indians to obtain "allotments on their own … Reservation[,]" the Nelson 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, 1004-05 (D. Minn. 1971). Minnesota's Supreme Court followed *Leech Lake* in *State v. Forge*, 262 N.W.2d 341 (Minn. 1977) (Leech Lake Reservation), and *State v. Clark*, 282 N.W.2d 902 (Minn. 1979) (White Earth Reservation), emphasizing the Ojibwe were authorized to take allotments on their respective reservations and Congress did not clearly evince an

intent to terminate the reservations. This Court subsequently held the Leech Lake Reservation "has never been disestablished or diminished," *Leech Lake Band of Chippewa Indians v. Cass Cnty.*, 108 F.3d 820, 821-22 (8th Cir. 1997), *aff'd in relevant part*, 524 U.S. 103, 106-08 (1998), and the District Court held that, because the Nelson Act "reserved parcels of land for Indians who elected to remain on the reservation[,]" it did not contain "the requisite clear Congressional intent needed to abolish a reservation." *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 at *8 (D. Minn. Aug. 13, 1998).[112]

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[112] In *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (*per curiam*), and *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 532-34 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982), the courts held the Nelson Act diminished the Red Lake and White Earth Reservations. This Court explained those cases were consistent with cases holding the Nelson Act did not disestablish the Leech Lake or White Earth Reservations because "[t]he 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*, 683 F.2d at 1135 (citation omitted).

At Red Lake and White Earth, the negotiators discussed reducing the reservations, and the agreements drew new, diminished reservation boundaries. *See* n.52, *supra*. There were no similar discussions at Mille Lacs, and, as the District Court found, its 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." Aplt.-App. 1496; R.Doc. 313, at 83; Cnty.-Add. 83.

Notably, the differing effects of the Nelson Act were depicted in Interior's contemporaneous maps showing reduced boundaries at Red Lake and White Earth but *no change* in Mille Lacs or other reservation boundaries. *See* Aple.-App. 1030-1031, 1048-1054; R.Doc. 235-2, at 4-5, 22-28.

b. Surrounding Circumstances and Indian Understanding

The "manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative reports presented to Congress" further supports this conclusion. *Solem*, 465 U.S. at 471. For decades, the Mille Lacs Band had sought to preserve its reservation. *See* §§ III.A.2-3, *supra.* Government negotiators presented the Act as confirming its understanding of the 1863 Treaty and a means to put it in a "stronger position" to retain its reservation in the future. *See* § III.A.3.c, *supra*. Negotiators repeatedly acknowledged the Reservation's existence; no one suggested it would cease to exist or the Act would alter its boundaries. *Id.*

Section 3's allotment provision was critical to the Band's agreement. In 1875, Commissioner Smith told Band leaders they needed title to secure their rights on the Reservation. *See* § III.A.2.c, *supra*. Band leaders took that message to heart and requested reservation lands be allotted to them. *See* n.35, *supra*. The Nelson Act promised allotments that would provide the very title they had been told was necessary to secure the Reservation. Band negotiators thus declared their intention to take "our allotments on this reservation, and not to be removed to White Earth[,]" adding "[t]hey tell us we are going to stay here forever, and that they are going to make allotments here to us." *See* § III.A.3.c, *supra*. Shaboshkung's plea to quell the "shaking" that plagued the Reservation by making allotments "solid under their

seats, solider and solider every move of their bodies[,]" made the Band's understanding that the allotments would secure their rights on the Reservation unmistakable. *Id.*

During the negotiations, the Band also requested lands be reserved for "a place where our schools, etc., shall be," as allowed under Section 6, and Rice "hoped you will have a superintendent and blacksmith, farmer, a man to run your mill, and physician, and that there will also be schools and missionaries"—the latter made possible by "a law of Congress authorizing missionaries to use a piece of land upon every reservation." *Id.* The Band's requests and Rice's response reflect their mutual understanding that the Reservation would continue to exist. *Cf. Solem*, 465 U.S. at 474 (difficult to imagine why lands would be reserved "for such purposes if [Congress] did not anticipate that the opened area would remain part of the reservation").

Reports to the President and Congress referred to the Mille Lacs Reservation as an existing Indian reservation, the difficult issues created by squatters within the Reservation, the Band's intent to take allotments on its reservation, and the need for a sawmill, farmer and other services on the Reservation. *See* § III.A.3.d, *supra*. They made no suggestion that the Act would disestablish the Reservation. *Id.*

Thus, the way the transaction was negotiated with the Band and reports presented to Congress support the continued existence of the Reservation. They

provide no evidence of the "present and total surrender of all tribal interests[,]" or a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation[.]" *Solem*, 465 U.S. at 470-71. The Band's understanding is especially important. Because the Band's assent was required for the Act to take effect, *see* §§ III.A.3.a-b, *supra*, the Indian canons require the Act to be construed as it was presented to and understood by the Band. *See First Nat'l Bank*, 234 U.S. at 259. Here, the negotiating record is clear that the Band understood the Act to secure, not disestablish, its reservation. *See* § III.A.3.c, *supra*.

c. Post-Enactment Events

Post-enactment events also fail to support disestablishment. In the Nelson Act's immediate aftermath, Congress recognized the Reservation's continued existence in acts granting a railroad right of way "through the Mille Lacs Indian Reservation" and making payments to the Indians residing on the "Mille Lac Reservation[]." *See* § III.A.3.d, *supra.*

The subsequent opening of the Reservation to new non-Indian entries resulted from the mistaken *Amanda Walters* decision. *See* § III.A.4.a, *supra.* Because the opening violated the Nelson Act, it does not reflect "what Congress expected would happen[.]" *Solem*, 465 U.S. at 472. As the Supreme Court held, the "wrongful disposal" of reservation lands under the 1893 and 1898 Resolutions was

"[d]oubtless" based on "a misapprehension of the true relation of the Government to the lands," *MLB II*, 229 U.S. at 509-10, and thus sheds no light "on what the terms found in [the Nelson Act] meant at the time of the law's adoption[.]" *McGirt*, 140 S. Ct. at 2469.

Defendants' reliance on references to the "former" reservation in the 1893 and 1898 Resolutions, Cnty. Br. at 30, is misplaced. *See McGirt*, 140 S. Ct. at 2472-73 (no disestablishment despite congressional references to "former" reservation); *Solem*, 465 U.S. at 479 (same). Determining whether those references were correct—that is, whether the Reservation had been disestablished by earlier acts when Congress adopted the 1893 and 1898 Resolutions—"is the peculiar province of the judiciary[.]" *Jones*, 175 U.S. at 32. Because the Mille Lacs Reservation had not been disestablished by any prior treaty or statute, references to the "former" reservation in the Resolutions could not make it so. *See McGirt*, 140 S. Ct. at 2468-69; *Jones*, 175 U.S. at 32 (mistaken Congressional resolution had "no effect upon the rights previously acquired by the plaintiffs").

Defendants' reliance on the 1902 Act and Agreement is also misplaced. *See* Cnty. Br. at 32-33. In the Act, Congress appropriated $40,000 to pay for the Indians' improvements "on [the] Mille Lac Indian Reservation." *See* § III.A.4.d, *supra*. Although the payment was conditioned on the Band's agreement to remove from the Reservation, the Act expressly provided Band members who acquired "land within

said Mille Lac Reservation" could remain. *Id*. Multiple references to the Reservation in the Act reflect the Reservation's continued existence, not its disestablishment.

In negotiating and drafting the Agreement, McLaughlin referred at times to the "former" reservation, but his opinion was based on the mistaken premise that all lands within the Reservation had been disposed of before the Nelson Act. *See* § III.A.4.d, *supra*. In fact, when the Act was passed the majority of reservation lands were available for Band member allotments and to fulfill other purposes of the Act (including reserving lands for the Indians). *See MLB III*, 51 Ct. Cl. at 400-01 (identifying lands subject to Section 6's proviso and those wrongfully disposed of after the Act's passage); *see also* Aple.-App. 1331-1332; R.Doc. 237-1, at 267-268 (quantifying lands available for allotments). McLaughlin's mistaken understanding provides no evidence of *Congress's* intent when it enacted the Nelson Act. As the District Court observed, "if *Congress's* use of the word 'former' offers little evidence of [prior] Congressional intent to disestablish a reservation …, use of the word in an agreement penned by federal negotiators bears virtually no weight." Aplt.-App. 1504 n.24; R.Doc. 313, at 91 n.24; Cnty.-Add. 91 n.24.

Despite the wrongful opening and disposal of reservation lands, the Band maintained a continuous presence on the Reservation. Its population increased in the 1890s and did not decline until after the 1902 Agreement. *See* §§ III.A.4. b & d,

supra.[113] Even then, several hundred non-removal Mille Lacs remained on the Reservation, where the Government provided allotments, education, health care and other services to them and repeatedly recognized the Reservation's existence. *See* §§ III.A.4.d & f, *supra.* Today, the Reservation's Indian population and landownership is comparable to or greater than other extant reservations. *See* § III.A.4.f, *supra.* The "seat of tribal government" remains on the Reservation and "most important tribal activities take place" there. *Solem*, 465 U.S. at 480 (citing these factors in finding reservation not diminished).

The Nelson Act and its legislative history "fail to provide substantial and compelling evidence of a congressional intention" to disestablish or diminish the Mille Lacs Reservation. *Id.* at 472. The surrounding circumstances, especially the negotiation of the Band's agreement and reports presented to the President and Congress, demonstrate the opposite: that all parties understood the Reservation would continue to exist and the Band's rights on it would be strengthened. The Reservation's subsequent history does not—and under *McGirt*, 140 S. Ct. at 2468-69, cannot—overcome this.

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[113] Defendants mistakenly assert that, "[b]y 1902, the vast majority of Band members had already moved to White Earth[.]" Cnty. Br. at 32. According to the House Report on the 1902 Act, "[t]here [were] 1,200 Indians upon the [Mille Lacs] reservation." Aple.-App. 776; R.Doc. 233-1, at 4; *see also* Aplt.-App. 989; R.Doc. 242-10, at 26 (Figure 3) (Defendants' expert report, showing approximately 900 Indians at Mille Lacs in 1902).

6. The 1893 and 1898 Resolutions Did Not Disestablish the Reservation.

In the District Court, Defendants argued the 1893 and 1898 Resolutions "support[ed]" their claim that the 1863 and 1864 Treaties and the Nelson Act disestablished the Reservation. Cnty. Br. at 33-34. As discussed above, that argument lacks merit. Defendants now claim that "the 1893 and 1898 Resolutions are sufficient expressions of congressional intent to disestablish a reservation." *Id*. at 34 (footnote omitted). This new argument also lacks merit.

The 1893 Resolution's text confirmed it had been "definitely determined" that "lands within the Mille Lac Indian Reservation" could only be disposed of under the Nelson Act and permitted patents to be issued on lands mistakenly entered "[w]ithin said reservation," making no suggestion the Reservation had been or was being disestablished. *See* § III.A.4.a, *supra*. The 1898 Resolution declared "public lands formerly within" the Reservation subject to entry and allowed patenting of certain additional lands. *See* § III.A.4.c, *supra*. Neither Resolution itself purported to alter the Reservation's boundaries. *See McGirt*, 140 S. Ct. at 2464 ("Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.").

References to the "former" reservation in the 1893 Resolution's title and the 1898 Resolution's text were mistaken. *See MLB II*, 229 U.S. at 509-10 (Resolutions

were "[d]oubtless" based on "a misapprehension of the true relation of the Government to the lands"); *see also* § III.A.4.e, *supra*. As the District Court explained, the 1898 Resolution's erroneous premise that the Reservation no longer existed undermines any claim that Congress intended to disestablish the Reservation when it enacted the Resolution. *See* Aplt.-App. 1502; R.Doc. 313, at 89 n.23; Cnty.-Add. 89.[114]

Moreover, the Resolutions were unlawful. Congress can only alter an Indian treaty when exercising its "administrative power … over the property and affairs of dependent Indian wards." *MLB II*, 229 U.S. at 509-10. Congress has no power to appropriate Indian property and treat it as its own. *Chippewa Indians of Minn. v. United States*, 301 U.S. 358, 375-76 (1937); *Choate v. Trapp*, 224 U.S. 665, 674, 678 (1912); *Jones*, 175 U.S. at 32 (congressional resolution has no effect upon rights previously acquired under Indian treaty). Because the Resolutions asserted "an

[114] Defendants assert (Cnty. Br. at 31) all lands ultimately passed into private ownership, but this includes lands patented to or otherwise acquired by Band members and lands patented to non-Indians based on "false oaths" that they were unoccupied, and does not account for the burial grounds reserved in the 1898 Resolution. *See* §§ III.A.4.b - d, *supra*. That "non-Indian settlers were particularly effective in obtaining reservation land, sometimes by fraud or unfair dealing, or simply by taking advantage of Indian poverty[,]" is not evidence of *Congress's* intent to disestablish a reservation. *Oneida Nation*, 968 F.3d at 684; *see also Parker*, 577 U.S. at 486, 492-93 (no diminishment even though vast majority of disputed area opened for nonmember settlement and tribe "almost entirely absent" for more than 120 years).

unqualified power of disposal over the lands as the absolute property of the government[,]" they exceeded Congress' authority and were unlawful. *MLB II*, 229 U.S. at 509-10; *see also* Aple.-App. 868 n.14; R.Doc. 234-10, at 8 n.14 (Solicitor's Opinion M-31156, 58 Interior Dec. 319, 1943 WL 4324 (Jan. 27, 1943)) (Congress has only disposed of Indian property without Indian consent for non-Indian purposes "when the facts and applicable law had not been adequately presented," and in each case such "enactments were held unconstitutional in whole or in part," citing *MLB II*, *Choate*, and *Jones*).[115] If the *lawful* disposition of reservation lands has no effect on reservation boundaries, *see McGirt,* 140 S. Ct. at 2464; *Solem*, 465 U.S. at 470; *New Town*, 454 F.2d at 125, surely the *unlawful* disposition of reservation lands has no such effect. *See Jones*, 175 U.S. at 32.

7. The 1902 Act Did Not Disestablish the Reservation.

Defendants do not contend the 1902 Act disestablished the Reservation, claiming only that it "reflects that disestablishment had already occurred." Cnty. Br. at 34. For reasons discussed above, that argument lacks merit.

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[115] Defendants argue the Supreme Court did not "deem" the Resolutions unlawful because it did not invalidate the land dispositions made pursuant to them. Cnty. Br. at 31-32. However, under the 1909 jurisdictional act, damages were the only available remedy. *See* § III.A.4.e, *supra.* In holding the Band was entitled to damages, the Court rejected the Government's reliance on the Resolutions because they were not within Congress's administrative power over Indian property, *i.e.*, because they were unlawful. *MLB II*, 229 U.S. at 509-10.

8. Defendants' Remaining Arguments Lack Merit.

a. *MLB II*

Defendants argue the Supreme Court held the 1863 and 1864 Treaties and Nelson Act terminated the Reservation in *MLB II*. Cnty. Br. 35-43. However, the Court held the dispute over the Treaties' effect on the Reservation was "adjusted and composed" in the Nelson Act. *MLB II*, 229 U.S. at 506. Specifically, the Government agreed to accept the Indians' contention that the Reservation continued to exist, while the Indians agreed prior entries, if regular and valid, could be patented under Section 6's proviso. *Id.* at 506-07. Accordingly, the Court had no occasion to determine, on the merits, whether the Treaties disestablished the Reservation.

Defendants note the Court rejected the Band's argument that no entries could have been regular and valid if they were within an Indian reservation. Cnty. Br. at 39. The Court rejected that argument because it failed to give effect to Section 6's proviso, which was part of the compromise under which the Government accepted the Indians' position that the Reservation's still existed. *See MLB II*, 229 U.S. at 508. It did not hold the Treaties disestablished the Reservation, which "was the very matter in dispute." *Id*.

As to the Nelson Act, the Court held it provided for disposition of ceded lands "for the benefit of the Indians":

> "The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians[.]"

Id. at 509 (quoting *Hitchcock*, 185 U.S. at 394). As to lands within the Reservation not subject to Section 6's proviso, the Court held the Indians were entitled to recover for the losses resulting from their disposition "not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights." *Id.* In so holding, the Court had no occasion to determine whether the Nelson Act, which provided only for a cession of "unallotted lands" in trust, had disestablished the Reservation. The only question was whether the lands' wrongful disposition supported a damage award, which the Court answered affirmatively.

b. *United States v. Minnesota*

Defendants also argue (Cnty. Br. at 43-47) that the Supreme Court held that the 1863 and 1864 Treaties disestablished the Reservation in *United States v. Minnesota*, 270 U.S. 181 (1926). In that case, the Court confirmed there was a controversy over the Treaties' effect on the Reservation and it was resolved in the Nelson Act. *Id.* at 198 (citing *MLB II*). The Court held the United States could not recover the value of Reservation swamplands patented to Minnesota in 1871, *see* n.16, *supra*, because the Court of Claims held the United States had no liability to the Indians for those lands since they were within Section 6's proviso. *Minnesota*,

270 U.S. at 198-99.[116] Because the decision rested on the proviso, it provides no support for Defendants' theory that the Treaties disestablished the Reservation.

Defendants also assert the Court rejected the United States' claim for additional swamplands within the Reservation based on the Treaties. Cnty. Br. at 45 & n.80, 47 & n.81. They cite an 1882 GLO report that the State *claimed* additional swamplands within the Reservation, *id.*, but those lands were never patented to the State. *See MLB III*, 51 Ct. Cl. at 400-01 & Tables 1 & 2. There is no reference to such lands in the Court's decision and no statement the Court was rejecting any claim to them based on the Treaties.

c. Past Band Statements

Defendants argue the Band previously asserted that the Reservation was ceded and accepted compensation for that cession. Cnty. Br. at 47-50. In the District Court, Defendants argued those previous assertions should judicially estop the Band from claiming the Reservation still exists. The District Court disagreed, and Defendants do not challenge that ruling here. *See* Aplt.-App. 1469-1471; R.Doc. 313, at 56-58; Cnty.-Add. 56-58.

[116] Defendants argue that because swamplands were not homestead or preemption entries they could not have come within Section 6's proviso. Cnty. Br. at 46-47. However, the Court of Claims held otherwise, *MLB III*, 51 Ct. Cl. at 400 & Table 1, and, because "[n]o appeal was taken" that decision was "final." *Minnesota*, 270 U.S. at 190.

Any suggestion the Band's past statements are evidence *Congress* intended to disestablish the Reservation is mistaken. Such extrinsic evidence is relevant only "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." *McGirt*, 140 S. Ct. at 2469.

The Band consistently argued the Treaties preserved the Reservation. *See*, *e.g.*, Aple.-App. 1471-1473; R.Doc. 254-4, at 5-7 (1909 Court of Claims Petition); Aplt.-App. 1008; R.Doc. 242-10, at 45 (1911 Court of Claims Brief). As to the Nelson Act, the Band argued it relinquished its right of occupancy in trust and was entitled to allotments on its reservation, and never argued that the Act disestablished or terminated the Reservation. *See*, *e.g.*, Aple.-App. 1474; R.Doc. 254-4, at 8 (1909 Petition); Aplt.-App. 1010-1011; R.Doc. 242-10, at 47-48 (1911 Brief).

The Band argued the subsequent disposition of reservation lands and the Resolutions had the practical effect of depriving it of its reservation, but also argued they were unlawful and could not legally deprive it of its rights under the Nelson Act. *See*, *e.g.*, Aple.-App. 1474-1475; R.Doc. 254-4, at 8-9 (1909 Petition, asserting that, in violation of the Treaties and Nelson Act, "the United States through its Land Department wrongfully and unlawfully … appropriated and disposed of [the] lands" in the Reservation and such disposition was "without authority of Congress and in violation of the [Band's] legal rights"); Aplt.-App. 1011-1012, 1018; R.Doc. 242-

10, at 48-49, 55 (1911 Brief, asserting Interior officials violated the Nelson Act by refusing to permit Band members to take allotments on the Reservation, failing to dispose remaining lands under that Act and hold proceeds in trust for the Band, and instead opening the Reservation to public settlement, thereby "extinguish[ing]" the reservation and depriving the Band "of their reservation as a home and for every purpose whatsoever"); Aple.-App. 1480-1483; R.Doc. 254-6, at 26-27, 74-75 (1913 Supreme Court Brief, arguing Resolutions "do not indicate any intention on the part of Congress to confiscate the Mille Lacs Reservation"; instead, Congress's purpose was to protect "a few individuals who had in good faith filed upon some of the agricultural lands in the Mille Lac reservation," knowing it was within Congress's power to compensate the Band for any damages from such entries).

These statements addressed the practical consequences of the Government's violation of the Nelson Act and never ascribed to Congress an intent to disestablish the Reservation. Aplt.-App. 1470 n.11; R.Doc. 313, at 57 n.11; Cnty.-Add. 57 n.11. Given the "limited interpretative value" of subsequent statements regarding a reservation's status, *Parker*, 577 U.S. at 493 (internal quotation omitted), they provide no support for Defendants' disestablishment claim.

d. Indian Claims Commission Act ("ICCA")

Defendants argue Plaintiffs' claims are barred by the ICCA, which required certain claims against the United States to be brought before the Indian Claims

Commission ("ICC") by 1951. Cnty. Br. at 50-51; *see* ICCA § 12, 60 Stat. 1049, 1052 (Aug. 18, 1946). However, as the District Court explained, Plaintiffs' claims arose from Defendants' interference with the exercise of Plaintiffs' law enforcement authority in 2016 and could not have been brought under the ICCA. *See* Aplt.-App. 1474; R.Doc. 313, at 61; Cnty.-Add. 61.

Defendants focus not on Plaintiffs' claims but on their position regarding the Reservation's status. Presuming Defendants are correct that the Reservation was disestablished, Defendants argue the Band was required to challenge the Reservation's disestablishment before the ICC. *See* Cnty. Br. at 51-52 (citing *Oglala Sioux Tribe of Pine Ridge Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 333 (D.C. Cir. 2009)). However, Plaintiffs assert the Government did *not* disestablish the Reservation, which could not have been the basis for a claim against the United States in the ICC and is not barred by the ICCA. *See Mille Lacs Band of Chippewa Indians v. Minn. Dep't of Na. Res.*, 853 F. Supp. 1118, 1139 (D. Minn. 1994) (because the ICC only had "'jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946[]' … [it] would have dismissed any claim relying on existing rights for lack of jurisdiction") (quoting *United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir. 1989)).

Unlike the claims in *Oglala Sioux*, Plaintiffs' position regarding the Reservation's status does not require the courts "to set aside any treaty, statute, or

agreement"; it requires only that the courts interpret the relevant treaties, statutes and agreements to determine the Reservation's present status and the Band's law enforcement authority within it. *See* Aplt.-App. 1475; R.Doc. 313, at 62; Cnty.-Add. 62. "[R]eservation boundary cases do not run afoul of the [ICCA] 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." *Oglala Sioux*, 570 F.3d at 333.

e. Laches

Defendants argue the laches doctrine, "as applied to long-delayed claims of Indian tribes to historic lands," bars Plaintiffs from asserting the Reservation still exists. Cnty. Br. at 54-56. They rely on *City of Sherill v. Oneida Indian Nation*, 544 U.S. 1975 (2005), and its progeny, in which courts have barred certain tribal claims based on the length of time between an historical injustice and the present day, the disruptive nature of claims long delayed, and the degree to which the claims would upset justifiable expectations of persons far removed from events giving rise to the tribe's injury. Cnty. Br. at 54 (citing *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010)).[117]

[117] Defendants argue Plaintiffs' claims arose "when the relevant legislation was passed in the 1800s[,]" *id*. at 54-55, again assuming Defendants are right on the merits, *i.e.*, that "the relevant legislation" disestablished the Reservation. As

The Supreme Court has rejected laches' application in determining whether a reservation has been disestablished. In *Parker*, 577 U.S. at 494, the Court held, even where concerns about upsetting "justifiable expectations" were "compelling," those "expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation." (Internal quotation omitted.) The Court left open the question "whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax … in light of the Tribe's century-long absence from the disputed lands[,]" but that had no bearing on the "question of diminishment[.]" *Id*. (citing *Sherill*, 544 U.S. at 217-21); *see also McGirt*, 140 S. Ct. at 2481 (deferring reliance interests for another day in deciding whether a reservation was disestablished).

Plaintiffs' only claims involve the scope of their law-enforcement authority.[118] While *Parker* leaves open whether "equitable considerations of laches and

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explained above, it is Plaintiffs' position that the legislation did *not* disestablish the Reservation and, therefore, gave rise to no claim regarding the Reservation's status.

[118] This case does not involve the type of possessory land claims involved in *Wolfchild v. Redwood Cnty.*, 91 F. Supp. 3d 1093, 1105 (D. Minn. 2015), *aff'd*, 824 F.3d 761 (8th Cir. 2016)). As the District Court explained, "[u]nlike in *Wolfchild*, the Band does not seek to oust any landowners within the Mille Lacs Reservation. … Rather, it seeks only declaratory and injunctive relief concerning its law enforcement authority within the 1855 treaty area." Aplt.-App. 1473; R.Doc. 313, at 60; Cnty.-Add. 60. Nor does this case involve civil regulatory jurisdiction, such as taxation or zoning of Band fee land, liquor licenses, or environmental regulations,

acquiescence" might curtail that authority, 577 U.S. at 494, Defendants make no attempt to show they do. As a threshold matter, this case does not involve a tribe's "century-long absence from the disputed lands." *Id.* The Band never abandoned the Reservation and maintained a continuous presence there. *See* § III.A.4.f, *supra.*

Moreover, recognizing the Band's law enforcement authority does not upset settled expectations. Plaintiffs' claimed law enforcement authority is coextensive in geographic scope with law enforcement authority the Band exercised under Minn. Stat. § 626.90 long before 2016 and since 2018. *See* Aple.-App. 270, 288; R.Doc. 217, at 4, 22. Defendants make no argument that recognizing the Band's inherent and federally delegated law enforcement authority in the same geographic area would upset "justifiable expectations" or have "disruptive practical consequences" of the type identified in *Sherill*. Indeed, with the recent amendment to Minn. Stat. § 626.90, the Band has *broader* authority under state law, without regard to the existence of a cooperative agreement between the Band and the County Sheriff. Under these circumstances, "equitable considerations of laches and acquiescence" cannot curtail the tribal law enforcement authority at issue here.

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on which Defendants and their *amici* primarily focus. *See* Cnty.Br. at 55; Brief of City of Wahkon *et al*. at 18, 23-28.

9. Reservation-Boundary Summary

The Mille Lacs Band was promised a reservation as a permanent homeland on its ancestral lands in 1855. The 1863 and 1864 Treaties and the Nelson Act preserved the Reservation for the Band. Neither unlawful dispossession of Band members from lands they occupied within the Reservation, nor the 1893 or 1898 Resolutions, nor the 1902 Act, changed that.

> Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

McGirt, 140 S. Ct. at 2482. The District Court correctly held the Reservation's original boundaries remain intact.

C. The District Court's Declaratory Judgment Was Proper.

1. Introduction and Standard of Review

The District Court's declaratory judgment addresses the Band's inherent and federally delegated law enforcement authority. Aplt.-App. 1577-1578; R.Doc. 349, at 71-72; Cnty.-Add. 164-165. Defendants challenge only the portion addressing the Band's *inherent* authority, arguing the judgment was advisory, expanded such authority beyond existing Supreme Court precedent, and violated principles of federalism and the Guarantee Clause. *See* Madore Br. at ii-iii.

This Court reviews a grant of declaratory relief for abuse of discretion, but its review is "relatively rigorous." *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 562 (8th Cir. 2009); *but see Century Indem. Co. v. McGillacuty's, Inc.*, 820 F.2d 269, 270 (8th Cir. 1987) ("regular abuse of discretion standard applies when district court has granted declaratory relief, less deferential standard when it has declined jurisdiction") (citing *Interdynamics, Inc. v. Wolf*, 698 F.2d 157, 167 nn.9 & 10 (3d Cir. 1982)). Normally, "[a]n abuse of discretion will only be found if the district court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions." *Mathenia v. Delo*, 99 F.3d 1476, 1480 (8th Cir. 1996).

2. The Declaratory Judgment Was Not Advisory.

The Declaratory Judgment Act ("DJA") provides 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). A "case of actual controversy" refers to "Cases" and "Controversies" justiciable under Article III. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). "To proceed successfully under the [DJA], there must be a 'substantial controversy' that presents a 'concrete and specific' question." *Rosebud Sioux Tribe*, 9 F.4th at 1025 (quoting *Caldwell v. Gurley Refining Co.*, 755 F.2d 645, 649-50 (8th Cir. 1985)).

These requirements were satisfied here. The District Court determined Plaintiffs' claims are justiciable under Article III, Aple.-App. 295-302; R.Doc. 217, at 29-36, and found the case "involve[d] a 'substantial controversy'" presenting three "specific questions":

> (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.

Aplt.-App. 1556; R.Doc. 349, at 50; Cnty.-Add. 143.

Defendants argue the declaratory judgment was advisory insofar as it declared *what* the Band's inherent law enforcement authority entails (but not *where* it may be exercised), because it lacks "any record support involving the Band's exercise of such authority" and is not based "on specific scenarios of alleged interference or deterrence with the Band's exercise of authority." *See* Madore Br. at 18, 32-33. However, all three questions identified by the District Court were raised by the County Attorney's Opinion and Protocol and their enforcement by the County Sheriff. *See* § III.B.2, *supra*. As the District Court explained:

> 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 … [and it] is undisputed that Defendants enforced the restrictions.

Aplt.-App. 1543-1544; R.Doc. 349 at 37-38; Cnty.-Add. 130-131. Specifically, it was undisputed that the Opinion and Protocol prohibited Band officers from investigating state-law violations and non-Indians; that they stated Band officers could be subjected to criminal and civil penalties if they exercised such authority; and, that the Sheriff's Office took on all investigations of state-law violations and non-Indians. *See* § III.B.2, *supra*.

Moreover, the record was "replete with evidence that, pursuant to the Opinion and Protocol, County law enforcement officers repeatedly interfered with law enforcement measures undertaken by Band officers." Aple.-App. 272; R.Doc. 217 at 6. The Court's unchallenged holding that Plaintiffs had standing rested on "numerous actual, concrete, and particularized incidents in which the Band's police officers [were] restricted from carrying out their law enforcement duties pursuant to the [County Attorney's] Opinion and Protocol." Aple.-App. 297; R.Doc. 217 at 31.

Defendants (Madore Br. at 32) misconstrue the District Court's statement that "facts relating to specific incidents of deterrence and interference may very well be in dispute." Aplt.-App. 1544; R.Doc. 349, at 38; Cnty.-Add. 131. The Court first cited undisputed testimony that Defendants enforced the restrictions in the Opinion and Protocol. *Id.* It then noted that "*[a]dditional facts* concerning specific incidents

of interference and deterrence, some of which [Plaintiffs] relied upon to establish standing (and which Defendants had a full opportunity to rebut), [were] unnecessary to address the merits of Plaintiffs' claims for relief." *Id.* (emphasis added). Although those *additional facts* might have been in dispute, "the record of undisputed facts provide[d] a sufficient basis for the Court to rule on the merits." *Id.* Defendants do not address the undisputed facts on which the District Court relied and do not show it erred in relying on them.

Defendants also argue the Court declined to "'itemize[] various forms of investigative authority' … because the record lacks concrete facts that the Band was prevented from exercising any such investigative authority." Madore Br. at 33 (quoting Aplt.-App. 1574; R.Doc. 349, at 68; Cnty.-Add. 161). However, the Court declined to itemize such authority because the courts "have not identified all aspects of investigative authority that tribal police possess when exercising their inherent law enforcement authority[.]" Aplt.-App. 1574; R.Doc. 349, at 68; Cnty.-Add. 161. This cautious approach did not prevent the Court from addressing the specific questions presented by Defendants' restrictions on the Band's law enforcement authority. Moreover, contrary to Defendants' argument, Madore Br. at 33, the Court's rulings on those questions settled a dispute which affects Defendants' behavior toward Plaintiffs by making clear Defendants cannot limit Plaintiffs' law enforcement authority to trust lands or prohibit Band officers from investigating

federal and state-law violations or non-Indians—the precise actions that gave rise to this lawsuit.

Defendants also cite the Court's decision not to award injunctive relief. *Id.* The Court denied injunctive relief because it concluded "the less drastic remedy of declaratory relief" would prevent future violations of Plaintiffs' rights and was "carefully limit[ed] … to the law enforcement authority recognized by the Supreme Court and other federal courts." Aplt.-App. 1579; R.Doc. 349, at 73; Cnty.-Add. 166. Its statement that an injunction would be "advisory as to the specifics of any given scenario, not present in this record," *id.*, does not undermine its declaratory judgment, which was based on undisputed facts present in the record.

3. The Declaratory Judgment Correctly Defined the Band's Inherent Authority.

a. The District Court's Order

The only portions of the District Court's declaration challenged here—that the Band's inherent authority includes the authority to investigate violations of federal, state and tribal law and to temporarily detain non-Indians—rest on a substantial body of law recently confirmed by the Supreme Court. Although tribes do not have inherent authority to prosecute non-Indians for criminal offenses, *see Oliphant*, 435 U.S. at 212, they may patrol roads within their reservations, detain non-Indian offenders, and turn such offenders over to jurisdictions with prosecutorial authority.

E.g., *Strate*, 520 U.S. at 456 n.11; *Duro*, 495 U.S. at 697; *State v. Schmuck*, 850 P.2d 1332, 1342 (Wash. 1993), *cert. denied*, 510 U.S. 931 (1993); *State v. Ryder*, 649 P.2d 756, 759, *aff'd on other grounds*, 648 P.2d 774 (N.M.1982).

To enable tribes to exercise this and the related authority to exclude non-Indian offenders from tribal lands, many courts have held tribes have authority to investigate non-Indians to determine whether they have violated federal or state law within their reservations. *E.g.*, *Terry*, 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."); *see also State v. Thompson*, 937 N.W.3d 418, 419-20 (Minn. 2020); *United States v. Santistevan*, No. 3:19-CR-30017-RAL, 2019 U.S. Dist. LEXIS 72263 at *7 (D.S.D. Apr. 29, 2019); *United States v. Green*, 140 F.3d. App'x 798, 800 (10th Cir. 2005); *State v. Pamperien*, 967 P.2d 503, 506 (Or. Ct. App. 1998); *State v. Haskins*, 887 P.2d 1189, 1195-96 (Mont. 1994); *Ortiz-Barraza*, 512 F.2d at 1179-80.

In *Cooley,* 141 S. Ct. at 1644, the Supreme Court confirmed this authority, holding tribal authority to search a non-Indian suspect prior to transport was ancillary to the authority the Court had already recognized to patrol reservation roads and to detain and turn over non-Indian offenders to state officers. "Indeed, several state courts and other federal courts have held that tribal officers possess the

authority at issue here." *Id*. (citing *Schmuck*, *Pamperien*, *Ryder*, *Terry*, and *Ortiz-Barraza*, all *supra*, and F. Cohen, Handbook of Federal Indian Law § 9.07 at 773 (2012)).

Cooley acknowledged that "in *Duro* we traced the relevant tribal authority to a tribe's right to exclude non-Indians from reservation land." *Id.* (citing *Duro*, 495 U.S. at 696-97). However, "tribes 'have inherent sovereignty independent of the authority arising from the power to exclude,' … and here *Montana's* second exception recognizes that inherent authority." *Id*. (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 425 (1989)). Under that 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 1643 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981) (emphasis added in *Cooley*). This exception fit *Cooley* "almost like a glove":

> To 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. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.

Id.

Following this precedent, the District Court here declared the "Band possesses inherent sovereign law enforcement authority within the [Mille Lacs Reservation,]" which "includes the authority of Band police officers to investigate violations of federal, state, and tribal law." Aplt.-App. 1577; R.Doc. 349, at 71; Cnty.-Add. 164. Such "investigative authority is the authority recognized by the courts in *Cooley*, *Terry*, *Thompson*, and their progeny." *Id.* With limited exceptions, the Band's authority to detain a non-Indian 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." *Id*. All such authority is subject to the Indian Civil Rights Act, 25 U.S.C. §§ 1301-04, including the proscription against unreasonable searches and seizures in § 1302(a)(2). *Id.*

b. Non-Indians on Non-Indian Fee Lands

Defendants argue the authority recognized by the Court is "unsupported by law" insofar as it recognized the Band's law enforcement authority over non-Indians "even on non-member fee lands[.]" Madore Br. at 18-19. We address their supporting arguments below.

i. *Montana*

Defendants argue *Montana*'s second exception requires case-by-case determinations that specific non-Indian criminal conduct on non-Indian fee land

threatens the tribe's health or welfare. *See*, *e.g.*, Madore Br. at 38-41. However, federal and state courts have long recognized tribal authority to investigate such conduct, without ever holding such authority depends on case-by-case determinations. *See* § V.C.3.a, *supra*. In citing those cases with approval, *Cooley* imposed no such requirement. Instead, invoking *Montana's* second exception, it held "[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." *Cooley*, 141 S. Ct. at 1643-44 (emphasis added). *Cooley* nowhere suggested this authority is limited to specific crimes or impracticable case-by-case determinations by tribal officers in the field; to the contrary, it expressed concerns about the "workability" of the case-by-case standards the Ninth Circuit adopted in that case. *Id.* at 1645; *see Seymour*, 368 U.S. at 358.[119]

[119] Defendants' examples of criminal activity that allegedly does not trigger *Montana*'s second exception illustrate the problem. *See* Madore Br. at 44 n. 15. Their first example, non-Indian drug possession, would prevent tribal officers from investigating how drugs arrived on the Reservation; from investigating persons suspected of distribution if the evidence only supported a possession charge; or from addressing visible drug use, which became a problem at Mille Lacs after Defendants restricted Plaintiffs' law enforcement authority. *See* Aple.-App. 285-286; R.Doc. 217, at 19-20. Defendants' remaining examples—domestic disputes, child neglect and theft—are equally problematic. Given their potential to lead to violence and disturbance of public order, these criminal activities can and do threaten the Band. *See*, *e.g.*, *Terry*, 400 F.3d at 578 (ammunition and rifle discovered in domestic incident).

Defendants argue the District Court's application of *Cooley* swallowed *Montana's* general limitation on tribal jurisdiction over non-Indians. Madore Br. at 41-43. *Cooley* itself rejected this argument: despite the Court's previous warnings against reading *Montana*'s exceptions expansively, *Cooley* noted the Court had repeatedly acknowledged the exceptions' existence and the possibility that certain non-Indian conduct—here, violation of state or federal criminal law—might sufficiently affect the tribe to justify tribal oversight. 141 S. Ct. at 1645. *Cooley* also recognized the Court's prior cases limiting tribal jurisdiction over non-Indians "rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them." *Id.* at 1644. However, tribal law enforcement authority "protects the public *without raising similar concerns*" because it does not subject non-Indians to tribal law but only to *state and federal* laws. *Id*. at 1644-45 (emphasis added, internal quotation omitted).

ii. Fee Lands vs. Rights-of-Way

Defendants argue the District Court went "too far" by extending the Band's inherent authority to investigate non-Indian law violations on a public right-of-way, such as the one at issue in *Cooley*, to non-Indian fee land. Madore Br. at 44-48. However, *Montana*'s second exception expressly applies to tribal authority "over the conduct of non-Indians on fee lands within its reservation." 450 U.S. at 566. *Strate*,

520 U.S. at 455-56, held tribal authority over non-Indian conduct on a public right-of-way was equivalent to tribal authority over such conduct on non-Indian fee land. Non-Indian crimes on non-Indian fee lands pose the same threats to tribes as crimes on public rights-of-way and thus likewise fall within *Montana*'s second exception. *See*, *e.g.*, Aple.-App. 211-212; R.Doc. 156, at 3-4 (discussing drug houses on fee lands); *Terry*, 400 F.3d at 578 (domestic violence call at private residence)[120]; *United States v. Peters*, No. 3:15-CR-30150-RAL, 2017 U.S. Dist. LEXIS 56754 at *1 (D.S.D. Apr. 13, 2017) (fight behind motel); *Haskins*, 887 P.2d at 1191 (undercover investigation and controlled drug buys).

iii. Public Law 280

Defendants argue *Cooley* is inapplicable here because Minnesota is a Public Law 280 state, "in which local officers can be called in to investigate suspicious activities by nonmembers on fee lands." Madore Br. at 40; *see also id.* at 52-56.[121] There is no support for this argument in Public Law 280's text, which recognizes concurrent federal, state, and tribal jurisdiction. *See* 18 U.S.C. § 1162(d)(2). The limited authority to detain and search non-Indians recognized in *Cooley*—and by the

[120] The *Terry* Court did not specify whether the residence was on trust or fee lands, indicating the land's status was irrelevant to the officers' authority.

[121] Public Law 280 delegated criminal jurisdiction over Indian country in several states, including parts of Minnesota, from the United States to the states. *See* Act of Aug. 15, 1953, ch. 505, 67 Stat 588, codified in part at 18 U.S.C. § 1162.

District Court here—applies only during a reasonable time-period while local authorities are being called to the scene. No court has held Public Law 280 obviates the need for such authority. Former U.S. Attorneys suggested why in *Cooley*:

> [I]f a tribal officer patrolling the streets of a reservation community comes across a residence with fresh blood in its driveway, broken house windows, and screaming coming from within the house, but the officer knows that the house is on non-Indian fee land and that the resident is a non-Indian, [Defendants' position] leads to the conclusion that the officer lacks authority to enter the house and should instead sit idly by while waiting for state or county police to arrive to stop the mayhem. *Cf. Michigan v. Fisher*, 558 U.S. 45 (2009) (per curiam).

Brief *amici curiae* of Former U.S. Attorneys at 32, *United States v. Cooley* (U.S. June 1, 2021) (No. 19-1414)[122]; *see also Cooley*, 141 S. Ct. at 1645-46 (rejecting alternative law enforcement mechanisms as grounds for limiting tribal authority).

More broadly, Defendants assert Public Law 280 "granted states primary jurisdictional authority over criminal matters in Indian country [and] overrides the Band's interests in self-government." Madore Br. at 55. This argument runs afoul of "[t]he nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the [Interior Solicitor's Office], and legal scholars … that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched." Cohen § 6.04[3][c] (collecting citations).

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[122] *Available at* https://www.supremecourt.gov/DocketPDF/19/19-1414/166500/20210115134044388_19-1414%20tsac%20Former%20U.S.%20Attorneys.pdf

For example, in *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1200 (C.D. Cal. 1998), the court held Public Law 280 did not divest a tribe of "its inherent authority to establish a police force with jurisdiction to enforce tribal criminal laws against Indians and to detain and turn over to state or local authorities non-Indians who commit suspected offenses on the reservation." The court explained "'Public Law 280 was designed not to supplant tribal institutions, but to supplement them[,]'" and "'is not a divestiture statute.'" *Id*. at 1199 (quoting *Venetie*, 944 F.2d at 560).

In *Schmuck*, 850 P.2d at 1344, the court held Public Law 280 did not divest "a tribe's authority to stop and detain non-Indian motorists allegedly violating state and tribal law while traveling on reservation roads." It explained that "[b]oth the United States Supreme Court and the Ninth Circuit have concluded that Public Law 280 is not a divestiture statute[,]" and that "[i]n the area of criminal jurisdiction, the Eighth Circuit concluded that Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their members for violations of tribal law[.]" *Id*. at 1343 (citing *Venetie*, 944 F.2d at 560; *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-12 (1987); *Bryan v. Itasca Cnty*., 426 U.S. 373, 383-90 (1976); *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990)). "[N]othing in the language or history of Public Law 280 indicates an intent by Congress to diminish tribal authority[,]" and, "[g]iven 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." *Id*. at 1344; *see also TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999); *Confederated Tribes of the Colville Reservation v. Superior Court of Okanogan Cnty*., 945 F.2d 1138, 1140 n.4 (9th Cir. 1991); *Walker*, 898 F.2d at 675 ("nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority").

Defendants' reliance on *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), Madore Br. at 55, is misplaced. *Castro-Huerta* held Public Law 280 does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country. 142 S. Ct. at 2499-2500. The Court did not hold Public Law 280 confers primary jurisdictional authority upon states; in fact, it recognized that any state jurisdiction "would be concurrent with federal jurisdiction[.]" *Id.* at 2501. The Court said nothing about *tribal law enforcement* authority and did not purport to overrule or limit in any respect its recent decision in *Cooley.*

c. Investigations of Indians and Federal-Law Violations

Defendants argue the District Court also erred in defining the Band's inherent authority by "provid[ing] tribal officers unfettered investigatory authority over state law violations as to Indians" and "authoriz[ing], as a matter of common law, unfettered investigatory authority over federal law violations across the 1855

reservation without congressional authority." Madore Br. at 18-19. These arguments mischaracterize the District Court's declaratory judgment. The Court did not provide "unfettered" authority to tribal officers; it expressly limited their investigatory authority to that recognized in *Cooley*, *Terry*, *Thompson*, and their progeny, and held the exercise of such authority was subject to the Indian Civil Rights Act. Aple.-App. 1577; R.Doc. 349, at 71; Cnty.-Add. 164. Because, with a limited exception under the Violence Against Women Act, 25 U.S.C. § 1304, tribes cannot prosecute non-Indians for violations of federal or state law, such investigations are subject to review by federal and state prosecutors who make charging decisions. Far from declaring a "new-fangled" or "limitless" authority, Madore Br. at 36, 40, the Court merely recognized the limited authority long recognized by this and other courts and confirmed by *Cooley*.

Noting that *Cooley* involved non-Indians, Madore Br. at 41, Defendants challenge the District Court's conclusion that the Band's inherent authority over Indians is as least as broad as it is over non-Indians. *See* Aplt.-App. 1565; R.Doc. 349, at 59; Cnty.-Add. 152. However, "tribal power is at its zenith where territory and membership intersect." *Kelsey v. Pope*, 809 F.3d 849, 857 (6th Cir. 2016). Importantly, although tribes lack inherent authority to prosecute non-Indians, they have inherent authority, recognized by Congress and the courts, to try and punish all Indians, including members of other tribes. *See* 25 U.S.C. § 1301(2); *Lara*, 541 U.S.

at 210 (2004). Just as the tribes' lesser authority over non-Indians, such as the power to exclude, includes the ancillary authority to investigate non-Indian violations of federal and state law, the tribes' greater authority over Indians must include the ancillary authority to investigate Indians suspected of committing crimes within the Reservation. *See*, *e.g.*, *Cooley,* 141 S. Ct. at 1644; *Ortiz-Barraza*, 512 F.2d at 1180.

4. There Are No Federalism or Guarantee-Clause Concerns.

Defendants argue the District Court's judgment "violat[es] principles of federalism" by "chill[ing] [Defendants'] exercise of PL-280 criminal jurisdiction[.]" Madore Br. at 19. They assert federalism principles counsel against declaring "the Band possesses open-ended inherent law enforcement authority—untethered to any specific factual scenario—while expressly inviting the Band to haul [Defendants] into court for injunctive relief whenever it claims such authority in any given scenario." *Id.* at 49. Defendants analogize this to "an ongoing federal audit of County law enforcement" like that at issue in *O'Shea v. Littleton*, 414 U.S. 488 (1974). Madore Br. at 50.

"Appropriate consideration must be given to principles of federalism in determining the availability and scope of injunctive relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). In *O'Shea*, the requested remedy was an injunction "aimed at controlling or preventing … specific events that might take place in … future state criminal trials[,]" which "contemplate[d] interruption of state proceedings to

adjudicate assertions of noncompliance by petitioners." 414 U.S. at 500. *Rizzo* involved a broad structural injunction requiring city officials "to submit to [the district court] for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct." 423 U.S. at 365.

Here, the District Court did not issue an injunction and simply defined the scope of the Band's inherent law enforcement authority in response to Defendants' unlawful limitations on that authority. Issuance of declaratory relief instead of an injunction "mitigate[s]" concerns about excessive federal judicial interference in state affairs. *Courthouse News Serv. v. Gilmer*, 48 F.4th 908, 915 (8th Cir. 2022).

The federalism concerns in *O'Shea* and *Rizzo* are not present here because the County has not been given "a sharp limitation on [its] latitude in the dispatch of its own internal affairs[.]" *Rizzo*, 423 U.S. at 379 (internal quotation omitted). The County remains free to exercise its full criminal and law enforcement jurisdiction over everyone within the County, provided only that it must recognize the Band's limited concurrent jurisdiction within the Reservation, just as it must recognize the concurrent authority possessed by other federal, state and local law enforcement agencies. Nothing in the Court's declaration displaces the County's authority under State law and P.L. 280.

Nor is the District Court's denial of Plaintiffs' request for injunctive relief without prejudice tantamount to an "ongoing federal audit" of County law

enforcement. *O'Shea*, 414 U.S. at 500. Unlike *O'Shea*, nothing in the Court's judgment contemplates interruption of County law enforcement activity. And unlike *Rizzo*, nothing in the judgment requires submission of a compliance program for court approval.

The settled rule of equity is that the nature of the violation determines the remedy. *Rizzo*, 423 U.S. at 378. The District Court's declaratory judgment was precisely tailored to correct unlawful restrictions Defendants imposed on Plaintiffs' law enforcement authority. Denying injunctive relief without prejudice does no more than allow Plaintiffs to return to court should Defendants renew those restrictions in the future.

Defendants also argue the District Court's declaratory relief violated the Guarantee Clause as to County citizens who "lack[] representation" in the Band's electoral process. Madore Br. at 57-60. They contend the Court's declaration of Band authority to investigate state-law violations by non-Indians goes beyond *Cooley* because it "more aptly resembles 'full tribal jurisdiction' than the very limited authority exercised in *Cooley*." *Id.* at 58.

Defendants again mischaracterize the Court's judgment. The Court stated the "Band's investigative authority is the authority recognized by the courts in *Cooley*, *Terry*, *Thompson*, and their progeny." Aplt.-App. 1580; R.Doc. 349, at 74; Cnty.-Add. 167. Defendants' assertions that the investigative authority declared by the

Court is "categorically different[,]" "virtually unlimited[,]" and goes "beyond the precedential limits in *Cooley*[,]" Madore Br. at 58, ignore the express terms of the Court's order.

Defendants also misapprehend *Cooley*, which *rejected* concerns about subjecting non-Indians to tribal authority based on lack of representation in tribal government. As discussed above, the investigations authorized in *Cooley*—and by the District Court here—protect the public without raising such concerns because they do not subject non-Indians to *tribal* law but only to *state and federal* laws. *Cooley*, 141 S. Ct. at 1644-45.

VI. CONCLUSION

If this appeal is not dismissed as moot, the District Court's judgment should be affirmed.

Dated: September 18, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned certify that the foregoing Brief of Plaintiffs-Appellees Mille Lacs Band of Ojibwe, et al., complies with the length and type-size limitations under Federal Rules of Appellate Procedure 27(d)(2) and 32(a) and this Court's Order dated August 14, 2023, granting Plaintiffs-Appellee's motion for leave to file a brief not to exceed 32,000 words. The Brief contains 31,981 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, table of contents, table of authorities, signature block, certificate of compliance and certificate of service. The undersigned additionally certifies that the foregoing Brief has been scanned for viruses and is virus-free.

Dated: September 18, 2023

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