UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW REGARDING THE EFFECT OF DEFENDANTS WALSH AND LORGE'S INTERLOCUTORY APPEAL ON THIS COURT'S JURISDICTION**

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I. INTRODUCTION.

Pursuant to the Court's March 12 and 15, 2021, Orders (ECF 275 & 280), plaintiffs submit this memorandum regarding the effect of Defendants Walsh and Lorge's interlocutory appeal (ECF 218) on this Court's jurisdiction to decide the parties' pending reservation-boundary motions (ECF 223 & 239). Although plaintiffs are anxious to have their claims adjudicated, as indicated in footnote 1 of plaintiffs' motion (ECF 223), the Court does not have jurisdiction to decide the reservation-boundary motions while Walsh and Lorge's appeal is pending.

II. PROCEDURAL HISTORY.

A. *The Parties' Pleadings and the Reservation-Boundary Issue.*

Plaintiffs' complaint alleges that the boundaries of the Mille Lacs Indian Reservation, as established in 1855, have not been disestablished or diminished and that all lands within the 1855 Reservation are Indian country within the meaning of 18 U.S.C. § 1151. ECF 1 at 2-3 (¶¶ 5.A-C).[1] On this and other grounds, the complaint alleges that the Mille Lacs Band of Ojibwe possesses inherent and federally delegated authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the boundaries of the 1855 Reservation. *Id.* at 4-7 (¶¶ 5.G-K). The complaint alleges that defendants disputed the existence of, and actively

[1] In this memorandum, all citations to page numbers in ECF documents are to the page numbers generated by the ECF system, not the document's original page numbers.

interfered with the exercise of, the Band's inherent and federally delegated law enforcement authority, creating a concrete and particularized dispute over the existence and scope of such authority that is ripe for resolution by the Court. *Id*. at 5-7 (¶¶ 5.M-V). Apart from fees and costs, the only relief sought in the complaint is: (1) a declaratory judgment that the Band possesses inherent and federally delegated authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the boundaries of the 1855 Reservation; and (2) an injunction prohibiting interference with that authority. *Id*. at 7-8.

Defendants' answers largely deny plaintiffs' allegations, specifically allege that the 1855 Reservation had been disestablished, and assert a variety of affirmative defenses, including defenses based on absolute, qualified, official, prosecutorial, statutory discretionary, and quasi-judicial immunity. *See* ECF 17 at 2-3 (¶ 5.A), 10 (¶¶ 10-11), 13 (¶¶ 29-32); ECF 19 at 2 (¶ 5.A), 6-7 (¶¶ 2-6); ECF 21 at 2 (¶ 5B), 6 (Sixth through Eleventh Affirmative Defenses). The County also counterclaimed for declaratory and injunctive relief regarding the existence of the 1855 Reservation, ECF 17 at 13-34, but the Court dismissed its counterclaims because they did not present an Article III case or controversy. ECF 46 at 2-3, 12-21. As the Court explained, an academic dispute over the reservation boundary is not, by itself, sufficient to give rise to an Article III case or controversy; what is necessary is concrete injury caused by defendants that can be redressed by the Court.

See id. at 13-14, 20; *see also Cnty. of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990 (D. Minn. 2003), *aff'd*, 361 F.3d 460 (8th Cir. 2004).

Accordingly, the reservation-boundary issue is present in this case because it is relevant to the geographic scope of plaintiffs' inherent and federally delegated law enforcement authority; put another way, it is simply one element of plaintiffs' law enforcement claims. *See* 12-21-2020 Memorandum Opinion and Order at 2 (ECF 217) ("This case involves important and complex issues regarding the boundaries of the Mille Lacs Indian Reservation and, *consequently*, the extent of the Mille Lacs Band's sovereign law enforcement authority within those boundaries.") (emphasis added); 4-13-2020 Order at 11 (ECF 130) ("controlling issues" in this case are "geographical limits of the Reservation" and "the scope of the Band's law enforcement authority *within those limits* under applicable law") (emphasis added). The reservation-boundary issue is not present as an element of any other claim because there is no other claim. It does not (and under Article III could not) exist as a stand-alone claim for declaratory or injunctive relief.[2]

B. *Early Dispositive Motions.*

In April 2020, after completing fact discovery, the parties jointly sought leave to file three dispositive motions before completion of expert discovery: (1) Plaintiffs' motion for summary judgment that they have standing and that their claims are ripe and not moot;

[2] Plaintiffs, of course, are the masters of their complaint and thus their decision not to seek stand-alone relief regarding the reservation boundary is controlling. *See*, *e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 & n.7, 398-99 (1987).

(2) Walsh and Lorge's motion for summary judgment on their immunity defenses; and (3) Walsh's motion for summary judgment that the Court lacks subject-matter jurisdiction. ECF 132 at 1-2. The Court granted the parties' request to file these early dispositive motions, ECF 138 at 1, 6, and they were then filed, briefed, and heard by the Court. ECF 146, 149, 162, 164, 173, 175, 176, 194, 198 and 199.

In its opposition to plaintiffs' early dispositive motion on standing, ripeness and mootness, Defendant Mille Lacs County recognized that the reservation-boundary issue was an element of plaintiffs' law enforcement claims:

> Implicit in Plaintiffs' claims is the main material fact in dispute between the parties: whether or not 61,000 acres of land in Mille Lacs County is Indian country. *The scope of Plaintiffs' sovereign jurisdiction and ability to exercise its law enforcement authority hinges on that determination*. Whether or not Defendants' actions *unlawfully* interfered with Plaintiffs' authority cannot be decided at summary judgment, in a motion on justiciability. Further, one cannot grant Plaintiffs' Motion without affirmatively ruling on the issue at the heart of this dispute: whether or not the reservation established by the Treaty of 1855 was disestablished by the treaties of 1863, 1864, the Nelson Act and Agreement of 1889, and the 1902 Agreement and authorizing statute.

ECF 175 at 3-4 (first emphasis added) (footnote omitted). The County was mistaken insofar as it argued plaintiffs' standing depended on resolution of the boundary issue on the merits, *see* Pltfs.' Reply (ECF 194) at 2 n.1 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)), but it correctly identified the boundary issue as a central element of plaintiffs' law enforcement claims.

C. *Reservation-Boundary Motions.*

In October 2020, after completing expert discovery and while the parties' early dispositive motions remained pending, the parties scheduled a hearing on additional dispositive motions for March 15, 2021. On November 11, 2020, the parties jointly proposed to limit those motions to the reservation-boundary issue, deferring dispositive motions regarding the scope of the Band's law enforcement authority within the Reservation's boundaries pending resolution of the boundary issue. ECF 206. In a joint memorandum, the parties again explained the interrelationship between the reservation-boundary issue and the law enforcement issues and their reasons for proposing that the reservation-boundary issue be resolved first:

> Resolution of the issues relating to the status of the 1855 Reservation may significantly affect the nature and extent of the parties' dispute regarding the scope of the Band's inherent and federally delegated law enforcement authority. If the Court were to determine that the 1855 Reservation has not been disestablished or diminished, the Band's inherent and federally delegated law enforcement authority will extend, at least to some extent, to all lands within the Reservation, including Band-owned and non-Band-owned fee lands, and it will be necessary to determine the precise extent of the Band's authority on such lands (as well as trust lands). On the other hand, if the Court were to determine that the 1855 Reservation has been disestablished, the dispute regarding the scope of the Band's law enforcement authority will largely, if not entirely, be confined to the extent of such authority on trust lands.

ECF 208 at 3-4.

On November 16, 2020, the Court granted the parties' joint request to address the reservation-boundary issue first. ECF 211. On December 3, 2020, noting the parties' intent to file motions on reservation-boundary issue, the Court granted plaintiffs' request

to enlarge the word limits for the parties' memoranda of law addressing that issue. ECF 216. Given the previously scheduled March 15, 2021, hearing date, the parties' motions regarding the reservation boundary were due on February 1, 2021.

D. *The Court's Ruling on the Parties' Early Dispositive Motions.*

On December 21, 2020, the Court issued an opinion and order deciding the parties' early dispositive motions. ECF 217. The Court first denied Walsh and Lorge's motion for summary judgment that the Court lacked subject-matter jurisdiction over plaintiffs' claims of interference with the Band's law enforcement authority, holding that the scope of the Band's sovereign law enforcement authority is a federal question under 28 U.S.C. § 1331. *Id*. at 24-29. The Court then addressed plaintiffs' motion for summary judgment on standing, ripeness, and mootness. It held plaintiffs had standing to bring their claims because the Band has a legally protected interest in exercising its inherent sovereign law enforcement authority; the record revealed numerous actual, concrete, and particularized incidents in which Band police officers were restricted from carrying out their law enforcement duties pursuant to an Opinion and Protocol issued by Defendant Walsh and enforced by Defendant Lorge's predecessor; and it is likely that plaintiffs' injuries will be redressed by a favorable decision, because the declaratory and injunctive relief sought is specifically designed to recognize and restore the Band's sovereign law enforcement authority. *Id*. at 29-34. The Court also held that plaintiffs' claims were ripe, *id.* at 34-35, and not moot, *id.* at 35-36.

The Court next considered Walsh and Lorge's immunity defenses. It held that a judicial declaration of the scope of a tribe's sovereign law enforcement authority or a judicial order prohibiting interference with that authority would not run afoul of the Tenth Amendment. *Id.* at 37. It also determined the Eleventh Amendment does not shield Walsh and Lorge from suit in their official capacities because they are not "arms of the state." *Id.* at 41-43. The Court also held that Walsh and Lorge were not entitled to dismissal from the case due to prosecutorial immunity because plaintiffs do not seek money damages. *Id.* at 44-46. The Court declined to rule on certain other defenses "at this time" because they were not within the scope of the early dispositive motions authorized by the Court. *Id*. at 46.

E. *Walsh and Lorge's Appeal; Filing, Briefing and Arguing the Reservation-Boundary Motions.*

On January 19, 2020, with no prior notice to plaintiffs, Defendants Walsh and Lorge filed a Notice of Appeal (ECF 218) from the Court's December 21, 2020, Opinion and Order, asserting that "[a]n interlocutory appeal from this Order is proper under the collateral order doctrine." Plaintiffs' counsel immediately contacted defendants' counsel to discuss the effect of the appeal on the parties' planned motions for summary judgment on the reservation-boundary issue. *See* Slonim Declaration Ex. 1 (filed herewith). In email correspondence on January 20, 21 and 22, 2021, plaintiffs' counsel expressed concerns about the Court's jurisdiction to decide the reservation-boundary motions during the pendency of the appeal, while defendants' counsel asserted that the Court had discretion to

hear and decide the motions because they were "collateral to the appeal." *See* Slonim Decl. Ex. 1 at 3 (2020-01-20 Flaherty to Slonim *et al.*). Because the parties had already scheduled a hearing on and undertaken extensive work to prepare the reservation-boundary motions (which were due less than two weeks after Walsh and Lorge filed their Notice of Appeal),[3] and because the Court had already agreed to the parties' joint request to limit the motions to the reservation-boundary issue and established an enlarged word-limit for the motions, plaintiffs agreed to proceed with filing, briefing and arguing the reservation-boundary motions on the condition that plaintiffs would alert the Court to the jurisdictional issue so it could make its own determination regarding its jurisdiction. *Id.* at 1 (2020-01-22 Slonim to Flaherty *et al.*). Defendants did not object to this approach.

The reservation-boundary motions were filed and fully briefed by March 8, 2021, based on the previously scheduled March 15, 2021, hearing date. *See* ECF 223, 225, 239, 241, 253, 257, 269 and 271. On March 11, the Court ordered that, during the March 15 hearing, the parties should first present arguments whether Walsh and Lorge's Notice of Appeal divested the Court of jurisdiction to consider the reservation-boundary motions. ECF 272. In response, defendants acknowledged that "there exists a good chance that merits argument on the pending summary judgment motions will be delayed pending

[3] Plaintiffs had begun work on their motion in October 2020, immediately upon completion of expert discovery at the end of September, and it and all supporting papers were substantially complete when Walsh and Lorge filed their notice of appeal. *See* Slonim Decl. ¶ 4

appeal" and therefore asked the Court to limit the March 15 hearing to the jurisdictional concerns and to reset hearing on the pending summary judgment motions to a later date. ECF 274. The Court determined to proceed with the arguments while reserving the jurisdictional question:

> [T]he pending motions have been fully briefed, the hearing was scheduled long ago, and neither party has sought to stay these proceedings while the appeal is pending. The Court will not rule on the pending motions until it has satisfied itself that it retains jurisdiction—but in the interest of judicial economy, the Court will proceed with the hearing as described in its previous Order. In addition, the Court will order supplemental briefing from the parties regarding the jurisdictional question, as follows: Plaintiffs shall file a supplemental memorandum regarding this Court's jurisdiction by March 29, 2021; and Defendants shall file a responsive memorandum by April 12, 2021. The Court will then rule on whether it retains jurisdiction over the pending motions; and, if so, the merits of the motions.

ECF 275. Pursuant to this Order, the Court heard argument on the jurisdictional issue and the reservation-boundary motions on March 15 and took the motions under advisement. ECF 279.

III. ARGUMENT.

Walsh and Lorge's Notice of Appeal divested this Court of jurisdiction to decide the reservation-boundary motions during the pendency of the appeal because the Court's jurisdiction and authority to decide the motions is at issue in the appeal. The appeal seeks review of this Court's order on the parties' early dispositive motions under the collateral-order doctrine. Walsh and Lorge's immunity defenses, if upheld on appeal, would require dismissal of—and preclude this Court from adjudicating—plaintiffs' claims against Walsh

and Lorge. Because the reservation-boundary issue exists only as an element of those claims, this Court cannot decide the issue while an appeal is pending in which the Court's authority to adjudicate those claims is at issue.

Moreover, in deciding Walsh and Lorge's appeal, the Court of Appeals will need to determine, as a threshold matter, whether this Court has jurisdiction over plaintiffs' claims against Walsh and Lorge. Again, because the reservation-boundary issue exists only as an element of those claims, this Court cannot decide the issue while an appeal is pending in which the Court's very jurisdiction to adjudicate those claims is at issue.

The filing of a notice of appeal is a jurisdictional event the deprives a district court of jurisdiction over those aspects of the case involved in the appeal. Because this Court's authority and jurisdiction to adjudicate the reservation-boundary issue is directly at issue in Walsh and Lorge's appeal, Walsh and Lorge's Notice of Appeal divested this Court of jurisdiction to decide the parties' reservation-boundary motions during the pendency of the appeal.

A. *Walsh and Lorge's Notice of Appeal Divested This Court of Jurisdiction to Decide the Reservation-Boundary Issue Because It Is an Integral Element of the Claims Against Walsh and Lorge From Which They Assert Immunity.*

Walsh and Lorge's Notice of Appeal seeks review of this Court's order on the parties' early dispositive motions under the collateral-order doctrine. ECF 218. It is well established that rulings denying Eleventh Amendment or absolute prosecutorial immunity are immediately appealable collateral orders. *See*, *e.g.*, *Will v. Hallock*, 546 U.S. 345, 350

(2006); *Monroe v. Ark. State Univ.*, 495 F.3d 591, 593-94 (8th Cir. 2007) (Eleventh Amendment immunity); *Alternative Fuels, Inc. v. Cabanas*, 435 F.3d 855, 858 (8th Cir. 2006) (absolute immunity). There is more limited and somewhat conflicting authority regarding the immediate appealability of rulings denying Tenth Amendment defenses,[4] while there is substantial authority that the denial of an abstention defense is not a collateral order subject to immediate appeal.[5] The Court's decision to not decide defendants' other defenses also is not an immediately appealable collateral order because the Court did not conclusively determine or resolve them. *See Will v. Hallock*, 546 U.S. at 349 (collateral order must "conclusively determine the disputed question").

Accordingly, we focus first on Walsh and Lorge's Eleventh Amendment and absolute prosecutorial immunity defenses because it is clear this Court's dismissal of those defenses is subject to immediate appeal under the collateral-order doctrine. Walsh and

[4] *See Michigan Bell Tel. Co. v. Climax Tel. Co.,* 202 F.3d 862, 867 (6th Cir. 2000) (denial of Tenth Amendment claim is immediately appealable either as collateral order or in exercise of pendent appellate jurisdiction); *but see id.* at 868-69 (denial of Tenth Amendment claim is not an immediately appealable collateral order or within pendent jurisdiction) (Cole, J., dissenting); *Delawder v. Platinum Fin. Servs. Corp*., 189 F. App'x 369, 2006 U.S. App. LEXIS 15478 at **4, **6 (6th Cir. 2006) (implicitly holding denial of Tenth Amendment claim is not an immediately appealable collateral order); *see also Robertson v. Morgan County*, No. 97-1469, 1999 U.S. App. LEXIS 95 at *4-*5 (10th Cir. Jan. 6, 1999) (denial of Tenth Amendment claim is immediately appealable).

[5] *See Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 908, 914 (10th Cir. 2008); *Summers v. Leis*, 368 F.3d 881, 889-890 (6th Cir. 2004); *Confederated Salish and Kootenai Tribes v. Simonich*, 29 F.3d 1398, 1401-03 (9th Cir. 1994); *RRI Realty Corp. v. Inc. Village of Southampton*, 766 F.2d 63, 65 (2d Cir. 1985).

Lorge argued that, under the Eleventh Amendment, "[p]laintiffs' complaint against [them] is barred." ECF 164 at 51. According to Walsh and Lorge, this bar extends *both* to plaintiffs' assertion of law enforcement authority *and* to their assertion that the Reservation continues to exist and is Indian country. *Id.* at 55. Similarly, Walsh and Lorge argued that they were "immune from suit" under the doctrine of absolute prosecutorial immunity. *Id.* at 55-59. Thus, under those immunity defenses, Walsh and Lorge seek dismissal of plaintiffs' claims against them *in their entirety*. As discussed above, the reservation-boundary issue is simply one element of plaintiffs' claims against Walsh and Lorge. Accordingly, if their immunity defenses succeed, plaintiffs' claims against Walsh and Lorge would be dismissed in their entirety and there would be no basis for deciding the reservation-boundary issue.

> It is settled law that:
>
> > "'[a] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously,'" and that the filing of a notice of appeal "'confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'"

Johnson v. Hay, 931 F.2d 456, 459 n.2 (8th Cir. 1991) (quoting *United States v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989), in turn quoting *Griggs v. Provident Consumer Discount Co.* 459 U.S. 56, 58 (1982) (*per curiam*)). Accordingly,

> [o]nce a notice of appeal has been filed in a case in which there has been denial of a summary judgment motion raising the issue of qualified immunity, the district court should then stay its hand. Jurisdiction has been vested in the court of appeals and the district court should not act further.

Id. In *Ledbetter*, the court identified two compelling reasons for this rule:

> First, it promotes judicial economy for it spares a trial court from considering and ruling on questions that possibly will be mooted by the decision of the court of appeals. Second, it promotes fairness to the parties who might otherwise have to fight a confusing "two front war" for no good reason, avoiding possible duplication and confusion by allocating control between forums.

882 F.2d at 1347 (quoting *Shewchun v. United States*, 797 F.2d 941, 943 (11th Cir. 1986)). "The exceptions to this rule pertain to matters outside the scope of the appeal." *Price v. Dunn*, 139 S. Ct. 1533, 1537 (2019).

In this case, Walsh and Lorge's Notice of Appeal has transferred jurisdiction to the Court of Appeals to determine whether plaintiffs' claims against Walsh and Lorge can be adjudicated by this Court despite their assertions of Eleventh Amendment and absolute prosecutorial immunity. If this Court were to issue a ruling on the reservation-boundary issue, which is an integral element of plaintiffs' claims against Walsh and Lorge, it would be asserting jurisdiction over those claims simultaneously with the Court of Appeals, in direct contravention of *Griggs*, *Johnson* and *Ledbetter.* Moreover, it would undermine one of the principal reasons for the rule divesting district courts of jurisdiction over matters on appeal, by ruling on a question that might be mooted by the Court of Appeals' decision.

This result also follows from Walsh and Lorge's appeal of this Court's rejection of their Tenth Amendment and *Younger*[6] abstention defenses, which, if successful, would also

[6] *Younger v. Harris*, 401 U.S. 37 (1971).

bar plaintiffs' claims against them. *See* ECF 164 at 44-51 (arguing that Tenth Amendment and principles of comity articulated in *Younger* "mandate dismissing [Walsh and Lorge] from this action"). As noted above, there is some doubt whether the Court's rejection of these defenses is immediately appealable. However, that is a question to be addressed by the Court of Appeals and, in the meantime, this Court "should stay its hand." *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1106-07 (8th Cir. 1999) (because "appellate jurisdiction is primarily an issue for the appellate court …, if an appeal is taken from an interlocutory order and the issue of appealability is in doubt, the district should stay its hand" until the court of appeals resolves the issue of its jurisdiction, or remands for further clarification.)

Defendants argued during the March 15, 2021, hearing that the reservation-boundary issue is collateral to the appeal because it presents different legal issues and rests on a different factual record than plaintiffs' claims that Walsh and Lorge interfered with the exercise of the Band's law enforcement authority in 2016 and 2017. *See* 3-15-2021 Hearing Transcript at 13:21-25 and 14:1-9, 23-25. However, Walsh and Lorge themselves argued that the Court could not adjudicate the reservation-boundary issue under the Eleventh Amendment. ECF 164 at 55. More importantly, the different legal and factual issues relating to the reservation boundary does not change the fact that this Court's *authority to adjudicate* plaintiffs' claims against Walsh and Lorge—including the reservation-boundary issue—is now before the Court of Appeals, *i.e.*, the Court's authority

to adjudicate those claims is an "aspect[] of the case involved in the appeal." *See Johnson*, 931 F.2d at 459 n.2.

To illustrate this point, consider a hypothetical case filed under 42 U.S.C. § 1983, in which plaintiffs claim that defendant law enforcement officers used excessive force causing the death of plaintiffs' family member. The defendants defend on the ground that they are entitled to qualified immunity because their conduct did not violate clearly established law *and* on the ground that the decedent's death resulted from a pre-existing medical condition, not defendants' actions. If the defendants file an interlocutory appeal from an order denying their qualified immunity claim, the district court could not proceed to adjudicate whether defendants' actions caused decedent's death during the pendency of the appeal, even though that issue involves different facts and different legal principles than the qualified immunity claim. That is because the issue on appeal is whether the court has *authority to adjudicate* plaintiffs' claim against defendants in the first place; under such circumstances, the district court cannot proceed to adjudicate a discrete but integral element of the claim while the appeal is pending.

At the March 15th hearing, Defendants also argued that the reservation-boundary issue is collateral to the issues on appeal because the parties have completed discovery and resolution of the reservation-boundary motions will place no added burden on the parties. *See* 3-15-2021 Hearing Transcript at 14:15-20. However, the issue here is one of jurisdiction, not burden on the parties. As the Eighth Circuit explained, once a notice of

appeal has been filed, "[j]urisdiction has been vested in the court of appeals and the district court should not act further." *Johnson*, 931 F.2d at 459 n.2.

We have considered whether the Court could decide the reservation-boundary motions in the context of plaintiffs' claims against Defendant Mille Lacs County alone, even though defendants' "reservation cession" motion and their supporting and opposition briefs were submitted on behalf of all defendants and argued in part by Walsh's counsel. This attempt to cure the jurisdictional defect created by Walsh and Lorge's appeal raises several problems. First, because plaintiffs' standing rests on actions taken by the County Attorney and Sheriff, *see* ECF 217 at 29-34, it is not clear that the case could proceed against the County if Walsh and Lorge were dismissed. Plaintiffs alleged that the assertions, threats of prosecution and instructions made or issued by the County Attorney and/or Sheriff were made on behalf of the County and were official County policy, *see* ECF 1 at 6 (Complaint ¶ 5.R), but *all* defendants denied that allegation, *see* ECF 17 at 9; ECF 19 at 6; ECF 21 at 5. If Walsh and Lorge are no longer defendants in this case, there may be no "putatively illegal conduct" attributable to the remaining defendant, Mille Lacs County, sufficient to maintain plaintiffs' standing. *See Wieland v. U.S. Dep't of Health and Human Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) ("A case or controversy exists only if a plaintiff 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct *of the defendant*.'") (emphasis added) (quoting *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)).

Second, if the Court of Appeals were to accept Walsh and Lorge's Tenth Amendment, Eleventh Amendment or *Younger* abstention arguments, its decision could prevent litigation of plaintiffs' claims against the County. As noted, Walsh and Lorge themselves have argued that the Eleventh Amendment precludes the Court from adjudicating the reservation-boundary issue at all, ECF 164 at 55, and it is difficult to see how any of these arguments would allow plaintiffs' claims against the County to proceed if their claims against Walsh and Lorge could not. Third, because Walsh and Lorge exercise law-enforcement authority independent of the County, *see* Pltfs.' Opp'n Mem. (ECF 173) at 37-38, 48-50, it is not clear that the Court could provide any relief on plaintiffs' law enforcement claims, which are the *only* claims in the case, if Walsh and Lorge were dismissed.

Fourth, if the Court were to decide the reservation-boundary motions solely in the context of plaintiffs' claims against the County, it is not clear that its decision would be binding on Walsh and Lorge; thus, the Court might need to re-visit the decision if the Court of Appeals were to reject Walsh and Lorge's defenses on appeal, allowing plaintiffs' claims against them to proceed. Under these circumstances, the Court should not attempt to reform the pending motions and decide them solely in the context of plaintiffs' claims against the County. *See Root v. Liberty Emergency Physicians, Inc.*, 68 F. Supp. 2d 1086, 1088 (W.D. Mo. 1999) (staying all proceedings even though only one defendant in a multi-

defendant action filed an appeal and sovereign immunity constituted only a small part of the case).

B. *Walsh and Lorge's Notice of Appeal Divested This Court of Jurisdiction to Decide the Reservation-Boundary Motions Because the Court of Appeals Will Need to Determine, as a Threshold Matter, Whether This Court Has Jurisdiction to Adjudicate Plaintiffs' Claims (Including the Reservation-Boundary Issue).*

In deciding Walsh and Lorge's collateral-order appeal, the Court of Appeals will first need to determine whether this Court has subject-matter jurisdiction to adjudicate plaintiffs' claims against Walsh and Lorge.[7] As the Supreme Court has held, courts of appeal must always satisfy themselves of their own *and the district court's jurisdiction* before deciding an appeal. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998).

To our knowledge, every circuit to have considered this issue has applied *Steel Co.* and/or the doctrine of pendent appellate jurisdiction under *Swint v. Chambers Cnty.*

[7] This is so even though, by itself, a district court ruling denying a motion to dismiss on jurisdictional grounds is not a collateral order subject to immediate appeal. *Caitlin v. United States*, 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."); *Keyes v. Gunn*, 890 F.3d 232, 235 n.4 (5th Cir. 2018) ("Ordinarily, a district court's rejection of a defense of lack of subject matter jurisdiction is not immediately appealable."); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 n.2 (10th Cir. 2002) ("[D]enial of a motion to dismiss for lack of subject matter jurisdiction is not ordinarily entitled to interlocutory review."); *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 268 (2d Cir. 1999) ("[N]on-immunity based motions to dismiss for want of subject matter jurisdiction are not ordinarily entitled to interlocutory review").

Comm'n¸ 514 U.S. 35 (1995), to require consideration of the district court's jurisdiction in a collateral-order appeal. In *Keyes*, the court of appeals had appellate jurisdiction because defendants sought review of orders denying their claims of Eleventh Amendment and absolute and qualified immunity. 890 F.3d at 235 n.4. Citing *Steel Co.*, 523 U.S. at 94-95, the Fifth Circuit held that the requirement that jurisdiction be established as a threshold matter is inflexible and without exception and, therefore, "we must satisfy ourselves of the jurisdiction both of this court *and of the district court*." 890 F.3d at 235 (emphasis added).

In *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1109 (9th Cir. 2016), the Ninth Circuit held:

> Post-*Swint*, we have found pendent jurisdiction ... when the pendent issue implicates the very power the district court used to issue the rulings under review. For example, we have exercised jurisdiction over issues of subject matter jurisdiction and personal jurisdiction when attending an interlocutory appeal [because] if the appellate court does not have jurisdiction then it does not have the authority to address *any* issue on appeal.

Id. at 1109 (emphasis in original) (internal citations omitted).

In *Myers v. Hertz Corp*., 624 F.3d 537, 554 n.8 (2d Cir. 2010), the Second Circuit held that an "inquiry into subject matter jurisdiction" during review of a qualified immunity order "is easily justified under the prong of our pendent jurisdiction analysis directed at whether review of the pendent issue is necessary to ensure meaningful review of the appealable order, given 'our independent obligation to satisfy ourselves of the jurisdiction of [our] court *and the court below*.'" (quoting *In re MTBE Prods. Liab. Litig*., 488 F.3d 112, 121 (2d Cir. 2007)) (emphasis added) (alteration in original). Earlier, in *Merritt*, the

Second Circuit held it could "not reach the substance" of a collateral order denying a motion to dismiss a *Bivens*[8] claim on qualified-immunity grounds "without first carrying out our 'special obligation to satisfy [ourselves] not only of [our] own jurisdiction, but also that of the lower courts in [the] same cause under review.'" 187 F.3d at 267-68 (quoting *Steel Co.*, 523 U.S. at 95) (alterations in original). The court explained that this did not "run afoul of the boundaries of ... appellate jurisdiction articulated in *Swint*" because:

> [O]ur examination of the basis for the district court's subject matter jurisdiction over the *Bivens* claim is "necessary to ensure meaningful review of" the district court's order denying qualified immunity on that claim. The existence of subject matter jurisdiction goes to the very power of the district court to issue the rulings now under consideration.

Id. at 268-69 (citing *United States Catholic Conference v. Abortion Rights Mobilization,* 487 U.S. 72, 77 (1988)).[9]

In *Tarrant Reg'l Water Dist.*, 545 F.3d at 910 n.3, the Tenth Circuit considered defendants' assertion that plaintiffs' claims were not ripe in an interlocutory appeal from a district court order denying the defendants' assertion of Eleventh Amendment immunity, stating that because the ripeness issue "goes to this court's subject matter jurisdiction, we will consider the defendants' challenge." Earlier, in *Timpanogos*, the Tenth Circuit held

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[8] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[9] The court emphasized that "we examine only whether the district court possessed jurisdiction over the precise claims that are the basis for this appeal, *i.e.*, Merritt's *Bivens* claims that the defendants-appellants' participation in a tainted investigation violated his Fifth Amendment due process rights." *Id*. at 269.

that, where an interlocutory appeal can be taken from a ruling denying a motion to dismiss a claim based on the Eleventh Amendment, the court of appeals has jurisdiction to decide whether the district court had subject matter jurisdiction over the claim that was subject to the Eleventh Amendment defense. 286 F.3d at 1200-01. The court reasoned that "jurisdiction is a threshold question which an appellate court *must* resolve before addressing the merits of the matter before it." *Id*. at 1201 (emphasis added) (citing *Steel Co.*, 523 U.S. at 94). Furthermore, it held that deciding the jurisdictional issue in an interlocutory appeal does not run afoul of the limitations on pendent appellate jurisdiction in *Swint*, 514 U.S. at 37, because "our examination of the basis for the district court's subject matter jurisdiction over the Tribe's claim is necessary to ensure meaningful review of the district court's order denying Eleventh Amendment immunity on that claim." *Id*. (citing *Merritt*, 187 F.3d at 269); *see also ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1186 (10th Cir. 1998) (reviewing district court consideration of subject-matter jurisdiction on interlocutory appeal necessary to provide "plenary review to issues under the Eleventh Amendment").

In an unpublished decision, the Third Circuit likewise held that its "consideration of the District Court's collateral orders leads us to review the jurisdictional issue that the District Court addressed in previous orders." *Diffenbach v. CIGNA, Inc*., 310 F. App'x 504, 506, 2009 U.S. App. LEXIS 123 at **7 (3d Cir. 2009) (citing *Steel Co.*, 523 U.S. at

94-95, for the proposition that "the first and fundamental question is that of jurisdiction, first, of this court, and then, of the court from which the record comes").

Although we have not found an Eighth Circuit case addressing the duty of the Court of Appeals to consider the District Court's jurisdiction in a collateral-order appeal, there is no reason to expect the Eighth Circuit would depart from the unanimous views of the Second, Third, Fifth, Ninth and Tenth Circuits on this issue, especially given the clear mandate from the Supreme Court in *Steel Co*. Indeed, the Eighth Circuit has held that it "has 'the right and *duty* to raise and determine the district court's subject matter jurisdiction at any time.'" *ABF Freight Sys. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 962 (8th Cir. 2011) (quoting *Borntrager v. Cent. States Se. & Sw. Areas Pension Fund*, 577 F.3d 913, 919 (8th Cir. 2009)) (emphasis added). In addition, the Eighth Circuit has cited the Second Circuit's decision in *Merritt* favorably in holding that its pendent jurisdiction extends to an issue "predicate" or "analytically antecedent" to an assertion of immunity. *Nebraska Beef v. Greening*, 398 F.3d 1080, 1083-84 (8th Cir. 2005); *accord Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 n.2 (8th Cir. 2004) (adhering to earlier Eighth Circuit cases "holding that questions of law which will dispose of the necessity to address an assertion of immunity are 'closely related issues of law' that are properly before the Court on interlocutory appeal.") (citing *Moreno v. Small Bus. Admin.*, 877 F.2d 715, 716-17 (8th Cir. 1989), and *Drake v. Scott*, 812 F.2d 395, 398-99 (8th Cir. 1987)).

Accordingly, one aspect of this case necessarily involved in Walsh and Lorge's appeal is whether this Court has jurisdiction to adjudicate plaintiffs' claims against Walsh and Lorge. This entails both the question whether this Court has subject-matter jurisdiction over plaintiffs' claims under 28 U.S.C. § 1331 and the question whether plaintiffs' claims are justiciable under Article III (*i.e.*, whether plaintiffs have standing and whether plaintiffs' claims are ripe and not moot). *See*, *e.g.*, *ABF Freight Sys.*, 645 F.3d at 958 (absent standing, district court lacks subject-matter jurisdiction); *Tarrant Reg'l Water Dist.*, 545 F.3d at 910 n.3 (because ripeness "goes to this court's subject matter jurisdiction," court will consider it in collateral-order appeal). And, because Walsh and Lorge's Notice of Appeal "divests [this Court] of its control over those aspects of the case involved in the appeal," *Johnson*, 931 F.2d at 459 n.2, this Court cannot adjudicate plaintiffs' claims against Walsh and Lorge—including the reservation-boundary issue—while its jurisdiction to do so is at issue on appeal. In this context it is especially clear that this Court cannot decide the reservation-boundary motions in the context of plaintiffs' claims against the County alone because the same jurisdictional issues–both subject-matter jurisdiction and justiciability—are applicable to plaintiffs' claims against the County.

IV. CONCLUSION

This Court cannot adjudicate an integral element of plaintiffs' claims against Walsh and Lorge and of their defenses to those claims while the Court's jurisdiction and authority to adjudicate those claims is at issue on appeal. While the Court may proceed with matters

not involved in the appeal, that is not the case here; the Court's jurisdiction and authority to adjudicate the reservation-boundary issue is directly at issue in the appeal. Plaintiffs of course want their claims adjudicated and their injuries redressed but, as we have said throughout this litigation, it is important to do so on a sound jurisdictional foundation.

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Respectfully submitted,

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