

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Mille Lacs Band of Ojibwe, et al.,

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

Plaintiffs,

v.

County of Mille Lacs, Minnesota,  
et al.,

**DEFENDANTS'  
RESPONSE TO PLAINTIFFS'  
MEMORANDUM OF LAW  
REGARDING JURISDICTION**

Defendants.

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## INTRODUCTION

Pending before the Eighth Circuit is an appeal from a prior order denying Walsh and Lorge's summary judgment motion. That appeal raises as issues subject-matter jurisdiction, absolute immunity, and Tenth and Eleventh Amendment immunities. Pending before this Court is a second set of summary judgment motions that raise the issue of whether the former 1855 reservation still exists. The issues on appeal are collateral to the reservation-cession issue pending before this Court. Jurisdiction over the former issues is before the appellate court. Jurisdiction over the latter issue is here, in this Court.

## BACKGROUND

### A. Pleadings

Plaintiffs sued the County Attorney Joe Walsh, former Sheriff Brent Lindgren and Mille Lacs County. (ECF 1.) Plaintiffs' Complaint alleges that all three Defendants interfered with Plaintiffs' law-enforcement authority within the boundaries of a reservation described in an 1855 treaty (hereinafter the "1855 Reservation"). Specifically, Plaintiffs assert law-enforcement power over, and interference with, "trust lands" and "Band fee lands" and non-Band members. (ECF 1 at 4-5.)

Defendants each separately answered, raising their own defenses. (ECF 17; ECF 18; ECF 19.) Later, Sheriff Don Lorge was substituted for former Sheriff Lindgren. (ECF No. 63.)

## **B. Prior Order and Appeal**

The Court granted Plaintiffs' prior motion for summary judgment on, *inter alia*, standing, and the Court denied Walsh and Lorge's prior motion for summary judgment on, *inter alia*, various immunity defenses. (ECF No. 217.) The County did not move for summary judgment during that prior round of briefing. Other issues remain unresolved. (*See* ECF 217 at 46 (identifying as unaddressed issues the individual-capacity claims and qualified immunity).)

Walsh and Lorge appealed the denial of their motion (ECF 218.) That appeal raises as issues subject-matter jurisdiction, absolute immunity, and Tenth and Eleventh Amendment defenses. Plaintiffs have not yet filed their appellee brief.

## **C. The Pending Summary Judgment Motions**

Now pending before this Court is a second set of summary judgment motions that raise the issue of whether the 1855 Reservation still exists. (ECF 223 & 239.) All parties, including the County, have urged the Court to decide whether the 1855 Reservation still exists.

The Court has sought briefing regarding whether and how Walsh and Lorge's interlocutory appeal affects its jurisdiction over what are effectively cross-motions for summary judgment regarding the reservation. (ECF 280.) Plaintiffs have submitted their memorandum of law. (ECF 286.)

## ARGUMENT

At the outset of the most recent hearing, the Court correctly identified the controlling law for the jurisdictional issue at hand: *United States v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989). (ECF 284 at 4.) That case’s rule is straightforward: “The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Ledbetter*, 882 F.2d at 1347 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)). The paramount principle that underlies the divesting of the district court of jurisdiction during an appeal is the prevention of district court rulings which would undermine or alter the issues presented to the court of appeals during an interlocutory appeal. *Liddell v. Bd. of Educ.*, 73 F.3d 819, 822 (8th Cir. 1996). “For example, while an appeal is pending, the district court may not reexamine or supplement the order being appealed.” *State ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir. 1999).

The purpose of this rule is twofold. First, to prevent the district court from wasting judicial resources in considering issues that may be mooted by the appeal, and second to save the parties from needlessly fighting a two-front war. *Ledbetter*, 882 F.2d at 1347.

The question is thus whether the reservation-cession issue—fully briefed in the pending summary judgment motions—is an “aspect[] of the case involved in the appeal.” *Id.* Precedent frames the question insofar as the district court retains jurisdiction to adjudicate issues collateral, or tangential, to the appeal. *See Harmon v. U.S. ex rel. Farmers Home Admin.*, 101 F.3d 574, 587 (8th Cir. 1996).

Prompt resolution of cases is favored, even during interlocutory appeals. *Society for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 918 (D.C. Cir. 1975) (“We assume that the case will proceed forward expeditiously in the district court despite the pendency of the § 1292(a) appeal in this court.”). For example, a district court may proceed to determine the action on the merits even while an appeal is pending from denial of a preliminary injunction. *United States v. Price*, 688 F.2d 204, 215 (3d Cir. 1982). A district court retains jurisdiction to proceed on the merits pending an appeal from an order granting or denying a preliminary injunction. *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012).

A district court may even dismiss an action pending appeal, even though the same issues might be decided by the court of appeals, because the substantive issues had been fully considered in denying an injunction and in the interest of expeditious disposition. *Free Speech v. Fed. Election Comm’n*, 720 F.3d 788, 791-792 (10th Cir. 2013) (adopting district court opinion). “A



judge may—and should—enforce an un-stayed injunction while an appeal proceeds.” *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 565–566 (7th Cir. 2000).

Where an interlocutory appeal is taken on the grounds of immunity, a district court is not required to issue a stay. *E.g.*, *Committee On The Judiciary U.S. House of Representatives v. Miers*, 575 F. Supp. 2d 201, 202-03 (D.D.C. 2008) (denying motion for stay pending appeal of order denying absolute immunity); *Miccosukee Tribe of Indians of Florida v. United States*, No. 10-cv-23507, 2011 WL 5508802, \*1 (S.D. Fla. Nov. 8, 2011) (denying, except for a two-week partial stay, a motion to stay pending appeal of sovereign immunity).

**I. This Court has jurisdiction over the pending summary judgment motions because a ruling on those motions will not be mooted by the interlocutory appeal.**

A ruling on the pending summary judgment motions will not be mooted by the appeal here. Essentially, the Eighth Circuit will make one or two decisions: (1) whether subject-matter jurisdiction exists over Plaintiffs’ claims against Walsh and Lorge; and, if so, (2) whether any one of Walsh and Lorge’s appealed immunity defenses precludes them from being parties to the Plaintiffs’ suit against them. The pending summary judgment motions, in contrast, essentially ask this Court to decide a single, different issue: whether the 1855 Reservation still exists.

The 1855 Reservation’s purported existence is orthogonal to subject-matter jurisdiction over Plaintiffs’ claims against Walsh and Lorge and to whether they are immune from suit. It is possible that there is no subject-matter jurisdiction over Plaintiffs’ claims against Walsh and Lorge. It is possible that Walsh and Lorge should be dismissed based on one of their immunity defenses. Essentially, whether Walsh and Lorge should be parties in the case is before the Eighth Circuit. Whether the 1855 Reservation exists is not before the Eighth Circuit.

There is another way in which the reservation-cession issue and the order appealed are collateral to each other. The prior summary judgment order is appealable because it is a “collateral order.” *Mitchell v. Forsyth*, 472 U.S. 511, 528-29 (1985); *Monroe v. Ark. State Univ.*, 495 F.3d 591, 593 (8th Cir. 2007). This raises the question, “collateral to what”? The answer: “collateral to[] rights asserted in the action.” *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *accord Abney v. United States*, 431 U.S. 651, 658-59 (1977) (referring to an “issue completely collateral to the cause of action asserted”). Walsh and Lorge’s immunities are necessarily collateral to the reservation-cession issue—otherwise they would not be appealable. And because the County has not appealed, the Eighth Circuit will not be deciding whether there is subject-matter jurisdiction over the Band’s claim against the

County.<sup>1</sup> Under the “party presentation principle ... an appellate court may not alter a judgment to benefit a nonappealing party.” *Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008); *see also Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397-98 (1981) (reversing circuit court holding that “non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties”).

A ruling on the pending summary judgment motions will neither undermine nor alter the issues on appeal. If the Court grants Defendants’ pending summary judgment motion and holds that the 1855 Reservation no longer exists, then Plaintiffs’ law-enforcement interference claim will be limited to trust lands, Band-owned fee lands, and to non-Band members. (ECF 1 at ¶¶ 5.A (describing “trust lands” and “Band fee lands”), ¶ 5.N (alleging defendants have denied that Plaintiffs have investigatory authority over non-Band members even on trust land), ¶ 5.O (alleging Defendants made threats regarding same).) Conversely, if the Court denies Defendants’ pending summary judgment motion and holds that the 1855 Reservation still exists, then Plaintiffs’ law-enforcement interference claim includes that entire geographic area and non-Band members. (See ECF 1 at 7-8.)

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<sup>1</sup> In its recent filing, Plaintiffs now suggest that they may not have any claims against the County. (ECF No. 286 at 21 (“[I]t is not clear that the case could proceed against the County if Walsh and Lorge were dismissed.”)) That surprising admission is discussed *infra* p. 11.

But whether Defendants’ pending summary judgment motions are granted or denied, this case is not over. Plaintiffs prevailed in their prior summary judgment motion that they have standing to pursue their claims. (ECF 217 at 34 (“Accordingly, the Court finds that Plaintiffs have met their burden of establishing standing to pursue these claims.”).) Having prevailed on standing, though, Plaintiffs have *not* prevailed on the merits of their claims.<sup>2</sup> Indeed, the Court correctly recognized that standing “in no way depends on the merits of the plaintiffs’ contention that particular conduct is illegal.” (ECF 217 at 30 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).)

## **II. The interlocutory appeal does not create a needless, two-front war.**

The second purpose of this rule that limits district court jurisdiction to collateral matters is to save the parties from the burden of needlessly fighting a “two front war.” *Ledbetter*, 882 F.2d at 1347. Plaintiffs have explicitly waived any argument as to burden. (ECF 286 at 20 (“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

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<sup>2</sup> Plaintiffs do not seek a simple declaration that the Reservation of 1855 is still in existence. Rather, Plaintiffs’ first claim for declaratory relief hinges on the Court recognizing their inherent legal authority to police and investigate actions. Plaintiffs’ second claim for relief is even broader than their first, as it focuses on the meaning of the Deputation Agreement and the authority the Band possesses under that Agreement.

Transcript at 14:15-20. However, the issue here is one of jurisdiction, *not burden on the parties.*”) (emphasis added).)

**III. Plaintiffs’ remaining arguments are unavailing, confused, or otherwise incorrect.**

**a. Plaintiffs’ jurisdictional argument contradicts their own complaint.**

Plaintiffs seem to argue they cannot proceed against the County alone in this action. (ECF 286 at 21 (“[I]t is not clear that the case could proceed against the County if Walsh and Lorge were dismissed.”)) This surprising assertion contradicts Plaintiffs’ own Complaint, is (by their own admission) speculative, and is wrong. (ECF 286 at 21-22.) If these arguments were accepted, the County would have to be dismissed as a Defendant.

If the Plaintiffs have a valid claim against the County, that claim can proceed. If the Plaintiffs do not have a valid claim against the County, the County should not be a party to this case. Plaintiffs either do—or do not—have a claim against the County. Plaintiffs’ Complaint asserts no *respondeat superior* or vicarious liability claims against the County. Plaintiffs’ Complaint *directly* asserts that Walsh and former Sheriff Lindgren’s allegedly offending behaviors “are the official custom or policy of the County.” (ECF 1 at ¶ 5.R.) If

that “custom or policy” is sufficient for a claim, then there is a claim against the County; if it is insufficient, the County should be let go.<sup>3</sup>

Walsh and Lorge are different from the County. Respectively, they prosecute and enforce state-law crimes. But a county is not an arm of the state, *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), and does not act for the state.<sup>4</sup> Suing a county does not trigger the Tenth and Eleventh amendment issues raised by suing a prosecutor or sheriff. Likewise, because counties do not enforce the state’s criminal laws, no *Younger* abstention issues arise when a suing a county.<sup>5</sup>

- b. The issues raised on appeal do not include whether subject-matter jurisdiction exists over the Plaintiffs claims against the County, as the County is not a party to the appeal.**

Plaintiffs are correct that the Eighth Circuit will likely decide whether federal subject-matter jurisdiction exists over Plaintiffs’ claims against Walsh

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<sup>3</sup> Or, the County should be permitted to re-plead its counterclaim. (ECF 17.)

<sup>4</sup> Subject to exceptions not applicable here. *E.g.*, *Andrade v. Ellefson*, 391 N.W.2d 836, 840 (Minn. 1986) (county acts for state when investigating day care licensing).

<sup>5</sup> At the remedy stage, after adjudicating of liability, a *Younger* issue might arise if a court were to enjoin a county attorney under Fed. R. Civ. P. 65, in a way that affected that county attorney’s legal actions taken on behalf of the State. But such a *Younger* issue could be resolved by a carefully crafted injunction, and in any event that issue goes only to the scope of a particular equitable remedy; that issue does not go to whether litigation against a county could proceed to a remedy.

and Lorge. (See ECF 286 at 25-28 (surveying various circuit courts).) But the County is not an appellant.

Because the County is not an appellant, the appellate court will *not* be considering whether the district court has subject-matter jurisdiction over Plaintiffs' claims against the County. An appellate court lacks the power to adjudicate disputes between two parties where one is not a party to the appeal. *Johnson v. Florida High School Activities Ass'n, Inc.*, 102 F.3d 1172, 1173 (11th Cir. 1997); *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 105 n.1 (2d Cir. 2009); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 192 (9th Cir. 1977).

The question of subject-matter jurisdiction over Plaintiffs' claims against the County will be answered, if ever, in a subsequent appeal to which the County would be a party. More likely, though, that issue will never even be raised. Plaintiffs' Complaint asserts subject-matter jurisdiction over its claims against the County (ECF 1), and the County agrees that there should be a trial in this case. (ECF 175 at 1 ("The County agrees that Plaintiffs' claims present a justiciable dispute appropriate for determination by this Court—at trial.").)

In any event other issues collateral to the appeal and to the pending summary judgment motions remain unresolved. (See ECF 217 at 46 (identifying as unaddressed issues the individual-capacity claims and qualified immunity).)

- c. The pending appeal does not implicate the Court’s jurisdiction to decide the issue in the pending motions.**

Plaintiffs next err in arguing that “the Court’s jurisdiction and authority to decide the motions is at issue in the appeal.” (ECF 286 at 14-15.) That statement is both technically incorrect and misleading. It is incorrect, as noted, *supra* pp. 6-7, because the appellate issue regarding subject matter regards only Plaintiffs’ claims against Walsh and Lorge, and not the Plaintiffs’ claims against the County, which did not appeal. The County did not even join the motion disposed of by the appealed order. (See ECF 162.)

Besides being incorrect, Plaintiffs’ argument is misleading because the pending summary judgment motions do not seek any different relief as between Walsh and Lorge on one hand, and the County on the other. Put differently, the 1855 Reservation either exists or it does not. It cannot both exist as to claims against Walsh and Lorge, and not exist as to the claims against the County.

- d. In their claim against the County, Plaintiffs have asserted that the reservation still exists.**

Plaintiffs’ Complaint asserts their claims against three defendants: Walsh, Lorge, and the County. Plaintiffs admit that they are masters of their Complaint (ECF 286 at 8 n.2), and thus their decision to name the County binds them. (*Id.* (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 & n.7, 398-99 (1987)).) And so Plaintiffs are now at war with their own Complaint



when arguing that if Walsh’s and Lorge’s “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.” (ECF 286 at 17.) But Plaintiffs cannot dismiss the County as a matter of right; they must either have signed consent of all parties, Fed. R. Civ. P. 41(a)(1)(A)(ii), or leave of court, *id.* 41(a)(2).

**e. Issues and claims are not the same.**

Plaintiffs confuse *issues* on appeal with *claims* in their Complaint. (ECF 286 at 18). Specifically, Plaintiffs argue that if “this Court were to issue a ruling on the reservation-cession 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[.]” (ECF 286 at 18 (emphasis added).)

But Walsh and Lorge did not appeal “Plaintiffs’ claims” to the Eighth Circuit; they appealed three issues: subject-matter jurisdiction, absolute immunity, and Tenth and Eleventh Amendment immunities. Applicable precedent does not refer to “claims” on appeal. *E.g.*, *Ledbetter*, 882 F.2d at 1347 (referring to “those aspects of the case involved in the appeal”). Plaintiffs’ casual use of “claims” is unhelpfully imprecise and does not match Eighth Circuit precedent.

Plaintiffs misrepresent Walsh and Lorge's position when Plaintiffs write that "Walsh and Lorge themselves argued that the Court could not adjudicate the reservation-boundary issue under the Eleventh Amendment." (ECF 164 at 55.) Plaintiffs' assertion is unsupported by their citation. Walsh and Lorge have not argued that the Court cannot adjudicate the reservation-cession issue in the context of Plaintiffs' claims against the County.

**f. The pending summary judgment motions do not threaten to "adjudicate" any "claims" at all.**

Plaintiffs' next argument is a *non sequitur*. They argue that because the "authority to adjudicate" claims against Walsh and Lorge is implicated by the pending appeal, that therefore the reservation-cession issue is likewise before the Court of Appeals. (ECF 286 at 19-20.) Whether the 1855 Reservation exists is analytically, factually, and legally distinct from whether Plaintiffs' Complaint states any causes of action against Walsh and Lorge.

Plaintiffs' § 1983 hypothetical teaches a quite different lesson than the one Plaintiffs impute to it. In that hypothetical, plaintiffs claim 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. They take an appeal.

There, a district court determination that there was no causation would moot that pending appeal. Here, neither Plaintiffs nor Defendants argue that a determination on the reservation-cession issue would moot the pending appeal. The issue in that hypothetical, as here, is whether “authority to adjudicate” is disputed. Indeed, in every immunity appeal, the “authority to adjudicate” is disputed—that is the very definition of what it means to be immune from suit.

Rather, the issue in that hypothetical, and here, is whether district court action will moot a pending appeal. Plaintiffs’ hypothetical illustrates that risk, but Plaintiffs’ *actual* case carries no such risk. Nowhere does Plaintiffs’ jurisdictional memorandum even suggest that a ruling on the reservation-cession issue would moot the pending appeal.<sup>6</sup>

Plaintiffs confuse when an order granting summary judgment becomes binding. Plaintiffs argue “it is not clear that its decision would be binding on Walsh and Lorge[.]” (ECF 286 at 22.) Walsh and Lorge’s prior briefing makes clear that any injunctive relief against the County would bind the County Attorney and Sheriff even if they were not parties under Fed. R. Civ. P. 65. (ECF 164 pp. 47-48 (citing authorities).) As to timing, no decision on the

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<sup>6</sup> What’s more, that hypothetical is inapposite because it does not involve a multi-defendant case, where fewer than all defendants appeal issues unique to them, and where a district court is being asked to decide an issue common to all defendants, unrelated to the appeal.

pending summary judgment motions is binding on anyone—including the County—until a final judgment is entered. Fed. R. Civ. P. 54(b); *SLA Property Management v. Angelina Cas. Co.*, 856 F.2d 69, 72 (8th Cir. 1988); *accord Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (9th Cir. 2003) (stating a district court retains the power to modify rulings on partial dispositive motions).

## CONCLUSION

One set of issues is on appeal, and another, different issue is before this Court. There is neither legal nor factual overlap between the issues on appeal (i.e., subject-matter jurisdiction and immunities) and the issue in the pending summary judgment motions (i.e., whether the 1855 Reservation exists). No decision by this Court will answer the issues on appeal; no decision by the Eighth Circuit will answer the issues pending before this Court. Jurisdiction over the pending summary judgment motions remains in this Court.

Respectfully submitted,

Dated: April 12, 2021

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