UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

Consolidated Appeals Under Appeal No. 12-6004

In re: Linda Rose Whitaker, Debtor.	Bky. Case No. 10-38674-DDO Chapter 7
Paul W. Bucher, Trustee, Plaintiff-Appellant, vs. Dakota Finance Corporation and The Lower Sioux Indian Community in the State of Minnesota, Defendants-Appellees.	Appeal No. 12-6004 Appeal No. 12-6007
In re: Cecil Ray Barth and Deanna Joan Barth, Debtors.	Bky. Case No. 09-36006-DDO Chapter 7
Michael S. Dietz, Trustee, Plaintiff-Appellant, vs. The Lower Sioux Indian Community in the State of Minnesota, Defendant-Appellee.	Appeal No. 12-6005
In re: Morris Jerome Pendleton, Sr. and Constance Louise Pendleton, Debtors.	Bky. Case No. 10-34267-GFK Chapter 7
Paul W. Bucher, Trustee, Plaintiff-Appellant, vs. The Lower Sioux Indian Community in the State of Minnesota Defendant-Appellee.	Appeal No. 12-6006

Appeals from the United States Bankruptcy Court for the District of Minnesota
(Adv. Nos. 11-3154, 11-3235, 11-3233, 11-3234)

JOINT PRINCIPAL BRIEF OF APPELLEES' THE LOWER SIOUX INDIAN COMMUNITY AND DAKOTA SERVICES ENTERPRISE D/B/A DAKOTA FINANCE CORPORATION

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JURISDICTIONAL STATEMENT

On January 11, 2012, the United States Bankruptcy Court for the District of Minnesota, the Honorable Dennis D. O'Brien (the "Bankruptcy Court"), ordered the dismissal of the four Complaints[1] brought by Chapter 7 Trustees Paul W. Bucher and Michael S. Dietz (the "Trustees") against Defendants The Lower Sioux Indian Community and its subsidiary entity, Dakota Services Enterprise d/b/a Dakota Finance Corporation (collectively, "Lower Sioux"). The Bankruptcy Court's dismissals constitute appealable judgments because, *inter alia*, the Bankruptcy Court expressly determined, pursuant to Fed. R. Civ. P. 54(b) and Fed. R. Bankr. P. 7054(a), that there was no just reason for delay of entry of judgment.

The Trustees timely appealed the Bankruptcy Court's four Orders for Dismissal and the Judgments entered pursuant thereto, under 28 U.S.C. § 158(b). The Bankruptcy Appellate Panel for the Eighth Circuit consolidated the four appeals under Appeal No. 12-6004, Bucher v. Dakota Finance Corporation. This principal brief of Appellees is timely under the briefing schedule established by the Court on January 27, 2012 and the Court's Order granting Appellees until April 9, 2012 to file their principal brief.

[1] This consolidated appeal concerns four separate adversary proceedings involving The Lower Sioux Indian Community and its subsidiary entity, Dakota Services Enterprise d/b/a Dakota Finance Corporation: Bucher v. Dakota Finance Corporation, Adv. No. 11-3154; Dietz v. The Lower Sioux Indian Community, Adv. No. 11-3233; Bucher v. The Lower Sioux Indian Community, Adv. No. 11-3234; and Bucher v. The Lower Sioux Indian Community, Adv. No. 11-3235. In the interest of efficiency, all record citations will be to Bucher v. Dakota Finance Corporation, Adv. No. 11-3154, except where there may be relevant factual variations.

STATEMENT OF ISSUES PRESENTED

1. It is settled law that Indian tribes are immune from suit unless Congress has "unequivocally expressed" its intent to abrogate the sovereign immunity of Indian tribes. Under Eighth Circuit precedent, Congressional intent to abrogate sovereign immunity requires that a statute, in at least one place, must refer specifically to Indian tribes. The Bankruptcy Code, however, does not make a single reference to Indian tribes. Was the Bankruptcy Court correct to dismiss the Trustees' Complaints against Lower Sioux because the defendant Indian tribe is immune from suit?

2. A business entity formed under tribal law is deemed an arm of the tribe, and thus protected by the tribe's sovereign immunity from suit, if the entity is sufficiently connected to the sponsoring tribe such that the entity should be regarded as the tribe itself. Dakota Services Enterprises d/b/a Dakota Finance Corporation was created by the Lower Sioux Indian Community as a "subordinate economic organization and an arm and instrumentality of the Community established and doing business under the Community Constitution and exercising governmental powers" for the express purpose of "fulfill[ing] governmental purposes of generating Community governmental revenues by promoting economic development and self-sufficiency through business development," and was endowed with "sovereign immunity from suit to the same extent that" Lower Sioux would be. Is Dakota Services Enterprise d/b/a Dakota Finance Corporation immune from the Trustees' suits to the same extent as Lower Sioux?

STANDARD OF REVIEW

Whether an Indian tribe enjoys sovereign immunity from suit, as a matter of jurisdiction, is a legal question for the Bankruptcy Appellate Panel to review *de novo.* *See, e.g., Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)

STATEMENT OF THE CASE

These four consolidated appeals concern the efforts by Chapter 7 trustees to bring bankruptcy-law claims against a Federally recognized Indian tribe, the Lower Sioux Indian Community, and its subsidiary entity, Dakota Services Enterprise d/b/a Dakota Finance Corporation. Three enrolled members of the Tribe – Deanna Joan Barth,[1] Morris Jerome Pendleton, Sr.,[2] and Linda Rose Whitaker[3] – filed voluntary Chapter 7 petitions in 2009, 2010, and 2010, respectively. All three Debtors disclosed that they had received or expected to receive in the future per capita payments of tribal revenue pursuant to the Tribe's ordinances and the Indian Gaming Regulatory Act.

The Trustees commenced four adversary proceedings relating to the Debtors' per capita payments. Mr. Bucher, as trustee of Linda Rose Whitaker's bankruptcy estate, filed Adv. No. 11-3154 against Dakota Finance Corporation to avoid its security interest in Ms. Whitaker's per capita payments, and Adv. No. 11-3235 against Ms. Whitaker and Lower Sioux for turnover of all post-petition per capita payments paid or to be paid to Ms. Whitaker. Mr. Bucher, as trustee of Mr. Pendleton's bankruptcy estate, filed Adv. No. 11-3234 against Mr. Pendleton and Lower Sioux for turnover of all post-petition per

[1] Bankruptcy Case No. 09-36006-DDO.

[2] Bankruptcy Case No. 10-34267-GFK.

[3] Bankruptcy Case No. 10-38674-DDO.

capita payments paid or to be paid to Mr. Pendleton.[4] Mr. Dietz, as trustee of Deanna Joan Barth's bankruptcy estate, commenced Adv. No. 11-3233 against Ms. Barth and Lower Sioux for turnover of all post-petition per capita payments paid or to be paid to Ms. Barth.

The United States Bankruptcy Court for the District of Minnesota, the Honorable Dennis D. O'Brien ("Bankruptcy Court") held a combined scheduling conference on November 3, 2011, pursuant to which the Bankruptcy Court established a schedule for briefing on the Tribal Defendants' motions to dismiss for lack of jurisdiction.[5] On January 11, 2012, following thorough and complete briefing by the parties and a hearing on the merits,[6] the Bankruptcy Court granted the Tribal Defendants' motions to dismiss for lack of jurisdiction, and ordered dismissal of the Trustees' claims against Lower Sioux and Dakota Finance Corporation based on the Tribal Defendants' sovereign immunity from suit.[7] In support of its decision, the Bankruptcy Court cited to and adopted wholesale the reasoning of Judge Kilburg in *In re National Cattle Congress*, 247

[4] On September 22, 2011, Chief Judge Kishel transferred Adv. No. 11-3234 to Judge O'Brien for coordinated resolution, in the interests of judicial economy and uniformity. (*See* Adv. No. 11-3234 at Doc. No. 11.)

[5] (*See* Adv. No. 11-3154 at Doc. Nos. 11, 14, and 15.)

[6] (*See* Adv. No. 11-3154 at Doc. Nos.17, 18, and 20.)

[7] (*See* Adv. No. 11-3154 at Doc. Nos. 22 and 23; Adv. No. 11-3233 at Doc. Nos. 25 and 26; Adv. No. 11-3234 at Doc. Nos. 27 and 28; and Adv. No. 11-3235 at Doc. Nos. 26 and 27.)

B.R. 259 (Bankr. N.D. Iowa 2000),[8] which held that, under precedent of the Supreme Court and the Eighth Circuit, Congress had not unequivocally expressed its intent to abrogate the sovereign immunity of Indian tribes to bankruptcy lawsuits.

The Trustees timely appealed the orders and judgments for dismissal.[9] Upon motion of the Debtor Defendants, the Bankruptcy Court has stayed Adv. Nos. 11-3233, 11-3234, and 11-3235 pending the outcome of the Trustees' appeals.[10]

STATEMENT OF FACTS

Appellees are satisfied with the Appellants' Statement of Facts, as supplemented by the few factual and documentary matters noted in Section III of the Appellees' Brief, concerning the organization, powers, and privileges of Lower Sioux's subsidiary entity, Dakota Services Enterprise d/b/a Dakota Finance Corporation.

[8] (*See* Adv. No. 11-3235 at Doc. No. 38 (transcript not available on PACER).)

[9] (*See* Adv. No. 11-3154 at Doc. No. 26; Adv. No. 11-3233 at Doc. No. 30-1; Adv. No. 11-3234 at Doc. No. 32; and Adv. No. 11-3235 at Doc. No. 31.)

[10] (*See* Adv. No.11-3233 at Doc. No. 36; Adv. No. 11-3234 at Doc. No. 41; and Adv. No. 11-3235 at Doc. No. 42.)

ARGUMENT

I. SUMMARY OF ARGUMENT

These appeals present a single, important question of Federal Indian law: Did Congress, when it enacted the Bankruptcy Code, abrogate the sovereign immunity of Indian tribes with respect to bankruptcy lawsuits? The Supreme Court has held consistently that Congressional intent to abrogate tribal sovereign immunity cannot be implied, but must be "unequivocally expressed." The Eighth Circuit has faithfully applied that standard, finding Congressional intent to abrogate sovereign immunity only where a statute, in at least one place, makes specific reference to Indian tribes. The Bankruptcy Code does not refer to Indian tribes and therefore does not abrogate Tribal sovereign immunity.

Only two courts in the Eighth Circuit have considered the precise issue presented by this appeal – the Bankruptcy Court in these four appealed cases and Judge Kilburg of the U.S. Bankruptcy Court for the Northern District of Iowa – and they agreed that Congress did not unequivocally express its intent to abrogate Indian tribal sovereign immunity in the Bankruptcy Code. Courts from other circuits have held to the contrary by piecing together statutory text and decisional-law definitions to divine what Congress may have meant when it enacted the Bankruptcy Code. In so doing, those other courts both ignored the Supreme Court's proscription against implied abrogation and impermissibly resolved ambiguous language against Indian sovereignty. Verily, those other courts usurped Congress' exclusive prerogative. It is for Congress, and Congress

alone, to say whether it intends to abrogate Indian tribal sovereign immunity in a particular law. Congress did not do so in the Bankruptcy Code.

Appellees respectfully ask this Court to affirm the Bankruptcy Court's dismissal of the Trustees' four Complaints against Lower Sioux and its wholly owned tribal subsidiary, Dakota Services Enterprise d/b/a Dakota Finance Corporation.

II. THE BANKRUPTCY COURT CORRECTLY DISMISSED THE TRUSTEES' CLAIMS AGAINST LOWER SIOUX ON GROUNDS OF SOVEREIGN IMMUNITY

A. Indian Tribes Are "Distinct, Independent Political Communities."

Indian nations are ancient and unparalleled governments "pre-existing the Constitution" and "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1675-76, 56 L. Ed. 2d 106 (1978). "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Id*. at 55 (citing *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832)). Although they challenge the orderly flow-chart of the American political system, Indian tribes' sovereignty is limited only by Congress' plenary power. *Santa Clara Pueblo*, 436 U.S. at 56 (citing *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)).

The sovereign immunity of Indian tribes is distinct and apart from the sovereign immunity of states. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 755-56, 118 S. Ct. 1700, 1703, 140 L. Ed. 2d 981 (1998). This distinction between State and Indian sovereign immunity flows from the origins of the Constitution itself.

Specifically, because Indian tribes did not attend the Constitutional Convention, they never were "parties to the 'mutuality of ... concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" *Id.* (citing *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)).

B. Sovereign Immunity From Suit Deprives The Courts Of Jurisdiction To Determine Claims Against Indian Tribes.

Federal district courts are courts of limited jurisdiction and are able to hear only those matters authorized by the Constitution or Congress.[11] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994). The party asserting subject matter jurisdiction – the Trustees in these cases – bears the burden of proving the Court has subject matter jurisdiction. *Id.* Lack of subject matter jurisdiction may be raised at any time. *See* Fed. R. Civ. P. 12(h)(3). In determining whether it has subject matter jurisdiction, the Court should examine all jurisdictional facts presented to it. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). The Court is not limited to the matters embraced by the Complaint, as it would be in a Rule 12(b)(6) motion. *Id.*

Sovereign immunity from suit is a jurisdictional question. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1042-44 (8th Cir. 2000) (internal citations omitted). "It is undisputed that Indian tribes enjoy sovereign immunity." *Id.* (citing *Kiowa Tribe,* 523 U.S. at 754). "Indian tribes possess the 'inherent powers of a limited sovereignty which has never been extinguished.' " *E.E.O.C. v. Fond du Lac Heavy*

[11] Bankruptcy Courts are units of the District Court. *See* 28 U.S.C. §§ 151, 157.

Equip. & Const. Co., Inc., 986 F.2d 246, 248 (8th Cir. 1993) (citing *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 1085, 55 L.Ed.2d 303 (1978)). An Indian tribe is "subject to suit only where Congress has expressly authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 754.

C. Only Congress May Abrogate The Sovereign Immunity Of Indian Tribes, And Congress' Intent To Do So Must Be "Unequivocally Expressed."

i. The Supreme Court Standard.

Time and again, the Supreme Court has reaffirmed the existence and importance of tribal sovereign immunity from unconsented suit. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S.Ct. 1083, 1087, 94 L.Ed. 2d 244 (1987); *Wheeler*, 435 U.S. at 323. No suit against an Indian tribe will lie "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent…." *Santa Clara Pueblo*, 436 U.S. at 72.

As the Trustees concede,[12] any such abrogation "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (citing *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976)) (emphasis added).

The question before the Court is whether the Bankruptcy Code, which makes no reference whatsoever to Indian tribes, can be said to have "unequivocally expressed" Congress' intent to abrogate the sovereign immunity of Indian tribes. The answer is no.

[12] (*See* Trustee Br. at pp. 6-7.)

ii. Under Eighth Circuit Precedent, Abrogation Of Tribal Sovereign Immunity Will Not Be Found Unless The Statute Specifically Refers To Indian Tribes.

For reasons that become self-evident, the Trustees do not discuss or even cite to a single decision of the Eighth Circuit concerning the standard for finding Congressional abrogation of Indian tribal sovereign immunity. Instead, the Trustees devote the lion's share of their legal argument to a smattering of non-binding, wrongly decided cases from other circuits.[13]

The Trustees' reason for this evasion is understandable: the Eighth Circuit's faithful adherence to the Supreme Court's mandate in *Santa Clara Pueblo* proves too high a hurdle for the Trustees to pass. Under Eighth Circuit precedent, Congressional abrogation of tribal sovereign immunity is found only where there is a specific reference to Indian tribes somewhere in the statute.

For example, in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993), the Court upheld an injunction against the Tribe under the Hazardous Materials Transportation Act because "[e]very relevant subsection of section 1811 [49 U.S.C. § 1811(a)-(d)] contains the language 'state or political subdivision thereof or Indian tribe.'" 991 F.2d at 462.

Similarly, in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), the Court found an express abrogation of tribal sovereign immunity because a "person" subject to suit under the Resource Conservation and Recovery Act included "municipalities," which in turn were specifically defined elsewhere in the same

[13] (*See* Trustee Br. at pp. 8-12.)

act to include "an Indian tribe or authorized tribal organization." 867 F.2d at 1097. Moreover, the Court in *Blue Legs* observed that the legislative history of the statute demonstrated that Congress intended to prevent the specific harm of "Indian children playing in dumps on reservations." *Id*. (citing H.R.Rep. No. 94-1491, 94th Cong., 2d Sess. pt. 1, at 4 (1976) (House Report), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6241-42 (USCAN)).

In dismissing the Trustees' Complaints against Lower Sioux, the Bankruptcy Court expressly and without exception adopted the holding and rationale of the only court in our Circuit previously to have considered the issue of tribal sovereign immunity in the context of the Bankruptcy Code. In *In re National Cattle Congress*, 247 B.R. 259 (Bankr. N.D. Iowa 2000), Judge Kilburg applied the exacting standard for finding abrogation of tribal sovereign immunity as set forth by the Eighth Circuit in *Prairie Island* and *Blue Legs*, and held that Congress had not abrogated tribal sovereign immunity in the Bankruptcy Code.

Relying on the Supreme Court's decision in *Santa Clara Pueblo* and that of the Eighth Circuit Court of Appeals in *Prairie Island* and *Blue Legs*, Judge Kilburg rightly concluded that:

> Congress has not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code. The Code makes no specific mention of Indian tribes. Unlike States and foreign governments, Indian tribes are not specifically included in the § 101(27) definition of "governmental unit". In order to conclude Congress intended to subject Indian tribes to suit under the Code, the Court would need to infer such intent from language which does not unequivocally and unambiguously apply to Indian tribes. Considering the Supreme Courts [sic] pronouncements on tribal sovereign immunity, such an inference is inappropriate. Congress has not abrogated the Tribe's immunity from suit under the Bankruptcy

Code. The Tribe is not subject to suit by Debtor absent a clear waiver by the Tribe itself.

National Cattle Congress, 247 B.R. at 267 (emphasis added).[14]

iii. The Eighth Circuit's Requirement Of Specific Reference To "Indian Tribes" In Order To Find Abrogation Is Consistent With Other Circuit Courts Of Appeal.

Instead of addressing the Eighth Circuit's standard for abrogation of Tribal sovereign immunity, the Trustees make the unsubstantiated assertion that "[u]nequivocal expression does not require the presence of the magic words 'Indian Tribe' to abrogate sovereignty."[15] Curiously, the claimed source for the Trustees' assertion is *Santa Clara Pueblo*. That case says no such thing – not at the page identified by the Trustees nor elsewhere in the opinion. In fact, after examining legislation aimed specifically at providing civil-rights protection to Indians,[16] the Supreme Court concluded that Indian tribes were immune from suits under the law because "[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts." *Santa Clara Pueblo*, 436 U.S. at 59 (emphasis added).

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[14] The Bankruptcy Appellate Panel for the Tenth Circuit, in *In re Mayes*, 294 B.R. 145 (10th Cir. 2003), echoed the reasoning of Judge Kilburg. The panel in that case correctly found that the text of Sections 101(27) and 106 were not sufficient to abrogate tribal sovereign immunity because they did "not refer to Indian nations or tribes." *Id*. at 148 n.10. The panel observed that "[its] conclusion comports with the general proposition that Congress must make its intent clear and unequivocal, and actions against a tribe cannot merely be implied." *Id*. at 148-149 n.10 (citing *Santa Clara Pueblo*, 436 U.S. at 58-59).

[15] (*See* Trustee Br. at p. 7 (emphasis original) (purporting to cite *Santa Clara Pueblo*, 436 U.S. at 58.)

[16] The Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303.

Indeed, it is the Supreme Court's pointed gesture toward "the face" of a statute that proves the correctness of the Eighth Circuit's decisions in *Blue Legs* and *Northern States Power*. As the *National Cattle Congress* court observed, other Circuit Courts of Appeal insist, as does the Eighth Circuit, that Congress' intent must appear plainly in the words of the statute. 247 B.R. at 267. In *Bassett v. Mashantucket Pequot Tribes*, 204 F.3d 343 (2d. Cir. 2000), the Court held that "[n]othing on the face of the Copyright Act 'purports to subject tribes to the jurisdiction of the federal courts in civil actions' brought by private parties." 204 F.3d at 357 (citing *Santa Clara Pueblo*, 436 U.S. at 59) (emphasis added).

Similarly, the Eleventh Circuit refused to find abrogation of tribal sovereign immunity in the Americans With Disabilities Act because "[d]espite its apparent broad applicability, [] no specific reference to Indians or Indian tribes exists." *Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999)). The Court concluded "that Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Id.*

The precedential decisions of the Supreme Court and of the Eighth Circuit, consistent with those of the Second Circuit and the Eleventh Circuit, are adamant that Congress must refer specifically to Indian tribes in order to abrogate tribal sovereign immunity.[17]

[17] The Eleventh Circuit has held that even a statutory reference to Indian tribes was insufficient to find abrogation where the relevant provision referred specifically to "an

D. Congress Did Not Abrogate The Sovereign Immunity Of Indian Tribes To Bankruptcy Suits Because Congress Did Not Refer To Indian Tribes Anywhere In The Bankruptcy Code.[18]

The Trustees implicitly concede, as they must, that the Bankruptcy Code makes no mention of Indian tribes or suits against Indian tribes. There is no reference to Indian tribes in Section 106, which effects the abrogation.

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

11 U.S.C. § 106.

Nor is there any reference to Indian tribes within the definition of a "governmental unit" whose sovereign immunity is abrogated by Section 106.[19]

Indian tribe which has an agreement with the designated State agency," rather than all Indian tribes. *See Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1289-90 (11th Cir. 2001) (examining the Rehabilitation Act).

[18] Notably, the Supreme Court's decision in *Santa Clara Pueblo* – which is the touchstone for determining Congressional intent to abrogate tribal sovereign immunity – was issued on May 15, 1978 (*see* 436 U.S. at 49), a half a year before the Bankruptcy Code was enacted (*see* PL 95–598, November 6, 1978, 92 Stat 2549). Despite knowing what was required to abrogate sovereign immunity of Indian tribes, Congress elected not to so at that time, nor 16 years later when it amended Section 106 to clarify its intent with respect to the sovereign immunity of States. *See* House Report No. 103-835 (1994) (provided at Adv. No. 11-3154 at Doc. No. 17 at pp. 4-5).

> [The] United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27).

Nor is there any reference to Indian tribes in the few definitions provided by the Bankruptcy Code for the component types of governmental units enumerated in 11 U.S.C. § 101(27).

- "The term 'United States,' when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States." 11 U.S.C. § 101(55).
- "The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title." 11 U.S.C. § 101(52).
- "The term 'municipality' means political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40).[20]

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[19] By use of the term "means," Section 101(27) provides the exhaustive definition of the term. This is in contrast to the term "includes," which indicates the list is merely illustrative. *See, e.g.*, 11 U.S.C. § 101(31) ("The term 'insider' includes…."); *In re Rosen Auto Leasing*, 346 B.R. 798, 804 (B.A.P. 8th Cir. 2006).

[20] Congress' decision to not include Indian tribes within the definition of "municipality" in the Bankruptcy Code stands in contrast to that word's definition in the Resource Recovery and Conservation Act, which specifically includes Indian tribes. *See Blue Legs, supra,* 867 F.2d at 1097.

Under the plain text of the Bankruptcy Code, therefore, there is no unequivocally clear expression that Congress intended to abrogate an Indian tribe's sovereign immunity. There is no reference to Indian tribes in the waiver set forth in Section 106, nor within the component definitions of a "governmental unit" subject to Section 106's abrogation.[21]

E. The Cases Cited By The Trustees Are Not Binding Precedent And, In Any Event, Are Contrary To Supreme Court And Eighth Circuit Precedent.

Compelled to concede that the Bankruptcy Code makes no mention of Indian tribes or suits against Indian tribe, the Trustees urge this Court to adopt the flawed reasoning of courts from other circuits that Indian tribes must be an "other foreign or domestic government," as enumerated in Section 101(27), whose sovereign immunity was abrogated by Section 106.[22] Setting aside that those extra-circuit decisions are of no precedential weight against the Eighth Circuit's own decisions, those other decisions are simply incorrect. Those other decisions do double violence to the Supreme Court's edicts in the area of Indian sovereign immunity: Not only do they ignore the only canon of construction applicable to Indian sovereign immunity – that ambiguities must be resolved in favor of Indian sovereignty – they also wrongly characterize language that is at best ambiguous as an unequivocal expression of Congressional intent.

[21] *See Blue Legs*, *supra*, 867 F.2d at 1097.

[22] (*See* Trustee Br. at pp. 8-9.)

i. Indian-Law Canons Of Statutory Construction Mandate That Ambiguities Of Congressional Intent Be Resolved In Favor Of Tribal Sovereign Immunity.

Much of the Trustees' argument rests on the proposition that "[t]he legislative history shows Congress intended to define 'governmental unit' in the broadest sense."[23] The Trustees' argument not only miscomprehends the scope of the legislative history, but, more importantly, pays no heed to the sole principle of statutory construction applicable to Indian tribes: Ambiguities must be resolved in favor of Indian sovereignty.

"The standard principles of statutory construction do not have their usual force in cases involving Indian law…. '[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.'" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2404, 85 L.Ed. 2d 753 (1985) (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258, 84 L. Ed. 2d 169 (1985)).

When a federal statute is unclear as to its impact on tribal sovereign immunity abrogation, the Supreme Court has directed that "ambiguities of congressional intent must be resolved in favor of tribal sovereignty." *Fond du Lac Heavy Equip.*, 986 F.2d at 250 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 178, 109 S.Ct. 1698, 1708, 104 L.Ed.2d 209 (1989)).

> In matters involving federal Indian law, the Court must apply a discrete set of canons of construction. These canons require that treaties, agreements, statutes and executive orders be liberally construed in favor of the Indians. In addition, to the extent that federal Indian law is ambiguous, any ambiguity is construed liberally in favor of the Indians.

[23] (*See* Trustee Br. at pp. 7-8.)

White Earth Band of Chippewa Indians v. County of Mahnomen, 605 F.Supp.2d 1034, 1046 (D. Minn. 2009) (citations omitted). *See also Santa Clara Pueblo*, 436 U.S. at 60-61 (finding no abrogation of tribal sovereign immunity despite having in the past "frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights").

The Trustees' pleas for an expansive reading of the Bankruptcy Code's abrogation of sovereign immunity violates the only canon of construction applicable to this case, that ambiguity be construed liberally in favor of Indian sovereignty. Without expression of any intent specific to Indian tribes, Congress' general intent is irrelevant to the issue before the Court.

ii. The Ninth Circuit's Decision In *Krystal Energy*.

At the forefront of the cases crutching the Trustees' argument is the Ninth Circuit's decision in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004). The decision in *Krystal Energy* stands *Santa Clara Pueblo* on its head by engaging in the very type of implication the Supreme Court forbade. That impermissible implication is also contrary to the Eighth Circuit's decisions in *Blue Legs* and *Northern States Power*.

Despite superficially acknowledging the Supreme Court's admonitions in *Santa Clara Pueblo* that abrogation of tribal sovereign immunity must be "unequivocally expressed," the Ninth Circuit proceeded to employ a tortured syllogism to read the words "Indian tribes" into the statute. According to the Ninth Circuit, (1) the Supreme Court

(not Congress) has stated that Indian tribes are "domestic dependent nations;"[24] (2) a "domestic dependent nation" seems to be an "other foreign or domestic government" articulated in Section 101(27); so (3) by referring generically to all types of foreign or domestic governments, Congress must have intended to abrogate the sovereign immunity of Indian tribes. 357 F.3d at 1057-58. That the Ninth Circuit was forced to engage in this daisy chain of Congressional and case-law definitions belies any finding of unequivocal intent.

In an attempt to buttress its contorted analysis, the Ninth Circuit impermissibly expanded on the notion that unequivocal expression of abrogation may be found by patching together various bits of statutory text. 357 F.3d at 1058 (citing *Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1181-82 (10th Cir. 1999)). However, and as the Ninth Circuit concedes,[25] unlike the Safe Drinking Water Act examined by the Tenth Circuit in *Osage* and the Resource Conservation and Recovery Act examined by the Eighth Circuit in *Blue Legs*, nowhere does the Bankruptcy Code provide the express reference to "Indian tribes" necessary to tie the statutory patches together. [26]

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[24] For that matter, in the seminal decision from which the "domestic dependent nation" moniker was derived, the Supreme Court itself was far from certain whether Indian tribes were a domestic government. The full statement reads: "They may, more correctly, perhaps, be denominated domestic dependent nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17, 8 L.Ed. 25 (1831).

[25] 357 F.3d at 1058-59.

[26] The Trustees suggest that the Supreme Court's denial of certiorari to review the *Krystal Energy* decision is somehow meaningful. (*See* Trustee Br. at p. 9 n.1.) The denial of

iii. Other Cases Cited By The Trustees.

The other extra-circuit cases upon which the Trustee relies,[27] including those cited by the Ninth Circuit in *Krystal Energy*, are similarly incorrect because they impermissibly failed to resolve "ambiguities of congressional intent….in favor of tribal sovereignty."[28] Indeed, the inconsistent and far-ranging rationales of those other cases undercut any persuasive force.

Three cases, *In re Russell*, 293 B.R. 34 (Bankr. D. Ariz. 2003), *In re Vianese*, 195 B.R. 572 (Bankr. N.D.N.Y. 1995), and *In re Platinum Oil Properties, LLC*, 465 B.R. 621 (Bankr. D. N.M. 2011) merely state the rationale espoused by *Krystal Energy* that Indian tribes are domestic dependent nations and therefore must be "other foreign or domestic governments" within the meaning of Section 101(27). *Russell* protests too much, going to great pains to parse a false distinction between "implication" and "deduction." Indeed, the court's rationale centers on attacking the definition of "imply" set forth in Black's Law Dictionary. 293 B.R. at 39-40. Further, as the court in *Krystal Energy* observed,[29] the holding in *Vianese* was mere dicta, as its primary rationale for permitting suit against

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certiorari means nothing. *See, e.g., State of Md. v. Baltimore Radio Show*, 338 U.S. 912, 919, 70 S. Ct. 252, 255, 94 L. Ed. 562 (1950) ("[T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.")

[27] (*See* Trustee Br. at pp. 9-11.)

[28] *See Fond du Lac Heavy Equip.*, *supra*, 986 F.2d at 250.

[29] *See* 357 F.3d at 1058.

the Indian tribe was that the tribe had affirmatively waived sovereign immunity by filing a Section 523 adversary proceeding against the debtor in the first place. 195 B.R. at 575.

In *In re Sandmar Corp.*, 12 B.R. 910 (Bankr. D.N.M. 1981) and *In re Shape*, 25 B.R. 356 (Bankr. D. Mont. 1982), the courts did not actually consider abrogation of sovereign immunity from suit under Section 106. Instead, those decisions concerned the separate and distinct question of whether a particular law applies to Indian tribes, not whether suit against the tribe was barred by sovereign immunity. "Whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *National Cattle Congress*, 247 B.R. at 265 (citing *Florida Paraplegic*, 166 F.3d at 1130) (emphasis original).

Finally, in *In re Davis Chevrolet, Inc.*, 282 B.R. 6743 (Bankr. D. Ariz. 2002), the court held only that the tribe voluntarily waived its sovereign immunity by filing a proof of claim in the bankruptcy case. The court's finding of a waiver was predicated on general principles of waiver emanating from the tribe's participation in the bankruptcy case. It was not until after the court had performed its entire "same transaction or occurrence" analysis and had found the waiver that it noted "Section 106(b) supports this result." 282 B.R. at 683.[30] In fact, the *Davis Chevrolet* court was careful to point out that it was not deciding whether an Indian tribe was a governmental unit for purposes of

[30] The principal case relied upon by the *Davis Chevrolet* court, *In re Lazar*, 237 F.3d 967, 980-81 (9th Cir. 2001), expressly declined to consider abrogation of a state's sovereign immunity under Section 106 because there was a general waiver by filing a proof of claim.

Sections 106, noting that the question was a "disputed proposition," but one that the tribe was not contesting in that case. 282 B.R. at 678 n.2; *Id.* at 683 n.5.

But, in any event, the Trustees' argument that Indian tribes plausibly could meet the definition of "other domestic government" by combining tidbits of decisional-law definitions and a liberally expansive reading of the Congressional record, misses the point. The Supreme Court requires that abrogation of sovereign immunity must be "unequivocally expressed" by Congress. That reasonable minds may differ as to what Congress intended when it enacted Sections 106 and 101(27), that several august courts have come to opposite conclusions, proves only that Congress did not speak unequivocally. At best Congress has spoken ambiguously, thereby invoking the only canon of construction applicable to this issue: "ambiguities of congressional intent must be resolved in favor of tribal sovereignty."[31]

The Bankruptcy Court was correct to conclude that the Trustees' suits against Lower Sioux are barred by sovereign immunity.

III. THE BANKRUPTCY COURT CORRECTLY DISMISSED THE TRUSTEES' CLAIMS AGAINST DAKOTA FINANCE CORPORATION ON GROUNDS OF SOVEREIGN IMMUNITY

It is well-established law that tribal sovereign immunity extends to arms or agencies of Indian tribes. *See, e.g., Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Weeks Const., Inc. v. Oglala Sioux Housing*

[31] *Fond du Lac Heavy Equip.*, 986 F.2d at 250.

Authority, 797 F.2d 668, 671 (8th Cir. 1986). "[A]n action against a tribal enterprise is, in essence, an action against the tribe itself." *Barker v. Menominee Nation Casino*, 897 F.Supp. 389, 393 (E.D. Wis. 1995).

A. Participation In Economic Activities Does Not Erode Tribal Sovereign Immunity.

The Trustees incorrectly assert that Dakota Finance Corporation's participation in economic activities is somehow relevant to whether it, as an arm of Lower Sioux, enjoys the Tribe's sovereign immunity from suit. (*See* Trustee Br. at pp. 13-14.) In support of this position, the Trustees cite to no Federal decisions, as might be expected when discussing questions of Federal law. Instead, the Trustees cite to two decisions of the Minnesota Court of Appeals.

The United States Supreme Court itself has held, repeatedly, that engaging in economic activities is of no bearing whatsoever whether an Indian tribe is immune from suit. "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe*, 523 U.S. at 760 (cataloging prior decisions).

Moreover, the Trustees' primary state-court case is entirely irrelevant because it involves a different and inapposite concept of Indian law. As is explained in the case cited by the Trustee:

> The Indian Reorganization Act of 1934 allows Native American communities to organize in two different ways: (1) by adopting a tribal constitution under section 16 of the Act, *see* 25 U.S.C. § 476; and (2) by incorporating pursuant to a corporate charter under section 17 of the Act, *see* 25 U.S.C. § 477. A section 16 constitutional entity and section 17 corporate entity are generally considered distinct organizations.

Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Cmty., 520 N.W.2d 167, 169 (Minn. App. 1994).

In *Dacotah Properties*, the Prairie Island Indian Community was acting directly under a Section 17 federal corporate charter. That federal charter expressly waived the tribe's sovereign immunity by granting the power to "[t]o sue and to be sued in courts of competent jurisdiction within the United States." *Id*. at 170.

By contrast, Lower Sioux is a Section 16 constitutional community. (*See* Lower Sioux Resolution 07-239, attached as Exhibit B to the Affidavit of Gabriel Prescott dated November 22, 2011, Adv. No. 11-3154 at Doc. No. 17 at pp. 24-25.) *See also Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379, 383 (Minn. App. 1995) (distinguishing Lower Sioux from the Prairie Island tribe in *Dacotah Properties*). As *Klammer* makes clear, the business enterprises of a Section 16 tribe (Lower Sioux in that case) are endowed with the sovereign immunity of the tribe. 535 N.W.2d at 383.

B. Dakota Finance Corporation Is An Arm Of Lower Sioux.

Having established that participation in economic activity is not relevant, the question becomes whether Dakota Finance Corporation qualifies as an "arm" of the Tribe subject to the same sovereign immunity from suit. Unlike the issue of abrogation of sovereign immunity, the Eighth Circuit has not yet "establish[ed] a specific test or list of factors for courts to consider when determining whether an organization is entitled to tribal sovereign immunity. *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's*

Health Bd., ___F. Supp. 2d. ____, 2012 WL 113866 *10 (D.S.D. Jan. 13, 2012) (cataloging cases from several Federal and state courts).

The most commonly accepted test is the "subordinate economic entity" test,[32] which was articulated by the Tenth Circuit Court of Appeals as comprising six factors:

1) The method of creation of the economic entities;
2) Their purpose;
3) Their structure, ownership, and management, including the amount of control the tribe has over the entities;
4) The tribe's intent with respect to sharing of its sovereign immunity;
5) The financial relationship between the tribe and the entities;
6) The policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether these policies are served by granting immunity to the economic entities.

Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1188 (10th Cir. 2010). Examination of those six factors demonstrates that Dakota Finance Corporation is an arm of Lower Sioux, and therefore immune from suit.

On May 5, 2010, the Lower Sioux Indian Community Tribal Council adopted Resolution 10-94 clarifying the names of Dakota Futures Inc. and the Dakota Finance Corporation. (*See* Lower Sioux Indian Community Tribal Council Resolution 10-94, attached as Exhibit A to the Prescott Affidavit, Adv. No. 11-3154 at Doc. No. 17 at pp. 21-22.) This resolution clarified that both names have no legal existence apart from Dakota Services Enterprise ("DSE"). (*Id.*)

DSE was created by Lower Sioux Indian Community Tribal Council Resolution 07-239. (*See* Prescott Affidavit Ex. B, Adv. No. 11-3154 at Doc. No. 17 at pp. 24-25.)

[32] *See id.*

DSE (including its various assumed or business names) was created pursuant to Lower Sioux Community law. DSE is wholly owned by Lower Sioux and is a "subordinate economic organization and an arm and instrumentality of the Community established and doing business under the Community Constitution [not a federal charter as in *Dacotah Properties*] and exercising governmental powers…." (Adv. No. 11-3154 at Doc. No. 17 at p. 26 Article IV.)

Lower Sioux's express purpose in establishing DSE was "to fulfill governmental purposes of generating Community governmental revenues by promoting economic development and self-sufficiency through business development." (Adv. No. 11-3154 at Doc. No. 17 at p. 26 Article III.) Furthermore, the Community Council has clearly expressed its desire that DSE be covered by the Community's "sovereign immunity from suit to the same extent that the Community would have such sovereign immunity if it has directly engaged in the activities undertaken by DSE." (Adv. No. 11-3154 at Doc. No. 17 at p. 26 Article IV.)

DSE therefore fulfills all of the factors that courts examine in order to determine whether a tribal business constitutes an arm of an Indian tribe. Consequently, the sovereign immunity of the Lower Sioux Indian Community applies with equal force to its subordinate economic organizations, including DSE doing business as Dakota Finance Corporation.

CONCLUSION

The binding precedent of the Supreme Court in *Santa Clara Pueblo* and of the Eighth Circuit in *Blue Legs* and *Northern States Power* requires that Congressional intent

to abrogate tribal sovereign immunity must be unequivocally expressed by specific reference to Indian tribes. The contrary holdings of *Krystal Energy* and other cases from outside of our Circuit wrongly resort to impermissible implication of Congress' intent. By not speaking, Congress has spoken. Indian tribes, such as Lower Sioux, are immune from suit in bankruptcy cases. The Bankruptcy Court correctly held that Lower Sioux and Dakota Finance Corporation are immune from suit by the Trustees. The Bankruptcy Court should be affirmed.

RESPECTFULLY SUBMITTED ON APRIL 9, 2012.

BY: /s/ Tyler D. Candee

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APPELLEES' CERTIFICATION OF INTERESTED PARTIES

Certification Required by L.R.B.A.P. 8th Cir. 8010(A)(b)(1): The undersigned, counsel of record for Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation, certifies that the following listed parties have an interest in the outcome of this appeal. These representations are made to enable the judges of this panel to evaluate possible disqualification or recusal.

Directly Interested Parties

Appellants Paul W. Bucher, as Trustee of the Chapter 7 bankruptcy estate of Linda Rose Whitaker; Paul W. Bucher, as Trustee of the Chapter 7 bankruptcy estate of Morris Jerome Pendleton, Sr. and Constance Louise Pendleton; and Michael S. Dietz, as Trustee of the Chapter 7 bankruptcy estate of Cecil Ray Barth and Deanna Joan Barth.

Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation.

Indirectly Interested Parties

The Defendants in the Adversary Proceedings identified in Appellant's Certification of Related Cases; and

All entities that have or may have claims against the Chapter 7 bankruptcy estates of Linda Rose Whitaker, Morris Jerome Pendleton, Sr. and Constance Louise Pendleton, and Cecil Ray Barth and Deanna Joan Barth.

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APPELLEES' CERTIFICATION OF RELATED CASES

Certification Required by L.R.B.A.P. 8th Cir. 8010(A)(b)(2): The undersigned, counsel of record for Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation, certifies that the following cases are related to the four cases in this consolidated appeal:

None.

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APPELLEES' CERTIFICATION OF LENGTH OF BRIEF

Certification Required by L.R.B.A.P. 8th Cir. 8010(A)(c): The undersigned, counsel of record for Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation, certifies that the body of Appellees' principal brief, exclusive of pages containing the table of contents, tables of citations, statement of the basis of appellate jurisdiction, statement of the issues and standard of review, contains 6,405 words, including in footnotes. Appellees' principal brief was prepared using Microsoft Office Word 2007.

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APPELLEES' IDENTIFICATION OF RELEVANT PORTIONS OF THE RECORD

Bucher, Trustee v. Dakota Finance Corporation Appeal No. 12-6004	Adv. No. 11-3154
Complaint	Docket No. 1
Answer	Docket No. 7
Order for Scheduling Conference	Docket No. 8
Order for Status Conference	Docket No. 11
Stipulation for Briefing Schedule on Motion to Dismiss	Docket No. 14
Order for Briefing Schedule on Motion to Dismiss	Docket No. 15
Motion to Dismiss Adversary Proceeding by Dakota Finance Corporation	Docket No. 17
Response to Motion to Dismiss Adversary Proceeding	Docket No. 18
Reply Memorandum in Support of Motion to Dismiss	Docket No. 20
Order Granting Motion to Dismiss	Docket No. 22
Judgment Dismissing Adversary Proceeding	Docket No. 23
Notice of Appeal	Docket No. 26

Dietz, Trustee v. The Lower Sioux Indian Community *et al.* Appeal No. 12-6005	Adv. No. 11-3233
Complaint	Docket No. 1
Answer of The Lower Sioux Indian Community	Docket No. 14
Order for Scheduling Conference	Docket No. 15
Stipulation for Briefing Schedule on Motion to Dismiss	Docket No. 18
Order for Briefing Schedule on Motion to Dismiss	Docket No. 19
Motion to Dismiss Adversary Proceeding by The Lower Sioux Indian Community	Docket No. 21
Response to Motion to Dismiss Adversary Proceeding	Docket No. 22
Reply Memorandum in Support of Motion to Dismiss	Docket No. 23
Order Granting Motion to Dismiss	Docket No. 25
Judgment Dismissing Complaint as to The Lower Sioux Indian Community	Docket No. 26
Notice of Appeal	Docket No. 30-1
Order Granting Motion to Stay Pending Appeal	Docket No. 36

Bucher, Trustee v. The Lower Sioux Indian Community *et al.* Appeal No. 12-6006	Adv. No. 11-3234
Complaint	Docket No. 1
Order Transferring Adversary Proceeding to The Honorable Dennis D. O'Brien	Docket No. 11
Answer of The Lower Sioux Indian Community	Docket No. 15
Order for Scheduling Conference	Docket No. 16
Stipulation for Briefing Schedule on Motion to Dismiss	Docket No. 19
Order for Briefing Schedule on Motion to Dismiss	Docket No. 20
Motion to Dismiss Adversary Proceeding by The Lower Sioux Indian Community	Docket No. 22
Response to Motion to Dismiss Adversary Proceeding (Amended)	Docket No. 24
Reply Memorandum in Support of Motion to Dismiss	Docket No. 25
Order Granting Motion to Dismiss	Docket No. 27
Judgment Dismissing Complaint as to The Lower Sioux Indian Community	Docket No. 28
Notice of Appeal	Docket No. 32
Order Granting Motion to Stay Pending Appeal	Docket No. 41

Bucher, Trustee v. The Lower Sioux Indian Community *et al.* Appeal No. 12-6007	Adv. No. 11-3235
Complaint	Docket No. 1
Answer of The Lower Sioux Indian Community	Docket No. 13
Order for Scheduling Conference	Docket No. 14
Stipulation for Briefing Schedule on Motion to Dismiss	Docket No. 17
Order for Briefing Schedule on Motion to Dismiss	Docket No. 18
Motion to Dismiss Adversary Proceeding by The Lower Sioux Indian Community	Docket No. 20
Response to Motion to Dismiss Adversary Proceeding (Amended)	Docket No. 23
Reply Memorandum in Support of Motion to Dismiss	Docket No. 24
Order Granting Motion to Dismiss	Docket No. 26
Judgment Dismissing Complaint as to The Lower Sioux Indian Community	Docket No. 27
Notice of Appeal	Docket No. 31
Transcript of Hearing	Docket No. 38 (not available on PACER)
Order Granting Motion to Stay Pending Appeal	Docket No. 42

CERTIFICATE OF SERVICE

X I hereby certify that on April 9, 2012, I electronically filed

Principal Brief of Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation; and

Appellees' Identification of Relevant Portions of the Record

with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

__ I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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CERTIFICATION REGARDING ELECTRONICALLY FILED DOCUMENTS

Certification Required by L.R.B.A.P. 8th Cir. 8008(A)(a): The undersigned, counsel of record for Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation, certifies that he has signed the original Principal Brief of Appellees The Lower Sioux Indian Community and Dakota Services Enterprise d/b/a Dakota Finance Corporation, including certifications appended thereto, and that he will maintain said originals for the time required by L.R.B.A.P. 8th Cir. 8008(A)(a).

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