UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Sheldon Peters Wolfchild, et al., *Plaintiffs,* v. Redwood County, et al., *Defendants.*	Ct. File No. 0:14-cv-01597-MJD-FLN

MEMORANDUM OF THE LOWER SIOUX INDIAN COMMUNITY IN SUPPORT OF ITS MOTION FOR RULE 11 SANCTIONS

INTRODUCTION

The Lower Sioux Indian Community ("Community") respectfully moves the Court pursuant to its inherent authority and Fed. R. Civ. P. 11(b) and (c) for an order imposing sanctions against Plaintiffs and their Attorney, Mr. Erick G. Kaardal. Plaintiffs and their Attorney knowingly and willfully filed pleadings with the Court without any evidence or law to support the Court's jurisdiction over the Community, and advanced claims that are contrary to and ignore long-settled legal authority. Sanctions are appropriate in this case because no reasonable and competent attorney having conducted a reasonable inquiry into the law and the facts could have concluded that the claims asserted against the Community were supported by existing law, or constituted a non-frivolous argument for extending, modifying or reversing existing law or for establishing new law. Sanctions are necessary in this case to deter Plaintiffs and their Attorney from

further vexatious litigation and to compensate the Community for the costs and attorneys' fees it has incurred in defending against Plaintiffs' frivolous Amended Complaint.

BACKGROUND

This case is a repackaging of claims, legal principles and arguments that the Plaintiffs and their Attorney litigated and lost before the United States Court of Federal Claims ("Court of Claims") and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). The prior litigation spanned 11 years and resulted in nine reported decisions—*Wolfchild I-IX*. [1] Throughout *Wolfchild I-IX*, the Plaintiffs advanced multiple and conflicting arguments on the very issues central to this case; specifically, whether or not the Secretary of the Interior set aside and/or conveyed 80 acres of land to individual loyal Sioux under the Act of February 16, 1863 (the "1863 Act"). In *Wolfchild IX*,[2] the Federal Circuit rejected each of plaintiffs' claims, specifically holding that:

[1] In this memorandum, the Community cites to the record in the *Wolfchild v. United States* litigation, denoting the nine significant reported decisions as *Wolfchild I-IX*. *See Wolfchild v. United States*, 62 Fed. Cl. 521 (2004) ("*Wolfchild I*"); *Wolfchild v. United States*, 62 Fed. Cl. 779 (2005) ("*Wolfchild II*"); *Wolfchild v. United States*, 77 Fed. Cl. 72 (2007) ("*Wolfchild III*"); *Wolfchild v. United States*, 72 Fed. Cl. 511 (2006) ("*Wolfchild IV*"); *Wolfchild v. United States*, 78 Fed. Cl. 472 (2007) ("*Wolfchild V*"); *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) ("*Wolfchild VI*"); *Wolfchild v. United States*, 96 Fed. Cl. 302 (2010) ("*Wolfchild VII*"); *United States*, 101 Fed. Cl. 54 (2011) ("*Wolfchild VIII*"); *Wolfchild v. United States*, 731 F.3d 1280 (Fed. Cir. 2013) ("*Wolfchild IX*").

[2] *Wolfchild IX*, 731 F.3d 1280.

1) Plaintiffs received no property rights under the 1863 Act;[3] and

2) U.S. conveyances of lands set aside under the 1863 Act to non-Indian third parties were legal.[4]

On March 10, 2014, the U.S. Supreme Court denied *certiorari*.[5]

Despite these unequivocal rulings, two months after the Supreme Court's decision, on May 20, 2014, Plaintiffs and their Attorney filed a Complaint with this Court reasserting the previously rejected claims, but this time against new defendants—the Community, 75 individual land owners, Renville, Redwood and Sibley Counties, and Paxton, Sherman, Honner, Birch Cooley and Moltke Townships.[6] The Complaint alleged the same set of facts and legal theories fully adjudicated and resolved in *Wolfchild I-IX*, namely that Plaintiffs' purported ancestors received 12 sections of property under the 1863 Act and that the United States illegally conveyed the property to third parties.[7]

This Court dismissed Plaintiffs' claims against the Community with prejudice, finding it lacked subject matter jurisdiction over the Community "[b]ecause there is no evidence or even an allegation that the Community has waived sovereign immunity with respect to the lands in which it has an interest…." The Court also dismissed Plaintiffs' case for want of a private right of action under the 1863 Act.[8]

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[3] *Wolfchild IX*, 731 F.3d at 1292-93.
[4] *Id.*
[5] *See* Pet. for Writ of Cert., *Wolfchild v. United States*, 134 S. Ct. 1516 (2014); Pet. for Writ of Cert., *Zephier v. United States*, 134 S. Ct. 1516 (2014).
[6] *See* Comp., ¶¶ 8, 50, Dkt. 1 (May 20, 2014).
[7] Comp. at ¶¶ 37-48, 83-89, 97-101, 106-10; *see also* First Am. Comp. at 36-47, 83-96, 99-121, 126-148.
[8] *Wolfchild v. Redwood County, et al.*, Civil No. 14-1597 (D. Minn. 2015).

Two weeks after Plaintiffs filed their Complaint in this case, the Community engaged Plaintiffs' Attorney in an effort to avoid the unnecessary expense of this litigation. On June 2, 2014, the Community sent Plaintiffs' Attorney a letter notifying him that Plaintiffs' claims were barred by tribal sovereign immunity, *res judicata*, and failure to join the United States as the party that holds legal title to the Community's reservation trust lands.[9] The letter demanded that Plaintiffs withdraw the Complaint "so that the Community can avoid further expense in responding to it."[10] By letter dated June 24, 2014, Plaintiffs' Attorney advised the Community of his refusal to withdraw the Complaint.[11] The Community, therefore, filed an Answer to the Complaint on June 25, 2014,[12] and filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12 and 19 on August 5, 2014.[13]

On September 22, 2014, Plaintiffs filed a First Amended Complaint,[14] but the Amended Complaint failed to address any of the defects identified in the Community's June 2, 2014 letter.[15] The Community filed an Answer to the Amended Complaint on September 25, 2014,[16] a Motion to Dismiss the Amended Complaint on September 26,

[9] Halloran Aff. ¶ 3; *see also* Ex. 1. (Ltr. of M. Magnuson and J. Halloran to E. Kardaal (June 2, 2014)).
[10] *Id.*
[11] *Id.* at ¶ 4; *see also* Ex. 2 (Ltr. of E. Kardaal to M. Magnuson (June 24, 2014)).
[12] Lower Sioux Indian Community Answer, Dkt. 24 (June 25, 2014); *see also* Lower Sioux Indian Community Am. Answer to First Am. Comp., Dkt. 154 (Sept. 25, 2014).
[13] Lower Sioux Indian Community Mot. Dismiss Comp., Dkt. 76 (Aug. 5, 2014).
[14] *See* First. Am. Comp., Dkt. 120 (Sept. 22, 2014).
[15] Halloran Aff. ¶ 5.
[16] Lower Sioux Indian Community Sep. Answer to Am. Comp., Dkt. 154 (Sept. 24, 2014).

2014,[17] and a Memorandum in Support of its Motion to Dismiss the Amended Complaint on September 26, 2014.[18]

On November 4, 2014, the Community sent another letter to Plaintiffs' Attorney informing him that the Amended Complaint failed to correct the defects of the original complaint, and that it contained claims and allegations wholly unfounded in law and fact[19] and contrary to settled legal authority from the Supreme Court, Congress, the Court of Appeals for the Eighth Circuit and other federal courts.[20] The Community asked that the First Amended Complaint be withdrawn so that the Community could avoid the unnecessary expense of defending the frivolous claims.[21] Plaintiffs ignored the Community's letter.[22]

On November 25, 2014, the Community served Plaintiffs with a Rule 11 Motion for Sanctions and advised Plaintiffs' Attorney that the Motion would be filed if the Amended Complaint was not withdrawn within 21 days. [23] Again, the Plaintiffs' ignored the Community's letter and Motion. Chief Judge Michael J. Davis heard oral arguments

[17] Lower Sioux Indian Community Mot. Dismiss First Am. Comp., Dkt. 162 (Sept. 26, 2014).
[18] Lower Sioux Indian Community Mem. in Support of Mot. to Dismiss First Am. Comp., Dkt. 165 (Sept. 26, 2014).
[19] Halloran Aff. ¶ 6; *see also* Ex. 3 (Ltr. of J. Halloran and M. Magnuson to E. Kardaal (Nov. 4, 2014)).
[20] *See* Pl's Mem. Opp. Mot. Dismiss, 10-31, Dkt. 185 (Sept. 26, 2014).
[21] Halloran Aff. ¶ 6; *see also* Ex. 3 (Ltr. of J. Halloran and M. Magnuson to E. Kardaal (Nov. 4, 2014)).
[22] Halloran Aff. ¶ 7.
[23] Halloran Aff. ¶ 8; *see also* Ex. 4 (Lower Sioux Indian Community Mot. Sanctions (Nov. 25, 2014)).

on December 11, 2014 on the Community's Motion to Dismiss,[24] and the Court dismissed Plaintiffs' claims with prejudice on March 5, 2015.[25]

ARGUMENT

I. Pursuant to its inherent authority and Rule 11, the Court should impose sanctions against Plaintiffs and their Attorney for knowingly making legal assertions that are blatantly contrary to settled law.

The Court can impose sanctions under two distinct authorities, both of which are appropriate here. First, the Court's "inherent power includes the discretionary 'ability to fashion an appropriate sanction for conduct which abuses the judicial process.'"[26] Where a litigant abuses the judicial process, whether or not the conduct was bad faith, the Court enjoys significant discretion in its choice of a sanction.[27] Where an attorney acts in bad faith, the Court may assess attorneys' fees as a sanction.[28]

Second, Rule 11(c) of the Federal Rules of Civil Procedure authorizes the Court to impose a range of sanctions, including attorneys' fees, against an attorney who asserts a claim with no legal merit.[29] In evaluating a Rule 11 violation, "the District Court must determine whether a reasonable and competent attorney would believe in the merit of an

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[24] *See* Lower Sioux Indian Community Notice of Hearing on Mot., Dkt. 78 (Oct. 7, 2014).
[25] *See* Judgment, Dkt. 197 (March 5, 2015); *see also Wolfchild, et. al. v. Redwood County, et al.*, 14-cv-1597 (March 5, 2015).
[26] *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)).
[27] *Id.*, 354 F.3d at 745.
[28] *Id*. at 751.
[29] *See* Fed. R. Civ. P. 11(b)(1-3) and (c); *Clark v. United Parcel Serv., Inc*., 460 F.3d 1004, 1008 (8th Cir. 2006).

argument."[30] A violation of Rule 11 occurs when a pleading or paper contains claims or contentions not warranted by existing law or by a non-frivolous argument for the extension or reversal of existing law,[31] or contains allegations or factual contentions that lack evidentiary support.[32] An attorney must conduct a reasonable inquiry of the legal basis for a claim before filing.[33] To be reasonable, an attorney's inquiry must uncover a factual and legal basis for the plaintiffs' allegations.[34] Rule 11 imposes on an attorney a "duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable[.]"[35]

Litigants who file claims with patent jurisdictional defects[36] or maintain arguments contrary to settled law[37] violate Rule 11. Sanctions under Rule 11 may be imposed whether the conduct is due to ignorance or bad faith.[38]

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[30] *Coonts v. Potts*, 316 F.3d 745, 754 (8th Cir. 2003) (internal citations omitted).
[31] Fed. R. Civ. P. 11(b)(2).
[32] Fed. R. Civ. P. 11(b)(3); *see also Clark*, 460 F.3d at 1008.
[33] *Coonts*, 316 F. 3d at 753
[34] *Id.*
[35] Fed. R. Civ. P. 11 advisory committee notes.
[36] *See e.g.*, *Bethesda Lutheran Homes and Servs., Inc. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001); *Charland v. Little Six, Inc.*, 112 F.Supp. 2d 858, 863-64 (D. Minn. 2000).
[37] *See e.g.*, *DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989); *In re Kunstler*, 914 F.2d 505, 517-18 (4th Cir. 1990); *Matthews v. Freedman*, 128 F.R.D. 194, 201-02 (E.D. Pa. 1989), aff'd, 919 F.2d 135 (3rd Cir. 1990); *MHC Inv. Co. v. Racom Corp.*, 209 F.R.D. 431, 434-46 (S.D. Iowa 2002), *aff'd*, 323 F.3d 620 (8th Cir. 2003); *Welk Murphy v. Aurora Loan Services, LLC*, 859 F.Supp.2d 1016, 1020-21 (Minn. D.C. 2012).
[38] *DeSisto College, Inc. v. Line*, 888 F.2d at 757 (insistence on maintaining a legal stance untenable with law demonstrates either an ignorance for the law, and thus inadequate research, or some intent to mislead the trial court as to the present state of this Circuit's precedent, and thus bad faith. Signing the complaint in either of the above situations is a violation of Rule 11 and warrants sanctions).

Plaintiffs' conduct warrants sanctions under the Court's inherent powers and Rule 11. Plaintiffs and their Attorney knew that there was no legal basis for filing this action against the Community, and the fatal defects of the Complaint were repeatedly and explicitly brought to Plaintiffs' attention. Nevertheless, they chose to maintain this action, and their Attorney chose to advance arguments completely at odds with well-settled facts and legal principles and contrary to established precedent.

A. Sovereign Immunity

The Community is a federally recognized Indian Tribe organized under a Constitution and By-laws[39] adopted and approved in 1936.[40] The Community's name appears on the List of Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs ("BIA"), published by the Secretary of the Interior.[41] Throughout its eighty-year history, the sovereign status of the Community has been repeatedly recognized and reaffirmed by the Courts.[42]

It is a well-settled principle of Federal Indian law that Indian tribes exercise "inherent sovereign authority."[43] As a corollary to its sovereignty and self-governance," the Community possesses "common-law immunity from suit traditionally enjoyed by

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[39] *See, e.g.*, http://www.lowersioux.com/pdffiles Lower%20Sioux%20Indian% 20Community %20Constitution.pdf (last visited March 23, 2015).
[40] 25 U.S.C. § 461 *et seq.*
[41] 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014).
[42] *Lower Sioux Indian Community v. United States*, 163 Ct. Cl. 329, 335 (1963); *Lower Sioux Indian Community v. United States*, 36 Ind. Cl. Comm. 295, 316 (1975); *Maxam v. Lower Sioux Indian Community*, 829 F.Supp.2d 277, 281 (D.Minn.1993); *Hester v. Redwood County*, 885 F.Supp.2d 934, 947 (D.Minn. 2012).
[43] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 U.S. (1 Pet.) 1, 17 (1831)).

sovereign powers."[44] This immunity exists for all federally recognized Indian tribes regardless of when or how a tribe was recognized or organized.[45] Absent specific Congressional authorization, a Court does not have subject matter jurisdiction over an action against a federally recognized Indian tribe.[46]

Plaintiffs and their Attorney acted in bad faith, and with reckless disregard for the law, when they asserted claims against the Community without regard to its sovereign status. No reasonably competent attorney, after even a cursory review of the law and facts, could have concluded that the law supported the claims alleged against the Community. Moreover, any competent attorney, particularly one who has spent the last dozen years advancing spurious claims involving the same Indian tribe, would know that a complaint needed to plead *some* basis for the Court's power over the Community as a sovereign.[47] And any doubt about the need for pleading a jurisdictional basis over the Community would have been made clear to the Plaintiffs upon receipt of the Community's June 2, 2014 letter. Remarkably, even after Plaintiffs received the Community's letter, the Plaintiffs *generally* alleged jurisdiction in the Amended Complaint, but offered "no evidence or even an allegation that the Community has

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[44] *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (*quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986)).
[45] 25 U.S.C. § 476 (f) and (g), *See also* H.R. Rep. No. 103-781, 3-4 (1994) (providing that all recognized tribes have equal sovereign rights).
[46] *Bay Mills Indian Community*, 134 S. Ct. at 2031.
[47] *See* Fed. R. Civ. P. 8; *Jefferson v. United States*, 104 Fed. Cl. 81, 88 (2012) (citing *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009); C. Wright, A. Miller, Federal Practice and Procedure, § 1212 (3d ed. 2002).

waived sovereign immunity."[48] By failing to provide any evidence to support the Court's jurisdiction over the Community, and by ignoring the well-settled doctrine of tribal immunity, Plaintiffs and their Attorney violated Rule 11(b)(2) and (3).

Plaintiffs' outrageous and late-made argument that the Community is not entitled to sovereign immunity because it is not a tribe is not supported by existing law, nor can it be characterized as a nonfrivolous argument for the modification, extension, or reversal of existing law. The argument advanced by Plaintiffs relied on an obscure 1938 Solicitor's Opinion that Congress statutorily repudiated more than twenty years ago.[49] As this Court specifically held:

> [T]he Community is a federally recognized tribe that has equal sovereign rights, as the Solicitor Opinion for the Department of Interior issued in 1938 **no longer reflects a correct interpretation of law.** *Redwood County*, 15-cv-1597 at 16 (citing 25 U.S.C. § 476(f) and(g); H.R. Rep. No. 103-781, 3-4 (1994) (emphasis added)).

Rather than attempting to distinguish the application of Section 476, Plaintiffs simply ignored it. They did not cite to it, distinguish it, nor discuss it. No attorney can argue for the modification, extension, or reversal of law without acknowledging or discussing it.[50]

Plaintiffs and their Attorney willfully and intentionally refused to acknowledge the Community's immunity from unconsented suit and ignored a federal statute that expressly and unequivocally abolished the late made theory that they advanced in argument to the Court. Plaintiffs' untenable legal positions "demonstrate[] either an

[48] *Redwood County,* 14-cv-1597 at 17.
[49] 25 U.S.C. § 476 (f) and (g).
[50] *Crookham v. Crookham*, 914 F.2d 1027, 1029-30 (8th Cir. 1990) (attorney must discuss or be aware of existing law to make a non-frivolous argument for a change).

ignorance of the law, and thus inadequate research, or some intent to mislead the trial court . . . and thus bad faith."[51] Regardless, Plaintiffs' and their Attorney have clearly violated Fed. R. Civ. P. 11.

B. Failure to Join the United States as an Indispensable Party

The Plaintiffs' Amended Complaint was also defective because it sought relief from the Community that only the United States could provide. Fed. R. Civ. P. 19 requires the court to dismiss an action if a necessary party cannot be joined. By pursuing their claims against the Community and its reservation lands, Plaintiffs and their Attorney blatantly ignored binding precedent from the Supreme Court, Eighth Circuit, and other federal courts that require the United States' presence as a party to this action.

1. Lands held in trust

The United States holds title to the Community's trust lands.[52] It is uncontroverted that a "proceeding against property in which the United States holds an interest is a proceeding against the United States."[53] In any action that may alienate Indian trust land, judgment cannot be rendered without divesting the United States' title.[54] The United States is "therefore an indispensable party to any suit to establish or

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[51] *DeSisto*, 888 F.2d at 766.
[52] *United States v. Shoshone Tribe*, 304 U.S. 111, 115, 117 (1938) (United States holds "legal title" to trust lands); *see also* F. Cohen, Handbook of Federal Indian Law § 15.04, 999 (2012).
[53] *Minnesota v. United States*, 305 U.S. 382, 386 (1939).
[54] *Id.* (action to condemn right of way over allotted lands in which the U.S. holds fee title cannot proceed without the U.S.); *Fontelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 145 (8th Cir. 1970) (absent U.S. consent, action against Indian lands in which U.S. holds an interest could not proceed); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975) (U.S. is necessary party to any action in which relief sought might

acquire an interest in [] [trust] lands"[55] and it cannot be joined because it is immune from suit.[56]

Plaintiffs simply ignored this well-settled law. They made no cogent attempt to address the application of an unbroken line of cases—including Supreme Court authority—*specifically holding that the United States is indispensable to an action that seeks to alienate trust lands*.[57] Instead, they attempted to pass off the fiction that they are a tribe and then analogized to clearly inapposite cases brought by *Indian tribes* to *protect* their lands.[58] But, the Court in *Wolfchild IX* had already disposed of this fiction and dispositively determined that the Plaintiffs are not a tribe,[59] and their claims in this lawsuit seek to *alienate*—not protect—Indian lands. No competent attorney would believe in the merits of an action that seeks to divest the United States of its lands without naming the United States as a party.

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interfere with its obligation to protect Indian lands against alienation); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460 (10th Cir. 1951) (U.S. is indispensable in action that may alienate Indian lands).

[55] *Minnesota*, 305 U.S. at 386 n. 1.

[56] 28 U.S.C. § 2409a(a).

[57] *See ibid.* at n. 54.

[58] *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983); *Sokaogon Chippewa Community v. State of Wisconsin, Oneida Cnty.*, 879 F.2d 300, 302 (7th Cir. 1989); *Red Lake Band of Chippewa v. City of Baudette, Minn.*, 730 F. Supp. 972, 974 (D. Minn. 1990).

[59] *Wolfchild IX*, 731 F.3d at 1294 (citing *Wolfchild VIII*, 101 Fed. Cl. at 65-69); *Redwood County*, 14-cv-1597 at 25.

2. Lands held in fee

The Eighth Circuit decision in *Nichols v. Rysavy*[60] also demonstrates that Plaintiffs' claims against the Community's fee lands are similarly defective. The Plaintiffs in *Nichols* made the same basic arguments that Plaintiffs make here: the United States illegally issued fee patents, rendering all subsequent transactions void. The Court of Appeals dismissed the action under Rule 19(b) because "the result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally."[61] Thus, in the Eighth Circuit, it is clear that the United States is indispensable where a judgment determines the legality of U.S. conduct.[62]

Rule 11 imposes a duty of candor on Plaintiffs' Attorney to at least acknowledge, at *some* point, that *Nichols* disposed adversely of his client's claims under Rule 19.[63] Plaintiffs' only response to *Nichols*—that "[it] is especially not on point"—is absurd and misleading.[64] Blithely brushing aside established Circuit precedent, Plaintiffs' Attorney instead relied on decisions from the Ninth and Seventh Circuits that are inapposite, as they only apply to claims brought by *Indian tribes* to *protect* their lands.[65]

Even if the foreign-circuit decisions cited by the Plaintiffs offered support, which they do not, an attorney that completely ignores this Circuit's law cannot avoid Rule 11

[60] 809 F.2d 1317 (8th Cir. 1987).
[61] *Id.* at 1333.
[62] *Id.*
[63] *DeSisto*, 888 F.2d at 766; *see also* Fed. R. Civ. P. 11 advisory committee notes.
[64] Pl.'s Mem. Opp. Def.'s Mot. Dismiss at 36.
[65] *Id.* at 34-36 (citing *Puyallup*, 717 F.2d 1251, and discussing *Sokaogon*, 879 F.2d 300).

sanctions.[66] This case is controlled by the law in this jurisdiction. And in *Nichols*, the Eighth Circuit decided that Rule 19 bars an action that adjudicates the legality of U.S. conduct when issuing land patents. To argue for *Nichols'* modification, Plaintiffs must at least discuss it and address its impact on their claims.[67] By simply ignoring *Nichols*, Plaintiffs made a frivolous argument that is not supported by existing law in the Eighth Circuit.

C. *Res Judicata*

The Amended Complaint is also defective because it is based on law and facts that were fully litigated and decided adversely to the Plaintiffs by the Court of Claims and the Federal Circuit in *Wolfchild I-IX*. *Res judicata* prohibits parties from relitigating issues that were "actually litigated and necessary to the outcome of the first action."[68] After extensive litigation, the Court in *Wolfchild IX* disposed of the two principle issues alleged by Plaintiffs in this case:

1) Plaintiffs received no property rights under the 1863 Act;[69] and

2) U.S. conveyances of lands set aside under the 1863 Act were legal.[70]

Summarizing the findings of the previous *Wolfchild* litigation, this Court concluded:

> With respect to plaintiffs' argument that under the 1863 Act, the Secretary of the Interior had a duty to set aside 80 acres of land to each loyal Sioux and that the Secretary breached said duty by not setting aside such land, the

[66] *DeSisto*, 888 F.2d at 766; *In Re Kunstler*, 914 F.2d at 517.
[67] *Crookham*, 914 F.2d at 1029-30 (attorney must discuss or be aware of existing law to make a non-frivolous argument for a change in the law).
[68] *Montana v. United States*, 440 U.S. 147, 153 (1979); *see also* Lower Sioux Indian Community Mem. in Support of Mot. to Dismiss First Am. Comp. at 16-20.
[69] *Wolfchild IX*, 731 F.3d at 1292-93 (citing *Wolfchild VIII*).
[70] *Id.*

> court held that the 1863 Act provided only that the Secretary was "authorized" to set apart parcels of land, and that such language is "simply too discretionary to support a viable claim for damages. [Wolfchild IX, 731 F.3d] at 1292. The court further held that the 1863 Act did "not impose any duty on the Secretary to make the land grants that it authorizes. It therefore cannot 'fairly be interpreted as mandating compensation for damages sustained from a failure to provide such lands.'" Id. (quoting United States v. Navajo Nation, 556 U.S. 287, 291 (2009)).
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> The court also rejected the plaintiffs' alternative claim that lands were set aside in 1865 under the authority of the 1863 Act. Specifically, plaintiffs contended that the Secretary identified 12 sections of land for the loyal Sioux and withdrew them from public sale, which sufficiently set them apart. Id. The court held, however, that the 1865 actions do not support a timely claim for relief. Id. The court went on to find that the government "took the steps toward conveyance of the 12 sections" but terminated the process of conveying the 12 sections to the designated Indians and sold the parcels to others. Id. at 1293.

Plaintiffs and their Attorney cannot simply disregard the findings from the first *Wolfchild* litigation, nor can they repackage settled issues against different defendants in an attempt to circumvent the principles of *res judicata*. Plaintiffs and their Attorney intentionally and willfully filed and prosecuted claims that they knew were resolved in previous litigation and were, therefore, barred by *res judicata*. Such blatant disregard for the preclusive effect of their prior litigation constitutes a clear violation of Rule 11.[71]

II. Monetary sanctions are necessary to deter attorneys from pursuing similar frivolous litigation against the Community.

After asserting claims that attack the history and government of the Community in the Court of Claims, Plaintiffs file the same claims in this Court to attack the Community's homelands. Plaintiffs and their attorney knew their claims were meritless, and maintained arguments patently contrary to law. In response to such an abuse of the

[71] *See King v. Hoover Group, Inc.*, 958 F.2d 219, 223 (8th Cir. 1992).

judicial process, and to deter future abuse, this Court should impose sanctions in the amount of the Community's costs and attorneys' fees.

A. The Applicable Standards

As noted, the Court may assess attorneys' fees as a sanction pursuant to its inherent authority and under Fed. R. Civ. P. 11(c). This case warrants sanctions in the form of attorneys' fees under both bases because Plaintiffs and their attorney acted in bad faith and willfully disregarded the application of settled law.

The Court's inherent authority includes the ability to assess attorneys' fees as a sanction where the offending litigant "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[72] This "inherent power reaches conduct both before and during litigation as long as that conduct abuses the judicial process in some manner."[73]

The Court may also rely on Rule 11 to impose non-monetary or monetary sanctions, including attorneys' fees, to deter the repetition of improper conduct.[74] While Rule 11 sanctions are typically reserved for the attorney that signed the improper pleading, the Rule expressly authorizes sanctions to be levied against the parties.[75] This

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[72] *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766 (1980) (*citing F. D. Rich Co. v. United States ex. Rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)); *see also Willhite v. Collins*, 459 F.3d 866, 870 (8th Cir. 2006); *Stevenson*, 354 F.3d at 751.
[73] *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 751 (8th Cir. 2004) (citing *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 266 (8th Cir. 1993)).
[74] Fed. R. Civ. P. 11(c)(4); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 407 (1990).
[75] *Brown v. Ameriprise Fin. Servs., Inc.*, 276 F.R.D. 599, 606 n.6 (D. Minn. 2011) (quoting Fed. R. Civ. P. 11(c)); *see also Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) ("[a]lthough typically levied against an attorney, a court is authorized to issue Rule 11 sanctions against a party even though the party is neither an attorney nor the signor of the pleadings."); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 948 F.2d 1338, 1344 (2d Cir. 1991) ("Rule 11 subjects the client . . . to

is especially the case where, as here, the offending party knew or should have known that the claims were frivolous.[76]

The Advisory Committee Notes for Rule 11 provide district courts with the following criteria for determining what kind of sanctions are appropriate:

> Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is need to deter that person from repetition in the same case, what amount is needed to deter similar activity by other litigants.[77]

Applying these standards, Plaintiffs and their Attorney's conduct warrants a monetary sanction because it was willful and part of a pattern of bad faith and vexatious conduct that began in *Wolfchild I-IX*. The Court should employ Rule 11 to impose attorneys' fees as a sanction to deter similar conduct in the future. It should also assess attorneys' fees as

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sanctions even if he has not signed the offending paper."); *Sanders v. Tyco Elecs. Corp.*, 235 F.R.D. 315, 322 (W.D.N.C. 2006) ("[P]ursuant to . . . Federal Rule of Civil Procedure 11, the undersigned may impose sanctions on a party who is or was represented by counsel.").

[76] *Brown*, 276 F.R.D. at 606 n. 6; *Byrne*, 261 F.3d at 1118 (sanctions against a party are appropriate if "she knew or should have known that the allegations in the complaint were frivolous"); *Union Planters Bank v. L & J Dev. Co.*, 115 F.3d 378, 384-85 (6th Cir. 1997) (affirming Rule 11 sanctions against parties for "knowingly bringing and pursuing claims devoid of evidentiary support); *Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1472 (2nd Cir. 1988) (sanctions may be imposed on represented party with "actual knowledge that the filing of the papers constituted wrongful conduct, *e.g.*, the papers made false statements").

[77] *See MHC Inv. Co.*, 209 F.R.D. at 437 (applying criteria to determine whether sanctions are warranted and what sanctions to impose), *aff'd*, 323 F.3d 620.

a sanction pursuant to its inherent authority "to protect[] the due and orderly administration of justice and [] maintain[] the authority and dignity of the court."[78]

B. Plaintiffs' conduct warrants monetary sanctions

In evaluating an appropriate sanction, the Court should consider Plaintiffs' experience and behavior during *Wolfchild I-IX*. Without a doubt, *Wolfchild I-IX* demonstrates that this case is not the product of naivety, ignorance, or negligence. Plaintiffs' and their Attorney's conduct is nothing short of bad faith.

Plaintiffs have pursued this litigation for the past 12 years. *Wolfchild I-IX* involved the interpretation and understanding of fundamental principles of federal Indian law, as well as the application of that law to the same facts as alleged in this most recent case. Plaintiffs knew that the Community is immune from suit, and that the United States holds most of the lands claimed in trust for the benefit of the Community, but chose to ignore these facts. This intentional ignorance "infected the entire proceedings."[79] Had Plaintiffs respected these legal tenants, the Community would not be here. Despite the Community's effort to remind Plaintiffs of these legal tenants, and repeated requests that it be spared the unnecessary expense of defending this litigation, Plaintiffs maintained an action that blatantly ignored dispositive law and presented specious legal theories as valid.

What is particularly egregious, however, is that this case confirms a pattern of bad faith conduct that began in the prior *Wolfchild* litigation. In *Wolfchild VII* and *IX*,

[78] *Roadway Exp.*, 447 U.S. at 765.
[79] Fed. R. Civ. P. 11 advisory committee notes; *see ibid.* at n. 77.

Plaintiffs argued that the Secretary both did and did not convey lands under the 1863 Act.[80] In *Wolfchild VII* (2010) Plaintiffs argued that the Secretary failed to set land aside under the 1863 Act.[81] In *Wolfchild IX* (2013), Plaintiffs argued that the Secretary actually conveyed property to Plaintiffs' ancestors.[82] Finally, in their Petition for *Writ of Certiotari* (2014), Plaintiffs admit that "no land was provided to the Mdewankanton Band under the 1863 Act…."[83] An attorney cannot, in good faith, employ the same facts and legal principles to advocate contrary legal conclusions. By filing and arguing this claim after obtaining the judgment in *Wolfchild IX*, Plaintiffs' confirm their wanton disregard for the law.

Monetary sanctions are necessary "to deter repetition of such conduct or comparable conduct by others similarly situated."[84] In fact, non-monetary sanctions will not serve as an effective deterrent. This Court's public reprimand, by itself, is unlikely to deter either Plaintiffs or their attorney, Erick Kaardal, from filing additional claims based on the same issues litigated for 12 years and repeatedly lost. Also, in light of Mr. Kaardal's experience practicing federal Indian law, additional legal education classes will not help him learn what he already should know. Thus, monetary sanctions are the only appropriate remedy here.

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[80] Reply to Pls.' Mot. to Amend Comp., *Wolfchild v. United States* ("*Wolfchild VII*") 1:03-CV-02684 CFL, Doc. 778 at 19 (Sept. 20, 2010); *Wolfchild IX*, 731 F.3d at 1292.
[81] Reply to Pls. Mot. to Amend Comp., *Wolfchild v. United States* (Wolfchild VII) 1:03-CV-02684 CFL, Doc. 778 at 19 (Sept. 20, 2010).
[82] *Wolfchild IX*, 731 F.3d at 1292.
[83] Pet. For Writ of Cert. at 21-22, *Wolfchild v. United States*,134 S.Ct. 1516 (2014).
[84] Fed. R. Civ. P. 11(c)(4).

Monetary sanctions are also necessary in light of the dire threat that the claims presented to the Community and the costs that the Community incurred to defend itself.[85] As stated by Denny Prescott, President of the Lower Sioux Indian Community, "the claims made by those who brought this suit are a threat to our very existence as an Indian tribe."[86] To properly defend against the claims, the Community had to develop an accurate evaluation of the facts, and raise and brief every available defense.

Wolfchild I-IX demonstrates that Plaintiffs are comfortable advancing frivolous claims—propped up by untenable legal theories—that threaten the Community as a sovereign body politic. Unless Plaintiffs and their counsel are subject to sanctions, they will continue to advance frivolous claims against the Community without regard to the consequences or the harm caused by their actions. Substantial monetary sanctions are necessary to deter Plaintiffs and their counsel from continued misconduct in clear violation of Rule 11.

CONCLUSION

Plaintiffs and their attorney have demonstrated a continuous disregard for the law that is unjustifiable in our adversarial system. Their conduct exemplifies precisely the abusive conduct that the Court's inherent powers and Rule 11are intended to punish and

[85] *See Willhite*, 459 F.3d at 870 ($66,698.30 sanction in attorneys' fees affirmed); *MHC Inv. Co.*, 323 F.3d at 628 ($25,000 sanction in attorneys' fees affirmed).
[86] *See* Halloran Aff. ¶ 15; *see also* Ex. 5. (Press Release, Denny Prescott, President, Lower Sioux Indian Community Tribal Council (Dec. 11, 2014).

deter. Therefore, the Community requests that the Court order the Plaintiffs, their counsel, Erick G. Kaardal, and the law firm of Mohrman & Kaardal, P.A. to reimburse the Community for the costs and attorneys' fees incurred in defending against these frivolous claims. The Community will document such costs and attorneys' fees by affidavit in the event the Court imposes sanctions.

Respectfully Submitted,

Date: March 25, 2015

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