No. 15-2375
No. 15-3225
No. 15-3277

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Sheldon Peterson Wolfchild, et al.,

Appellants-Cross-Appellees,

v.

Redwood County, Paxton Township, Sherman Township, Honner Township, Renville County, Birch Cooley Township, Sibley County, Moltke Township,

Appellees-Cross-Appellants,

and

John Goelz, III, et al.

Appellees.

BRIEF OF APPELLEES/CROSS-APPELLANTS

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Summary of the Case and Request for Oral Argument

In their Amended Complaint, Appellants' claimed title to, and sought return of, property that lies within the Counties of Redwood, Sibley, and Renville, and the Townships of Honner, Paxton, Sherman, Moltke, and Birch Cooley [hereinafter "Municipal Appellees"], which has been put to public use since 1862. Municipal Appellees were granted dismissal of the Amended Complaint in primary part on the basis of no private right of action and the *Sherrill* doctrine (a laches doctrine).

Thereafter, Municipal Appellees moved for (1) sanctions alleging that the claims against them had been frivolous and brought in bad faith, and (2) in the alternative, reimbursement for costs and disbursements. The lower court granted Municipal Appellees' motion for sanctions; and, having granted the motion for sanctions, declined to reach the issue of costs and disbursements. Appellants have never advocated for, nor raised, a nonfrivolous argument for pursuing their claims, nor for extending, modifying or reversing the applicable defenses—no private right of action and laches, nor have they raised a nonfrivolous argument for the establishment of new law in this case. At least 15 minutes of oral argument to address any novel issues raised by Appellants is proper.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Jurisdictional Statement

The Municipal Defendants-Appellees are also cross-appellants in this matter, in order to recover their costs in the event this court reverses the Municipal Defendants-Appellees' attorneys fees award. On October 9, 2015 the Municipal Defendants filed their Notice of Cross-Appeal from the District Court's Amended Order and Amended Judgment. Appellees' Second Joint Appendix, pp. 500, 505; Appellants' Appendix, p. 37. The District Court had federal question jurisdiction of the underlying action under 28 U.S.C. § 1331. Further, under 28 U.S.C. § 1291, this Court has jurisdiction of appeals from all final decisions of the district courts of the United States.

Statement of the Legal Issues

I. Whether the lower court abused its discretion in concluding that Appellants had pursued frivolous claims in bad faith; and, therefore, Municipal Appellees were entitled to sanctions in the form of attorneys fees and costs?

Most Apposite cases:

Chambers v. NASCO, Inc., 501 U.S. 32 (1991)

Roadway Exp., Inc. v. Piper, 447 U.S. 752 (1980);

Stevenson v. Union Pac. R. Co., 354 F.3d 739 (8th Cir. 2004)

Apposite Statutes:

28 U.S.C. § 1927

Fed. R. Civ. P. 11

II. Alternatively, whether Municipal Appellees are entitled to their requested fees, costs and disbursements?

Most Apposite cases:

Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009)

Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006)

Appliance Inv. Co. v. Western Electric Co., 61 F.2d 752 (2nd Cir. 1932)

Swan Carburetor Co. v. Chrysler Corp., 149 F.2d 476 (6th Cir. 1945)

Apposite Statutes:

28 U.S.C. § 1920

Fed. R. Civ. P. Rule 54(d)

III. Whether the lower court abused its discretion in ordering a cost bond on appeal?

Most Apposite cases:

Sckolnick v. Harlow, 820 F.2d 13 (1st Cir. 1987)

In re Cardizem CD Antitrust Litig., 391 F.3d 812 (6th Cir. 2004)

Tennille v. W. Union Co., 774 F.3d 1249, 1254 (10th Cir. 2014).

Apposite Statutes:

Fed. R. App. P. 7

Fed. R. App. P. 38

Statement of Case

For approximately 150 years, Municipal Appellees have constructed, maintained and put to public use certain rights of way. Appellants', asserting claims of ejectment and trespass, now claim a possessory interest in the rights of way under the Act of Feb. 16, 1863, Ch. 37, 12 Stat. 652). Complaint, Docket No. 1 (Appellees' Second Joint Appendix ("ASJA"), p. 1).

The lower court correctly dismissed Appellants' claims of ejectment and trespass, holding that (1) there is no private right of action under the 1863 Act, and (2) the claims of ejectment and trespass are barred by laches. Memorandum of Law & Order, Docket No. 196 (Appellants' Appendix in No. 15-1580, p. 17, 20-28). In a separate appeal, Appeal No. 15-1580, which this Court has yet to resolve, Appellants are challenging the propriety of the dismissal.

Following dismissal of Appellants' claims, Appellee Lower Sioux Indian Community, Municipal Appellees, and certain Appellee Landowners filed motions for sanctions, and all Appellees filed a motion for an appeal bond. *See* Municipal Appellee's Motion for Sanctions, (ASJA, p. 101); Joint Motion for Rule 7 Appeal Bond (ASJA p. 178).

Municipal Appellees moved for sanctions, pursuant to Fed. R. Civ. P. 11 and related or similar rules, statutes and laws and incorporated the notices and arguments of the Lower Sioux Indian Community. (ASJA, p. 101). In addition, Municipal Appellees filed for costs and disbursements which was scheduled and consolidated with the sanctions motion. (ASJA, p. 204).

In an order dated June 9, 2015, the lower court granted the motions for sanctions and ordered Appellants to post an appeal bond in the amount of $200,000. Memorandum of Law & Order, Docket No. 291, at 3 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 3). With regard to the Municipal Appellees, sanctions were awarded *not* pursuant to Fed. R. Civ. P. 11 but instead pursuant to the lower court's inherent authority and 28 U.S.C. § 1927 (Id. at p. 17). In a 35 page memorandum, the lower court noted in pertinent part: "the claims asserted in this case are so completely frivolous and without a factual or legal basis that they had to have been brought in bad faith . . . such conduct warrants severe sanctions against both Plaintiffs and their counsel." (Id. p. 3).

The lower court, thus, ordered Appellants and their counsel to pay the moving Appellees their reasonable attorneys' fees and costs as sanctions. (Appellants' Appendix, pps. 25-26). Having granted the motion for sanctions to Municipal Appellees, the lower court did not reach the issue of Municipal Appellees' request for costs and disbursements. (Id.) Thereafter, the lower court awarded specific amounts in attorneys' fees and costs to Municipal Appellees. Amended Memorandum of Law & Order, Docket No. 363 (Appellants' Appendix p. 37); Amended Judgment in a Civil Case, Docket No. 364 (ASJA, p. 500).

On October 1, 2015, Appellants filed their notice of appeal. (ASJA, p. 501). The sanctions appeal was consolidated with the appeal relating to the cost bond. As of this date, Appellants have failed to post any appellate cost bond.

Summary of the Argument

The lower court order awarding sanctions and the posting of an appeal bond should be upheld for all the reasons set forth herein and those reasons set forth in the briefs of the Lower Sioux Indian Community and the Landowners in these consolidated appeals, which are hereby adopted and incorporated as if set forth herein.

With regard to the award of sanctions, Appellants' action was not plausibly meritorious and instead was a bad faith relitigation of fact and legal issues which previously resolved that they do not have title to, or a possessory interest in, the land at issue again in this lawsuit. Furthermore, Appellants consistently misrepresented case law and submissions which continues through the current briefing as discussed herein.

Finally, their claims of a possessory interest were explicitly barred by established legal principles, including the *Sherrill* Doctrine and the other defense ruled upon and otherwise raised to the court. Appellants neither sought a change, nor an expansion of the law. As a result, the award of sanctions was appropriate.

If this Court concludes that the award of sanctions to Municipal Appellees should be reversed, then this Court should award Municipal Appellees their petitioned for costs and disbursements. Because the Municipal Appellees were the primary holders of relevant public records in this matter, they suffered additional and unique burdens and expenses in having to accommodate, comply with, and adduce voluminous public records in response to data practices requests and for its own defense. The extensive and burdensome work was driven exclusively because of Appellants' action and the related costs were properly taxed pursuant to Fed. R. Civ. P. 54 and 28 U.S.C. § 1920(4).

Finally, with regard to the appeal bond, Fed. R. App. P. 7, 38, and 39 each contemplate the requirement to post a bond prior to a party being permitted to proceed with an appeal. The amount of the bond is reflective of the likely costs to be incurred by the parties on appeal; and, the appeal is a continuation of litigation already found to be frivolous and in bad faith. Therefore, the lower court did not abuse its discretion in ordering the posting of a bond, nor in determining the amount of the bond.

Argument

I. The lower court did not abuse its discretion in concluding that Appellants had pursued frivolous claims in bad faith; and, therefore, Municipal Appellees were entitled to sanctions in the form of attorneys fees and costs.

The lower court awarded sanctions to Municipal Appellees pursuant to its inherent authority. As discussed herein, the lower court's decision to award sanctions to the Municipal Appellees on the basis of its inherent authority should be upheld. However, this Court may uphold the award of sanctions to Municipal Appellees under the alternative, Rule 11. *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670-71 (8th Cir. 2013) (lower court decision may be affirmed by any basis supported by the record).

Standard of Review

"[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)(resolving standard of review conflict amongst circuits with regard to the award of sanctions pursuant to Fed. R. Civ. P. 11). Similarly, a district court's imposition of sanctions under its inherent power is also reviewed for an abuse of discretion. *Stevenson*

v. Union Pac. R. Co., 354 F.3d 739, 745-46 (8th Cir. 2004)(citations and quotations omitted). Under the circumstances presented in this matter, the lower court did not abuse its discretion in awarding sanctions.

A. The lower court did not abuse its discretion in finding bad faith conduct and, thus, allowing fees as sanctions pursuant to its inherent authority.

Federal courts can use their inherent power to assess attorney fees as a sanction for bad faith conduct (conduct that abuses the judicial process in some manner) before and during litigation. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980); *Stevenson*, 354 F.3d at 751 (citations and quotations omitted). It is not an abuse of discretion to award fees and costs as sanctions pursuant to inherent authority where:

1. The sanctioned party pursued relitigation of issues previously ruled upon. *See W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 873 (9th Cir. 1992), *as amended* (June 23, 1992); *see also King v. Hoover Group, Inc.*, 958 F.2d 219, 223 (8th Cir. 1992)(allowing sanctions under Rule 11 for relitigation).

2. The sanctioned party intentionally misrepresented law, rulings, and/or facts to the lower court. *See e.g. Gas Aggregation Servs.,*

Inc. v. Howard Avista Energy, LLC, 458 F.3d 733, 739 (8th Cir. 2006); *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001); And/or

3. The sanctioned party pursued claims barred by well-established law without arguing for a change or expansion of the law. *See e.g. FDIC v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994) (citing *White v. Gen. Motors Corp.*, 908 F.2d 675, 682 (10th Cir. 1990) *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991); *see also Friedler v. Equitable Life Assur. Soc'y of United States*, 86 Fed.Appx. 50, 56 (6th Cir. 2003) (finding that Rule 11 imposes duty upon counsel to research applicable statute of limitations period prior to filing complaint).

In awarding sanctions in this matter, the lower court made clear findings of bad faith conduct because Appellants had abused the judicial process by engaging in each of above-identified modes of misconduct. Each of instances of misconduct will be addressed in turn below.

Impermissible relitigation of issues resolved

The lower court specifically found that Appellants had acted in bad faith by re-litigating previously resolved issues, noting, for example: plaintiffs "advanced multiple and conflicting arguments in the

prior litigation based on facts that are also at issue here." (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 15); (2) "previous litigation demonstrates that this case is not the product of naivety, ignorance or negligence, and that Plaintiffs and their attorneys acted in bad faith." (Id. p. 24). The lower court did not abuse its discretion in reaching this conclusion.

As more fully set forth in prior briefing by Municipal Appellees with regard to the merits of this litigation, in *Wolfchild, et al v. United States,* 731 F.3d 1280 (Fed. Cir. 2013), *cert denied* ("*Wolfchild IX*"), the Court specifically found that title to land within the disputed area had not been conveyed to Appellants, nor any other individual, by virtue of the 1863 Act, nor any of the cited subsequent actions in 1865 which were again set forth in exhibits 1-5 of the Amended Complaint filed in this action. *Id.* at 1292-1294. The doctrine of issue preclusion applies to issues of fact or law. *See Allen v. McCurry,* 449 U.S. 90, 94 (1980); *Simmons v. O'Brien,* 77 F.3d 1093, 1095 (8th Cir. 1996). Because it had been specifically found (based on the same evidence presented in this case) that Appellants do not hold title to any land within the disputed area by virtue of the 1863 Act and the subsequent 1865 actions cited by

them and as claimed in the Amended Complaint, the subject litigation was (and is) an impermissible relitigation of issues previously resolved by a court. *See Lane v. Peterson*, 899 F.2d 737, 743 (8th Cir. 1990) (preclusion found where the evidence for the most part was nearly identical to that in prior litigation); *NAACP v. Metropolitan Council,* 125 F.3d 1171, 1174 (8th Cir. 1997) ("federal law governs res judicata effect of an earlier federal judgment based on federal law"); *see also Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971) (encouraging federal circuits to apply claim and issue preclusion to the decisions of their sister federal courts).

At page 18 of their brief, Appellants cite *Pulaski County Republican Comm. v. Pulaski County Bd. of Election Com'rs.*, 956 F.2d 172 (8th Cir 1992) in support of a claim that sanctions is not proper here. There the court declined to award sanctions for litigation of a subsequent claim that was similar in nature because it was only similar and did not involve the same parties and issues. *Id.* Unlike *Pulaski,* some of the parties to this litigation are the same and the issues in this litigation are precisely the same as those in the prior *Wolfchild*

litigation—whether Appellants have title, and a possessory interest in, land within the same 12 square miles previously disputed.

Under these circumstances, the lower court did not abuse its discretion in concluding that Appellants had brought this litigation in bad faith. *See Ulloa*, 958 F.2d at 873 (concluding that sanctions could be awarded pursuant to inherent authority for relitigation of issues previously litigated in front of a different tribunal citing, *Chambers v. Nasco, Inc.*, 111 S.Ct. at 2139)). Nor, did the lower court abuse its discretion in concluding that attorneys fees and costs were an appropriate sanction for having relitigated these issues in bad faith. *See id., see also King*, 958 F.2d at 223 (granting sanctions under Rule 11 for bad faith pursuit of issues previously litigated). Accordingly, the award of sanctions under the lower court's inherent authority may be upheld for this reason alone.

Misrepresentation of rulings, law and the record

The lower court specifically found that Appellants had acted in bad faith by misrepresenting prior rulings, case law, and the record issues, noting, for example: (1) Plaintiffs misrepresented *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003) (Appellants'

Appendix in Case Nos. 15-2375/15-3225, p. 12-13), (2) Plaintiffs even misrepresented the law as set forth in the earlier litigation (Id. at pp. 17-19), including that "Plaintiffs' reliance on this footnote...is disingenuous, in light of the prevailing authority to the contrary." (Id. at pp. 19), and (3) Plaintiffs engaged in vexatious and wanton conduct, not just because they asserted frivolous legal arguments but also because they misrepresented the law. (Id. at p. 25). Again, the lower court did not abuse its discretion in reaching this conclusion. In fact, in their brief submitted with regard to this sanctions appeal, Appellants have continued to misrepresent the prior proceedings.

First, with regard to misrepresentations to the lower court, the Municipal Appellees in their briefing to the lower court specifically pointed out various misrepresentations. For example, in briefing, Appellants claimed that the prior *Wolfchild v. United States* litigation addressed only a statute of limitations defense raised. But, an accurate representation of the Court of Federal Claims and the Federal Circuit holdings, demonstrated:

- In response to a then breach of fiduciary duty claim by Plaintiffs, the Court stated that "[t]he Secretary never exercised the authority

granted by the 1863 legislation, and no lands were provided to the loyal Mdewakantons at that time...." *Wolfchild v. United States*, 559 F.3d 1228, 1232 (Fed. Cir. 2009).

- In light of the fact that property had not been conveyed under the 1863 Act, the Court went on to rule upon Plaintiffs' claim that land was being held in trust from them pursuant to subsequent Appropriations Acts, ruling in pertinent part that

> [...] Congress authorized the conveyance of land for "each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians." Act of Feb. 16, 1863, 12 Stat. at 654. [...] That language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute. The trial court regarded the 1863 statute as relevant to the proper interpretation of the Appropriations Acts, which were enacted 25 years later, stating that the 1888 Act was "motivated in part by the fact that the 1863 Act was not successfully implemented." *Wolfchild I,* 62 Fed.Cl. at 542.
>
> While Congress's motivation to assist the loyal Mdewakantons no doubt derived in part from the failure of earlier efforts at assistance, it is clear that Congress did not use the 1863 statute as a model for the Appropriations Acts. To begin with, there is a significant difference between the language used in the 1863 statute and the language used in the Appropriations Acts. The 1863 statute referred solely to allotments of land, while the Appropriations Acts referred to the purchase of a wide variety of assets within the discretion of the Secretary of the Interior. Moreover, the first of the two 1863 statutes expressly stated that the beneficiaries would obtain an inheritable interest in the allotted lands, while the Appropriations Acts say nothing about the nature of the ownership interest in any of the purchased lands. Those differences strongly suggest that Congress

> intended an approach in the Appropriations Acts different from the approach used in the first 1863 statute.
>
> Even more telling is that the second of the two 1863 statutes, which was enacted only two weeks after the first and superseded it, merely authorized the Secretary to assign land to those who had assisted the white settlers during the uprising; it did not prescribe any particular form of ownership interest in the properties. Instead, it pointedly left open the nature of the interest that the assignees would have in the lands, stating that the lands would be "held by such tenure as is or may be provided by law." Thus, the failure of the 1863 Acts cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands along the same lines set forth in the first 1863 statute, because the second of the two 1863 Acts left the question of ownership open to later resolution. That approach, of postponing resolution of the ownership question, is the same as the interpretation the Interior Department was later to accord to the Appropriations Acts with respect to the ownership of the 1886 lands.

Wolfchild v. United States, 559 F.3d at 1241-42.

- On remand from the 2009 Federal Circuit decision, the Federal Court of Claims was called upon to address "several new claims" advanced by Plaintiffs. *Wolfchild v. United States*, 731 F.3d 1280, 1285 (Fed. Cir. 2013) *cert. denied*, 134 S. Ct. 1516, 188 L. Ed. 2d 463 (U.S. 2014). Specifically,

> On remand, several groups of claimants filed motions to amend their complaints to add a number of claims not previously asserted. They continued to pursue revenues derived from the land (now under new theories), and they also sought to add claims based on the government's alleged failure to provide them with more land in the 1800s. Claimants rooted their proposed causes of action in a variety of authorities, including the 1863 Acts, the 1888–1890 Acts, the

> Indian Non–Intercourse Act, and the Takings Clause of the Fifth Amendment.

Wolfchild, 731 F.3d at 1288 (emphasis added). With regard to their claim under the 1863 Act, Appellants in the prior litigation specifically advanced the theory "that certain actions taken in 1865 actually did set aside land for the loyal Sioux under the statute, thereby giving rise to the more concrete rights ..." *Id.* at 1292.

Laying out the history and law again, the Court noted the passage of the 1863 Act and that thereafter:

> Two years later, in 1865, the United States took additional steps to try to help the loyal Sioux. First, Congress appropriated $7,500 to "make ... provision[s] for their welfare" because they were "entirely destitute." Act of Feb. 9, 1865, ch. 29, 13 Stat. 427. Shortly thereafter, the Secretary of the Interior approved the withdrawal from public sale of 12 sections of land (12 square miles, or 7,680 acres), invoking the land-allocating authority of the two 1863 Acts. But opposition from local residents developed, leading officials to abandon this effort to secure a more permanent settlement for the loyal Sioux. The 12 parcels were returned to public sale and sold.

Id. at 1286.

Reviewing all of the decision together, it was clear that in the prior *Wolfchild* litigation, the court had addressed the application of statute of limitations. *See Wolfchild,* 101 Fed.Cl. at 74; *Wolfchild,* 559 F.3d at 1293. However, for Appellants to claim, as they did here; that

the prior *Wolfchild* litigation had no bearing on the issues in litigation in this matter; was an intentional misrepresentation of the prior rulings and the record. Accordingly, there was no abuse of discretion by the lower court in concluding that Appellants had, in bad faith, misrepresented the law, prior rulings, and the record in this matter.

Now, at pages 40-46 of Appellants' brief, they raise new arguments and cite new cases on appeal. Arguments not raised in the district court cannot be raised for the first time on appeal. *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006); *Concordia College Corp. v. W.R. Grace,* 999 F.2d 326, 330 (8th Cir. 1993), *cert. denied,* 510 U.S. 1093, 114 S.Ct. 926, 127 L.Ed.2d 218 (1994); *see also Nyer v. Winterthur Intern.*, 290 F.3d 456, 460 (1st Cir. 2002) (affirming sanctions and refusing to consider appellants' argument that sanctions motion was not timely filed because that argument was not raised before the district court) (internal citations and quotations omitted).

On page 45 of their brief, Appellants claim that "Prior to the *Sherrill* decision in 2005, laches did not apply to Indian land claims at all." This is different from what Appellants' counsel argued below and

at the December 11, 2014 Merits hearing (*See* Page 65, ASJA 642) when Appellants argued that *Oneida Indian Nation of N. Y. State v. Oneida County, New York*, 414 U.S. 661, 677-78 (1974) ("*Oneida I*") and, more specifically, *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) ("*Oneida II*") dealt with the doctrine of laches in the context of Indian land claims.

On page 43 of their brief, Appellants write that "Similarly, Appellants argued that *Sherrill* laches should not apply here because any 'disruption' to Defendants would be caused by the Court enforcing Appellants possessory rights to the lands transferred to Appellants pursuant to an act of Congress – the 1863 Act." In support of this **new** argument, **for the first time ever,** Appellants cite *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, 2008 WL 4808823 (E.D. Mich. Oct. 22, 2008), for the proposition that *Sherrill* does not apply to claims premised on a treaty or congressional act.

On pages 30-32 of their Memorandum in Opposition to the Sanctions Motions to the lower court, Appellants identified the arguments that they had made in opposition to laches. ASJA 748-50.

They identified four arguments:

1. "However, accepting as true the allegations in the first Amended Complaint, equity is squarely in Plaintiffs favor. Furthermore, 'when the defense of laches depends on disputed facts, it is inappropriate to make a determination on a motion to dismiss.'"

2. "As the Court in *Fannie* said, the existence of prejudice with regard to a laches determination is a question of fact, and plaintiffs dispute that the prejudice suffered by any defendant is greater than plaintiffs for having been dispossessed of their land because of white hostility, as detailed above . . . . The Court cannot grant a motion to dismiss on the ground of laches because the balance of prejudices in this case is ultimately fact dependent, and in fact Plaintiffs have been prejudiced to a much great degree than any defendant, on top of the fact that exactly what prejudices each defendant faces is unknown."

3. "Furthermore, *Sherrill* and *Stockbridge* are inapplicable to this case. Simply put, *Sherrill* was a claim based on aboriginal title and the wrongful sale of lands under Federal law, not an establishment of title and a group of Indians by Congress, such as the Act of February 16, 1863. 544 US at 202. *Sherrill* does not apply because Plaintiffs seek to vindicate their federally created rights pursuant to that Act, not their aboriginal claim to the land before any action by Congress."

4. "Laches cannot bar Plaintiffs trespass damages claims because money damages for said trespasses is legal remedy, not an equitable remedy, which would not cause any physical disruption pointed to by Defendants."

ASJA 748-49.

Later on in the same section, Appellants reiterated their arguments as follows:

1. "The Defendants fail to address that the language of 1863 Act itself was interpreted by the Federal Circuit majority opinion to provide more absolute rights."

2. "Laches cannot apply to repeal a statute guaranteeing American Indians land title 'forever' as is the case with the 1863 Act."[1]

3. "The Plaintiffs argued that the *"Sherrill* and *Stockbridge* cases were distinguishable because the Indian Non-intercourse Act cases involved aboriginal land sold or transferred by the American Indians. Here the Loyal Mdewakanton never sold the 12 square miles and are legally guaranteed it by the 1863 Act. The Court in response stated, There is no language in *"Sherrill* or *Stockbridge* that would limit the holdings of those decisions to claims based on aboriginal title. That is the type of Court response that indicates that Plaintiffs' effort to distinguish the case is reasonable, not sanctionable."

4. "The Plaintiffs cited cases where laches could only be applied after a factual inquiry, defendant by defendant.

5. The Plaintiffs cited cases where laches could not be applied to legal claims.

ASJA 749-50.

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[1] See also Merits Hearing (p. 59, ASJA 636) and Sanctions Hearing (p. 46, ASJA 553).

A plain review of Appellants' own submissions demonstrates that, **they never raised the argument that they now claim they did at the district court.** The district could not have considered Appellants' alleged argument when considering sanctions because Appellants never made that argument.

In a recent case, this Court awarded appellate sanctions where the appeal itself was not frivolous, but was "frivolous as argued" because it misrepresented the district court's rulings. *Meyer v. U.S. Bank Nat. Ass'n*, 792 F.3d 923, 928-29 (8th Cir. 2015). Similarly, here, the Appellants are misrepresenting the arguments they made to the district court.

Not only did Appellants not make the argument and citation to law that they now put before this Court, a review of the case indicates that it is without import here. First, it is a federal district court unpublished decision from a foreign district; and, therefore, clearly without precedential value. Furthermore, it is without persuasive value.

In *Saginaw*, the plaintiff Indian Tribe had initiated the suit to enforce rights it claimed derived from treaties executed in 1855 and

1864. *Id.*, 2008 W.L. 4808823 at *1. Unlike the Appellants here, it was specifically noted that (1) the plaintiffs in *Saginaw* were not seeking ejectment and possession, and (2) no disruption was expected by the remedy. *Id.* at 17, 23. For this reason, as well as others, the court in *Saginaw* concluded that the principles developed in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 275 (2nd Cir. 2005), which served in both cases to bar trespass and ejectment claims were not available in *Saginaw*. *Id.*

In sum, taking into consideration the arguments and representations made to the lower court below compared to the actual prior rulings, case law, and record, it was reasonable for the lower court to conclude that Appellants had intentionally misrepresented the prior rulings, law and the record. Under these circumstances, it was not an abuse of discretion under *Gas Aggregation* and *Fink, supra,* for the lower court to conclude as it did, that Appellants conduct was in bad faith and sanctionable. Accordingly, the award of sanctions may be upheld for this reason as well.

Pursuit of claims barred by established affirmative defenses

The lower court specifically found that Appellants had acted in bad faith by pursuing claims barred by affirmative defenses, noting, for example: "a reasonable and competent attorney would know that claims raised over 100 years later would be equitably barred." (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 22-23). Again, the lower court did not abuse its discretion in reaching this conclusion.

Seeking to overcome the award of sanctions, at pages 39-49 of their brief, Appellants argue that the award constituted an abuse of discretion simply because they had arguments that *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005) did not serve to bar their claim. Appellants completely ignore the fact that not only were there claims barred by *Sherrill*; they were barred by 8th Circuit precedent.

Laches is not a novel affirmative defense; and, in fact, has been applied by this Court to property claims dating back to 1899. *Curtis v. Lakin*, 94 F. 251, 255 (8th Cir. 1899) (laches barred title claim). Therefore, Appellants were on notice of the application of this affirmative defense. *Id.;* see also *Mothner v. Ozark Real Estate Co.*, 300

F.2d 617, 621 (8th Cir. 1962) ("plaintiffs and their predecessors cannot stand by and fail to assert any claim [of title], which they either knew, or should have known, they had"). Furthermore, there was 8th Circuit precedent establishing that the passage of 100 years is simply too long to wait to bring a claim. *See Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 807 (8th Cir. 1979) (although rendered outside of the context of an Indian land claim, the court noted that some delays are simply too long, negating any necessity of proving prejudice).

The *Sherrill* doctrine in this case only provided additional guidance and affirmation of the application of the laches doctrine. The *Sherrill* doctrine is borne out of the laches defense, but represents an amalgamation of affirmative defenses in the nature of impossibility, frustration of purpose, acquiescence and other equitable principles. *City of Sherrill*, 544 U.S. at 217-221. These combined equitable principles serve to bar claims of title to, and possessory interest in, land when the passage of time is so great as to effect a grave inequity if the demanded relief of trespass or ejectment were provided. *Id.*

Appellants have never argued that the relief that they are seeking would not have the very disruptive impact that the courts in *Sherrill,*

Goodman, Mothner, or *Curtis* indicated should be barred by laches. In fact, Appellants failure to challenge the disruptive impact precisely likens them to the plaintiff in *Hoover v. Armco, Inc.*, 915 F.2d 355 (8th Cir. 1990); a case they try to distinguish. While "merely asserting a time barred claim" may not normally allow for the finding of bad faith conduct; as the court in *Hoover* concluded, bad faith may certainly be found where a party pursues a time barred claim after the defense is raised without dispute. Because Appellants have never challenged the disruptive effect of the remedies they pursue; and because laches applies to bar land claims over 100 years old, the lower court did not abuse its discretion in concluding that Appellants had acted in bad faith by pursuing claims that they knew were barred by well-established legal principles.

B. Municipal Appellees could have been awarded sanctions pursuant to Fed. R. Civ. P. 11.

Municipal Appellees served Appellants with a safe harbor notice pursuant to Fed. R. Civ. P. 11, but the lower court's order of dismissal was entered before the expiration of the 21-day notice period required by the rule. Municipal Appellees do not dispute that notice and an opportunity to be heard is a prerequisite to the award of Rule 11

sanctions. *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 767 (1980). However, under the facts and circumstances presented here, Appellants were provided with all the notice and opportunity to be heard necessary so as to entitle Municipal Appellees to sanctions pursuant to Rule 11.

The purpose of the safe harbor requirement is to give the party charged with sanctionable conduct an opportunity to withdraw the offending documents—in this case an opportunity to withdraw the Amended Complaint. Although this Court does not appear to have addressed the issue, other courts have ruled that Rule 11 sanctions can be sought even after a decision of dismissal. *Truesdell v. Southern California Permanente Medical Group*, 293 F.3d 1146 (9th Cir. 2002) (holding that a motion for sanctions could be granted if the original action was dismissed even though the safe harbor had yet to pass by the time the case was decided).

Following dismissal, parties continue to have various rights available to them which (depending upon the circumstances) can take in the form seeking reconsideration, amending the complaint, filing motions under Fed. R. Civ. P. 59 and/or 60, and rights of appeal. *Truesdell*, 293 F.3d at 1153; see generally 27 C.J.S. Dismissal and

Nonsuit § 104. As a result, the court in *Truesdell* concluded that, where, as here, the moving party served the offending party less than 21 days prior to a decision in the case; the moving party continued to retain the right to seek sanctions until the offending party had "affirmatively withdrawn the complaint or formally disclaimed any intention of filing an amended complaint, while making it clear that he was taking advantage of the safe-harbor period." *Id.*, 293 F.3d at 1153.

The *Truesdell* court suggested that sanctions under Rule 11 would not continue to be available, where, as here, dismissal with prejudice was granted. *Id.*, 293 F.3d at 1153. Such statements, however, were dicta. Instead, the principles established in *Truesdell* are what should be of weight and import in this matter—a continuing right to sanctions even after dismissal where an offending party continues to have available to him, and uses, mechanisms for continued litigation, frivolously pursued.

In this case, the Amended Complaint was dismissed with prejudice. Appellants had the opportunity to withdraw pursuit of their claims, but instead have steadfastly pursued continued litigation of the claims, including by bringing motions to reopen the record and

reconsider the claims. (ASJA 327). As a result, just as was the case in *Truesdell,* 293 F.3d at 1153, this Court should conclude that the mandatory safe-harbor period was (and is) still available to Municipal Appellees. Appellants' counsel simply elected not to take advantage of it. Accordingly, Municipal Appellees could have been awarded sanctions on the alternative basis of Rule 11.

As more fully set forth above and in the briefs of the Landowners and the Community, the lower court did not abuse its discretion in awarding Rule 11 sanctions. Appellants' litigation was an impermissible relitigation of an issue already resolved—they do not have title to, nor a possessory interest in, the disputed land.

Furthermore, the conduct of Appellants in misrepresenting prior rulings, the law, and the record was vexatious and in bad faith. Finally, as set forth in the briefs filed on the merits, any claim to a possessory interest advanced in this litigation is wholly frivolous based upon the prior existing and well-established doctrines of no private right of action and laches. Under these circumstances, it was within the lower court discretion to award sanctions. Accordingly, the award of sanctions to Municipal Appellees may be upheld for this reason as well.

II. Alternatively, Municipal Appellees are entitled to their requested fees, costs and disbursements incurred.

Standard of Review

This Court "review[s] de novo the legal issues related to the award of costs and review[s] the actual award for an abuse of discretion." *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 464 (8th Cir. 2015)(citation omitted). Because the issue of the propriety of the award of costs is a legal issue, this Court may resolve the issue on appeal without remand to the lower court for an initial determination. *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991).

Rule 54(d) of the Federal Rules of Civil Procedure allows district courts to tax costs in favor of a prevailing party, and Title 28 U.S.C. § 1920 defines the expenses that may be taxed as costs pursuant to that rule. *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 601 (8th Cir. 2009). Under § 1920, a judge or court clerk "may tax as costs" fees of the clerk and marshal, fees for printed or electronically recorded transcripts necessarily obtained for use in the case, fees and disbursements for printing and witnesses, fees for copies of necessary papers, docket fees, and compensation of court appointed experts and interpreters. 28 U.S.C. § 1920(1)-(6). As the losing party, Appellants

bear the burden of overcoming the presumption that Municipal Appellees are entitled to recover all costs allowed by § 1920. *Janis v. Biesheuvel*, 428 F.3d 795, 801 (8th Cir. 2005).

In furtherance of the theories of defense put forth by Municipal Appellees and others, the Municipal Appellees gathered, assembled, summarized (where appropriate), produced, and filed voluminous modern and historical public records. In reaching the decision to dismiss Appellant's claims (and in considering future motions), the lower court specifically cited to and relied upon the public records filed with the court. Thus, Municipal Appellees sought $305.25 in printing costs for making courtesy copies of pleadings for the Court, and $37,635.40 in exemplification costs, the amount incurred by the Municipal Appellees in procuring and preparing the public record for use by the Court.

The costs and fees incurred in procuring and preparing the public record are taxable under 28 U.S.C. § 1920 as "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." "Exemplification" is defined as

the "official transcript of a public record, authenticated as a true copy for use as evidence." *Black's Law Dictionary* 692 (10th ed. 2014).

Municipal Appellees examined the public record of their meeting minutes and other pertinent records for the past 150 years, identified the portions relating to the land at issue in this litigation, prepared the same to be presented to the court for use as evidence and authenticated the same as a true copy of the original public record. The costs incurred therein are, therefore, are taxable under § 1920. *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 763 (8th Cir. 2006)(affirming award of over $124,000.00 in exemplification expenses for obtaining and copying papers that were "necessarily obtained" and "received as evidence, prepared for use in presenting evidence, or obtained for service on the other parties in the litigation and the court."); *Appliance Inv. Co. v. Western Electric Co.*, 61 F.2d 752, 756-57 (2nd Cir. 1932) (affirming allowance of costs where the information at issue may have otherwise been on the record but was incomprehensible without professional preparation); *see also Swan Carburetor Co. v. Chrysler Corp.*, 149 F.2d 476, 477 (6th Cir. 1945)(affirming award of expenses related to putting forth evidence necessary to theories of defense, but not models).

In opposition, Appellants primarily argued that the exemplification fees sought were primarily in the form of attorneys fees incurred by the undersigned in gathering, assembling, and summarizing the record. Given the unique circumstances presented in this matter, such monies are taxable even if incurred by attorneys. *See Pinkham v. Camex, Inc.*, 84 F.3d 292, 294-95 (8th Cir. 1996) (holding that "such costs [are] reasonable out-of-pocket expenses of the normally charged to clients by attorneys").

Municipal Appellees held the majority of the public records dispositive of Appellants' claims and was subject to producing those records either through discovery or the Minnesota Data Practices Act Minn. Ch. 13. An agreement was reached to utilize, where feasible, a title company to procure records.

As to the remainder, although the professional expenses incurred by Municipal Appellees in collecting, organizing and otherwise amassing the public records were borne in the form of fees charged by their attorney of record, Jessica Schwie and her delegates, this was solely because the collection of records in this matter presented the need for a particular form of professional expertise that could be met

only through undersigned counsel, and was divergent from any legal services rendered by the undersigned.

The title company's expertise in collecting property records was limited and did not include the knowledge required here – an understanding of the nature, type, manner of location of public records relating to notice, land use proceedings, hearings, recordings of objections (or lack thereof), formation of rights of way, erection of public buildings, regulation of economy, and taxation. Such knowledge and understanding was contained solely within the professional expertise and experience of the undersigned given our lengthy and extensive experience in representing and working with local governmental entities; and, therefore, was properly billed as awardable exemplification costs arising out of professional fees. Accordingly, should this Court decline to affirm the award of sanctions, it would be appropriate for this Court to award Municipal Appellees $37,542.10 in costs incurred in preparing the public record for use by the court in reaching the decision on the merits.

III. The lower court did not abuse its discretion in ordering a cost bond on appeal.

Standard of Review

The propriety of requiring a bond is reviewed de novo, *Pedraza v. United Guar. Corp.*, 313 F.3d 132, 1328 (11th Cir. 2002), the nature and amount of the bond is reviewed for abuse of discretion. *Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir. 1987).

As more fully set forth in the Landowners' brief, it is appropriate for a cost bond on appeal to be ordered when it is reflective of costs that a successful appellate litigant can recover. *See In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004); *Tennille v. W. Union Co.*, 774 F.3d 1249, 1254 (10th Cir. 2014).

Regardless of the outcome of the decision on the merits, Municipal Appellees are incurring fees and expenses for which they are entitled to reimbursement. If the order dismissing the Appellants' claims is upheld, Municipal Appellees will have continued to incur attorneys fees and costs related to the continued defense of a frivolous matter, entitling it to reimbursement to amounts for which it is appropriate to order a cost bond on appeal. *See* Fed. R. App. P. 7; Fed. R. App. P. 38.

Even if the order of dismissal is reversed (which it should not be as set forth in separate briefing), Municipal Appellees are continuing to maintain the rights of way at issue in this lawsuit which continue to be put to use by the public at large. As a result, they are continuing to incur costs in maintaining the rights-of-way for which they are entitled to reimbursement should title and exclusive possession ultimately be vested in Appellants. Minn. Stat. § 559.10 (2014); *Searl v. School Dist. No. 2, of Lake County,* 133 U.S. 53 (1890)(holding that a party who makes improvements to land it believes it has valid title to, even if that title is actually defective, is entitled to reimbursement for those improvements); *See DeSutter v. Township of Helana,* 489 N.W.2d 236 (Minn. Ct. App. 1992)(analyzing road as improvement to real property). Therefore, for this reason, and all reasons set forth in the Landowners' brief, it was appropriate for the lower court to impose the cost bond on appeal.

Conclusion

For all the reasons set forth above, Municipal Appellees respectfully request that this Court (1) uphold the award of sanctions in the form of attorney fees and costs, (2) in the alternative, award costs

and disbursements incurred by Municipal Appellees, and (3) uphold the order for a cost bond on appeal.

Dated: November 23, 2015 **Jardine, Logan & O'Brien, PLLP**

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Certificate of Compliance with FRAP 32(a)(7)(C) and Eighth Cir. R. 28A(h)

Jessica Schwie and/or Nicholas Matchen, attorneys for Redwood County, et al, hereby certify that this brief complies with the requirements of Federal Rule of Civil Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rules and Procedures 28A(h) as follows: (1) The brief was prepared using Microsoft Word 2010, Century Schoolbook font size 14, and contains 7,341 words, according to the word processing program used to prepare this brief, (2) The brief has been scanned for viruses and is virus-free, and (3) The electronic version of the brief was generated by printing to PDF from the original word processing file and is searchable and subject to copying.

Jardine, Logan & O'Brien, PLLP

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Certificate of Service

I hereby certify that on November 23, 2015, I electronically filed the foregoing 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 CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. Upon court approval of the Brief, I will mail the foregoing document 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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