UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-3225

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Sheldon Peters Wolfchild, *et al.*,

Plaintiffs-Appellants,

and

Erick G. Kaardal, Plaintiffs' attorney; Mohrman, Kaardal & Erickson, P.A., Plaintiffs' law firm,

Appellants,

vs.

Redwood County, *et al.*,

Defendants-Appellees.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE MICHAEL J. DAVIS, CHIEF JUDGE

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BRIEF OF APPELLEE LANDOWNERS ROBERT D. AND LORI A. REBSTOCK, JON LUSSENHOP, DALE R. AND NANCY HANNA, JOHN C. AND MARY J. SIMMONS, JULIE ANNA GUGGISBERG, LEE H. GUGGISBERG TRUST UWT, SCOTT A. AND KIMBERLY A. OLAFSON, AND KENNETH LARSEN

_____

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

The District Court's September 29, 2015 Order should be affirmed because the District Court did not abuse its discretion in granting Appellee Landowners' Motion for Sanctions by ordering pursuant to Fed. R. Civ. P. 11 and its inherent power that Plaintiffs, their counsel and their counsel's law firm, pay Appellee Landowners their reasonable attorneys' fees incurred in defending against this frivolous action.

Prior to bringing this action against the defendants in this action, Plaintiffs and their counsel Erick Kaardal unsuccessfully litigated related claims in the Court of Federal Claims for eleven years, resulting in nine published decisions. With the knowledge that their 1863 Act claims lacked any factual or legal basis, Plaintiffs and their counsel nonetheless continued pursuing their frivolous litigation in this case by bringing suit against 75 innocent private landowners and others, requesting among other relief that these landowners be ejected from their properties. Such conduct warranted the District Court's finding that monetary sanctions in the form of reasonable attorneys' fees and costs were necessary in order to deter Plaintiffs and Mr. Kaardal from engaging in this frivolous litigation in the future. Furthermore, the proper procedures for imposing such sanction were followed.

Oral argument has been set for December 17, 2015.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Appellate Procedure and Eighth Circuit Rule 26.1A, these Appellees make the required corporate disclosures:

Defendants-Appellees Robert D. Rebstock, Lori A. Rebstock, Jon Lussenhop, Dale R. Hanna, Nancy Hanna, John C. Simmons, Mary J. Simmons, Julie Anna Guggisberg, Lee H. Guggisberg Trust UWT, Scott A. Olafson and Kimberly A. Olafson, make the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendant-Appellee Kenneth Larsen makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

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STATEMENT OF ISSUE

I. Whether the District Court abused its discretion in granting Appellee Landowners' Motion for Sanctions by ordering pursuant to Fed. R. Civ. P. 11 and its inherent power that Plaintiffs, their counsel and their counsel's law firm, jointly and severally, pay Appellee Landowners their reasonable attorneys' fees incurred in defending this action.

Most Apposite cases:

City of Sherrill, New York v. Oneida Indian Nation of New York, 544 U.S. 197 (2005)

Willhite v. Collins, 459 F.3d 866 (8th Cir. 2006)

Wolfchild et al. v. United States, 731 F.3d 1280 (Fed. Cir. 2013)

Apposite Statute:

Fed. R. Civ. P. 11

STATEMENT OF THE CASE

This appeal, like the appeals in consolidated Case Nos. 15-1580 and 15-2375, arises from a lawsuit filed by Plaintiffs on May 20, 2014, claiming possessory rights and damages concerning a twelve square mile area of land in parts of Sibley, Renville, and Redwood Counties in south-central Minnesota. *See generally* Complaint, Docket No. 1 (Appellees' Second Joint Appendix ("ASJA"), p. 1).

The lawsuit stems from litigation that began over a decade ago when the principal plaintiff, Sheldon Wolfchild, and numerous other purported descendants of the loyal Mdewakanton, through their attorney Erick Kaardal, filed an action against the United States in the Court of Federal Claims pursuant to the Indian Tucker Act, 28 U.S.C. § 1505. *See Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) (*Wolfchild VI*). The plaintiffs' claims were rejected by the Federal Circuit Court of Appeals and the matter was remanded to the trial court. *Id.*

On remand, the plaintiffs moved to amend their complaint to add a number of new claims, including a claim that the Secretary of the Interior had a duty to set aside 80 acres of land to each loyal Sioux under the Act of February 16, 1863, 12 Stat. 652 (the "1863 Act"), and that the Secretary breached that duty by not setting aside that land. The 1863 Act provides

> And it be further enacted, That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated,

> eighty acres in severality to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land to be set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

The court held 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 et al. v. United States*, 731 F.3d 1280, 1292 (Fed. Cir. 2013) (*Wolfchild IX*). 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)).

The court also rejected the plaintiffs' alternative claim that lands were set aside in 1865 under the authority of the 1863 Act. Plaintiffs contended 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 the 1865 actions did not support a timely claim for relief. *Id.* The court specifically found 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.

Following the Federal Circuit's dismissal of their claims and the U.S. Supreme Court's denial of certiorari on March 10, 2014[1], Plaintiffs filed this action on May 20, 2014, claiming possessory rights and damages concerning the twelve square mile area of land. *See generally* Complaint, Docket No. 1 (ASJA, p. 1). Since Plaintiffs had already fully litigated and lost their case against the United States, Plaintiffs this time named as defendants 75 private landowners, the Lower Sioux Indian Community (the "Lower Sioux"), Renville, Redwood and Sibley Counties, and the Townships of Paxton, Sherman, Honner, Birch Cooley, and Moltke (the "Municipalities"). *Id.*, Docket No. 1 (ASJA, p. 1). Plaintiffs again argued that the 1863 Act and subsequent actions of the Secretary of the Interior, set aside and conveyed the 12-square-miles to their purported ancestors. *Id.*, Docket No. 1 (ASJA, p. 1).

In their Complaint, Plaintiffs sought a declaratory judgment that they own exclusive title, use, and occupancy, and the right to quiet enjoyment of the land. *Id.*, Docket No. 1 (ASJA, p. 1). Plaintiffs also brought a common law claim of ejectment against the defendants, claiming the defendants wrongfully possess and are trespassing on their land. *Id.*, Docket No. 1 (ASJA, p. 1). Additionally, Plaintiffs asserted a common law claim of trespass. *Id.*, Docket No. 1 (ASJA, p.

[1]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).

1). Plaintiffs sought to have the defendants' possessions removed from the land and damages for trespass exceeding $75,000. *Id.*, Docket No. 1 (ASJA, p. 1).

On July 31, 2014, Defendant Landowners Robert D. and Lori A Rebstock, Jon Lussenhop, and Dale R. and Nancy Hanna filed their motion to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b) for failure to state a claim upon which relief may be granted and failure to join a party under Fed. R. Civ. P. 19. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b), Docket No. 71 (ASJA, p. 49). On August 14, 2014, Defendant Landowners John C. and Mary J. Simmons, Julie Anna Guggisberg, Lee H. Guggisberg Trust UWT, Scott A. and Kimberly A. Olafson, and Kenneth Larsen, along with other private landowners, filed a motion for dismissal pursuant to Fed. R. Civ. P. 12(b)(1), (6) and (7), 12(c), and 19(a) and (b), on the grounds that the District Court lacked subject matter jurisdiction, Plaintiffs failed to state a claim upon which relief may be granted, Plaintiffs' claims were barred by the doctrines of collateral estoppel and res judicata, the subject property was never conveyed to putatively loyal Mdewakanton Indians and Plaintiffs have no ownership and possession of the subject property, and Plaintiffs failed to join an indispensable party. Motion for Dismissal, Docket No. 84 (ASJA, p. 44).

On September 22, 2014, Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief, asserting the same claims from their first

Complaint against the defendants. First Amended Complaint, Docket No. 120 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 57). On September 25, 2014, Defendant Landowners Robert D. and Lori A Rebstock, Jon Lussenhop, and Dale R. and Nancy Hanna amended their motion to dismiss, seeking to dismiss the First Amended Complaint for lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and failure to join a party under Fed. R. Civ. P. 19. Amended Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b), Docket No. 126 (ASJA, p. 49). On that same date, Defendant Landowners John C. and Mary J. Simmons, Julie Anna Guggisberg, Lee H. Guggisberg Trust UWT, Scott A. and Kimberly A. Olafson, and Kenneth Larsen, along with other private landowners, amended their motion to dismiss to move for dismissal of all claims asserted against them in the First Amended Complaint on the same grounds that had been asserted in their first motion for dismissal. Amended Motion for Dismissal, Docket No. 125 (ASJA, p. 44).

On November 21, 2014, counsel for Defendant Landowners Robert D. Rebstock, Lori A. Rebstock, Jon Lussenhop, Dale R. Hanna, Nancy Hanna, John C. Simmons, Mary J. Simmons, Julie Anna Guggisberg, Lee H. Guggisberg Trust UWT, Scott A. Olafson, Kimberly A. Olafson, and Kenneth Larsen (hereinafter "Appellee Landowners" for the purposes of this appeal) sent Plaintiffs' counsel Erick Kaardal letters advising him that the Amended Complaint contained both

claims and allegations that are wholly unfounded in law or in fact. Meet and Confer Statement and Affidavit ("Aff.") of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Meet and Confer Statement and Affidavit ("Aff.") of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). Pursuant to Fed. R. Civ. P. 11(c), the motions for sanctions were enclosed with the letters to Mr. Kaardal. Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). Mr. Kaardal was advised that he had 21 days from the date of the letters to withdraw all claims asserted against Appellee Landowners and if he did not do so, Appellee Landowners would file the enclosed motions with the District Court, requesting an order awarding reasonable sanctions. Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111).

Among the grounds stated in Appellee Landowners' motions for sanctions was that Plaintiffs' Complaint is nothing more than a repackaging of the claims that Plaintiffs and Mr. Kaardal unsuccessfully litigated against the United States for over 11 years before the Federal Court of Claims. Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). Mr. Kaardal was advised that "[t]he arguments Plaintiffs assert in their Complaint have already been presented to and decided against Plaintiffs by the courts of the United States and Plaintiffs are attempting to

circumvent the principles of res judicata by bringing this Complaint." Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). Mr. Kaardal was further advised that Plaintiffs' claims were time-barred under *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and that there was no private right of action under the 1863 Act of Congress. Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). These issues and grounds for dismissal were also thoroughly discussed in Appellee Landowners' Joint Memorandum of Law in Support of Motions for Dismissal and the Memorandum in Support of Defendant Lower Sioux Indian Community's Motion for Dismissal of First Amended Complaint or Alternatively, Summary Judgment, that had been filed and served on Plaintiffs two months prior, on September 26, 2014.

Appellee Landowners' letters and motions for sanctions dated November 21, 2014 were never responded to and Plaintiffs' claims against Appellee Landowners were not dismissed. Aff. of Ken D. Schueler, Docket No. 204, at ¶ 3 (ASJA, p. 97); Aff. of Robert G. Benner, Docket No. 205, at ¶ 3 (ASJA, pps. 109-110).

The motions to dismiss of Appellee Landowners, along with the motions to dismiss filed by the Lower Sioux and the Municipalities, were granted by the District Court on March 5, 2015. Memorandum of Law & Order, Docket No. 196

(Appellants' Appendix in Case No. 15-1580, p. 1). In dismissing Plaintiffs' claims against the individual private landowner defendants, the District Court found Plaintiffs failed to assert a claim upon which relief may be granted. *Id.* at 17 (Appellants' Appendix in Case No. 15-1580, p. 17). The District Court found Plaintiffs' claims arise under the 1863 Act, which does not provide for a private right of action. *Id*. (Appellants' Appendix in Case No. 15-1580, p. 17). The District Court also found that even if a claim for relief had been stated, Plaintiffs' claims were barred as a result of Plaintiffs' unreasonable delay in bringing the action. *Id*. at 20-28 (Appellants' Appendix in Case No. 15-1580, pps. 20-28). The land at issue was sold to third parties no later than 1895. *Id*. at 26 (Appellants' Appendix in Case No. 15-1580, p. 26). Plaintiffs had notice for well over one hundred years that others were in wrongful possession of the land to which Plaintiffs were now seeking title. *Id*. at 25 (Appellants' Appendix in Case No. 15-1580, p. 25). As such, Plaintiffs' claims were equitably barred under the *Sherrill* doctrine. *Id*. at 20-28 (Appellants' Appendix in Case No. 15-1580, pps. 20-28).

On March 17, 2015, Plaintiffs filed their Notice of Appeal, appealing the decision of the District Court (Case No. 15-1580). Notice of Appeal, Docket No. 198 (ASJA, p. 83).

Following the District Court's dismissal of Appellants' claims, the Lower Sioux, the Municipalities, and Appellee Landowners filed motions for sanctions on

the grounds that Plaintiffs and their counsel knowingly commenced and prosecuted this action on legal theories that are not supported by existing fact or law, or did not involve a nonfrivolous argument for extending, modifying or reversing existing law. *See* Appellee Landowners' Motion for Sanctions, Docket No. 200 (ASJA, p. 86).

In an order dated June 9, 2015, the District Court granted the motions for sanctions, finding "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." Memorandum of Law & Order, Docket No. 291, at 3 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 3). The District Court again reiterated that there was no private right of action under the 1863 Act, and even if there was, "it is abundantly clear that the land was sold no later than 1895," "and that a reasonable and competent attorney would know that claims raised over one hundred years later would be equitably barred." *Id*. at 22 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 22). The District Court stated

> [d]espite the fact that Plaintiffs' claims accrued approximately one hundred and fifty years ago, Plaintiffs asked the Court to eject the defendants from the land and to award Plaintiffs' trespass damages. In other words, Plaintiffs sought a remedy that would result in private landowners being dispossessed of lands and real property that they and their ancestors had owned for over a hundred years, an Indian tribe being dispossessed of reservation lands that are held in trust for the tribe by the United States, municipalities losing the ability to

> obtain reimbursement in the form of taxes and assessments for the building of roads and other improvements, and a church being forced to move from land that was transferred to Reverend Henry Whipple, Episcopal Bishop, from Andrew Good Thunder for the sum of $1.00.

Id. at 5 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 5).

The District Court found Plaintiffs and Mr. Kaardal brought this action in bad faith, because "[a]fter eleven years of unsuccessful litigation in the Court of Federal Claims, it should have been clear that this action had no basis in law or fact." *Id*. at 25 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 25). The District Court also found that in response to the motions for sanctions, Mr. Kaardal "continued to engage in vexatious and wanton conduct by asserting frivolous legal arguments and mispresenting the law." *Id*. (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 25). The District Court ordered Plaintiffs and their counsel to pay the moving Appellees their reasonable attorneys' fees and costs as sanctions. *Id*. at 25-26 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 25-26). The District Court found that monetary sanctions in the form of reasonable attorneys' fees and costs were necessary in order to deter Plaintiffs and Mr. Kaardal from engaging in frivolous litigation in the future. *Id*. at 25 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 25).

Per the District Court's June 9, 2015 Order, within 30 days of the date of the Order, the Appellees moving for sanctions submitted a detailed accounting of the attorneys' fees they had incurred. *Id*. at 35 (Appellants' Appendix in Case Nos.

15-2375/15-3225, p. 35); *see* Affidavit of Robert G. Benner in Support of Attorney's Fees, Docket No. 307 (ASJA, p. 395); Affidavit of Ken D. Schueler in Support of Attorney's Fees, Docket No. 310 (ASJA, p. 398). Appellants submitted their response and objections to those requested fees on August 10, 2015. Response and Objections to Defendants' Attorney Fee Submissions Pursuant to the Court's June 9, 2015 Order, Docket No. 331 (ASJA, p. 456).

On June 25, 2015, Appellants filed a notice of appeal from the June 9, 2015 Order. Notice of Appeal from June 9, 2015 Order, Docket No. 292 (ASJA, p. 376). An Amended Notice of Appeal from the June 9, 2015 Order was filed on July 9, 2015 (Case No. 15-2375). Amended Notice of Appeal from June 9, 2015 Order, Docket No. 314 (ASJA, p. 401).

Appellees filed motions to dismiss Appellants' second appeal for lack of jurisdiction, because a proper appeal of the District Court's June 9th Order required finality in its award of sanctions against the Appellants. (*See* Appellee Landowners' Motion to Dismiss Appellants' Amended Appeal of the June 9, 2015 Order filed on July 14, 2015, No. 15-2375.) In an Order of this Court dated September 30, 2015, the Court dismissed Appellants' appeal of the District Court's award of sanctions as premature. (Order of September 30, 2015, at 1, No. 15-2375.)

Since that time, the District Court issued its final order and judgment on sanctions, awarding attorneys' fees and costs to the moving Appellees. Amended Memorandum of Law & Order, Docket No. 363 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 37); Amended Judgment in a Civil Case, Docket No. 364 (ASJA, p. 500). On September 29, 2015, the District Court ordered Plaintiffs, Mr. Kaardal and Mr. Kaardal's law firm Mohrman, Kaardal & Erickson, P.A. (hereinafter "MKE"), jointly and severally, to pay reasonable attorneys' fees and costs to Appellee Landowners Robert D. Rebstock, Lori A. Rebstock, Jon Lussenhop, Dale R. Hanna, Nancy Hanna, John C. Simmons, Mary J. Simmons, Julie Anna Guggisberg, Lee H. Guggisberg Trust UWT, Scott A. Olafson and Kimberly A. Olafson, in the amount of $28,351.49. Amended Memorandum of Law & Order, Docket No. 363, at 20 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 56); Amended Judgment in a Civil Case, Docket No. 364 (ASJA, p. 500). Plaintiffs and their counsel were also ordered to pay reasonable attorneys' fees and costs to Appellee Landowner Kenneth Larsen in the amount of $8,109.11. Amended Memorandum of Law & Order, Docket No. 363, at 20 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 56); Amended Judgment in a Civil Case, Docket No. 364 (ASJA, p. 500).

On October 1, 2015, Appellants filed their notice of appeal of the District Court's September 29, 2015 Order (Case No. 15-3225). Notice of Appeal from

September 29, 2015 Amended Order, Docket No. 366 (ASJA, p. 501). That appeal was consolidated with the appeal in Case No 15-2375, which had previously been ordered to be consolidated with the appeal in Case No. 15-1580. (Order of September 2, 2015, at 1, No. 15-2375; Correspondence from Clerk of Court Dated October 6, 2015, No. 15-3225.)

SUMMARY OF LANDOWNERS' ARGUMENT

The District Court did not abuse its discretion in awarding monetary sanctions in the form of reasonable attorneys' fees and costs against Appellants and in favor of Appellee Landowners pursuant to Fed. R. Civ. P. 11 and its inherent power.

The District Court found that the claims Plaintiffs and their counsel 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. Prior to bringing this action against the defendants in this action, Plaintiffs and Mr. Kaardal unsuccessfully litigated related claims in the Court of Federal Claims for eleven years, resulting in nine published decisions. The prior *Wolfchild* litigation held that the 1863 Act did not impose any duty on the Secretary of the Interior to make the land grants it authorizes, and that Plaintiffs' ancestors obtained no property interest under the 1863 Act because the government took steps toward conveyance of the 12 sections to the designated Indians in 1865, but terminated the process and sold the parcels to others. The sole

basis for Plaintiffs' claims in this case was their assertion that the Secretary set apart and thereby conveyed the 12 sections of land to their ancestors. That is in direct contradiction to and thereby precluded by the court's holdings in prior *Wolfchild* litigation.

The District Court did not abuse its discretion in finding that Plaintiffs' and their counsel's conduct of continuing their frivolous litigation in this case by bringing suit on that same basis against 75 private landowners and others, warranted a finding that monetary sanctions in the form of reasonable attorneys' fees and costs were necessary in order to deter Plaintiffs and Mr. Kaardal from engaging in frivolous litigation in the future. Appellants' continued attempt to argue there is any basis in law or fact for their claims in this Court shows the appropriateness of the sanction ordered by the District Court.

The proper procedures for imposing the sanctions were followed and the District Court's order for sanctions should be affirmed by this Court.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] a court's imposition of sanctions under its inherent power for an abuse of discretion." *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993) (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). Likewise, the Court

reviews a district court's determinations concerning Fed. R. Civ. P. 11 under the abuse of discretion standard. *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006) (citing *Cooter & Gell*, 496 U.S. at 405). "This is true with regard not only to the sanction imposed, but also to the factual basis for the sanction." *Dillon*, 986 F.2d at 267. The Court gives "substantial deference to the district court's determination as to whether sanctions are warranted because of its familiarity with the case and counsel involved." *Willhite v. Collins*, 459 F.3d 866, 869 (8th Cir. 2006) (citing *Lee v. First Lenders Ins. Servs., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001)).

There is no authority to support Appellants' assertion that the abuse of discretion standard should be applied with "particular strictness" with regard to Appellee Landowners. The case Appellants rely on in making this argument, *Security National Bank of Sioux City v. Day*, 800 F.3d 936, 941 (8th Cir. 2015), and the case *Security National Bank* cites to, *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 898-99 (8th Cir. 2009), involve the applicable standard of review for a district court's imposition of discovery sanctions, not a sanction imposed pursuant to Rule 11 or the district court's inherent power. Those cases therefore do not apply. This Court has stated that the *sua sponte* issuance of Rule 11 sanctions is to be reviewed with "particular strictness." *Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003) (quoting *MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 623

(8th Cir. 2003)). Since the District Court did not award Rule 11 sanctions *sua sponte* with regard to the Appellee Landowners, only the abuse of discretion standard and not the "particular strictness" standard apply. *See* Appellee Landowners' Motion for Sanctions, Docket No. 200 (ASJA, p. 86).

II. ALL OF PLAINTIFFS' CLAIMS FAIL BECAUSE THERE IS NO PRIVATE RIGHT OF ACTION UNDER THE 1863 ACT

One of the grounds for the dismissal of Plaintiffs' Amended Complaint was that Plaintiffs' claims arise under the 1863 Act, which does not provide for a private right of action. Memorandum of Law & Order, Docket No. 196, at 17 (Appellants' Appendix in Case No. 15-1580, p. 17). In its June 9, 2015 Sanctions Order, the District Court stated as follows:

> [a]s to the merits of the claims asserted against [Appellee Landowners], in the prior litigation, the district court held that the plaintiffs' claims against the United States grounded in the 1863 Act were without merits. Wolfchild et al. v. United States, 101 Fed. Cl. 54, 76 (2011). The Federal Circuit affirmed, finding that the 1863 Act did not impose a money mandating duty upon the United States, and that even if the Secretary had set apart the land under the Act, the claim was untimely. Wolfchild IX, 731 F.3d at 1292-93.
>
> Although the claims at issue here are directed to those individuals and entities that are in possession of the lands at issue, rather than the United States, the claims are also without merit. First, as this Court held in its March 5, 2015 Order, there is no private right of action under the 1863 Act.

Memorandum of Law & Order, Docket No. 291, at 21-22 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 21-22).

Appellants argue that the District Court was incorrect in stating that "Appellants' claims in the prior litigation were not 'without merit.'" (Appellants' Br. at 37.) That is not what the District Court said. The District Court's Order stated "plaintiffs' claims against the United States *grounded in the 1863 Act*," the same basis for Plaintiffs' claims against the defendants in this case, "were without merit." Memorandum of Law & Order, Docket No. 291, at 22 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 22) (emphasis added). This is a correct statement. *Wolfchild IX* held that the 1863 Act did "not impose any duty on the Secretary of the Interior to make the land grants it authorizes" and "therefore cannot 'fairly be interpreted as mandating compensation for damages sustained from a failure to provide such lands.'" 731 F.3d at 1292 (quoting *Navajo Nation*, 556 U.S. at 291). The court further determined that Plaintiffs' ancestors obtained no property interest under the 1863 Act, concluding that "[a]fter it took steps toward conveyance of the 12 sections to the designated Indians in 1865, the government terminated the process and sold the parcels to others." *Id.* at 1292-93. Thus, Plaintiffs' 1863 Act claims in *Wolfchild IX* were found to be without merit.

Appellants also take issue with the District Court's statement that the claims in this case "are also without merit" because it "suggests that the District Court believed that the Federal Circuit's prior *Wolfchild* litigation had some sort of res judicata or collateral estoppel effect." (Appellants' Br. at 37.) The sole basis for

Plaintiffs' claims in this case was their assertion that the Secretary set apart and thereby conveyed the 12 sections of land to their ancestors. That is in direct contradiction to and thereby precluded by the court's holdings in *Wolfchild IX*. Thus, Plaintiffs' claims in this case are barred by the doctrine of res judicata or collateral estoppel. (*See* Brief of the Lower Sioux Indian Community filed on June 15, 2015, No. 15-1580, at 46-51, for a full discussion of why Plaintiffs' claims in this case are barred by res judicata or collateral estoppel). Furthermore, even if the claims were not barred on res judicata or collateral estoppel grounds as Appellants argue, based on the prior litigation, Appellants still knew that their 1863 Act claims had absolutely no basis in law or fact, yet still pursued the claims in this action.

Appellants also argue that the District Court was wrong in sanctioning them on the basis that there was no private right of action because "Appellants never argued that they were asserting a private right of action under the 1863 Act. Rather, they claimed that they were alleging a federal common law claim under *Oneida I* and *Oneida II*." (Appellants' Br. at 38.) This is the same argument Plaintiffs made to this Court in Case No. 15-1580. For the sake of avoiding repetition, Appellee Landowners hereby incorporate by reference their extensive discussion of why the lack of private right of action in the 1863 Act precludes all of Plaintiffs' claims and why Appellants' argument lacks any merit. (*See* Brief of Appellee Landowners filed on June 17, 2015, No. 15-1580, at 10-23, specifically at

20-23 regarding why Appellants' argument that they can maintain federal common law claims lacks any merit because Appellants cannot concede, on the one hand, that their claim is a possessory action asserting a current right to possession conferred by federal law, the 1863 Act, while on the other hand, ignore the fact that the Act in question contains no private right of action, and furthermore, Plaintiffs are not a tribe and are not suing to enforce aboriginal land rights in the property at issue; rather, Plaintiffs admit that their rights, if any, only flow from the 1863 Act). It should also be noted that Appellants fail, as they have throughout this litigation, to even argue that there is a private right to enforce the 1863 Act by individual Indians, to the point of never citing or making any colorable argument under the many Supreme Court cases cited to in the briefs of Appellee Landowners and relied on by the District Court.

III. ALL OF PLAINTIFFS' CLAIMS ARE EQUITABLY BARRED BY THE *SHERRILL* DOCTRINE

In dismissing Plaintiffs' Complaint, the District Court found that even if a claim for relief had been stated, Plaintiffs' claims were barred as a result of Plaintiffs' unreasonable delay in bringing the action. Memorandum of Law & Order, Docket No. 196, at 20-28 (Appellants' Appendix in Case No. 15-1580, pps. 20-28). The land at issue was sold to third parties no later than 1895. *Id*. at 26 (Appellants' Appendix in Case No. 15-1580, p. 26). Plaintiffs had notice for well over one hundred years that others were in wrongful possession of the land to

which Plaintiffs were now seeking title. *Id*. at 25 (Appellants' Appendix in Case No. 15-1580, p. 25). As such, Plaintiffs' claims were equitably barred under the *Sherrill* doctrine. *Id*. at 20-28 (Appellants' Appendix in Case No. 15-1580, pps. 20-28).

Then in its June 9, 2015 Sanctions Order, the District Court again stated that "even if there [was a private right of action], it is abundantly clear that the land was sold no later than 1895, [], and that a reasonable and competent attorney would know that claims raised over one hundred years later would be equitably barred." Memorandum of Law & Order, Docket No. 291, at 22 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 22).

Appellants argue, just as they did in their brief to this Court in Case No. 15-1580, that they have reasonable arguments for challenging application of the *Sherrill* doctrine in this case. (*See* Appellants' Br. at 39-49.) For the sake of avoiding repetition, Appellee Landowners' hereby incorporate and adopt the arguments of the Municipalities with regard to application of the *Sherrill* doctrine set forth in their brief in this appeal, and also the briefs of the Municipalities and Appellee Landowners submitted in Case No. 15-1580, that address why Appellants' arguments that the *Sherrill* doctrine does not apply are without merit. (*See* Brief of Appellee Landowners filed on June 17, 2015, No. 15-1580, at 32-36; Brief of Municipal Defendants filed on June 17, 2015, No. 15-1580, at 23-33.)

IV. THE DISTRICT COURT FOLLOWED PROPER PROCEDURES IN SANCTIONING APPELLANTS

Appellants make a number of arguments as to why the District Court's sanctions order did not comply with procedural requirements. As discussed below, all of Appellants' arguments fail.

A. With Respect to Appellee Landowners, the District Court Ordered Sanctions Against Appellants Pursuant to Fed. R. Civ. P. 11 and Its Inherent Power.

Appellants assert that the District Court Order failed to specify the source of sanctions in favor of the Landowner Appellees. This is not true. The District Court issued sanctions against Appellants and in favor of Appellee Landowners pursuant to Rule 11 and also its inherent power.

First, there is no argument that the District Court did not issue sanctions against Appellants pursuant to Rule 11. The only grounds asserted in Appellee Landowners' motion for sanctions was Fed. R. Civ. P. 11(c). *See* Appellee Landowners' Motion for Sanctions, Docket No. 200 (ASJA, p. 86); *see also* Memorandum of Law & Order, Docket No. 291, at 35 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 35) (the District Court specifically referenced Appellee Landowners' Motion for Sanctions under Fed. R. Civ. P. 11(c) and stated it granted Defendants' Motions for Sanctions). Even more, the District Court spent considerable time in its opinion outlining the standard for imposing Rule 11 sanctions and Rule 11's safe harbor requirements. *See* Memorandum of Law &

Order, Docket No. 291, at 7-11 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 7-11). It was only with regard to the Municipalities that the District Court stated they did not satisfy Rule 11's safe harbor procedural requirements. *Id.* at 13-14 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 13-14) ("The Court finds that the Community and the Landowner Defendants complied with the safe harbor procedural requirements of Rule 11. The same is not true with respect to the Municipal Defendants."). Also, the language used in the District Court's Order evidences sanctions were issued pursuant to Rule 11. For example, the District Court stated "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* . . . ." *Id.* at 3 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 3) (emphasis added). This is a clear indication that the sanctions were awarded pursuant to Rule 11(b)(1), (b)(2) and (b)(3).

Furthermore, the language used in the District Court's Order also shows the District Court used its inherent power in ordering sanctions. A court's inherent power includes the discretionary "ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004) (quoting *Chambers*, 501 U.S. at 44-45). The Federal courts therefore have the inherent power to assess attorney fees against *a party or attorney* "as a sanction for bad faith conduct." *Gas Aggregation Servs., Inc. v.*

Howard Avista Energy, L.L.C., 458 F.3d 733, 739 (8th Cir. 2006) (quoting *Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997)); *see also Willhite*, 459 F.3d at 870 (noting that "an award of attorneys' fees is permissible under a court's inherent powers as long as the person being sanctioned has demonstrated bad faith"); *United States v. Gonzalez–Lopez*, 403 F.3d 558, 564 (8th Cir. 2005) (the court has the inherent power to sanction a party that has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons") (quoting *Kelly v. Golden*, 352 F.3d 344, 352 (8th Cir. 2003)). A finding of "bad faith" is specifically required in order to assess attorneys' fees pursuant to the court's inherent authority. *Gas Aggregation Servs., Inc.*, 458 F.3d at 739. The court's inherent power to sanction conduct "reaches conduct both before and during litigation as long as the conduct abuses the judicial process in some manner." *Id.* Thus, "[t]his inherent power is similar to the court's other powers to impose sanctions, but it is both broader in that it may reach more litigation abuses and narrower in that it may only be for attorney's fees." *Gonzalez–Lopez*, 403 F.3d at 564 (quoting *Kelly*, 352 F.3d at 352).

There is no question that the District Court used its inherent power to sanction Appellants. The District Court specifically stated the matter was before it on Defendants' motions for sanctions and the District Court's inherent authority. Memorandum of Law & Order, Docket No. 291, at 6 (Appellants' Appendix in

Case Nos. 15-2375/15-3225, p. 6). The District Court also stated it possessed the inherent authority to impose sanctions for bad faith conduct during litigation and discussed the standard for imposing such sanctions. *Id.* at 9 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 9). Furthermore, throughout its Order, the Court discussed the "bad faith" Plaintiffs and their counsel had shown in this litigation. *See id.* at 3 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 3) ("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"); *id.* at 22-23 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 22-23) ("[t]he fact a claim involves allegations of race discrimination does not provide a party or counsel leave to litigate such claim in bad faith"); *id.* at 23 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 23) ("the Court finds that Plaintiffs acted in bad faith and with reckless disregard for the law when it pursued this action against the Defendants."); *id.* at 25 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 25) ("[t]he Court finds that Plaintiffs and their counsel brought this action in bad faith.")

Finally, there is no question that the District Court imposed sanctions pursuant to Rule 11 and its inherent powers because the District Court specifically stated that it did just that. In its Order, the District Court stated "[p]ursuant to Rule 11 of the Federal Rules of Civil Procedure *and* the Court's inherent authority,

Plaintiffs and their Counsel, Erick Kaardal and MKE, jointly and severally, shall pay reasonable attorney's fees and costs . . . ." Memorandum of Law & Order, Docket No. 363, at 20 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 56) (emphasis added).

In this argument, Appellants also make the following assertion:

> Rule 11(c)(5) would specifically prohibit the Court from sanctioning Appellants based on frivolous legal arguments because the legal arguments are the responsibility of the party's attorney and not the party.[2] Therefore, Rule 11 cannot be the source of the Court's sanction.

(Appellants' Br. at 52.) Appellants' reasoning is incorrect because the District Court's award of sanctions was not limited to a Rule 11(c)(5) violation.

While sanctions under Rule 11 are typically imposed on the attorney signing the improper pleading, the Rule expressly authorizes a court to impose sanctions on any party that has violated Rule 11(b). *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.");

[2]Appellants repeat this same argument, that Appellants as represented parties cannot be sanctioned because the conduct the District Court relied on is frivolous legal arguments, in Section V, Subpart E of their brief. This argument is also set forth in the Separate Brief of Plaintiffs-Appellants. (*See* Separate Brief of Plaintiffs-Appellants filed on November 2, 2015, Case No. 15-3225, at 3-6.)

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 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) ("pursuant to the Court's inherent powers and Federal Rule of Civil Procedure 11, the undersigned may impose sanctions on a party who is or was represented by counsel."). Sanctions against a party directly are particularly justified when a plaintiff knew, or should have known, that the claims were frivolous. *See 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, 1474 (2d Cir. 1988) (sanctions may be imposed on a represented party with "actual knowledge that the filing of the papers constituted wrongful conduct, *e.g.*, the papers made false statements").

Rule 11(c)(5) limits monetary sanctions against a represented party only if the sanctions are for a violation of Rule 11(b)(2) in that the claims, defenses, and other legal contentions are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing

new law. Rule 11(c)(5) does not impose any limits on monetary sanctions against a represented party for a violation of Rule 11(b)(1) (is not being presented for an improper purpose) or for a violation of Rule 11(b)(3) (the factual contentions have evidentiary support).

Where Appellants are mistaken is that the District Court's award of sanctions was not limited to a Rule 11(c)(5) violation. The District Court specifically found that "Plaintiffs and their counsel *brought this action in bad faith*.[3] After eleven years of unsuccessful litigation in the Court of Federal Claims, it should have been clear that this action had *no basis in law or fact*." Memorandum of Law & Order, Docket No. 291, at 25 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 25) (emphasis added); *see also id.* at 3 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 3) (in discussing the nine published *Wolfchild* decisions, the District Court stated"[t]hose nine opinions also assist in demonstrating that 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*") (emphasis added). Thus, there was a basis for the Court's imposition of monetary sanctions against Plaintiffs under Rule 11(b)(1) (improper purpose) and Rule

[3]Appellants make the assertion that the Court never made a finding that Appellants' counsel engaged in bad faith. (Appellants' Br. at 53.) That is not true. As can be seen from this statement of the District Court, the District Court did find Mr. Kaardal acted in bad faith.

11(b)(3) (no factual basis). Monetary sanctions can be imposed against represented parties on both of those grounds. Based on the previous failed litigation, Plaintiffs knew that their claims lacked any basis in law or fact, yet they still continued to pursue their frivolous claims. Such conduct demonstrates bad faith and warrants sanctions against Plaintiffs.

B. The District Court Made Findings of Bad Faith Against Plaintiffs and their Counsel.

Appellants argue the District Court did not make any specific findings of bad faith as to Plaintiffs and their counsel in order to impose sanctions pursuant to its inherent power.[4] This is not true, the District Court did make findings of bad faith against both Plaintiffs and Mr. Kaardal as required to exercise its inherent power to impose sanctions.

In its June 9, 2015 Order, the District Court discussed the eleven years of litigation these Plaintiffs and Mr. Kaardal had partaken in, which resulted in nine published decisions, and stated "[t]hose nine opinions also assist in demonstrating that 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."

[4]This same argument, that the District Court made no findings of bad faith with regard to the individual Plaintiffs, is also set forth in the Separate Brief of Plaintiffs-Appellants. (*See* Separate Brief of Plaintiffs-Appellants filed on November 2, 2015, Case No. 15-3225, at 7-17.)

Memorandum of Law & Order, Docket No. 291, at 3 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 3); *see also id.* at 23 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 23) ("[a]ccordingly, the Court finds that Plaintiffs acted in bad faith and with reckless disregard for the law when it pursued this action against the Defendants."): *id.* at 25 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 25) ("[t]he Court finds that Plaintiffs and their counsel brought this action in bad faith.") Thus, the District Court did make findings of bad faith based on Plaintiffs' and their counsel's history of partaking in 11 years of unsuccessful litigation in the Court of Federal Claims on related claims, as required to exercise its inherent power to impose sanctions. Plaintiffs and Mr. Kaardal abused the judicial process by pursuing frivolous litigation when they knew their claims lacked any basis in law or fact. That is the exact conduct for which a district court is given the inherent power to impose sanctions.

C. Appellee Landowners Complied with the Safe Harbor Provisions of Fed. R. Civ. P. 11.

Appellants try to argue that Appellee Landowners did not comply with the 21-day safe harbor provision of Rule 11(c)(2) because Appellants were served with Appellee Landowners' motion for sanctions and not a memorandum of law and affidavits. (*See* Appellants' Br. at 56.) Appellants are again incorrect.

The requirements for obtaining sanctions are explicitly set out in the text of Rule 11, which provides in pertinent part:

> [a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). *The motion must be served* under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

(emphasis added).

The advisory committee note explains that "[t]o stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon *service of the motion.*" Fed. R. Civ. P. 11 Advisory Committee Note (1993 Amendments) (emphasis added).

Rule 11 does not require that a motion served for purposes of the safe harbor period must include supporting papers such as a memorandum of law and exhibits. *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 176 (2d Cir. 2012); *see also Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 243 F.R.D. 322, 339 (N.D. Iowa 2007) ("Rule 11 says nothing about requiring service of the *brief* in support of a Rule 11 motion to trigger the twenty-one day 'safe harbor.'").

Appellee Landowners complied with the requirements of Rule 11. Appellee Landowners served the exact motion for sanctions that they subsequently filed with the District Court, on Appellants on November 21, 2014. Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). Appellee Landowners did not file their motion for sanctions with the District Court until March 24, 2015, giving Appellants far more than the required 21-days to withdraw their frivolous claims. Appellee Landowners' Motion for Sanctions, Docket No. 200 (ASJA, p. 86).

It seems Appellants are trying to argue that they somehow did not anticipate Appellee Landowners' grounds for seeking sanctions, specifically with regard to the *Sherrill* doctrine. Appellants had full knowledge of the *Sherrill* doctrine and Appellees Landowners' other grounds for sanctions. The motion set forth the grounds for the motion for sanctions, specifically that Plaintiffs' claims were barred by principles of res judicata, were time-barred under *Sherrill*, and that there was no private right of action under the 1863 Act. Aff. of Ken D. Schueler, Docket No. 204, Exh. 1 (ASJA, p. 98); Aff. of Robert G. Benner, Docket No. 205, Exh. 1 (ASJA, p. 111). Furthermore, these issues and grounds for dismissal were thoroughly discussed in Appellee Landowners' Joint Memorandum of Law in Support of Motions for Dismissal and the Memorandum in Support of Defendant Lower Sioux Indian Community's Motion for Dismissal, that had been filed and

served on Appellants on September 26, 2014, almost six months prior to the District Court's dismissal of Plaintiffs' claims.[5]

Appellee Landowners complied literally with the requirements of Rule 11, as they served their motion for sanctions more than 21 days before it was filed with the District Court, the motion was made separately from any other motion, and the motion described the specific conduct that violated Rule 11(b).

D. The District Court Did Not Abuse its Discretion in Ordering Appellants to Pay Appellees' Attorneys' Fees as a Sanction.

The primary purpose of Rule 11 sanctions is to deter attorney and litigant misconduct. *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1490 (8th Cir. 1994). Rule 11 is "aimed at curbing abuses of the judicial system." *Cooter & Gell*, 496 U.S. at 397. An award of sanctions should be "no greater than sufficient to deter future misconduct by the party," *In re Kujawa*, 270 F.3d 578, 583 (8th Cir. 2001), but a large award can be necessary to deter the sanctioned from similar

[5]Similarly, in the Separate Brief of Plaintiffs-Appellants, Plaintiffs try and argue they did not have notice and an opportunity to address the District Court's specific basis for sanctions. (*See* Separate Brief of Plaintiffs-Appellants filed on November 2, 2015, Case No. 15-3225, at 9-11.) This is not true. The letters from Defendant Landowners' counsel dated November 21, 2014 and the attached motions for sanctions gave Plaintiffs ample notice of the basis for their seeking sanctions. Furthermore, Plaintiffs were given the opportunity to respond to the motions for sanctions with a lengthy brief and a hearing on the motions was held. Thus, Plaintiffs were given notice and an opportunity to be heard as required for the District Court to impose sanctions against them pursuant to its inherent authority.

misconduct. *Willhite*, 459 F.3d at 869. With respect to a court's inherent power, an award of attorneys' fees is permissible as long as the person being sanctioned has demonstrated bad faith. *Id.* at 870 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980)).

The District Court did not abuse its discretion in ordering as sanctions that Plaintiffs, Mr. Kaardal, and Mr. Kaardal's law firm MKE, pay Appellee Landowners' attorneys' fees in defending against this frivolous action. The Appellee Landowners have suffered substantial hardship by defending against this lawsuit. Memorandum of Law & Order, Docket No. 291, at 21 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 21). Since May 2014, they have had to deal with the enormous stress of having a federal lawsuit pending against them and of not knowing whether their homes and land would be taken away from them. *Id.* (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 21). This action has

also clouded titles to their land, making it impossible to conduct transactions involving their land.[6] *Id.* (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 21).

Appellants argue the District Court should not have used Rule 11 to compensate Appellees. That is not what the District Court did. The District Court found that given these Plaintiffs' and Mr. Kaardal's long history of knowingly filing these related lawsuits, only a significant monetary sanction against Appellants would deter Plaintiffs and their counsel from engaging in further frivolous litigation. *Id.* at 24-25 (Appellants' Appendix in Case Nos. 15-2375/3225, pps. 24-25). Appellants' continued attempt to argue there is any basis in law or fact for their claims in this Court shows the appropriateness of the sanction ordered by the District Court.

As they did in the District Court, Appellants again assert that Mr. Kaardal and Plaintiffs do not have the ability to pay the sanctions ordered. The District Court acknowledged that each stands in a different position and that some have

[6]In their briefs, Appellants and Plaintiffs individually argue the District Court did not properly exercise its discretion in ordering attorneys' fees pursuant to its inherent power because it did not balance the equities of the parties. (*See* Appellants' Br. at 55; Separate Brief of Plaintiffs-Appellants filed on November 2, 2015, Case No. 15-3225, at 8.) However, a review of the record from the District Court shows the District Court did balance the equities of the parties in this case and awarded attorneys' fees when the overriding considerations indicated the need for such a recovery.

established that alone, he or she could not pay a large monetary sanction. Memorandum of Law & Order, Docket No. 363, at 19 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 55). However, as the District Court found, "Plaintiffs and counsel are jointly liable for the sanctions, and sharing the burden of the sanctions between them will decrease the financial burden on each and increase the ability to pay." *Id.* (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 55).

Furthermore, as acknowledged by Appellants, Mr. Kaardal's law firm MKE does have the financial ability to pay the sanctions. (Appellants' Br. at 58.) Appellants state the District Court made no findings as to why MKE should be sanctioned. That is a complete misstatement. Rule 11(c)(1) explicitly provides that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." The District Court found Appellants had not demonstrated exceptional circumstances exist which would exempt MKE from being held jointly liable for the sanctions imposed. Memorandum of Law & Order, Docket No. 363, at 18-19 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 54-55). The District Court found Mr. Kaardal had practiced with MKE for the entire time this matter was pending, and for the entire eleven years during which the case was pending before the Court of Claims. *Id.* at 18 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 54).

The District Court also took issue with Mr. Kaardal's representation that he was the only attorney at MKE handling this case since in addition to Mr. Kaardal, attorney James V.F. Dickey, an associate at MKE, was named as lead counsel and attorney to be noticed in the District Court's docket. *Id.* at 18-19 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 54-55). Mr. Dickey was also included in the signature blocks of Plaintiffs' memorandums in opposition to the motions to dismiss and motions for sanctions. *Id.* at 19 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 55). Thus, the District Court did not abuse its discretion in finding that no exceptional circumstances exist and MKE is jointly liable for the ordered sanction. Accordingly, MKE's ability to pay the ordered sanction is relevant and was properly considered.

Lastly, nowhere in their brief do Appellants contest the amount of the sanction imposed by the District Court. As such, Appellants have waived the ability to challenge the amount of the sanction ordered by the District Court. *See Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1306 n. 3 (8th Cir. 1997) (noting that, generally, the Court will consider an issue not raised or briefed to the Court waived).

CONCLUSION

For the foregoing reasons, and for those reasons set forth in the briefs of the Lower Sioux Indian Community and the Municipalities in this appeal, and the

briefing of Appellees in the consolidated appeals, Appellee Landowners respectfully request that the Court affirm the District Court's Order and Judgment of September 29, 2015.

Dated: November 23, 2015.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) AND LOCAL RULE 28A(h)(2)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 9,633 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

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Dated: November 23, 2015

s/ Ken D. Schueler