No. 15-2375 and No. 15-3225

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Sheldon Peters Wolfchild, et al.,

Plaintiffs-Appellants,

vs.

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

BRIEF OF THE LOWER SIOUX INDIAN COMMUNITY

Joseph F. Halloran (MN # 244132)
Mary B. Magnuson (MN # 160106)
Sara K. Van Norman (MN # 339568)
Michael L. Murphy (MN # 394879)
Jeffrey K. Holth (MN # 393070)
The Jacobson Law Group
Jacobson, Magnuson, Anderson & Halloran, P.C.
180 East Fifth Street, Suite 940
Saint Paul, MN 55101
Tele: (651) 644-4710
Email: jhalloran@thejacobsonlawgroup.com
mmagnuson@thejacobsonlawgroup.com

svannorman@thejacobsonlawgroup.com
mmurphy@thejacobsonlawgroup.com
jholth@thejacobsonlawgroup.com

Counsel for the Lower Sioux Indian Community

Summary of the Case

The District Court did not abuse its discretion when it ordered Appellants to pay, as a sanction imposed pursuant to its inherent authority, Federal Rule of Civil Procedure 11 ("Rule 11"), and 28 U.S.C. § 1927 ("Section 1927"), the attorney fees and costs that the Lower Sioux Indian Community ("Community") incurred defending against this frivolous lawsuit that the Appellants filed in bad-faith.

Appellants knew that their claims in this case were frivolous, as the Court of Federal Claims had already rejected the same claims in nine published decisions spanning eleven years of litigation. Moreover, Appellants filed a complaint and advanced legal contentions that patently ignored, contradicted, and misrepresented federal law. Most notably, Appellants sued the Community without regard to the well-settled doctrine of sovereign immunity, which outright bars Appellants' claims against the Community. As such, it was within the District Court's discretion to impose a monetary sanction in the form of fees and costs pursuant to its inherent authority and Section 1927, and to deter Appellants from advancing frivolous claims in bad-faith in the future, pursuant to Rule 11.

Additionally, the District Court did not abuse its discretion when it refused to take judicial notice of the Community's *utterly irrelevant* corporate charter, as federal law dictates that the charter does not waive the Community's immunity.

This Court granted Appellees 20 minutes for oral argument.

Table of Contents

Table of Authorities

Cases

Statutes

Treaties

Other Authorities

Jurisdictional Statement

The District Court exercised jurisdiction in the underlying cause of action based on an allegation of a federal question. *See* 28 U.S.C. § 1331. The District Court dismissed the Individual Appellants'[1] case with prejudice and entered its final judgment and order on March 5, 2015. On June 9, 2015, the District Court ordered the Individual Appellants, their attorney, and Mohrman, Kaardal & Erickson, P.A. ("MKE"), to pay the Community, as a sanction, the reasonable attorney fees incurred by the Community in defending the underlying cause of action. On September 29, 2015, the Court fixed the sanction in the amount of $107,758.17. Appellants filed Notice appealing the District Court's Order on October 1, 2015. This Court has jurisdiction to review the District Court's final decision. *See* 28 U.S.C. § 1291.

[1] The Community's reference to "Appellants" denotes each named appellant in this appeal. The Community's reference to "Individual Appellants" denotes the represented parties in this appeal who are the named plaintiffs in the underlying action. The Community's reference to "Appellants' attorney" denotes Erick G. Kaardal and his firm, MKE, because "a law firm must be held jointly responsible for a violation committed by its partner." Fed. R. Civ. P. 11(c)(1).

Statement of the Issues

1. Appellants filed an Amended Complaint requesting the District Court to dispossess the Community of its beneficial interest in its reservation lands, divest the United States of legal title to the Community's trust lands, and eradicate the Community's status as a sovereign, federally recognized Indian tribe. Did the District Court abuse its discretion in sanctioning Appellants pursuant to its inherent authority, Rule 11(b)(1)-(3), and Section 1927 for acting in bad-faith by filing a lawsuit that they knew had no basis in law or fact, invoking the jurisdiction of the District Court without justification, and advancing legal arguments that are contrary to law?

Apposite Authorities:

Federal Rule Civil Procedure 11

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

MHC Inv. Co. v. Racom Corp., 323 F.3d 620 (8th Cir. 2003)

2. The District Court determined that a monetary sanction payable to the Sanctions Appellees in the amount of $281,906.34 of reasonable attorney fees was necessary to deter Appellants from engaging in frivolous litigation in the future, and that the Community was entitled to its reasonable attorney fees of $107,758.17, given that Appellants have subjected the Community to their specious claims, in one form or another, for over thirteen years. Did the District

Court abuse its discretion by ordering Appellants to pay the Community, as a sanction, $107,758.17 in reasonable attorney fees incurred in defending against this action?

Apposite Authorities:

Federal Rule Civil Procedure 11

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

MHC Inv. Co. v. Racom Corp., 323 F.3d 620 (8th Cir. 2003)

Harlan v. Lewis, 982 F.2d 1255 (8th Cir. 1993)

3. Did the District Court abuse its discretion by refusing to take judicial notice of the Community's corporate charter, a document that has no relevance to the District Court's imposition of sanctions or the underlying claim?

Apposite Authorities:

Rosebud Sioux Tribe v. Val-U Const. Co. of S.D., Inc., 50 F.3d 560 (8th Cir. 1995)

Kushner v. Beverly Enters., Inc., 317 F.3d 820 (8th Cir. 2003)

4. Did the District Court abuse its discretion when it imposed an appellate cost bond in the amount of $200,000 under Federal Rule of Appellate Procedure 7?

Apposite Authorities:

Federal Rule of Appellate Procedure 7

Federal Rule of Appellate Procedure 38

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

Adsani v. Miller, 139 F.3d 67 (2d Cir. 1998)

Statement of the Case[2]

The District Court imposed sanctions against the Individual Appellants, their attorney Erick G. Kaardal, and MKE for acting in bad-faith by filing a lawsuit they knew was frivolous, invoking the District Court's jurisdiction without justification, and presenting arguments that contradict and misrepresent the law. Appellants' long arc of bad-faith conduct began in *Wolfchild v. United States*[3] and continues today. The Community incorporates the historical facts underlying this case that are detailed in its Principal Brief in Docket No. 15-1580. Here, the Community offers the facts and procedural history relevant to this sanctions appeal.

---

[2] Throughout this brief, the Community adopts the following conventions for citation: Appellants' Addendum ("Appellants' Add."); Appellants' Appendix ("Appellants' App."); Appellees' Joint Appendix ("JA"); District Court Docket in the underlying case, Civ. No. 0:14-cv-01597-MJD-FLN ("Dkt."); Individual Appellants' Principal Brief in No. 15-1580 ("Appellants' Brief, No. 15-1580"); Community's Principal Brief in No. 15-1580 (Community's Brief, No. 15-1580"); Appellants' Principal Brief in Case Nos. 15-2375, 15-3225 (Appellants' Brief, No. 15-3225).

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

I. The Community.

The Community[4] is a federally recognized Indian tribe organized under a Constitution and By-laws that the Community's membership adopted and the Secretary of the Interior approved in 1936 pursuant to the Indian Reorganization Act ("IRA").[5] In 1934, the Mdewakanton Sioux in Minnesota voted to accept the terms of the IRA and then organized as three separate tribes—the Lower Sioux Indian Community and the Prairie Island Indian Community ("PIIC") organized in 1936, and the Shakopee Mdewakanton Sioux Community ("SMSC") organized in 1969. Theodore H. Haas, Ten Years of Tribal Government Under I.R.A. 16 (1947), *available at* http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf ("Haas Report"); *see also Wolfchild IX*, 731 F.3d 1280, 1286-87 (Fed. Cir. 2013). These three sovereign, federally recognized Communities are the *only* successors in interest to the historic Mdewakanton Sioux in Minnesota who signed treaties with the United States in 1805, 1825, 1830, 1837, 1851, and 1858.[6] Each branch of the federal government has recognized the Community as

---

[4] The Community has detailed its legal status as a federally recognized Indian tribe in its Principal Brief in Docket No. 15-1580. *See* Community's Brief, No. 15-1580, at Section II.A.1.

[5] The Community's Constitution and By-laws are accessible on the Community's website. *See* "*Constitution of the Lower Sioux Indian Community in Minnesota*," Lower Sioux Indian Community, http://www.lowersioux.com/pdffiles/Lower%20Sioux%20Indian%20Community%20Constitution.pdf (last visited Nov. 22, 2015).

[6] The 1805 Treaty was submitted by the President to the Senate on March 29,

an Indian tribe with sovereign rights. *See infra* Argument, Section II.C.i.

The Community is governed by a Community Council, comprised of five officials elected from the Community's membership. The Community has 930 members, half of whom live on the Community's 1,743-acre reservation (the "Reservation"). Members receive numerous government services from the Community, including law enforcement, housing, healthcare, and social services. *See* "Departments," Lower Sioux Indian Community, http://www.lowersioux.com/departments.html.

II. The Background for this Case: *Wolfchild I-IX*.

The District Court's findings of bad-faith are rooted in the experience and knowledge Appellants garnered from litigating *Wolfchild I-IX* for eleven years. In that litigation, Individual Appellants sued the United States for breach of trust relating to their alleged interest in certain lands, including some of the lands that are the subject of these proceedings. *See Wolfchild IX*, 731 F.3d at 1287-89 (discussing the history of the *Wolfchild* litigation). After nine reported decisions the Federal Circuit dismissed Individual Appellants' case with prejudice. *Id.* at 1285. The Supreme Court denied *certiorari* on March 10, 2014. *Wolfchild v.*

1808, and ratified by the Senate on April 16, 1808. *See Lower Sioux Indian Cmty. v. United States*, 36 Ind. Cl. Comm. 295, 316 (1975); *see also* Treaty of August 19, 1825, 7 Stat. 272; Treaty of July 15, 1830, 7 Stat. 328; Treaty of September 29, 1837, 7 Stat. 538; Treaty of July 23, 1851, 10 Stat. 949; Treaty of August 5, 1851, 10 Stat. 954; Treaty of June 19, 1858, 12 Stat. 1031.

United States, 134 S. Ct. 1516 (2014); *Zephier v. United States*, 134 S. Ct. 1516 (2014).

In the prior *Wolfchild* litigation, Individual Appellants argued that the United States owed them compensation for taking lands promised and/or conveyed to their purported ancestors under an act passed by Congress in 1863 (the "1863 Act"). *Wolfchild IX*, 731 F.3d at 1291-92. Contrary to their claims, the Federal Circuit ruled that the 1863 Act created no "money mandating duty" under the Indian Tucker Act, because: (1) Individual Appellants received no property interest in any lands proposed for set aside under the 1863 Act; and (2) the United States' subsequent conveyance of any lands proposed for set aside under the 1863 Act was legal. *Id.* at 1292-93; *see also Wolfchild VIII*, 101 Fed. Cl. 54, 66 n.10 (2011) (stating that any lands proposed for set aside were returned to the public domain by Presidential Proclamation, as required by the 1863 Act). Accordingly, the prior *Wolfchild* litigation determined, as a matter of law, that no property rights were derived from the 1863 Act.

III. The Proceedings Below.

Individual Appellants filed their initial Complaint on May 20, 2014, two weeks after the Supreme Court denied *certiorari* in *Wolfchild I-IX*, and their Amended Complaint on September 22, 2014. *See* JA 1-35; Appellants' App. 57-118. Individual Appellants seek to dispossess the Community of its lands, divest

the United States of legal title to the Community's trust lands, and eradicate the Community as a body politic. *See* Appellants' Add. 2-3; Appellants' App. 59-60; JA 667-68.

Appellants' litigation strategy is borrowed from *Wolfchild I-IX*: it is frenetic, fractured, ever-changing, and designed to keep a dead case alive. Their frivolous Complaint has required the parties to submit 189 *substantive* filings in District Court alone. These filings amount to 5,101 pages, *exclusive* of the 1,707 pages of exhibits that the Appellants filed—twice. Appellants' Complaint has generated six substantive orders from the District Court and this Court, in addition to three piecemeal appeals. Appellants have filed four motions to stay separate portions of the District Court's June 9, 2015 Order—two in District Court and two in this Court—all of which have been denied. Because each request for a stay required the respective court to evaluate the merits of the Appellants' appeal, Appellants' claims and arguments have been considered and rejected *five* times.

A. The Merits Appeal, No. 15-1580.

The Individual Appellants' appeal in Case No. 15-1580 concerns the District Court's March 5, 2015 order and judgment granting Appellees'[7] motions to dismiss with prejudice for lack of jurisdiction based on the Community's immunity and for

[7] Reference to "Appellees" denotes the named appellees in the merits appeal, No. 15-1580. Reference to "Sanctions Appellees" denotes the named appellees in this appeal, No. 15-3225.

failure to state a claim upon which relief can be granted. JA 53-82. On June 30, 2015, this Court granted Appellees motion to expedite the merits appeal. Order of June 30, 2015, at 1 (No. 15-1580). The merits appeal was fully briefed on July 21, 2015. Appellants' Reply Brief, July 21, 2014 (No. 15-1580).

B. The Bond Appeal, No. 15-2375.

In March 2015, the Community, Appellee Landowners, and Appellee Municipalities filed motions for sanctions, and Appellees jointly filed a motion for a cost bond. JA 86-89, 120-25; 201-03. On April 16, 2015, Individual Appellants filed a motion in District Court to take judicial notice of the Community's corporate charter (the "charter"). JA 255. On June 9, 2015, the District Court granted the motions for sanctions, ordered Appellants' to post a $200,000 cost bond, and refused to take notice of the charter.[8] Appellants' App. 1-36. On June 25, 2015, Appellants filed a Notice of Appeal of the June 9, 2015 Order. JA 376-79. The appeal was premature because the District Court had not entered a final order that fixed the amount of the sanction. Appellants' Add. 35-36; JA 378.

On June 15, 2015, Appellees moved this Court to dismiss Individual Appellants' appeal on the merits if Appellants failed to post the required $200,000 cost bond prior to the filing of their reply brief. Appellees' Mots. for Expedited

[8] Per the June 9, 2015 Order, the Sanctions Appellees submitted an accounting of the attorney fees incurred in defending this action, the Appellants submitted objections. *See* Appellants App. 37-56; JA 456.

Appeal and to Dismiss, June 15, 2015 (No. 15-1580). Rather than filing the cost bond, on June 25, 2015, Appellants moved the District Court to stay imposition of the cost bond pending resolution of the appeal of the District Court's June 9, 2015 Order. JA 380-94. On June 30, 2015, this Court held in abeyance Appellees' motion to dismiss for failure to post the bond pending the District Court's disposition of Appellants' motion to stay the bond. Order of June 30, 2015, at 1 (No. 15-1580).

On July 16, 2015, the District Court denied Appellants' motion to stay the bond. JA 405-11. Appellants then moved this Court on July 24, 2015 to stay imposition of the bond, which this Court denied on September 2, 2015. Order of Sept. 2, 2015, at 1 (No. 15-2375). To date, Appellants have not posted the $200,000 cost bond.

On July 14, 2015, Appellees moved this Court to dismiss Appellants' premature appeal from the June 9, 2015 Order because the District Court had not issued a final order fixing the amount of sanctions. Community's Mot. to Dismiss Appellants' Amended Appeal, July 14, 2015 (No. 15-2375). On September 2, 2015, this Court dismissed Appellants' appeal of the sanctions portion of the June 9, 2015 Order for lack of jurisdiction. Order of Sept. 2, 2015, at 1 (No. 15-2375).

On August 4, 2015, Appellants filed three additional motions. First, they filed their *third* motion to stay a *part* of the June 9, 2015 Order, requesting again,

that the District Court stay the sanctions proceedings pending a disposition of the merits and bond appeals. JA 412-13. Second, Appellants moved this Court to consolidate both appeals. Appellees' Mot. to Consolidate, Aug. 4, 2015 (Nos. 15-1580, 15-2375). Third (and contradictorily), Appellants moved to hold the briefing schedule in the bond appeal in abeyance pending the resolution of all of the above-described motions. Appellees' Mot. to Hold Schedule in Abeyance, Aug. 4, 2015 (Nos. 15-1580, 15-2375). On September 2, 2015, this Court consolidated the merits appeal and the bond appeal. Order of Sept. 2, 2015, at 1 (No. 15-2375).[9]

C. The Sanctions Appeal, No. 15-3225, and Cross-Appeal, No. 15-3227.

On September 29, 2015, the District Court denied Appellants' request to stay the sanctions proceedings pending resolution on appeal, and fixed the amount of the sanction payable to the Community at $107,758.17. Appellants' App. 37-56. Two days later, on October 1, 2015, Appellants filed a Notice of Appeal from the September 29, 2015 Order, resulting in Case No. 3225 (the "sanctions appeal"). JA 501-04. Then, on October 10, 2015, the Municipal Appellees filed a Notice of Cross Appeal, resulting in Case No. 3227 (the "cross appeal"). JA 505-07.

On October 29, 2015, the date Appellants' sanctions were due to the

[9] Also in its September 2, 2015 Order, this Court expressly reserved ruling on Appellees' motion to dismiss for failure to post the bond pending disposition of the bond appeal, and vacated the prior order expediting the merits appeal. Order of Sept. 2, 2015, at 1-2 (No. 15-2375).

Community, Appellants filed a *fourth* motion to stay, this time requesting this Court to stay the imposition of the District Court's sanction.[10]

IV. Proceedings Specific to this Appeal and Rulings Presented for Review.

Despite numerous warnings from the Community and the other Sanctions Appellees, Appellants have continued to present arguments in support of their frivolous Amended Complaint that are contrary to and misrepresent the law.

A. Safe Harbor, Notice, and Appellants' Opportunity to be Heard.

On June 2, 2014, just two weeks after Individual Appellants filed their original Complaint, the Community's attorneys wrote a letter advising Individual Appellants' attorney that the Original Complaint violated Rule 11 and Section 1927. JA 152-54. The letter notified Individual Appellants' attorney that the claims made in the Complaint were barred by tribal sovereign immunity, *res judicata* and collateral estoppel, failure to join the United States as the party that holds legal title to the Community's trust lands, and failure to state a claim. *Id.* The letter demanded that Appellants withdraw their Complaint by the close of business on June 6, 2014 "so that the Community can avoid further expense by responding to it." *Id.* On June 24, 2014, Individual Appellants' attorney responded to the June 4, 2015 courtesy letter indicating his refusal to withdraw the

[10] In order to avoid additional motion practice that would delay the merits appeal, the parties stipulated to a stay of imposition of the sanctions order pending resolution of this appeal, which the District Court granted on November 3, 2015. Dkt. 378.

original Complaint. JA 155-62.

On September 22, 2014, Individual Appellants filed an Amended Complaint. Appellants' App. 57-118. In response, on November 4, 2014, the Community's attorneys sent another letter advising Individual Appellants' attorney that the First Amended Complaint failed to cure the defects of the original Complaint that were identified in the June 2, 2014 letter. JA 163-64. This letter demanded that the Individual Appellants and their attorney withdraw the Amended Complaint and cautioned that the Community would move for an award of fees, costs, and other sanctions under Rule 11 and Section 1927 if the Amended Complaint was not withdrawn. *Id.* The Individual Appellants' attorney ignored the letter. JA 149.

On November 25, 2015, the Community served Appellants with a Rule 11 Motion for Sanctions and again advised Appellants' attorney that the Community would file the motion if the Amended Complaint was not withdrawn within 21 days. JA 165-71. And again, Individual Appellants' attorney ignored the Community's letter and motion. JA 150. On March 25, 2015, the Community filed the Motion for Sanctions in District Court. JA 120-25. The Community's corresponding memorandum of law requested the Court to impose sanctions pursuant to Rule 11 and its inherent authority. JA 126.

B. The District Court's Sanctions Orders.

The District Court held a hearing on the motions for sanctions, the appellate

cost bond, and the Individual Appellants' motion to take judicial notice of the Community's charter on May 27, 2015. JA 508. On June 9, 2015, the District Court issued an order imposing sanctions on Appellants pursuant to its inherent authority, Rule 11, and Section 1927, on the ground that Appellants acted in bad-faith by bringing a lawsuit they knew had no basis in law or fact. Appellants' Add. 3, 16, 20, 25-26.

The District Court imposed sanctions against specific parties under specific grants of authority. The District Court imposed sanctions in the form of reasonable attorney fees pursuant to its inherent authority because Appellants filed the Amended Complaint in bad-faith. *Id.* at 25-26. Additionally, the District Court concluded that Appellants violated Rule 11(b)(3) and (1), and that Individual Appellants' attorney independently violated Rule 11(b)(2). Appellants' Add. 16, 20. The District Court also denied the Individual Appellants' motion to take judicial notice of the Community's corporate charter, emphasizing the charter's irrelevance under this Circuit's binding precedent. *Id.* at 30-32.

On September 29, 2015, after reviewing the Community's accounting of fees and costs as well as Appellants' objections, the District Court ordered Appellants to pay the Sanction Appellees a total of $281,906.34, $107,758.17 of which was awarded to the Community.[11] *Id.* at 46-56. The District Court also

[11] Notably, on August 12, 2015—two days *after* their objections were due—

denied Appellants' third motion to stay the sanctions proceedings, emphasizing once again that Appellants' arguments were without merit. *Id.* at 38-44.

Summary of the Argument

This Court must affirm the District Court's June 9, 2015 Order, which imposed sanctions on Appellants and refused to take judicial notice of the Community's corporate charter.

First, the District Court did not abuse its discretion in imposing sanctions. The Community afforded Appellants safe harbor as required by Rule 11 and Appellants had ample notice that the District Court was considering imposing sanctions. In addition, the record fully supports the District Court's imposition of sanctions against the Individual Appellants, their attorney Erick G. Kaardal, and MKE pursuant to Rule 11, Section 1927, and the District Court's inherent authority, for filing the Amended Complaint in bad-faith and in clear contradiction of well-established law.

Second, the District Court, as the "court[] on the front lines of litigation," *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 110 (8th Cir. 2006) (citation and internal citations omitted), did not abuse its discretion by fixing a sanction payable

---

Appellants moved for a protective order from the District Court to maintain the confidentiality of certain financial records. JA 495-97. Despite the untimeliness of the request, the District Court reviewed Appellants' financial records *in camera*, JA 498-99, but ultimately rejected Appellants' inability-to-pay argument in its September 29, 2015 Order. Appellants' App. 53-55; JA 500.

to the Sanctions Appellees in the amount of the reasonable attorney fees ($281,906.34) that the Sanctions Appellees incurred as a result of Appellants' frivolous suit. The District Court was well within its discretion to conclude that an award of $107,758.17 to the Community was necessary to deter future improper conduct given that Appellants have now subjected the Community to specious claims, in one form or another, for over 13 years, at a significant cost.

Third, the District Court did not abuse its discretion in refusing to take judicial notice of the corporate charter. The charter is irrelevant to the resolution of the case and, despite the fact that the Appellants would now have this Court believe that the charter was part of the record before the District Court, it was raised *after* the District Court had dismissed their Amended Complaint. Appellants seek judicial notice in an attempt to establish that the "sued and be sued" clause in the charter waives the Community's sovereign immunity from suit. But, as the District Court properly noted, this Court has held that a "sue and be sued clause" in a tribe's corporate charter does not operate as a general waiver of the Tribe's immunity from suit. *Rosebud Sioux Tribe v. Val-U Const. Co. of S.D., Inc.*, 50 F.3d 560, 563 (8th Cir. 1995). Furthermore, under Federal Rule of Evidence 201, Appellants cannot seek judicial notice of an extra-record document to prove the truth of false facts and erroneous legal conclusions—namely, that the charter is the Community's "founding document" and establishes that the

Community "never had sovereign immunity." JA 262; *see* Fed. R. Evid. 201 advisory committee's note. Appellants' patently erroneous assertions underscore their willingness to misrepresent the facts and law, and engage in bad-faith conduct to further their absurd claims.

Argument

I. The Court must affirm the District Court's imposition of sanctions.

In issuing sanctions, the District Court determined that Appellants demonstrated a continuous disregard for the law—behavior that this Court has said is "unjustified in our adversarial system." *See MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 626-27 (8th Cir. 2003). The District Court's decision is well-supported by the law and the record, and is not an abuse of discretion. The District Court's order must be affirmed.

A. This Court reviews the District Court's sanctions decisions for an abuse of discretion.

This Court reviews a lower court's imposition of sanctions under Rule 11 and the court's inherent authority for an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993). "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.

Appellate courts defer "to the determination of courts on the front lines of litigation" because Rule 11 decisions "often involve fact-intensive, close calls."

Clark, 460 F.3d at 1010 (citation and internal quotation marks omitted); *see also O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). As the Supreme Court explains:

> Rule [11] requires a court to consider issues rooted in factual determinations. For example, to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. . . . In considering whether a complaint was supported by fact and law "to the best of the signer's knowledge, information, and belief," a court must make some assessment of the signer's credibility. Issues involving credibility are normally considered factual matters.

Cooter & Gell, 496 U.S. at 401-02. In evaluating whether Appellants' Amended Complaint was supported by fact and law, the District Court made factual findings regarding the signer's credibility, and it is the District Court that was in the best position to do so.

Appellants contend that the Court should apply the abuse-of-discretion standard with "particular strictness." Appellants' Brief, No. 15-3225, at 19. But Appellants misconstrue the law. The authorities Appellants cite are inapplicable because they relate either to the imposition of *discovery* sanctions or to a district court's imposition of Rule 11 sanctions *sua sponte,* neither of which are at issue in this case. *See Sec. Nat'l Bank of Sioux City, Iowa v. Day*, 800 F.3d 936, 944 (8th Cir. 2015); *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 889 (8th Cir. 2009); *Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003) ("*[S]ua sponte* issuance of sanctions is to be reviewed with 'particular strictness.'" (quoting *MHC Inv. Co.*,

323 F.3d at 623)). The deferential standard with "particular strictness" is applied to a sanction imposed *sue sponte* because:

> In that circumstance-*unlike the situation in which an opposing party moves for Rule 11 sanctions*-there is no "safe harbor" in the Rule allowing attorneys to correct or withdraw their challenged filings.

MHC Inv. Co., 323 F.3d at 623 (emphasis added). In this case, Appellants have enjoyed ample opportunity to cure their defective papers pursuant to the "safe harbor" that the Community afforded them under Rule 11, not to mention on two prior opportunities afforded them as professional courtesy. They simply refused to do so. Thus, the Court should apply the highly deferential abuse of discretion standard to the District Court's decision to impose sanctions against Appellants.

B. The District Court's sanctions decisions are procedurally sound.

Appellants advance two attacks against the District Court's sanctions decisions on procedural grounds. Each is without merit and both highlight Appellants' pattern of misrepresenting the law and facts.

1. The Community afforded Appellants "safe harbor" under Rule 11.

The record clearly demonstrates that the Community served Appellants with a Rule 11 motion that detailed the bases for sanctions, together with two courtesy letters that did the same. *See* JA 152-54,163-71. And that is all that was required to trigger the safe harbor requirement under Rule 11. *See* Fed. R. Civ. P. 11(c)(2).

Yet, Appellants argue that Rule 11 requires a moving party to serve the party subject to sanctions with a motion *and* memorandum of law in order to initiate the 21-day safe-harbor period. This is not correct. The plain language of Rule 11(c)(2) provides that the safe harbor is triggered upon service of a "motion" that details the bases for which sanctions are sought. *Stark Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory*, 682 F.3d 170 (2d Cir. 2012) (explaining that a moving party's Rule 11 motion met the safe harbor requirements "even though it did not serve [] supporting affidavits or memorandum of law").

Notably, Appellants cite no authority to support their argument that triggering the safe harbor requires service of a motion *and* memorandum. Moreover, Appellants lost on this same argument below. And in presenting the same argument before the District Court, Appellants argued that this Court *held* in *Gordon v. Unifund CCR Partners*, 345 F.3d 1028, 1029 (8th Cir. 2003), that a party moving under Rule 11 must comply with the local rules filing requirements. Appellants' App. 319. In dismissing Appellants' argument, the District Court concluded that Appellants' presented "an incorrect interpretation of the *Gordon* decision" as "there is no language in the *Gordon* decision discussing the district court's local rules." *Id.* at 12. The District Court further concluded that even "in response to the motions for sanctions, Plaintiffs' counsel continued to engage in vexatious and wanton conduct by asserting frivolous legal arguments and

misrepresenting the law." *Id.* at 25.

2. The District Court afforded the sanctioned parties due process.

Appellants next argue that the District Court imposed sanctions pursuant to its inherent authority *sua sponte* and without affording them notice. Appellants' Brief, No. 15-3225, at 49-50. Notably, Appellants state:

> [N]o Appellee moved for sanctions under § 1927 or the Court's inherent authority. Therefore, Appellants were never on notice that such sanctions were being sought either in their opposition papers or at the Rule 11 hearing.

Id. at 49 n.23.

Appellants once again misstate the facts and the law. Under *Harlan v. Lewis*, cited by Appellants in support of their position, Appellants were on notice "that the court was considering generally the imposition of penalties" pursuant to its inherent powers and Section 1927 after the Community sent them two Rule 11 courtesy letters and the Rule 11 motion. 982 F.2d 1255, 1261-62 (8th Cir. 1993) ("[A]n attorney who did not have explicit notice that the court was considering imposing costs and fees against him nevertheless had sufficient notice because he knew that the court was considering generally the imposition of penalties." (citing *Lepucki v. Van Wormer*, 765 F.2d 86, 88 (7th Cir. 1985)); *see* Appellants' Add.41-42; JA 152-54,163-71. And, critically, the Community *specifically* asked the Court to impose sanctions against Appellants pursuant to its inherent authority. JA 126;

Appellants' Add. 41-42. Thus, Appellants' assertion that they were not on "notice that such sanctions were being sought either in their opposition papers or at the Rule 11 hearing" is not only contrary to *Harlan*, but it is patently false. Appellants' Brief, No. 15-3225, at 49 n.23.

C. This Court must affirm the District Court's decision to sanction Appellants pursuant to its inherent authority and Rule 11.

District courts have inherent authority "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). The "inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49. One aspect of a court's inherent power is the ability to assess attorney fees and costs against the client or the client's attorney, or both, when either "has acted in bad-faith, vexatiously, wantonly or for oppressive reasons." *Id.* at 45-46; *see also Willhite v. Collins*, 459 F.3d 866, 870 (8th Cir. 2006).

In addition, under Rule 11(c), district courts may assess attorney fees and costs against an attorney for violating Rule 11(b)(2), and against both an attorney and an attorney's clients for violating either Rule 11(b)(1) or (b)(3). *See* Fed. R. Civ. P. 11(b)(1-3) and (c). Rule 11 sanctions are warranted when a pleading is "presented for an improper purpose," contains claims or contentions not warranted by existing law or by a non-frivolous argument for the extension or reversal of existing law, or contains allegations or factual contentions that lack evidentiary

support. *Id.*, 11 (b)(1), (b)(2), and (b)(3). Fundamentally, "the District Court must determine whether a reasonable and competent attorney would believe in the merit of an argument." *Coonts v. Potts*, 316 F.3d 745, 754 (8th Cir. 2003) (internal citations and quotation marks omitted). Sanctions are appropriate when a party brings an action despite the obvious applicability of an immunity as a bar to the suit. *Bethesda v. Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853, 859 (7th Cir. 2001); *see also Charland v. Little Six, Inc.*, 112 F. Supp. 2d 858, 861 (D. Minn. 2000).

The sanctions imposed by the District Court are deliberately tailored to confront and deter each party's interwoven, but equally improper, conduct. Appellant's Add. 3, 16, 20, 25. Specifically, the District Court sanctioned:

- Appellants under Rule 11(b)(3) for filing a lawsuit that they knew lacked evidentiary support, Appellant's Add. 16;
- Individual Appellants' attorney under Rule 11(b)(2) for filing a pleading and advancing arguments contrary to the preclusive effect of the Community's immunity from suit, the United States' status as a necessary party under Rule 19, and the patently obvious defense of "no private cause of action," Appellant's Add. 16, 20; and
- Appellants for acting in bad-faith by filing an Amended Complaint they *knew* had no basis in law or fact, itself constituting a violation of

Rule 11(b)(1). Appellant's Add. 3, 20, 25.

Because the District Court's imposition of sanctions was not an abuse of discretion, this Court must affirm.

1. The District Court did not abuse its discretion in concluding that any reasonably competent attorney would know the Community is immune from suit.

The District Court did not abuse its discretion by finding that Appellants violated Rule 11(b)(1) and (3), and that Individual Appellants' attorney violated Rule 11(b)(2), for completely ignoring the obvious and binding application of the doctrine of sovereign immunity in this case. Appellant's Add. 16, 20. The entirety of the record, together with black letter law regarding tribal sovereign immunity, supports the District Court's findings.

On March 5, 2015, the District Court dismissed Individual Appellants' Amended Complaint on the basis that it lacked subject matter jurisdiction over Appellants' claims to the Community's lands because the Community is immune from suit. JA 66-69. In reaching the conclusion that it lacked jurisdiction due to the Community's immunity, the District Court found that Individual Appellants failed to offer any "*evidence or even an allegation that the Community has waived sovereign immunity*." JA 69 (emphasis added).

In its June 9, 2015 Order, the District Court found that Appellants' willful disregard for the Community's immunity began well before their Amended

Complaint was dismissed. Appellants' Add. 16. Indeed, the Community notified Appellants of the patent defects in their original Complaint on June 2, 2014. JA 152-54. But rather than plead *some* factual basis justifying the District Court's jurisdiction, Appellants filed an equally frivolous Amended Complaint and continued to advance arguments contrary to the doctrine of immunity. Appellants' App. 57-118. As such, the District Court specifically sanctioned Appellants under Rule 11(b)(3) for "failing to provide evidence to support the Court's jurisdiction" over the Community, and sanctioned Appellants' attorney under Rule 11(b)(2) for "ignoring the well-settled doctrine of tribal immunity." Appellant's Add. 16. Additionally, the District Court found that:

> a reasonable and competent attorney would have recognized that, given the well settled law that the Community was entitled to sovereign immunity, the Court did not have subject matter jurisdiction over asserted claims against the Community. Thus, by bringing this action against the Community, the Court finds that [Appellants] violated Rule 11(b)(1).

Id., at 20.

The District Court's conclusions are deeply anchored in the law. It is well-settled that Indian tribes possess "inherent sovereign authority." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). By recognizing an Indian tribe, the United States acknowledges the tribe in a formal government-to-government context as a sovereign body politic with reserved rights that predate

the United States Constitution. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-59 (1978); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). The Supreme Court has reaffirmed *time and time again* that tribes are entitled to sovereign immunity from suit. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (reaffirming that "[a]mong the core aspects of sovereignty that tribes possess—subject [only] to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" (quoting *Martinez*, 436 U.S. at 58)); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (stating that "the doctrine of tribal immunity is settled law"); *Martinez*, 436 U.S. at 58 ("Indian tribes have *long been recognized* as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (emphasis added)). This Court has emphasized that immunity is "necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." *Am. Indian Agr.Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). And contrary to Appellants' assertions, a tribe's "sovereign immunity is a *threshold* jurisdictional question," not an affirmative defense on the merits. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684-85 (8th Cir. 2011) (emphasis added); *see also Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000).

As the District Court acknowledged, "the Community is a federally recognized Indian tribe pursuant to the Indian Reorganization Act." Appellants' Add. 15. The Community is organized under an IRA Constitution and By-laws adopted by the Community's membership and approved by the Secretary of the Interior in 1936.[12] This fact alone is sufficient to demonstrate that the Community is entitled to sovereign immunity as a federally recognized Indian tribe.

All three branches of the federal government have acknowledged the Community's inherent sovereign status. On multiple occasions, Congress has specifically identified the Community as a successor to the historical Mdewakanton Sioux in Minnesota. *See e.g.*, Pub. L. No. 92-555, 86 Stat. 1168 (1972); S. Rep. No. 99-115, at 4 (1985); *see also* H.R. Rep. No. 99-298, at 1 (1985); Act of Dec. 19, 1980, Pub. L. No. 96-557, 94 Stat. 3262. Similarly, the Community is on the list of federally recognized tribes that is regularly published by the Secretary of the Interior. *See* 25 U.S.C. § 479a-1, § 479a(2); 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014). And numerous federal courts have recognized the Community as a sovereign tribe entitled to immunity. *See, e.g.*, *In re Whitaker*, 474 B.R. 687 (BAP 8th Cir. 2012); *Hester v. Redwood Cnty.*, 885 F. Supp. 2d 934,

[12] As noted, the Community's Constitution and By-laws are accessible on the Community's website. *See* "*Constitution of the Lower Sioux Indian Community in Minnesota*," Lower Sioux Indian Community, http://www.lowersioux.com/pdffiles/Lower%20Sioux%20Indian%20Community%20Constitution.pdf (last visited Nov. 22, 2015).

947 (D. Minn. 2012); *Maxam v. Lower Sioux Indian Cmty,*, 829 F. Supp. 2d 277, 281 (D. Minn. 1993).

Despite this obvious and overwhelming authority, Appellants present two equally absurd arguments claiming that the Community is not a tribe and therefore, not entitled to sovereign immunity. First, despite unequivocal congressional repudiation, Appellants continue to advance the claim that an obscure 1938 Solicitor Opinion demonstrates that the Community is a "temporary subgroup community" and not a tribe. Appellant's Brief, No. 3225, at 24-29. Second, Appellants insist that two wholly inapposite cases support their position. *Id.*, at 30.

i. Appellants' reliance on the repudiated 1938 Solicitor Opinion underscores the lack of any legal or factual basis for their claims.

Appellants' interpretation of the 1938 Solicitor Opinion was congressionally abrogated over two decades ago.[13] In clear and unambiguous terms, Congress amended the IRA in 1994 to expressly abolish any notion that there is a distinction between "created" and "historic" tribes because such a distinction "runs so clearly counter to the intent of Congress." H.R. Rep. No. 103-781, at 3-4 (1994).

Under 25 U.S.C. § 476(f), all federally recognized tribes enjoy the same powers, privileges, and immunities, regardless of when recognized. The statute also abrogates all past "administrative decision[s] or determination[s]" that treat

[13] For the Community's full briefing on how sections 476 (f) and (g) abrogated the 1938 Opinion, *see* Community's Brief, No. 15-1580, at Section II.B.1.

tribes differently from one another. 25 U.S.C. § 476(g). The 1938 Opinion is an "administrative determination" that purports to diminish the immunity of some federally recognized tribes relative to others. *Id.* Thus, the 1938 Opinion has had no "force or effect" for twenty-one years. *Id.*

In their memorandum in response to the motions to dismiss, Appellants ignore sections 476(f) and (g). Appellants' App. 257-302. They do not cite to, distinguish, nor discuss them. No attorney can argue for the modification, extension, or reversal of law without acknowledging or discussing it. *See Crookham v. Crookham*, 914 F.2d 1027, 1029-30 (8th Cir. 1990) (explaining that an attorney must discuss or be aware of existing law to make a non-frivolous argument for a change).

In their memorandum in opposition to the motions for sanctions, Appellants argue for the *first* time that a footnote in *Wolfchild IV* legitimizes their reliance on the 1938 Opinion. Not only is this dicta, but the Court of Federal Claims did not evaluate the Community's status as an Indian tribe or correlating immunity from suit. *Wolfchild IV*, 72 Fed. Cl. at 537. Thus, the District Court concluded that "the Court of Federal Claims did not hold that the Community did not enjoy any sort of sovereign immunity." Appellants' Add. 19. Appellants' reliance on the footnote is disingenuous in light of the authority that establishes the Community's status as an Indian tribe. As such, it was not an abuse of discretion for the District Court to

conclude that the Appellants' late reliance on the 1938 Opinion or the footnote in *Wolfchild IV* was frivolous and justified the imposition of sanctions.

ii. Appellants' reliance on the Supreme Court's decisions in *Carcieri* and *Cherokee Nation* is misplaced.

The case law offered by Appellants to support their position that the Community is not a tribe is equally frivolous—and late.[14] In the first instance, Appellants asserted *as fact* without developing at all how this fact or law applies to this case that under *Carcieri*, the Community lacks federal recognition because the Community was not under federal jurisdiction in 1934. *See* Appellants' App. 276, 299, 329. Regardless, each case is irrelevant here.

In *Carcieri v. Salazar*, the Supreme Court limited "the exercise of the Secretary's trust authority under § 465 to those tribes that were under federal jurisdiction at the time the IRA was enacted" in 1934. 555 U.S. 379, 391 (2009). The trust authority under § 465 refers to the Secretary's ability to take land into trust for Indian tribes. *Carcieri* has nothing to do with how or when a tribe is recognized. *Id.* at 387-93; *see also id.* at 397-98 (Breyer, J., concurring) (stating that an Indian tribe not "federally recognized" until after 1934 nonetheless may have been "under federal jurisdiction" in 1934). At any rate, the Community *was*

[14] For the Community's full briefing on how Appellants' reliance on APA challenges have no bearing on this case, *see* Community's Brief, No. 15-1580, at Sections II.B.2, and II.C.

under federal jurisdiction in 1934. Haas Report, at 16.

Cherokee Nation of Oklahoma v. Babbitt is equally irrelevant here. 117 F.3d 1489 (D.C. Cir. 1997). In that case, the Cherokee Nation of Oklahoma, a federally recognized Indian tribe, challenged the Department of the Interior's Final Decision under the Administrative Procedures Act (APA) to acknowledge the Delaware Tribe of Indians. The court allowed the challenge on the *sole* bases that it was brought by a federally recognized tribe and it constituted an APA action. *Cherokee Nation*, 117 F.3d at 1499. Because Appellants are not a tribe[15] and the instant proceeding is not an APA challenge to a final agency decision to acknowledge the Community as an Indian Tribe, Appellants' reliance on *Cherokee Nation* is entirely off the mark.

2. The District Court did not abuse its discretion by sanctioning Appellants pursuant to its inherent authority and Rule 11(b)(1) for acting in bad-faith.

The District Court found Appellants acted in bad-faith and therefore violated Rule 11(b)(1) by attacking the Community knowing that their "action had no basis in law or fact." Appellants' Add. 20, 25. Rule 11(b)(1) determinations necessarily involve inferences of a party's state of mind, and bad-faith conduct gives rise to inferences of "improper purpose." *Clark*, 460 F.3d at 1010-11; *see also Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 243 F.R.D. 322, 345-46 (N.D. Iowa).

[15] *Wolfchild IX*, 731 F.3d at 1294 (determining that the "loyal Mdewakanton" are not a tribe).

"In considering whether [the Amended Complaint] was supported by fact and law 'to the best of the signer's knowledge, information, and belief,'" the District Court assessed the litigants' credibility in light of, in part, their experiences litigating *Wolfchild I-IX*. *Cooter & Gell*, 496 U.S. at 402; Appellant's Add. 3, 15, 24-25. Based on this assessment, the District Court found that the sanctioned parties *subjectively* knew their claims were frivolous and filed them anyway. Appellant's Add. 3.

Appellants assert that the District Court made no findings with regard to their bad-faith conduct. Appellants' Brief, No. 15-3225, at 68-69. But this assertion is simply not true.

In fact, the District Court made several specific findings of bad-faith, relying in part on Appellants experience litigating *Wolfchild I-IX*:

> A review of those nine opinions demonstrates the breadth and depth of the issues that were actually litigated. Those 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*.
>
> . . . .
>
> Plaintiffs had advanced multiple and conflicting arguments in the prior litigation based on facts that are also at issue here. For example, one overlapping issue was whether the Secretary of the Interior set aside and/or conveyed 80 acres of land to the loyal Mdewakanton under the 1863 Act.
>
> . . . .

> The 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*.
>
> . . . .
>
> The Court finds that Plaintiffs and their counsel brought this action in *bad faith*. After eleven years of unsuccessful litigation in the Court of Federal Claims, it should have been clear that this action had no basis in fact or law.

Appellant's Add. 3, 15, 24-25 (emphasis added).

The record amply supports the District Court's finding and demonstrates that Appellants "advance[d] multiple and conflicting arguments" in *Wolfchild I-IX*. Appellants' Add. 15. Individual Appellants through their attorney first claimed to be a collection of individuals, and then later claimed to be a federally recognized tribe. The Court of Claims described their shifting identity as follows:

> This case has proceeded for the past eight years on the foundational finding by this court that plaintiffs are not a tribe . . . . Notwithstanding the long-established conclusions of this court and plaintiffs' own representations, plaintiffs contend that the Appropriations Acts' identification of loyal Mdewakanton as statutory beneficiaries recognized that group as a "tribe."

Wolfchild VIII, 101 Fed. Cl at 67-68. The Court of Claims held that the "loyal Mdewakanton" are not a tribe. *Wolfchild IX*, 731 F.3d at 1294 (affirming *Wolfchild VIII*, 101 Fed. Cl. at 65-59).

Appellants employ the same shifting tactics in this litigation. Appellants initiated this case as a class of individuals. *See* Appellants' App. 58. Since filing the Amended Complaint, Individual Appellants through their attorney have

attempted to fashion themselves into the federally recognized "Loyal Mdewakanton" and even the historic "Mdewakanton Band." Appellants' Principal Brief, No. 15-1580, at 17; Community's Brief, No. 15-1580, at 14-15; Appellants' Principal Brief, No. 15-3225, at 45. But the fact remains, the Individual Appellants are a collection of individuals, not a tribe. JA 77; *Wolfchild IX*, 731 F.3d at 1294.

Additionally, as recognized by the District Court, Appellants have advanced contrary arguments with respect to the "overlapping issue" of whether lands were conveyed under the 1863 Act. Appellants' Add. 15. In *Wolfchild VII*, Appellants argued that the United States failed to set apart land under the 1863 Act for their ancestors. Brief of Pls.' at 19, *Wolfchild VII*, 96 Fed. Cl. 302 (2010) (Nos. 03-2684L, 01-568L). In *Wolfchild IX*, Appellants argued that the Secretary set apart and conveyed property to their ancestors. 731 F.3d at 1292. Then, in their 2014 Petition for Writ of Certiorari (2014), Appellants admit that "no land was provided to the Mdewankanton Band under the 1863 Act . . . ." Pet. for Writ of Cert. at 21-22, *Wolfchild v. United States,* 134 S. Ct. 1516 (2014). Here, Appellants switch positions once again and argue that the Secretary set aside and *thereby conveyed* land under the 1863 Act. Appellants' Add. 14-15. Appellants cannot, in good faith, employ the same facts and law to advance contrary legal conclusions.

Nor did the District Court abuse its discretion by concluding that "[t]he

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." Appellant's Add. 24. Each Individual Appellant's relationship with the Community and each Individual Appellant's central role in this litigation demonstrates their understanding of the facts and law relative to this case. "Sheldon [Wolfchild] is the past president of the Council of the Lower Sioux Indian Community." JA 654. As the Community's past President, he knows, without a doubt, that the Community is a federally recognized Indian tribe with immunity and that the United States holds legal title to the Community's reservation lands. Appellant Barbara Buttes is the Appellants' expert historical witness, and therefore knows the facts of this case in detail. JA 660. The remaining Individual Appellants are either members of the Community or have at one time been closely connected to the Community's government. JA 654. They are not naïve bystanders. They know precisely what they are doing, and have a personalized understanding of the tremendous impact that this litigation has had on the Community and its members.

Taken as whole, the record shows that all of the sanctioned parties understood that their claims were without merit and frivolous. Thus, the District Court did not abuse its discretion by concluding that the Appellants acted in bad-faith and therefore violated Rule 11(b)(1). Appellants' Add. 20, 25. In addition,

the District Court did not abuse its discretion by sanctioning Appellants' attorney pursuant to its inherent authority for engaging in vexatious and wanton conduct by misrepresenting the law. *Id.*, at 25.

3. The District Court did not abuse its discretion in sanctioning Appellants for their failure to join the United States as an indispensable party under Federal Rule of Civil Procedure 19.

In its June 9, 2015 order, the District Court granted the Community's motion for sanctions against Appellants on the basis that failed to join a party—the United States—that was clearly indispensable under Federal Rule of Civil Procedure 19 ("Rule 19"). Specifically, the District Court held:

> [A] portion of the land at issue is located within the Community's reservation, and that land is held in trust for the Community by the United States. A reasonable and competent attorney, in particular one who had been involved in the related litigation for over eleven years, would know that the United States held title to such land, not the Community, and as a result, the United States was an indispensable party with respect to Plaintiffs' claims for damages and ejectment.

Appellants' Add. 20.

On appeal, Appellants contend that the District Court "never addressed [their] arguments" with respect to Rule 19, which they assert are "directly on point." Appellants' Brief, No. 15-3225, at 32. To the contrary, the cases Appellants cite to argue that the United States is not indispensible to this suit are inapposite, because none involve actions seeking to divest the United States of its title to Indian trust lands. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d

1251, 1254 (9th Cir. 1983) (involving a tribe's challenge to land held by the Port of Tacoma); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972, 980 (D. Minn. 1990) (explaining that the extent of the United States' interest in the land at issue was a lease to a customhouse and a flowage easement on the subject parcel).

More importantly, Appellants fail to discuss binding Supreme Court and Eighth Circuit precedent involving Rule 19 as it relates to an attempt to divest the United States of its title to property. In *Minnesota v. United States*, the Supreme Court concluded that "[i]n the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party, and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in [trust] lands." 305 U.S. 382, 386 n.1 (1939); *see also Fontelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 145 (8th Cir. 1970) (explaining that absent consent by the United States, action against Indian lands in which United States holds an interest cannot proceed). As a result, Appellants have failed to demonstrate that the District Court abused its discretion by imposing sanctions on the ground that any reasonable and competent attorney would understand that Rule 19 is a clear bar to their claims.

4. The District Court did not abuse its discretion in sanctioning the Appellants on the ground that the lack of any private right of action in the 1863 Act was an obvious affirmative defense to their suit.

In its June 9, 2015 Order the District Court imposed sanctions on the ground that Appellants' claims are frivolous and without a factual or legal basis because Appellants brought suit despite there being "no private right of action under the 1863 Act." Appellants' Add. 20, 22.

On appeal, Appellants persist in the assertion that their possessory claims are federal common law claims under *Oneida I* and *Oneida II* and not based on a private right of action under the 1863 Act. Appellants' Brief, No. 15-3225, at 38. But this assertion is defied by Appellants' own representations to this Court. Appellants have characterized their claim as "a possessory action asserting a current right to possession conferred by federal law, namely *the 1863 Act*." Appellants' Brief, No.15-1580, at 50 (emphasis added). The District Court found that "[i]t is clear from the remaining allegations in the Amended Complaint that [Appellants'] claims arise under the 1863 Act." JA 69. The Appellants' reliance on *Oneida I* and *Oneida II* is misplaced because those cases recognize common law claims brought on behalf of *tribes* to enforce aboriginal land rights. *See Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*"); *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226

(1985) ("*Oneida II*"). Individual Appellants are not a tribe and are not suing to enforce aboriginal land rights. Thus, *Oneida I* and *Oneida II* simply do not apply.

Appellants also contend that the District Court cannot justify sanctions based on "no private right of action" by merely concluding that Appellants' claims were "without merit." Appellants' Brief, No. 15-3225, at 36-37. But Appellants misconstrue the District Court's reasoning. Appellants argue that the District Court could not sanction them on the basis of an affirmative defense barring suit, including the defense of "no private right of action," because it was Defendants' burden to plead affirmative defenses. Appellants' Add. 23. The District Court rejected Appellant's contention outright, emphasizing that "Rule 11 requires a party to consider whether any obvious affirmative defenses bar the case." *Id.*.

The lack of a "private right of action" was an obvious defense to Appellants' claim. In *Wolfchild IX*, the Court of Federal Claims concluded that the 1863 Act did "not impose any duty on the Secretary of the Interior to make the land grants it authorizes." 731 F.3d at 1292 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009)). Because the 1863 Act did not mandate the Secretary of the Interior to convey the lands Appellants seek, no reasonable attorney could interpret the 1863 Act as establishing a private right to seek *title* to those same lands. Because the lack of a "private right of action" was an obvious defense to Appellants' claim, the District Court found that Appellants had "acted in bad faith

and with reckless disregard for the law" by bringing suit.[16] Appellants' Add. 23. This finding must be affirmed.

D. The District Court's inherent authority, Rule 11, and Section 1927 authorize sanctions in the form of reasonable attorney fees.

Appellants argue that the District Court did not have the authority to impose a sanction in the form of attorney fees and costs. Appellants' Brief, No. 15-3225, at 58-59. The argument is without merit.

A district court's inherent authority is broad, and the court is authorized to assess attorney fees against an attorney, a client, or both, "for conduct that abuses the judicial process," *especially* where the district court makes an express finding of bad-faith. *Harlan*, 982 F.2d at 1259-60 (explicit bad-faith finding warrants attorney fees as a sanction).

Second, a district court may assess attorney fees against an attorney to deter the repetition of improper conduct for violating Rule 11(b)(2), and against an attorney, a client, or both, for violating Rule 11(b)(1) or (3).[17] Fed. R. Civ. P.

---

[16] Notably, although Appellants attempt to repackage their claims as driven by *Oneida I* and *Oneida II*, they do not directly challenge the District Court's finding that the lack of a private right of action was an obvious defense to Appellants' claim.

[17] Appellants again allege, but do not demonstrate, that the District Court's Order did not identify the authority under which it imposed sanctions against the Individual Appellants, their attorney, and MKE. As discussed, a casual review of the District Court's Order demonstrates that allegation to be false. Even if it were true, it is immaterial. *Willhite*, 459 F.3d at 870 (presuming that each sanction was imposed pursuant to the proper legal authority where district court did not

11(c)(4). A Rule 11 sanction against a client in the form of attorney fees is proper if the client "knew or should have known that the allegations in the complaint were frivolous." *Byrne v. Nezhat*, 261 F. 3d 1075, 1117 (11th Cir. 2001). Additionally, "[a]bsent exceptional circumstances, a law firm *must* be held jointly responsible for a violation committed by its partner, associate, or employee." Fed. R. Civ. P. 11(c)(1) (emphasis added).

Here, the District Court's imposition of a sanction in the form of reasonable attorney fees accords with Rule 11. The District Court found that Appellants violated Rule 11(b)(1) and (3) collectively, and that Individual Appellants' attorney violated Rule 11(b)(2). Appellants' Add. 16, 20. Also, the District Court determined that no exceptional circumstance exempts MKE from the sanction. Appellants' Add. 55. Appellant states that "the District Court made no findings why the small law firm of ["MKE"] should be sanctioned . . . ." Appellants' Brief, No. 15-3225, at 72. To the contrary, the District Court determined that MKE is liable for the sanction because: (1) Individual Appellants' attorney practiced with MKE for the pendency of this suit, and throughout *Wolfchild I-IX*; (2) an MKE attorney other than Individual Appellants' attorney signed papers submitted to the District Court; and (3) MKE submitted no financial information demonstrating its inability to pay. Appellants' Add. 54-55. Indeed, Appellants acknowledge that the

---

explicitly state the authority for each sanction) (citing *United States v. Otto*, 176 F.3d 416, 418 (8th Cir. 1999)).

MKE "law firm has the financial ability to pay the sanctions." Appellants' Brief, No. 15-3225, at 72.

Finally, the District Court may assess attorney fees as a sanction against Individual Appellants' attorney under Section 1927. A district court does not need to evaluate a sanctioned attorney's ability to pay a sanction imposed pursuant to Section 1927 because the statute is "a real fee-shifting law." *See Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009). Thus, contrary to Appellants' assertions, the District Court's inherent authority, Rule 11, and Section 1927 authorize sanctions in the form of reasonable attorney fees.

E. The District Court did not abuse its discretion in concluding that a Rule 11 sanction in the total amount of $281,906.34 is necessary to deter the repetition of improper conduct.

In its June 9, 2015 Order, the District Court concluded that the imposition of attorney fees, as a sanction, is necessary to deter Appellants from engaging in frivolous litigation in the future.[18] Appellants' Add. 25.

Eleven years of litigation and nine reported decisions in *Wolfchild I-IX* did not deter Appellants from filing a frivolous Amended Complaint designed to seize

[18] The Court does not need to address whether the sanction under Rule 11 is necessary to deter improper conduct because the sanction was also properly imposed pursuant to the District Court's inherent authority and Section 1927. *Chambers*, 501 U.S. at 45-46 (explaining that a district court may fee-shift pursuant to its inherent authority); *Shales* 557 F.3d at 549 (explaining that Section 1927 is a fee shifting statute).

the Community's homelands, eradicate the Community as a body politic, and eject 75 private landowners from their farmland and homes. *Id.*, 2-3. Moreover, numerous motions for sanctions, and two courtesy letters, did not deter Individual Appellants' attorney from engaging "in vexatious and wanton conduct by asserting frivolous legal arguments and misrepresenting the law."[19] *Id.*, at 25. The $107,758.17 sanction awarded to the Community is *especially* necessary to deter Appellants from subjecting the Community to their incessant and groundless attacks, which have now lasted, in one form or the other, for more than *thirteen* years. *Id.*, at 3, 15, 17-18.

Appellants argue that they are not individually able to pay the sanction. Appellants' Brief, No. 3225, at 72. But this assertion is irrelevant given that Appellants' attorney acknowledges that the MKE "law firm has the financial ability to pay the sanctions." *Id.* Because Appellants are jointly and severally liable for the sanction under Rule 11, this admission is fatal to any inability-to-pay defense Appellants' raise. *Id.*; *see also* Fed. R. Civ. P. 11(c)(1).

Appellants failed to brief, and therefore waived, the issue of whether the Sanctions Appellees' attorney fees and costs are reasonable. *Nelson v. J.C. Penny Co.*, 75 F.3d 343, 348 (8th Cir. 1996) (explaining that failure to brief issues in the opening brief constitutes the appellant's abandonment of those issues); *Carter v.*

[19] Indeed, the amount of the Community's attorney fees directly reflects the research necessary to rebut Appellants' habitual misrepresentation of law.

Lutheran Med. Ctr., 87 F.3d 1025, 1026 (8th Cir. 1996) (explaining that appellants do not preserve an issue by stating it in the statement of issues, but failing to develop it in the argument); *Sidebottom v. Delo*, 46 F.3d 744, 750 (8th Cir. 1995) (explaining that appellants cannot preserve an issue omitted from their opening brief by including it in their reply brief). However, it is important to underscore the care with which the District Court evaluated each Appellee's attorney fees and costs submission. Appellant's Add. 8-17. As the District Court noted, Jacobson, Magnuson, Anderson & Halloran, P.C. (the "Firm") has served as general counsel for the Community for more than 30 years. *Id.*, at 10. The hourly rates that the Firm charges for its counsel are well below prevailing market rates in the Twin Cities region. *Id.*, at 11. Thus, the attorney fees and costs that the Community incurred in defending against the Amended Complaint are reasonable.

In sum, the District Court did not abuse its discretion in fixing the total sanction due to the Sanctions Appellees at $281,906.34 because, as demonstrated by the record, Appellants will continue to advance specious claims against the Community absent a severe sanction. This Court must affirm the sanction.

II. The District Court did not abuse its discretion in denying Appellants' motion to take judicial notice of the Community's corporate charter.

The Court reviews "a district court's decision [not] to take judicial notice for abuse of discretion." *Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010).

Over one month *after* the District Court dismissed their Amended Complaint

with prejudice, Appellants filed a motion asking the District Court to take judicial notice of the Community's corporate charter (the "charter"). JA 255. After the District Court denied the motion, Appellants continue to act as if the charter is a part of the record, despite their inability to provide even a scintilla of legal support for how the charter is relevant to the issues in this appeal. The Community urges this Court to see Appellants' efforts for what they are: a last-ditch attempt to save themselves from sanctions by attempting to create a factual dispute where there is none.[20]

A. The Charter has no legal or factual relevance to the District Court's imposition of sanctions or to Appellants' underlying claims.

The District Court denied Appellants' motion for judicial notice on the basis that the charter is irrelevant. Appellants' Add. 32. Indeed, it is well-settled that "a court may properly decline to take judicial notice of documents that are irrelevant to the resolution of a case." *Cravens*, 610 F.3d at 1029 (citing *Am. Prairie Constr.*

[20] Appellants moved this Court to take judicial notice of the Community's charter. Appellants' Mot. for Judicial Notice, May 7, 2015 (No. 15-1580). The Community opposed the motion. Community's Opp. to Appellants' Mot. for Judicial Notice, May 18, 2015 (No. 15-1580). The Community also requested the Court to strike any argument in Appellants' Principal Brief on the merits that relied on the charter because *no* court in these proceedings has taken judicial notice of the charter. *Id.*, at 10-11. The Community renews its request that this Court strike any argument in Appellants' Brief, No. 15-1580, that rely on the charter, and further requests that this Court strike any argument in Appellants' Brief, No. 3225, in this appeal that relies on the charter and relates to the imposition of sanctions.

Co.v. Hoich, 560 F.3d 780, 797 (8th Cir. 2009)). Further, "[e]rror in failing to take judicial notice of a fact is not ground for reversal unless it shows that the appellant is prejudiced by the error." *Blas v. Talabera*, 318 F.2d 617, 619 (8th Cir. 1963). Here, Appellants are not prejudiced because the charter is irrelevant.

The rationale for why the charter is irrelevant is strikingly simple. Appellants seek judicial notice to establish that the "sue and be sued" clause in the charter waives the Community's sovereign immunity from suit. JA 256, 263. As recognized by the District Court, "federal law allows the Community to form business corporations, [but] the formulation of such a corporation *does not affect the power of the tribe to act in a governmental capacity*." Appellants' Add. 32 (emphasis added) (citing *United Keetoowah Bank of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1174 (10th Cir. 1991)). As such, this Court has held that a "'sue and be sued clause' in [a] Tribe's corporate charter does not operate as a general waiver of the Tribe's immunity from suit." *Rosebud Sioux Tribe*, 50 F.3d at 563; *see* Appellants' Add. 32. Thus, because the Individual Appellants sued the Community as a tribal government, the charter cannot waive the Community's immunity.

In an apparent attempt to undermine the dispositive effect of *Rosebud*, Appellants now argue that the entity they in fact sued on September 22, 2014 was

not the Community in its governmental capacity, but the "LSIC Corporation."[21] Appellants' Brief, No. 15-3225, at 13; *see also e.g.*, Appellants' Brief, No 15-1580, at 5, 13, 19-21, 26, 32-41; JA 415, 435. But the District Court's finding[22] that the Individual Appellants sued the Community in its governmental capacity is well supported in the record. JA 67-68; Appellants' App. 136, 138, 218. Most notably, Individual Appellants' attorney acknowledged that he did not learn of the charter's existence until April 11, 2015, nearly a year after Individual Appellants submitted their original Complaint. JA 266. Appellants cannot contend in good faith that they sued a corporate entity on September 22, 2014, when they simultaneously declare that they did not know of the corporate charter's existence until several months later.

Additionally, in the Community's Answer to the Amended Complaint—and indeed in every paper presented to the District Court thereafter—the Community

---

[21] Appellants initially represented the charter as the Community's "founding document" and argued that it "clearly shows that LSIC is not an historic tribe with sovereign powers" but rather "a federal corporation delegated power to serve the Plaintiffs Class of Loyal Mdewakanton lineal descendants." JA 263. But Appellants conveniently ignore the fact that the charter itself identifies the Community as "a federally recognized Indian Tribe organized under a constitution approved by the Secretary . . . pursuant to chapter 16 of the Act of June 18, 1934." Appellants' App. 119.

[22] In its June 9, 2015 Order—after Appellants advanced their charter arguments—the District Court reaffirmed its prior finding of fact that the Individual Appellants sued the Community as a federally recognized Indian tribe with sovereign immunity. Appellants' Add. 3, 16, 20, 40, 43.

identified itself as a federally recognized tribe without objection by Appellants. And finally, most of the land for which the Individual Appellants seek a possessory interest are reservation trust lands, and only the Community in its *governmental capacity* exercises full control over these property rights. *See* Community's Constitution at Art. V(c) and (e) (reserving the powers to affect the Community's interest in land to the Council), *available at* http://www.lowersioux.com/pdffiles/Lower%20Sioux%20Indian%20Community%20Constitution.pdf; 25 U.S.C. § 477 (explaining that a Section 17 corporation may not convey any interest in tribal lands except leases for twenty-five years or less). That Appellants attempt to magically transform their identity from a collection of individuals to the "Mdewakanton Band," and the Community's identity as a federally recognized Indian tribe to that of a corporate entity, speaks volumes about their respect for the judicial process.

B. Alternatively, Appellants seek judicial notice of inferences and legal conclusions "subject to dispute."

The District Court also denied Appellants' motion for judicial notice on the related ground that the inferences and legal conclusions that Appellants sought to draw from the charter—that the charter's "sue and be sued clause" waived the Community's immunity—were clearly "subject to dispute" in that federal law dictates the exact opposite. Appellants' Add. 32 (citing *Rosebud Sioux Tribe*, 50 F.3d at 563). Because Federal Rule of Evidence 201 ("Rule 201") bars notice of a

fact or inference that is "subject to reasonable dispute," the District Court did not abuse its discretion in denying Appellants' motion.

That Appellants seek notice of inferences and legal conclusions to be drawn from the charter underscores Appellants' improper use of Rule 201. In *Kushner v. Beverly Enterprises, Inc.*, this Court held that a district court does not abuse its discretion when it declines to take notice of extra-record material offered "to prove the truth of the matters within them and inferences to be drawn from them-matters the [defendant] disputes." 317 F.3d 820, 829-30 (8th Cir. 2003). In fact, it would be an abuse of discretion if a district court relied on extra-record material to support a legal conclusion. *Hoich*, 560 F.3d at 796-98. Here, Appellants seek notice of the charter not to establish its existence as a factual matter, but to prove the truth of (patently) false inferences and (erroneous) legal conclusions—for example, that the charter is the Community's "founding document" and, therefore, it shows that the Community "never had sovereign immunity." JA 256, 263. Because Appellants offered the charter "to prove the truth of the matters within them and inferences to be drawn from them—matters the [Community] disputes"—the District Court did not abuse its discretion by refusing to take judicial notice of the charter. *Kushner*, 317 F.3d at 829-30.

III. The District Court did not abuse its discretion in concluding that the appellate cost bond may include damages where the appeal is frivolous; alternatively, Appellants' merits appeal must be dismissed for failure to post the appellate cost bond in the undisputed amount of $25,000.

The Community adopts the arguments presented by the Appellee Landowners in their Principal Brief on the bond appeal, No. 15-2375.

Conclusion

The District Court concluded that the Individual Appellants, their attorney, and MKE have demonstrated a continuous disregard for the law that cannot be tolerated in our adversarial system—and for good reason. Appellants filed an Amended Complaint in bad-faith seeking title to the Community's homelands and to eradicate its governing body, invoked the jurisdiction of the District Court without justification, and advanced legal contentions patently contrary to law. The District Court did not abuse its discretion in awarding the Community reasonable attorney fees and costs in the amount of $107,758.17 pursuant to its inherent authority, Rule 11, and Section 1927. This Court must affirm the District Court's decision.

Dated: November 23, 2015

Counsel for Appellee Lower Sioux Indian Community

s/ Joseph F. Halloran
Joseph F. Halloran (MN # 244132)
Mary B. Magnuson (MN # 160106)
Sara K. Van Norman (MN # 339568)
Michael L. Murphy (MN # 394879)
Jeffrey K. Holth (MN# 393070)
The Jacobson Law Group
Jacobson, Magnuson, Anderson & Halloran, P.C.
180 East Fifth Street, Suite 940
Saint Paul, MN 55101
Tele: (651) 644-4710
Email: jhalloran@thejacobsonlawgroup.com
mmagnuson@thejacobsonlawgroup.com
svannorman@thejacobsonlawgroup.com
mmurphy@thejacobsonlawgroup.com
jholth@thejacobsonlawgroup.com

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,068 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). Additionally, the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point, Times New Roman. Finally, pursuant to Eighth Circuit Local Rule 28A(h), this brief has been scanned for viruses and is virus free.

s/ Joseph F. Halloran
Counsel for Appellee Lower Sioux Indian Community

CERTIFICATE OF SERVICE

I hereby certify that November 23, 2015, I electronically filed the following documents with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system:

- Appellee Lower Sioux Indian Community's Principal Brief.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I have mailed the foregoing document by first class, postage paid U.S. mail to the following non-CM/ECF participants:

Mr. Leif E. Rasmussen
STEFFENS & RASMUSSEN
Suite 465
6600 France Avenue, S.
Minneapolis, MN 55435

Mr. Alan D. Eller
33991 Noble Avenue

Redwood Falls, MN 56283

s/ Joseph F. Halloran
Counsel for Appellee Lower Sioux Indian Community