

LOWER BRULE SIOUX TRIBAL COURT)
 LOWER BRULE SIOUX TRIBE) ss: LOWER BRULE SIOUX TRIBAL
 CIVIL DIVISION) TRIBAL COURT

ORVILLE LANDEAU, JR. and JOHN)	CASE NO. CIV-15-9-0111
MCCAULEY,)	
)	
Plaintiffs/Appellees, v.)	MOTION TO DISMISS FOR
)	VIOLATION OF THE LBST
KEVIN WRIGHT, SONNY ZIEGLER,)	RULES OF CIV. PRO. AND
AND DESIREE LAROCHE,)	MOTION TO DISMISS T.R.O.
)	ISSUED ERRONEOUSLY
Defendants/Appellants.)	

COMES NOW THE Defendants/Appellants and move the Court to dismiss the action and the Court's orders erroneously issued in CIV-15-9-0111, *see* Exhibit A, a true and accurate copy of the Affidavit of Sheryl Scott, incorporated herein as if fully set forth below. *See also*, Lower Brule Sioux Rules of Civil Procedure (hereinafter, "LBST Rules of Civ. Pro.") Rule 2(a), Rule 2(b) and Rule 3(1); *cf.* Federal Rule of Civil Procedure (hereinafter "Fed. R.Civ.Pro.") Rule 12(b) (4) insufficient process; Rule 12(b) (5) insufficient service of process; and Rule 12(b)(1) lack of subject matter jurisdiction.

The said rules provide:

RULE 2. COMMENCEMENT OF ACTION; SERVICE OF PROCESS.

(a) Commencement of Action. A civil action is commenced by filing a written complaint with the Clerk of the Tribal Court. The Court shall have jurisdiction from such time as both the complaint is filed and properly served upon the defendant and a return of service is filed with the Clerk.

(b) Service of Process. Service of process shall consist of delivering to the party served a copy of the complaint along with the summons be which need not issued by the Judge or Clerk, which advised the defendant that he is required to answer the complaint within thirty (30) day or a default judgment will be entered against him.

RULE 3 (1) The return of service shall be endorsed with the name of the person serving and the date, time and place of service and shall be filed with the Clerk.

The LBST Rules of Civ. Pro. Rule 2(a) mandates that a "civil action is commenced by filing a written complaint with the Clerk of the Tribal Court. The Court shall have jurisdiction from such time as both the complaint is filed and properly served upon the defendant and a return of service is filed with the

Clerk.” The Plaintiffs/Appellees’ Summons and verified Complaint filed September 11, 2015 are both numbered “CIV. 14-12-0119.” Therefore, Defendants/Appellants were never served with a “new” complaint. The summons is similarly defective. See, LBST Rules of Civ. Pro. Rule 2(a) and 2(b); *see also*, Fed. R.Civ.Pro. Rule 12(b) (4) insufficient process and Fed.R.Civ.Pro. Rule 12(b)(5). Clearly, Defendants/Appellees did not receive the notice required under LBST Civil Procedure Rule 2(a)! The summons and complaint could not, as a matter of law, have been properly filed or properly served as those documents are fatally defective and this cause must be dismissed. The Plaintiffs/Appellees are bound by the terms of their own Summons and Complaint! This matter must be dismissed with prejudice because it fails to comply with the LBST Rules of Civ.Pro. Rules 2(a) and 2(b).

Similarly, this matter must be dismissed for failure to comply with LBST Rules of Civ.Pro. Rule 3(1) which requires that the “return of service [] be endorsed with the name of the person serving and the date, time and place of service.” Then the document must be filed with the Clerk. It was legally impossible for the process server to return to the Clerk a return of service in CASE NO. CIV-15-9-0111 because no summons and no verified complaint in CASE NO. CIV-15-9-0111 were filed by the so-called Plaintiffs/Appellants.

The Summons, Complaint and the Court’s orders issued in CASE NO. CIV-15-9-0111 are all based on an improperly filed and served summons and improperly filed and served verified complaint. So, that action and all the Court’s orders issued in CASE NO. CIV-15-9-0111 including its order of September 29, 2015 are erroneously issued and must therefore be dismissed with prejudice. Because it was improperly filed this action is *void ab initio*¹. Rule 12(b) (5) insufficient service of process; *cf.* LBST Rules 2(b) (service of process) and 3(1)(return of service). Thus, the Court should legally place the Defendants/Appellees in the same position that they’d have been in but for the erroneous filing.

Given the extremely short amount of time that Defendants/Appellees were allowed to respond in

¹ Duhaime’s Online Dictionary defines the Latin term “*void ab initio*” as meaning “not legally binding. A document that is void is useless and worthless; as if it did not exist.” <http://www.duhaime.org/LegalDictionary/V/VoidorVoidAbInitio.aspx>

this matter it is ironic that the underlying claims made by the Plaintiffs/Appellants are that the Defendants/Appellees have acted in a manner inconsistent with the LBST Constitution when they Ps/As have received lawful notice² of LBST Tribal Council meetings and 1) been in attendance and left while the Tribal Council was still in session on May 6, 2015 and again on September 2, 2015; and 2) failed to attend the properly noticed LBST Tribal Council meeting on September 10, 2015. Exhibit A, Affidavit of Sheryl Scott, attached hereto and incorporated herein by reference as if fully set forth below.

These actions run afoul of the Court's own orders in the very civil action number the summons and verified complaint were filed under, i.e., Civil 14-12-0119! *Id.*; cf. October 4, 2015 email and Amended Order of Hon. Judge B.J. Jones³. In his email, Judge Jones wrote in relevant part: "When I

² Exhibits A and C, *supra*, requisite "notice."

³ Re: Langdeau, Jr. v. Wright, et al. 14-0119 No Hearing 10/2/15

Hon. B.J. Jones - 10/05/15

To: Steve Emery, Terry Pechota Cc: Michelle Hollow Horn Bear, Marlys Langdeaux, Gary Montana

1 attachment (62.5 KB) - [L]angdeau v. Wright 4.pdf

10.05.15 email from Hon. B.J. Jones transmitting Langdeau Order No. 4.

Counsel, I amended the scheduling order and temporary restraining order in Civ 15-9-0111 and attach a copy. The hearing has been moved to October 23, 2015 at 10 AM. Counsel, please make sure when you file things the correct docket number is on them. When I was reviewing the file I noticed that several matters intended to be filed in CIV-15-9-0111 had the docket number related to the case that is currently on appeal- CIV 14-12-0119. The Court of Appeals granted expedited review in that case but it does not appear that there will be a ruling from that Court prior to October 23, 2015. Everyone have a great week.

BJ Jones

LOWER BRULE SIOUX TRIBAL COURT) IN TRIBAL COURT
 LOWER BRULE SIOUX TRIBE) SS:
 LOWER BRULE SIOUX TRIBE JURISDICTION) CIVIL DIVISION

ORVILLE RED LANGDEAU JR.,)
 JOHN MCCAULEY SR, on behalf of themselves) CIV-15-9-0111
 and all other Tribal members affected by the) TEMPORARY RESTRAINING
 conduct of Defendants.) ORDER/ORDER TO SHOW
) CAUSE/ SECOND AMENDED
 Plaintiffs.) NOTICE OF HEARING

vs.)

KEVIN WRIGHT, SONNY ZIEGLER,)
 DESIREE LAROCHE, AND LEWIS)
 GRASSROPE,)
 Defendants.)

was reviewing the file I noticed that several matters intended to be filed in CIV-15-9-0111 had the docket number related to the case that is currently on appeal- CIV 14-12-0119.” This statement mistakenly assumes that the Court has the authority to change numbers that were set forth by the

The Plaintiffs, elected officials of the Lower Brule Sioux Tribe, have filed this complaint against the other three elected leaders of the Tribe and Defendant Grassrope, claiming that the Defendants are taking actions in derogation of the Lower Brule Sioux Tribal Constitution and in violation of a preliminary injunction this Court entered in CIV-14-12-0119. The legality of that injunction is currently on appeal to the Lower Brule Sioux Tribal Court of Appeals. In that case the Court enjoined the three elected Defendants from taking legislative action without the presence of a quorum and without the necessary 2/3’s of the total number of elected leaders. Both parties appealed from this Court’s ruling and that appeal remains pending.

This new lawsuit involves similar claims of unconstitutional action by the three elected Defendants and they have now included Defendant Grassrope, who has purportedly been installed as the new Chairman to replace the former Chairman who died.

The Plaintiffs claim that those actions are unconstitutional because they are contrary to this Court’s interpretation of the Lower Brule Sioux Tribal Constitution in CIV-14-12-0119. This Court has not been pointed to any action by the Court of Appeals to vacate that continuing injunction.

From the filings of the Plaintiffs it appears that the Defendants have taken actions that run contrary to this Court’s interpretation of the Lower Brule Sioux Tribal Constitution and that the Plaintiffs have also alleged harm to their rights as elected leaders to notice and the right to have their legislative voices heard. This may state a claim under the Indian Civil Rights Act and the Defendants may not be entitled to claim immunity from judicial review.

However, the Court finds that the Defendants should have a right to be heard prior to this Court taking action to invalidate any actions of the Defendants.

WHEREFORE, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Defendants shall be temporarily restrained from taking actions as a legislative body without a quorum and without the necessary votes of that quorum as this Court ruled in CIV-14-12-0119 and it is further

ORDERED, ADJUDGED, AND DECREED that the Defendants shall have until OCTOBER 7, 2015 by close of business to show cause, by affidavit or otherwise, why their actions taken at a meeting in Rapid City, South Dakota on September 8, 2015 should not be declared void and of no legal effect and it is further

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs shall have until October 12, 2015 by close of business to file any response to the filings of the Defendants and it is further ORDERED, ADJUDGED, AND DECREED that a hearing on whether to grant the Plaintiffs a preliminary injunction shall be held on the 23rd day of October 2015 at 10 AM. Counsel are urged to facilitate a meeting of their clients before that hearing to attempt to reach a resolution of the impasse that currently exists. The Court understands that a meeting of the Council is scheduled for October 7, 2015 and the Court directs that the Parties comply with the temporary restraining order issued in this case and the restraining order issued in CIV 14-0119 with regard to the appointment of a new Chairman and other tribal business.

So ordered this 14th day of September 2015 and amended September 28, 2015 and further amended September 30, 2015 and further amended October 5, 2015.

B.J. Jones
Lower Brule Sioux Tribe
Special Judge

Plaintiffs/Appellants in their verified Complaint numbered “CIV 14-12-0119.” No one, not the Clerk of Courts and not the Special Judge adjudicating the cause may change so much as a single character of the summons and verified complaint filed in this matter September 11, 2015 by Plaintiffs/Appellants. As noted, the temporary restraining order at bar was issued without a careful examination of Plaintiffs/Appellants’ defective papers. It is clear that the restraining order was not properly issued

The Court is asked to take judicial notice of the Answer--filed simultaneously with this Motion to Dismiss--to Plaintiffs/Appellants’ September 11, 2015 Summons and Verified Complaint. That Answer means that the complaint may not be amended without the leave of the Court.

The Defendants/Appellees submit that since they number at minimum three-fifths of the Lower Brule Sioux Tribe elected officials, that it is inappropriate for the Plaintiffs/Appellants who number two-fifths of the Lower Brule Sioux Tribe elected officials, that they should not and must not be allowed to denominate their papers as “the Lower Brule Sioux Tribe’ or the “the Tribe!” Moreover, the record is void of any evidence to support Plaintiffs/Appellants’ claims that they have brought this suit *parens patriae*⁴. The Court is asked to take judicial notice of that gap in the evidentiary record and dismiss that feebly pled allegation.

The Defendants/Appellees further move to dismiss all claims against the Defendants/Appellees who are elected members of the Tribal Council, on the grounds of sovereign immunity, legislative immunity, and that the Court lacks subject matter jurisdiction to adjudicate this matter under LBST Rules of Civ. Pro. Rule 7. Defenses and Objections. That rule provides:

- (a) When Presented. A defendant or other party against whom a claim has been made for affirmative relief shall have thirty (30) days from the date of service upon him to answer or respond to the claim.

⁴ The Latin term “*parens patriae*” is define as meaning “the government, or any other authority, regarded as the legal protector of citizens unable to protect themselves.” Moreover, the term “*parens patriae*” stands for “the principle that political authority carries with it the responsibility for protection of citizens.” <https://www.google.com/search?q=definition+of+parens+patriae&ie=utf-8&oe=utf-8>

In the case at bar, it is clear that the Plaintiffs/Appellees have both acted contrary to the orders of this Court in the actual earlier case denominated Civil 14-12-0119. *See*, Plaintiffs/Appellees' Exhibits 3, 4 and 5, *supra, passim*; and in a manner inconsistent with the LBST Constitution and Bylaws by leaving a Tribal Council meeting and breaking the quorum and ending any possibility of resolving issues within the Council; and by failing to attend a properly noticed Tribal Council meeting on May 6, 2015 and again, on September 2, 2015 contrary to the July 9, 2015 Order of this Court. *See*, Defendants/Appellees' Exhibit A, Affidavit of Sheryl Scott, *supra*; and Exhibit C, Affidavit of Sonny Ziegler, *supra, see also*, Plaintiff/Appellants' Exhibit 5, Order of July 9, 2015, at p. 5.

The orders entered by this Court on December 16, 2014, June 30, 2015 and July 9, 2015, are incorporated herein by reference as if fully printed hereinbelow as those orders are set forth in Plaintiff/Appellants' Exhibits 3, 4, and 5.

On September 10, 2015, the Plaintiffs/Appellees failed to attend a properly noticed and called Tribal Council meeting. Exhibit A, *supra*.

Simultaneously with the filing of this Motion to Dismiss, Defendants/Appellees file their answer to the papers filed by the Plaintiff/Appellants September 11, 2015 denominated in those papers Civil 14-12-0119 and erroneously referred to by the Court as CASE NO. CIV-15-9-0111 including in its Order of September 29, 2015 scheduling hearing in CASE NO. CIV-15-9-0111 on October 2, 2015 at 2:00 pm CST.

In this case, Defendants choose to file their Motion to Dismiss so that the Court might recognize and repair the injury done to their rights as elected Tribal Council representatives of the Lower Brule Sioux Tribe when this matter was filed, and an Ex Parte Temporary Restraining Order issued without the facts being accurately stated to the Court. *See*, Order of Hon. Judge B.J. Jones dated October 4, 2015.

Self-Help

Orville Langdeau used a self-help remedy when in his September 3, 2015 memorandum issued to Tribal employees, *etc.*, wherein Langdeau admits he left the meeting and then declares any actions taken

after Mr. Langdeau voluntarily left the meeting to be "illegal and [are] not valid[*sic*]." Exhibits E, Affidavit of Mrs. Kelly King, transcribed Tribal Council meeting from video recording of September 2, 2015 meeting, a true and accurate copy is attached to Exhibit E as Exhibit F, verbatim transcription of video recording of September 2, 2015 Tribal Council draft minutes, Those exhibits prove that Mr. Langdeau interfered with the rights of the other elected tribal leaders--each of whom had a right to meet in a manner consistent with this Court's February 13, 2015 Temporary Restraining Order--wherein the Court held that "the intervenors shall not interfere with the rights of the defendants." *Id.* at page 11.

Clearly, Mr. Langdeau used self-help to leave the May 6, 2015 and September 2, 2015 Tribal Council meetings. Mr. Langdeau's September 3, 2015 memorandum concerning whether the Vice-Chair voting while presiding at the Council meeting is an *argument that Judge Jones rejected* in his July 9, 2015 Order wherein Judge Jones found that "although the parties acted in Council session as if defendant Wright lacked the ability to vote while presiding over the meeting, that "is not clear to this Court..." *Id.* at page 3.

Mr. Langdeau does not get to be both the court and the Judge and his conduct in voluntarily absenting himself from the meeting—the next issue on the agenda September 2015 was a hot-button issue. Mr. Langdeau's exit from the May 6, 2015 and September 2, 2015 Tribal Council meetings together with his September 3, 2015 memorandum demonstrate his interference with the rights of elected Tribal officers to conduct council meetings. That conduct was all a pretext to defeat the Council's quorum.

There is no violation of the LBST Constitution as to the Defendants/Appellees because Defendants/Appellees Wright, LaRoche and Ziegler were in a regular council meeting called with a full quorum. They were exercising "their rights as elected leaders of the tribe." This court dismissed that part of the prior lawsuit against them "for lack of subject matter jurisdiction." *See*, Order of February 13, 2015, p. 10, demonstrating that that aspect of the case was dismissed! Plaintiffs/Appellants Langdeau and McCauley admit in their verified complaint, at ¶ 6, that they left the regular council meeting on September 2, 2015.

Plaintiffs/Appellants Langdeau and McCauley violated their mandatory duty to be present at a duly noticed, called, convened Tribal Council session with a quorum. This violates the LBST Bylaws, Article 1, §§ 3 and 4 and the said Court Orders of February 13, 2015, *supra*, and July 9, 2015, *supra*. Plaintiffs/Appellants Langdeau and McCauley waived their objections to meeting irregularities, if any, by opting to leave the regular council meeting⁵. They are bound by their admissions. On July 9, 2015 this Court ruled against them when they “opted to leave the meeting on May 6, 2015 instead of casting a vote on the controversial measures ratified that day.” *Id.* at page 5.

On July 9, 2015, Judge B.J. Jones “den[ie]d the Defendants' motion for reconsideration of its order of June 30, 2015, on the quorum and 2/3's of the full Council vote issue” and granted a preliminary injunction preventing Defendants from removing Plaintiffs from their elected positions or attempting to effectuate the actions they took on December 12, 2014, to remove the Plaintiffs from their positions.” *See*, Exhibit 5.

This action should be dismissed for lack of jurisdiction since it is, in essence, an action against the Lower Brule Sioux Tribe and the Tribe has not waived its sovereign immunity from suit in Tribal Court.

Defendants/Appellees are three of the five elected Tribal Council representatives of the Lower Brule Sioux Tribe. Defendant/Appellee Lewis Grass Rope was either elected or appointed by three of the five elected Tribal Council representatives of the Lower Brule Sioux Tribe. The officials of the Lower Brule Sioux Tribe are cloaked in Tribal sovereign immunity and this Court therefore lacks subject matter jurisdiction to adjudicate this cause. *See Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043

⁵ Robert's Rules of Order § 64 entitled “Quorum,” found online: <http://www.rulesonline.com/rro-11.htm>, provides in relevant part:

While no question can be decided in the absence of a quorum excepting those mentioned above, **a member cannot be interrupted while speaking in order to make the point of no quorum. The debate may continue in the absence of a quorum until someone raises the point while no one is speaking.** . . .

Emphasis added.

(8th Cir. 2000); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328 (D. Conn. 2001).

The Lower Brule Sioux Tribe is a federally recognized Indian Tribe that reserved its original, inherent right to self-government through the 1868 Treaty. Treaty of April 29, 1868 [15 Stat. 635] II Kappler, *Indian Affairs, Treaties* at p. 998. A Federally recognized Indian Tribe, the Lower Brule Sioux Tribe possesses sovereign immunity from unconsented suit.

In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Supreme Court held that Indian Tribes are “domestic dependent nations,” with inherent sovereign authority over their members and their territory, and in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held that suits against Indian Tribes are barred by tribal sovereign immunity.

The U.S. Supreme Court has repeatedly affirmed the sovereign immunity of Indian Tribes: “[W]e have time and again treated the ‘doctrine of tribal immunity as settled law’ and dismissed any suit against a tribe absent congressional authorization (or a waiver).” *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030-2031 (2014), quoting *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 756 (1998).

The doctrine of tribal sovereign immunity “is a necessary corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 890 (1986). The courts have noted that:

Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but “immunity [also] is thought [to be] necessary to promote the federal policies of tribal self [-] determination, economic development, and cultural autonomy.” *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182-1183 (10th Cir. 2010), quoting *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985), and citing Patrice H. Kunesh, *Tribal Self- Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 398 (2009) (“Tribal sovereignty and the jurisdictional counterpart of tribal sovereign immunity from suit are the bedrock principles of tribal self-determination”). Accord, Felix S. Cohen, COHEN’S

HANDBOOK OF FEDERAL INDIAN LAW §§ 7.05, 21.02[2] (Nell Jessup Newton, et al., eds., 2005 ed.).

Tribal sovereign immunity extends to the governmental and commercial activities of the Tribe, Kiowa Tribe, 523 U.S. at 760, and it applies to suits for monetary damages as well as suits for declaratory and injunctive relief. *See, Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

The doctrine of tribal sovereign immunity has been upheld and affirmed repeatedly by the courts. *See, Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416-417 (2001); *Kiowa Tribe*, 523 U.S. at 754; *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998).

Accordingly, because the Lower Brule Sioux Tribe has not expressly waived its sovereign immunity or the sovereign immunity of its elected officials, this Court lacks subject matter jurisdiction to hear this cause and the Court must dismiss this suit with prejudice.

Dated this 7th day of October, 2015.

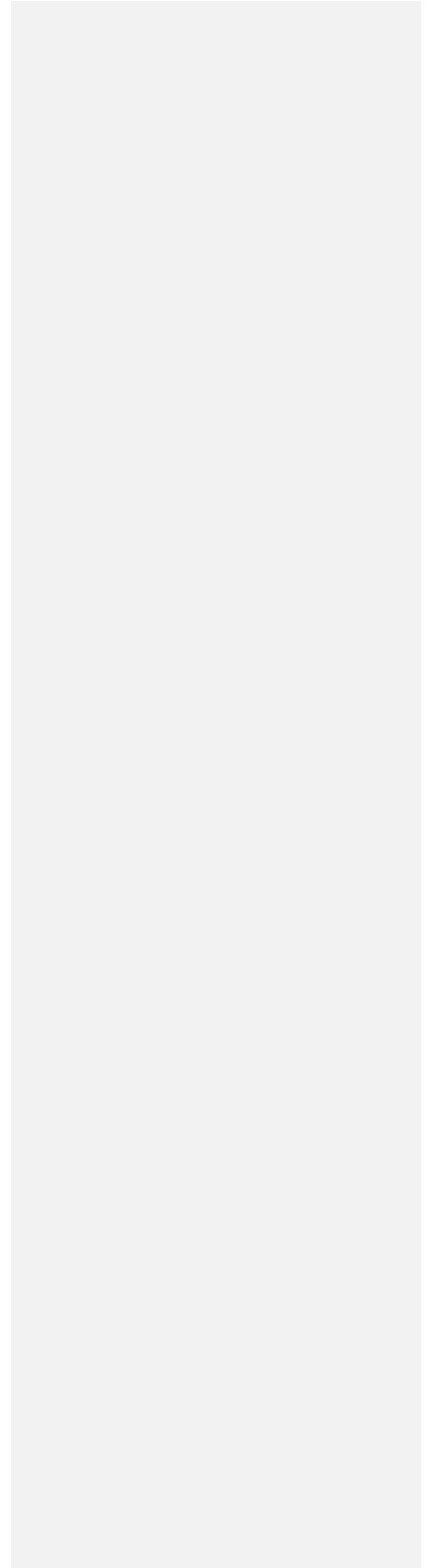


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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Notice of Appearance and Motion to Dismiss, together with the Exhibits thereto, if any, to the individuals and/or entities listed below, via United States Mail, certified, return receipt requested, postage prepaid and *via* email to:

Terry Pechota

Attorney for Plaintiffs/Appellants
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Lower Brule Sioux Tribal Court

Attn: Ms. Marlys Langdeau, Clerk of Court
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Via Email: marlys.langdeau@lowerbrule.net
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Hon. Judge B.J. Jones

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