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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mdewakanton Sioux Indians of Minnesota, Margo Bellanger, Tina Jefferson, Michael J. Childs, Jr.

Plaintiffs,

v.

Sally Jewell in her official capacity as Secretary of the U.S. Department of the Interior, or her successor, U.S. Department of the Interior; United States

Defendants.

Case No. 1:16-cv-02323-RC

PLAINTIFFS' MEMORANDUM FOR LEAVE TO FILE A SURREPLY MEMORANDUM

The Defendants filed a reply memorandum which has a new argument which was not raised in their initial memorandum to support a motion to dismiss. "Before filing a surreply … a party must move the court for leave to file. …. In addition, the moving party must show that the reply filed by the moving party raised new arguments that were not included in the original motion."[1] Our review of the reply memorandum reveals a newly-raised, significant argument which we argue here requires a surreply memorandum.

The government's reply memorandum, for the first time, argues that the Mdewakanton Sioux Indians of Minnesota are not "Indians" under the 1934 Indian Reorganization Act[2] because the 1888-1890 appropriation acts[3] contained a "severance of tribal relations" provision. Then, the government argues because the 1888-1890 appropriation acts contained the "severance of tribal relations" provisions, the Mdewakanton Sioux Indians of Minnesota were not under federal jurisdiction on June 1, 1934, but the non-tribal communities Lower Sioux Indian Community and Prairie Island Indian Community, approved in 1936, somehow were. In essence, the government

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[1] *Longwood Village Rest., Ltd. v. Ashcroft,* 157 F. Supp. 2d 61, 68 (D.D.C. 2001). *Cf. Alexander v. Federal Bureau of Investigation,* 186 F.R.D. 71, 74 (D.D.C.1998) (granting motion for leave to file a surreply where the reply included a declaration that was not included in her original motion, which raised "matters presented to the court for the first time").

[2] Act of June 18, 1934, ch. 576, 48 Stat. 988.

[3] Act of June 28, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.

argues that the Mdewakanton Sioux Indians of Minnesota – which were not terminated by the February 16, 1863 Act – were terminated by the "severance of tribal relations" provisions in the 1888-1890 appropriation acts.

The Plaintiffs request permission to file a surreply brief in opposition to this argument. In such a surreply brief, the Plaintiffs would point out that section 6 of the 1887 General Allotment Act or "Dawes Act" – enacted a year before the 1888-1890 appropriation acts – provided that Indian allottees who have separated themselves apart from the tribe qualify for U.S. citizenship:

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence *separate and apart from any tribe of Indians* therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

(Emphasis added). Thus, the Dawes Act created a statutory framework for allotting lands to Indians and for Indians receiving allotments "who have severed tribal relations" to establish citizenship.

Consistently, one year later, the 1888-1890 appropriation acts – which are appropriation acts, not public laws modifying the Dawes Act -- authorized appropriations for the Department to purchase land for the Mdewakanton

Sioux Indians of Minnesota. However, the lands purchased by the Department with the appropriated funds were never allotted under the Dawes Act. Thus, the "severance of tribal relations" provisions found in the 1888-1890 appropriation acts were never relied on by the individual Indians to obtain citizenship after receiving an allotment because the individual Indians never received an allotment from the Department. The 1924 Indian Citizenship Act which granted all Indian tribal members citizenship had the legal consequence of rendering the "severance of tribal relations" provisions in the 1888-1890 appropriation acts legally obsolete.[4]

Congress never intended the 1888-1890 appropriation acts to diminish nor terminate the tribal status of the Mdewakanton Sioux Indians of Minnesota – as argued by the Department. The essential thrust of the Acts was Congress' desire that specific Mdewakanton individuals who had either remained in, or were removing to, Minnesota as of May 20, 1886, receive land and citizenship.[5] Since the lands were never allotted under the Dawes Act prior to the 1934 IRA, the provision relating to "severance of tribal relations" as an individual Mdewakanton Indian's path to citizenship was never put

[4] *See* Sutherland Statutory Construction, § 23:26 Repeal by desuetude, obsolescence, and nonenforcement.
[5] *See* Act of Aug. 19, 1890, 26 Stat. at 349; Act of Mar. 2, 1889, 25 Stat. at 992; Act of June 29, 1888, 25 Stat. at 228.

into legal effect and was rendered obsolete by the 1924 Indian Citizenship Act which made all Indian tribal members citizens.

On this legal analysis and other legal analysis, we seek an opportunity to refute the new argument made in the Department's reply memorandum. Although the Plaintiffs have requested oral argument, the decision to grant that request is at the discretion of the Court. Even if granted, it is not certain at oral argument, the Plaintiffs would be able to provide a complete defense to the newly-raised argument. Therefore, under the circumstances presented here, a surreply memorandum would serve the bests interests of justice and serve due process. Therefore, the Plaintiffs request this Court leave to file a surreply memorandum.

DATED: April 18, 2017.

/s/Erick G. Kaardal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2017, I filed the foregoing electronically through the Court's CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

DATED: April 18, 2017.

/s/Erick G. Kaardal
Erick G. Kaardal