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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

MDEWAKANTON SIOUX INDIANS OF MINNESOTA, *et al.*,	
Plaintiffs	Case No. 1:16-cv-02323-RC
v.	
ZINKE, *et al.*,	
Defendants.	

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO MOTION TO DISMISS

Federal Defendants Ryan Zinke, Secretary of the Interior, and U.S. Department of the Interior oppose Plaintiffs' motion (ECF No. 15) for leave to file a surreply in further opposition to Federal Defendants' motion to dismiss (ECF No. 10). Plaintiffs incorrectly assert that Federal Defendants' reply (ECF No. 14) in support of the motion to dismiss included a "new" argument to which Plaintiffs must now respond. It did not, and there is no basis for the Court to grant Plaintiffs' motion to add more to their opposition papers.[1]

Although the Local Rules do not expressly permit surreplies, the Court has discretion to grant or deny leave to file a surreply. *See Ben–Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (noting that the district court has discretion to deny leave to file a surreply). However, arguments in a reply memorandum that were simply made in response to matters or issues raised in an opposition memorandum provide no reason to allow a surreply; thus, where "the movant's reply does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate." *Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 62 (D.D.C. 2011) *aff'd*, No. 11-5231, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012) ("[A] surreply is not a vehicle for rehashing arguments that have already been raised and briefed by the parties."); *Freedman v. Suntrust Banks, Inc.*, 139 F. Supp. 3d 271, 276 (D.D.C. 2015) (denying plaintiff leave to file a surreply because the "Defendants' Reply brief did nothing more than respond to Plaintiff's arguments").

In this case, Plaintiffs claim that Federal Defendants, "for the first time," argue in their reply that the 1888–1890 Appropriations Acts "terminated" the tribal relationship between the

[1] Federal Defendants' opening memorandum was only 26 pages, well under the 45-page limit of the Local Rules. LCvR 7(e). Plaintiffs' opposition memorandum (ECF No. 13) reached the 45-page limit for opposition papers. *Id*. Federal Defendants' reply was only 18 pages of text, again well under the 25-page limit for replies. *Id*.

Loyal Mdewakanton and the remaining Sioux Indians.[2] (ECF No. 15, at 2–3.) Federal Defendants never advanced any such position. Federal Defendants argued, in both their opening and reply memoranda, that the 1863 and 1865 Acts and subsequent Appropriations Acts simply recognized that the Loyal Mdewakanton themselves had severed tribal relations with the Sioux who had engaged in the 1862 uprising against Minnesota settlers—by not joining that uprising and, in some cases, actively defending the settlers. (ECF No. 10, at 2–4; ECF No.14, at 4–5.) Federal Defendants recited in their opening memorandum that the Indian Reorganization Act provided congressional authority under which the Shakopee Mdewakanton, Lower Sioux, and Prairie Island Indian Communities (the "Three Communities") could organize as federally recognized tribes (which they did) and for the federal government to acquire land for those Communities (which it did).[3] (ECF No. 10, at 4–5.) In their reply, Federal Defendants simply observed, in response to arguments made by Plaintiffs, that under the Indian Reorganization Act, individual Sioux Indians residing on lands provided under the Appropriations Acts were eligible to organize under the Act. (ECF No. 14, at 3.) Federal Defendants never asserted that any group of Mdewakanton Sioux Indians in Minnesota was "terminated." (*Id*. at 4.)

In short, Federal Defendants made no "new" argument in their reply memorandum that would require any further briefing by Plaintiffs, and Plaintiffs' discussion of the Dawes Act

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[2] Plaintiffs also claim that Federal Defendants assert that they are not "Indians." (ECF No. 15, at 2.) Plaintiffs cite no pages of Federal Defendants' papers in support of their assertion. Federal Defendants maintain that Plaintiff Mdewakanton Sioux Indians of Minnesota is not a federally recognized tribe, not that individual members of that group are not "Indians."

[3] Federal Defendants do *not* argue that the Appropriation Acts "terminated" the Mdewakanton Sioux Indians in Minnesota (*cf*. ECF No. 15, at 2–3). Rather, Federal Defendants have stressed that those Mdewakanton Sioux Indians who remained in Minnesota were not treated as members of a federally recognized tribe, other than under the Indian Reorganization Act, under which the Three Communities organized. (*See* ECF No. 10, at 4–5; ECF No. 14, at 3–5.)

(ECF No. 15, at 3–5) is entirely extraneous and, in fact, would inject entirely new (and irrelevant) issues into this case. Federal Defendants' motion to dismiss is founded on Plaintiffs' failure to identify final agency action that is reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701–706, failure to bring claims that are not time-barred, and failure to bring claims that are not precluded by rulings in litigation resolved in the Federal and Eighth Circuits.[4] None of the arguments Plaintiffs seek leave of Court to now advance salvages Plaintiffs' claims from dismissal on those bases.[5]

The Court should therefore deny Plaintiffs' request for leave to file any further memoranda in this case.

Dated: January 13, 2015

Respectfully Submitted,

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[4] Federal Defendants also argue that certain claims to lands held for the benefit of the Prairie Island Indian Community should be dismissed for failure to join an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

[5] The thrust of Plaintiffs' new arguments is that the Appropriations Acts purported to sever the tribal relations enjoyed by Mdewakanton Sioux Indians in Minnesota, but that those "severance provisions" were then nullified by later congressional enactments. (*See* ECF No. 15, at 3–5.) But as explained above, the Appropriations Acts made funds available to help Indians who had themselves severed their tribal relations. The Acts thus recognized, *but did not create*, the non-tribal status of the Mdewakanton Sioux Indians in Minnesota. The arguments Plaintiffs seek leave to advance in a surreply concerning non-existent "severance provisions" are thus entirely irrelevant.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 21, 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 21, 2017

/s/*David B. Glazer*
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