

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

CHARLES ANTHONY GREENE,)
)
 Appellant,)
)
 vs.) **Case No. 12-7068**
)
)
 CHARLES L. HEAD, et al.,)
)
 Appellees.)

**On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable Ronald A. White
District Judge
CIV 12-259-RAW**

BRIEF OF APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees do not request oral argument.

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The Appellees/Defendants, Charles L. Head (“Head”) and Ramona L. Ellis (“Ellis”), (collectively the “Defendants”) respectfully submit this brief in response to the opening brief filed by the Appellant/Plaintiff, Charles A. Greene (“Greene”) on December 10, 2012.¹

STATEMENT OF PRIOR OR RELATED APPEALS

In Appellate Case No. 02-17054, the Ninth Circuit affirmed the dismissal of similar claims Greene asserted against Assistant Secretary-Indian Affairs (BIA) Neal McCaleb, thereby upholding the district court’s determination that Greene failed to state a claim upon which relief could be granted.

STATEMENT OF JURISDICTION

Greene filed the original action against Head and Ellis in the United States District Court for the Eastern District of Oklahoma on June 12, 2012, alleging civil rights violations under 42 U.S.C. §1983, the Fifth and Fourteenth Amendments to the Constitution of the United States, and for breach of contract. [Record, pp. 5-6] The district court had jurisdiction to hear this matter under 28 U.S.C. §1343 and 28 U.S.C. §1346(b)(1).

On October 3, 2012, the district court issued a judgment dismissing the case. [Record, pp. 410-414]. A copy of the Opinion and Order is submitted herewith pursuant to 10th Cir.R.28.2(B). Greene filed a timely notice of appeal in the district

¹ As the Defendants are governmental entities, they are exempt from the joint briefing requirement pursuant to 10th Cir.R. 31.3(D).

court on October 15, 2012. [Record, pp. 418-419]. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting the Defendants' motion to dismiss based on Greene's failure to state a claim on which relief can be granted because Indian Tribes possess sovereign immunity regarding tribal membership issues.

STATEMENT OF THE FACTS AND CASE

This is a lawsuit filed under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments of the United States Constitution against Charles Head and Ramona Ellis. [Record, pp. 5-6]. Greene alleges the defendants, BIA employees, violated his civil rights by requiring him to use the Certificate of Degree of Indian Blood ("CDIB") form in order to be federally recognized as an Indian. [Record pp. 5-108]. Greene claims he is the descendant of a Choctaw Freedmen named Bennie Vinson. [Record p. 14]. Greene further believes this heritage entitles him to be federally recognized as an Indian. [Record pp. 5-108]. Greene did not apply for membership with the Choctaw Nation. [Record, pp. 28]. Instead, Greene requested that defendants, in their capacities as the Acting Regional Director, Eastern Oklahoma Bureau of Indian Affairs-Department of the Interior, and Superintendent, Bureau of Indian Affairs-Department of the Interior, Talihina Agency, create an application form to enable descendants of freedmen who cannot

prove Indian descendency to be federally recognized as Indians. [Record, pp. 16-22]. Each time Greene made such a request the request was denied and he was directed to apply for membership with the Choctaw Nation through the CDIB process. [Record, pp. 16-22]. In response to the denials of his requests, Greene filed lawsuits.

Prior to the current lawsuit on appeal, Greene has filed five similar actions in the United States District Court for the Eastern District of California and one case in the United States District Court for the Eastern District of Oklahoma. In 2000, Greene filed an action entitled Charles Anthony Greene v. Choctaw Nation of Oklahoma, Case No. CV F 00-6141 REC SMS (E.D. Cal. 2000). The Court dismissed the action on the grounds that it failed to state a claim upon which relief could be granted.

In 2001, Greene filed an action entitled Charles Anthony Greene v. Assistant Secretary-Indian Affairs (BIA) Neal McCaleb, et al., Case No. CV F 01-6325 AWI LJO (E.D. Cal. 2001). In that case, Greene appeared to allege he was denied membership to the Choctaw Nation of Oklahoma although he claimed membership through a tribal ancestor. On August 23, 2002, the Court dismissed the case without prejudice on the grounds that Greene failed to state a claim and failed to cure pleading deficiencies.

In 2002, Greene filed another action entitled Charles Anthony Greene v. Assistant Secretary-Indian Affairs (BIA) Neal McCaleb, et al., Case No. CV F02-6157 REC LJO (E.D. Cal. 2002). Again, Greene alleged that he was denied membership in the Choctaw Nation of Oklahoma and requested injunctive relief. On October 1, 2002, the Court dismissed the case on the grounds that Greene failed to state a claim, failed to cure pleading deficiencies, and that there was no waiver of sovereign immunity. On June 15, 2003, the Ninth Circuit Court of Appeals affirmed the district court's decision.

In 2005, Greene filed a fourth action entitled Charles Anthony Greene v. McCaleb, et al., Case No. 1:05-cv-555 OWW DLB (E.D. Cal. 2005). In this action, Greene contended that he was denied membership in the Choctaw Nation of Oklahoma because he could not connect to direct ancestor by blood. He disagreed with this interpretation and alleged that defendants deprived him of his right to be registered with the Bureau of Indian Affairs and conspired against him to deprive him of his civil rights. This complaint was dismissed for failure to state a claim upon which relief can be granted and that there was no waiver of sovereign immunity.

In 2009, Greene filed a fifth action entitled Charles Anthony Greene v. George Skibine, et al., Case No. 1:09-cv-1022 AWI GSA (E.D. Cal. 2009). In this action, Greene contended that he was denied membership in the tribe because he

could not connect back to a direct ancestor enrolled by blood. Greene requested the court to reverse an April 2009 decision issued by the Bureau of Indian Affairs and order the BIA to recognize him as a descendant of the Five Civilized Tribes. Greene further requested that he be recognized by the federal government as an Indian Freedmen descendant and that a CDIB card be issued to that effect. This complaint was dismissed for failure state a claim upon which relief may be granted.

In 2011, Greene filed a sixth action entitled Charles Anthony Greene v. Charles Head, et al., Case No. 11-CIV-042-RAW (E.D. Okla. 2011). In this action, Greene desired to be recognized by the BIA-DOI as descendant of the Choctaw Nation with all the rights and privileges of citizenship and provided a wallet size federal government card. Greene did not seek tribal membership and admittedly had never made application for tribal membership with the Choctaw Nation. Greene alleged that the BIA policy of only permitting recognition of citizens by blood systematically eliminated the freedmen based on their ethnic group. Greene alleged this violated his due process rights under 42 U.S.C. §1983, the Fifth Amendment and the Fourteenth Amendment. On September 8, 2011, the district court dismissed Greene's Complaint, determining that "Plaintiff's action is found to be frivolous, that Plaintiff fails to state a claim on which relief can be

granted, and that Plaintiff has failed to prosecute this matter.” [Record, pp.365-370].

Greene filed the present case in June 12, 2012 alleging violations of his civil rights. [Record, pp. 5-6]. Defendants filed their Motion to Dismiss on September 10, 2012. [Record, pp. 356-370]. Greene timely responded on September 24, 2012 and September 28, 2012. [Record, pp. 371-409]. On October 3, 2012, the district court issued an Order determining that the court did not have jurisdiction over the present lawsuit due to the tribe’s sovereign immunity. [Record, pp. 410-414].

SUMMARY OF THE ARGUMENT

The district court correctly determined that Greene failed to state a claim upon which relief can be granted. The district court also correctly determined that a federal court lacks any authority to determine tribal membership and that Greene’s allegations, even if true, would not rise to the level of a constitutional violation by any defendants.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT PROPERLY DISMISSED GREENE’S SUIT FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED BECAUSE INDIAN TRIBES POSSESS SOVEREIGN IMMUNITY REGARDING MEMBERSHIP ISSUES.

A. Standard of Review

The Court of Appeals reviews dismissals for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) *de novo*. In conducting such a review, the courts are to evaluate “whether the complaint contains ‘enough facts to state a claim to relief that is plausible on its face’”. Weise v. Casper, 593 F.3d 1163, 1166 (10th Cir. 2010) Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)). See also Weise v. Casper, 593 F.3d 1163, 1166 (10th Cir. 2010); Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214-15 (10th Cir. 2011).

B. Discussion

Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-governance. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (internal quotations omitted). “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” Id. Consequently, Indian tribes retain sovereign immunity from suit absent either an explicit waiver of immunity or express authorization of the suit by Congress. Id. at 72. A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Id., citing Roff v. Burney, 168 U.S. 218

(1897). Tribes, not the BIA, have exclusive authority on membership determinations for tribal purposes. Martinez v. S. Ute Tribe of S. Ute Reservation, 249 F.2d 915, 920 (10th Cir. 1957). Regardless of whether it is right, wrong, or well-intentioned, a federal court is prohibited from intervening in a tribal membership dispute. Ordinance 59 Ass'n v. U.S. Dept. of Interior Sec'y, 163 F.3d 1150, 1157 (10th Cir. 1998).

Appellant cites several federal statutes and constitutional provisions to support his claims. None of the authorities cited by appellant authorize a federal court to review a federally recognized Indian tribe's membership decisions. Indeed, as sovereigns pre-existing the Constitution, tribes have traditionally been "unconstrained by those Constitutional provisions framed specifically as limitations on federal and state authority." Santa Clara Pueblo, 436 U.S. at 56. Thus, claims against tribes based on the Fifth and Fourteenth Amendment due process clause cannot be sustained. Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that the powers of local self-government of the Cherokee Nation were not affected by the Fifth Amendment because they pre-existed the Fifth Amendment). Similarly, appellant's other allegation based on federal civil rights statutes must fail. See, e.g., Evans v. McKay, 869 F.2d 1341, 1347 (9th Cir. 1989) (action cannot be maintained under 42 U.S.C. §1983 for alleged deprivation of constitutional rights under color of tribal law); R.J. Williams Co. v. Fort Belknap Hous. Auth.,

719 F.2d 979, 982 (9th Cir. 1983)(same); Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006)(a 42 U.S.C. §1983 action is unavailable for persons alleging deprivation of constitutional rights under color of tribal law); Wardle v. Ute Indian Tribe, 623 F.2d 670, 673 (10th Cir. 1980)(claim against tribe based on 42 U.S.C. §1981 precluded by tribal sovereign immunity).

The issue of tribal membership of former slaves of a tribe has been challenged. See Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989). In Nero, a group of descendants of slaves owned by Cherokees brought suit in the United States District Court for the Northern District of Oklahoma alleging violation of a broad array of constitutional and statutory provisions by denying them the right to vote in tribal elections and the right to participate in federal Indian benefit programs. Id. There, plaintiffs sued the Cherokee Nation, tribal officials, the United States and various federal officials. Id. at 1458. The District Court granted summary judgment as to the federal officials on the basis of qualified immunity. Id. at 1465. The Tenth Circuit Court of Appeals affirmed, concluding that the federal officials were entitled to summary judgment because plaintiffs failed to state a claim upon which relief could be granted against the federal officials rather than on the basis of qualified immunity. Id. The Nero Court held that no cause of action exists for claims against a government official for non-intervention in the tribal membership process. Id.

Like Nero, appellant here brought suit against federal officials for their failure to intervene in the tribal membership process. The district court correctly determined that Greene failed to state a claim upon which relief can be granted because no cause of action exists for claims against government officials for non-intervention in the tribal membership process.

CONCLUSION

The district court properly dismissed Greene's claims for failure to state a claim. The district court's Judgment and Order dated October 3, 2012 should be affirmed.

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CERTIFICATE OF MAILING

I hereby certify that on January 7, 2013, I caused to be mailed postage paid, a true and correct copy of the foregoing to the following:

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CERTIFICATE OF COMPLIANCE

As required by Fed.R.App.P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2,580 words.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk.

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