15-10132-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILLY CYPRESS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

APPELLANTS' JOINT INITIAL BRIEF

On Appeal from the United States District Court
For the Southern District of Florida,
Case No.: 1:14-cv-22066-KMW

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Williams, Kathleen M. (District Court Judge)

Dated: August 27, 2015

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs hereby request that oral argument be permitted in this appeal. Plaintiffs respectfully submit that this appeal presents the following question of first impression which has not been finally decided by any other federal appellate court:

> Whether the sovereign immunity of the United States precludes a federal district court from exercising subject matter jurisdiction to determine whether revenues collected by the Miccosukee Tribe of Florida (Tribe) arising out of the use of tribal lands which are distributed to tribal members are subject to taxation by the Internal Revenue Service (IRS") as part of each member's gross income when applicable waivers of sovereign immunity have been alleged in the complaint?

Subsumed within this question of first impression are a number of issues that will need to be resolved by this court, including: a) Whether such taxes are prohibited by 25 U.S.C § 459e? b) Whether sovereign immunity was waived in the Miccosukee Reserved Area Act, 16 U.S.C. § 410, *et al.* (1998)? c) Whether sovereign immunity was waived in section 702 of the Administrative Procedure Act, 15 U.S.C. § 702 (1976)? d) Whether the Anti-Injunction Act, 26 U.S.C. § 7421, *et al.*, and/or Declaratory Judgment Act, 28 U.S.C. § 2201, bar the

requested declaratory relief? e) Whether the judicial exception to these statutes precludes the application of these Acts?

Clearly, this appeal should not be placed on the Non-Argument Calendar under 11th Cir. R. 34-3. This appeal is not frivolous, and the dispositive issues have not been determined by another court. Further, the decisional process will be significantly aided by oral argument as this appeal presents a case of first impression. Respectfully, this appeal should be placed on the calendar for oral argument.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction over this litigation between the Plaintiffs and the United States under 28 U.S.C. § 1331 (federal question), the Miccosukee Reserved Area Act, 16 U.S.C. § 410, *et seq.* (1998) ("MRAA"), 28 U.S.C. § 2201(a) (Declaratory Judgment Act), and 26 U.S.C. § 7421 (Administrative Procedure Act) ("APA").

This Court has appellate jurisdiction over the final decision of the district court dismissing the complaint for lack of subject matter jurisdiction (while denying leave to amend) pursuant to 28 U.S.C.A. § 1291 (final decisions of district courts).

STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed this action for lack of subject matter jurisdiction even though the United States expressly waived its sovereign immunity in the MRAA?

2. Whether the Plaintiffs' claims under the MRAA are barred because the MRAA does not mention taxes?

3. Whether the district court properly dismissed this action for lack of subject matter jurisdiction even though the United States expressly waived its sovereign immunity in the MRAA and APA?

4. Whether the Tax Anti-Injunction Act (the "Act"), 26

U.S.C. § 7421(a), bars this action for declaratory relief regarding taxes?

5. Whether the Declaratory Judgment Act, 28 U.S.C. § 2201(a), bars this action for declaratory relief regarding taxes?

6. Whether the judicial exception to the Act and Declaratory Judgment Act is applicable to this lawsuit?

7. Whether such taxes are prohibited by 25 U.S.C. § 459e?

STATEMENT OF THE CASE

This is an appeal by Plaintiffs, sixteen (16) individual members of the federally-recognized Miccosukee Tribe of Indians of Florida ("Tribe"), from a final order (A 28) of the district court which dismissed their Complaint (A 1) against the United States. Plaintiffs sought to prevent the United States from assessing and collecting personal income taxes upon monetary distributions by the Tribe to the Plaintiffs from a "separate tribal trust account all distributable tribal revenues." (*Id.*) These monetary distributions are derived from the land and are exempt, in part, from taxation. (*Id.*)

Plaintiffs allege that Congress expressly prohibited such taxes when it enacted 25 U.S.C. §§ 459e and exempted distributions to Tribal members of gross receipts from allotted lands from taxation. (A 1:48-49) Plaintiffs further assert that the United States expressly waived its sovereign immunity in the MRAA, and section 702 of the APA, 5 U.S.C. § 702 (1976). (A 1:31) The district court

granted the United States' motion on the grounds that it lacked subject matter jurisdiction since: (i) the United States has not waived its sovereign immunity in this case; and, (ii) the Anti-Injunction and Declaratory Judgment Acts expressly prohibit the tax relief requested. (A 28)

Plaintiffs' appeal seeks review of the order of dismissal on these grounds.

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiffs filed a 6-count Complaint against the United States which sought a declaratory judgment that any taxes levied on the Tribe's distributions to Plaintiffs violated a number of statutory and treaty provisions which control the relationship between the Tribe and the United States. (A 1)

The United States filed a motion to dismiss the Complaint (A 11) under Rule 12(b)(1), Fed. R. Civ. P. The United States contended that the district court lacked subject matter jurisdiction since Plaintiffs' claims were barred by sovereign immunity absent an explicit waiver. (*Id.*) The United States further asserted that Plaintiffs' causes of action were barred by the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a), and Act, 26 U.S.C. §§ 7421(a). (*Id.*)

Oral argument was held on the United States' dismissal motion. (A 27)

The district court granted the United States' motion and dismissed the Complaint. (A 28) It ruled that the United States had not explicitly waived its sovereign immunity from this suit under the MMRA or APA. (A 28:3-5) The

court further found that Plaintiffs failed to show that their claims arose under the MRAA, which did not mention taxes at all. (A 28:5)

Plaintiffs appealed from this order of dismissal.

B. STATEMENT OF THE FACTS

PRELIMINARY STATEMENT

Plaintiffs are aboriginal natives and enrolled members of the Miccosukee Tribe of Indians of Florida, a federally recognized Indian Tribe ("Tribe"), which resides on ancestral lands in this judicial district. (A 1:1) This is a dispute between Plaintiffs; the United States of America; Department of Interior ("DOI") and Department of the Treasury. (*Id.*) Legal disputes between the Tribe, the United States and its Agencies are not uncommon and may be inevitable given that "[t]he relation of [Native American] Tribes ... to the people of the United States has always been an anomalous one and of a complex character." *4*. The issues presented here are no exception and involve not only extraordinarily complex issues but also raises issues of first impression for the Court. (A 1:1-2)

For ease of reference in this action, Plaintiff's will use the term "Miccosukee," a term the United States adopted to commonly refer to members of the Tribe when identifying themselves in this case.[1] (A 1:2) The Miccosukee are a

[1] "The word Miccosukee is a term of language created and identified by the United States. "Miccosukee" literally means "us:" or "me." When first encountered by

unique people historically, culturally, and, in critical respects, legally. (*Id.*) After many decades of misinformation and neglect by the federal government, the Miccosukee continue to find themselves dealing with what has been thought of as an unquestioned and long resolved issue. (*Id.*) The most recent of these disputes arises and centers on the imposition of income tax liability on monies derived from the use of Miccosukee lands and fees or taxes paid for the privilege of using those lands within the boundaries of the Miccosukee. (*Id.*)

The Miccosukee possess an extraordinary heritage of strong Tribal Sovereignty. (*Id.*) Following years of armed conflict during the late 1800's, the ancestors of these Indians, who would later be identified by the United States as the Miccosukee; resisted removal, relocation and intrusion into their sovereignty at the hands of the government. (*Id.*) The term Miccosukee represents both the Tribe collectively as well as the individual members of the Tribe. (*Id.*) This is due to the unique method by which the Miccosukee utilize inherent sovereignty in the day to day self-governance of their activities. (A 1:3)

The Miccosukee Sovereignty has continued uninterrupted within the State of Florida prior to any "discovery" by invaders and explorers from other countries. (*Id.*) At one time, all of the State of Florida comprised the ancestral lands of the

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the non-Indian government and asked simply "what are you called" the response was simply to identify themselves as "us" or "me." Miccosukee became the title created by the United States to classify this people." (A 1:2)

Miccosukee. (A 1:2) As other tribes in the United States were forcibly moved onto reservations, the Miccosukee Indians – who were never conquered and never surrendered – moved to areas of Florida where non-Indians would almost never go. (*Id.*)

While other Tribes in Florida were interacting and negotiating with the United States, the Miccosukee remained in the swamps of the Everglades, opposed efforts to claim compensation from the United States government and continued to insist on their right to be left alone, free from governmental interference or impositions. (A 1:3) Thus, the Miccosukee culture and inherent sovereignty embodies a fierce sense of self-sufficiency, self-determination, and independence. (*Id.*)

The Miccosukee, historically and continuing through today, are self-governing and independent seeking nothing more from the federal government outside of the enforcement and compliance with federal laws enacted for the benefit of the Tribe and its members, as well as a number of settlement agreements between the Tribe, its members and the United States. (A 1:4-6)

The tapestry of law defining Tribe members' relationship with the United States is varied and includes federal legislation specifically passed to address the Miccosukee people's long-standing relationship with the Everglades and their economic rights on this land. (A 1:23) That federal legislation includes the

Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1741, *et. seq.*, the Miccosukee Settlement Act of 1997, 25 U.S.C. § 1750, *et. seq.,* and the Miccosukee Reserved Area Act passed in 1998, 16 U.S.C. § 410, *et. seq.* (A 1:23-33)

The binding treaty obligations set out not only the long standing position of Miccosukee independence, free from the influence and regulation of the federal government, but also contain specific language affirming the Miccosukee's inherent sovereign right to govern themselves and reflect negotiations and equitable concessions by the Miccosukee in return for giving up millions of acres of its ancestral lands. (*Id.*) The Miccosukee people properly insist that the United States take nothing "more" from them. (*Id.*) Central to their unique character is a correspondingly distinctive relationship with the United States best described in Miccosukee language as "pohoan checkish" ("Just leave us alone"). (*Id.*)

All members of the Miccosukee have an undivided interest in the use and benefit of Miccosukee lands. (*Id.*) Interestingly, there is no word in the Miccosukee language that describes individual ownership. (*Id.*) The words of individual possession or exclusive control of Tribal lands and property do not exist among the Miccosukee people. (*Id.*) Instead, the Miccosukee language defines the land as belonging to all the individual members for their collective use and benefit. (*Id.*)

Formally, the Miccosukee Constitution, which was recognized by the United States government pursuant to 25 U.S.C. § 476, provides that "[a]ll members of the Miccosukee Tribe" are "accorded equal political rights and equal opportunities to participate in the economic resources and activities of the Tribe." (*Id.*) Miccosukee Const., Art. VI, § 1.[2]

At issue in this case is the long settled right of the Miccosukee to utilize its aboriginal lands to generate revenue to benefit the Tribe and its members, thereby continuing the preservation of its culture, history, and independence free from the United States; the interpretation and application of clear statutory language exempting the lands of the Miccosukee and its members from federal, state and local taxes; and the conflict between the provisions of Title 26 of the United States Code governing the Internal Revenue Service, and Title 25 of the United States Code and its exclusive application to Indian Tribes. (*Id.*)

Included in this issue is the inherent right of the Tribe to enact laws governing persons within its boundaries, lease lands, identify and define the operation and expenditures of its funds, and the ability of the Tribe to operate in conjunction with its Constitution and customs and traditions relating to the very

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2 The General Council of the Miccosukee was later codified for the benefit of the United States in the Miccosukee Constitution as "*all adult members 18 years of age or older*." Miccosukee Const., Art. III § 1. A more detailed history of the Miccosukee Tribe and its dealings with the United States is contained in the Initial Complaint.

small remnant of what was once millions of acres of the Tribe's aboriginal land base. (*Id.*) These include the rights and privileges accruing to the Miccosukee Tribe and its members and contained in the aforementioned federal statutes. (*Id*) *See, e.g., McClanahan v. State Tax Comm'n. of Ariz.*, 411 U.S. 164 (1973) ("To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with tribes as collective entities. **But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.**") (emphasis added); *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925) (individual tribe-member plaintiffs held to have exclusive fishing rights based on treaty obligations).

Title 25 contains codified laws, settlements, and other binding statutory provisions granting to Tribes, including the Miccosukee and its members, various rights, and exemptions from the application, enforcement and other provisions of laws commonly applicable to citizens of the United States. (*Id.*) Within these provisions is codified the MRAA and other settlements with the Miccosukee Tribe and its members which provide exemptions to the inclusion of revenue from the Tribe and its lands as income. (*Id.*)

The Treasury defendants, among other things, seek to impose withholding obligations upon the Tribe and personal-income tax liability upon Plaintiffs for monetary distributions originating from a gross-revenues tax and lease fee imposed by the Tribe on any and all businesses conducting any operations on, or using,

Tribal lands. (*Id.*) In doing so, Treasury Defendants have failed to follow federal statutes relevant to the Miccosukee Tribe and its members and well-settled law relating to the inherent authority of the Tribe to govern and control those matters occurring within the boundaries of its lands and which affect its people and those interacting within its boundaries under the provisions of 25 U.S.C. §§ 459(e), 1745, 1750(e), and 2210, plus and the Tribal General Welfare Exclusion Act ("Exclusion Act") of 2014, 26 U.S.C. § 139E (2014), all of which prohibit and exempt the taxation of revenues derived from the lands of the Miccosukee Tribe without restriction. (*Id.*)

The DOI defendants have violated their obligations to Plaintiffs in connection with: (1) lands taken into trust for Plaintiffs and the Miccosukee Tribe's benefit, including but not limited to, those lands taken into trust in connection with the Florida Indian Land Claims Settlement Act of 1982, and the Miccosukee Settlement Act of 1997; (2) their commitments under the MRAA Act; (3) provisions, duties and obligations under 25 U.S.C. § 459(e), as well as the enforcement and protection of the Tribe and the assets of its members under the exclusive authority of the DOI as mandated by 25 U.S.C. § 2 and 25 CFR § 1.2. (*Id.*)

Suit has been brought by the Plaintiffs to enforce the terms and conditions set out in settlement agreements with the Tribe and its members codified in Title

25 U.S.C. § 1750, *et seq*., as well as the clear language of 25 U.S.C. § 459(e), 2210 and the provisions of the Exclusion Act. (A 1) Plaintiffs are beneficiaries of the settlements between the United States and filed this action seeking declaratory relief, a writ of mandamus, and other relief, including enforcement of the provisions of 25 U.S.C. § 459e exempting the payments made to the Plaintiffs from being treated as income for the purpose of any imposition of federal tax. (*Id.*)

The United States filed a Motion to Dismiss this action for lack of subject matter jurisdiction (A 11), which was heard November 25, 2014. (A 27) The Court ruled in favor of the United States granting a dismissal of this action on December 12, 2014. (A 28) Plaintiffs appeal from that Order of Dismissal.

C. STANDARD OF REVIEW

The standard of appellate review of an order granting a motion to dismiss for the lack of subject matter jurisdiction based upon a facial attack on the complaint is *de novo*. *See, e.g., McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1250 (11th Cir. 2007) (citing *S.E.C. v. Mut. Benefits Corp.*, 408 F.3d 737, 741 (11th Cir. 2007)). A district court ruling on such a motion must accept all the factual allegations in the complaint as true. *See, e.g., McElmurray*, 501 F.3d at 1251.

Also, a court construing a treaty or legislation between the United States and Native American Indians when ruling on a motion to dismiss must construe such

legislation as the Indians understood it, *see Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 1334 (1970), and resolve any ambiguity to the benefit of the Indians. *See, e.g., County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985).

The standard of appellate review of a district court order denying a motion for leave to amend is an abuse of discretion. *E.g., Bryant v. Dupree*, 252 F.3d 1161, 1162 (11th Cir. 2001). Generally, "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank v. Pitt,* 928 F.2d 1108, 1112 (11th Cir. 1991). On the other hand, a district court does not abuse its discretion and may deny leave to amend where any amendment would be futile. *See, e.g., Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

SUMMARY OF THE ARGUMENT

The district court erred when it dismissed the complaint for lack of subject matter jurisdiction based upon its finding that the United States had not waived its sovereign immunity for this suit since the express waiver contained in the MRAA only applied to lawsuits by the Miccosukee Tribe and not to actions brought by individual members of the Tribe. However, the court did not follow and apply the

basic rule for the construction of a complaint when ruling upon a motion to dismiss. Although the court was required to accept factual allegations in the complaint as true, it did not do so. Instead, the court erroneously refused to accept the factual allegations that the word "Tribe" as understood by the Miccosukee Indians means the individual Miccosukee Indians. If the court had accepted the allegations as true, it necessarily would have concluded that the express waiver of sovereign immunity" in the MMRA applied to Plaintiffs' lawsuit even though it was brought by individual Miccosukee Indians.

The district court further erred when it construed the MRAA in isolation without giving any consideration to the Miccosukee Settlement Act of 1997, 25 U.S.C. § 1750, *et seq.*, another statute enacted contemporaneously with the MRAA which also conveyed land to the Miccosukee Indians to settle a dispute over their land. Congress in this statute expressly recognized the Tribe and it members, and provided that any monetary and/or land benefits given to the Tribe and/or "its members" did not create a taxable event. Certainly, Congress knew about the 1997 Settlement Act when it passed the MMRA in 1998, and was not required to make the distinctions again since the two statutes must be construed together.

Plaintiffs' claims are not barred by the general provisions prohibiting lawsuits regarding the assessment or collection of a tax which are contained in the Act and Declaratory Judgment Act. Notwithstanding these general statutory

restraints, Congress has enacted specific statutes which benefit the Plaintiffs, the Miccosukee Settlement Act of 1997, the MRAA of 1998, and 25 U.S.C. § 459e, specifically waiving sovereign immunity and prohibiting the taxation of revenues from Miccosukee lands which are distributed to members of the Tribe. Such specific statutory provisions outweigh the general tax provisions in the Act and Declaratory Judgment Act.

Even if these acts were applicable to this lawsuit, moreover, the *Williams Packing* exception to these statutes exists in this case. The Plaintiffs do not have an adequate remedy at law if they have to pay the tax and sue for a refund. The Tribe is an indispensable party to a lawsuit which seeks declaratory relief as to statutes directly affecting it, yet, it cannot be joined involuntarily. Further, Plaintiffs will sustain irreparable injury, beyond the payment of taxes, upon payment of such taxation could cause severe consequences to the Plaintiffs' independent way of life as members of the Miccosukee Tribe. Thus, the *Williams Packing* exception permits this lawsuit.

Regardless of the ruling on the facial sufficiency of Plaintiffs' Complaint, the district court abused its discretion when it denied Plaintiffs leave to amend their complaint. Contrary to the court's ruling, an amendment would not be futile. It cannot be said that Plaintiffs, as a matter of law, cannot state facts that would

support a claim for relief. The failure to permit Plaintiffs to amend the complaint at least once is an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

A. FACIAL OR FACUAL CHALLENGE AND CONSTRUCTION OF COMPLAINT.

The district court correctly recognized that the United States challenged the complaint both facially and factually. (A 28:2) The United States' motion in fact contained four pages of factual background based upon extrinsic matters outside the pleadings. (A 11:1-4) Although a factual challenge to subject matter jurisdiction is proper under Rule 12(b)(1), Fed. R. Civ. P., *see, e.g.*, *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003), such a factual challenge typically is contained in affidavits and other evidence. *See, e.g., id.,* at 924-25. However, no affidavits or other evidence was filed by the United States.

Consequently, the dismissal motion properly raised only a facial challenge and is subject to the settled rules which govern such challenges. Under these rules, when considering a "facial attack," a court is required "merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (quoting *Menchaca v.*

Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir.1977)); *Longo v. Seminole Indian Casino-Immokalee*, --- F.Supp.3d ----, 2015 WL 2449642 (M.D. Fla. May 21, 2015). A court may not look "outside of the pleading and attached exhibits" in resolving a facial attack on a complaint. *See Lawrence*, 919 F.2d at 1529. Nor may a district court dismiss a complaint on a facial challenge on the grounds that the plaintiff cannot prove his well-pled claim. *See, e.g., McElmurray*, 501 F.3d at 1250.

B. CONSTRUCTION OF TREATIES, STATUTES AND AGREEMENTS BETWEEN NATIVE AMERICAN INDIANS AND THE UNITED STATES.

The district court did not apply or follow the basic principles of treaty, statutory and contractual construction when Native American Indians are parties to the transfer of land when it construed the MMRA and legislation that preceded it. Under such principles, it is recognized that treaties, statutes and agreements to which Native American Indians are parties are not "arms-length transaction[s]." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631-32, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970) (treaty); *see also U.S. v. State of Minn.*, 466 F.Supp. 1382, 1383-85 (D. Minn. 1979) (treaty and statutes subject to same rules of construction), *aff'd Red Lake Band of Chippewa Indians v. State of Minn.*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). As a result, treaties, statutes and

agreements must be interpreted as the Indians understood them. *See, e.g., Choctaw Nation*, 397 U.S. at 631-32 (quoting *Tulee v. Washington,* 315 U.S. 681, 684–85, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942)); *see also Washington State Commercial Passenger Fishing Vessel Ass'n v. Puget Sound Gillnetters Ass'n,* 443 U.S. 658, 676, 99 S.Ct. 3055, 3069 (1979); *Choctaw Nation v. United States,* 119 U.S. 1, 28, 7 S.Ct. 75, 90, 30 L.Ed. 306 (1886).

As a corollary, any ambiguity should be resolved in the Indians' favor. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd*, 291 U.S. 138, 160, 54 S.Ct. 361, 78 L.Ed. 695 (1934). Prior treaties and statutes, as well as historical and surrounding circumstances, should be considered to determine the meaning of the language to the Indians. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196-202, 119 S.Ct. 1187, 1196-1201 (1999); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195-212, 98 S.Ct. 1011, 1014-1023 (1978).

C. SUBJECT MATTER JURISDICTION AND WAIVERS OF SOVEREIGN IMMUNITY.

The court ruled that it lacked subject matter jurisdiction since the statutes Plaintiffs relied upon did not establish "an explicit waiver of sovereign immunity

applicable to this action" as to individual Tribal members. (A 28: 3) These statutes do, in fact, contain such waivers and will be addressed *in seriatim*.

1. MICCOSUKEE RESERVED AREA ACT

Although the court acknowledged that the United States waived sovereign immunity as to claims commenced by the Tribe under the MRAA, it rejected Plaintiffs' contention that the word "Tribe" should be construed to include its individual members. However, in doing so, the court essentially ignored the settled principles of construction stated above. Moreover, the court also appeared to conclude that the Plaintiffs could not prove the allegations in the Complaint, which the court deemed necessary to a successful amendment.

The MRAA expressly provides that:

> **Action brought by Tribe.**-- The Tribe may bring a civil action in the United States district court for the district in which the MRA is located to enjoin the United States from violating any provision of this Act . . . .

16 U.S.C. § 410.

The court erred when it construed the language of the MMRA alone without considering the factual allegations of the complaint, other related federal legislation effecting the Miccosukee, and historical and other circumstances. Failing to consider these settled sources as to the meaning of legislation with Native American Indians, while invoking the rule of construction that a waiver of sovereign immunity must be express and "strictly construed," (A 28:3), enabled the

court to conclude that the waiver of sovereign immunity as to the Tribe was not an "unequivocal expression" of a waiver as to individual Miccosukee such as the Plaintiffs. (A 28:4) Under settled law, however, the MMRA must be construed as conferring individual rights on the Plaintiffs even though the legislation nominally benefited the Tribe as a collective entity. *See McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 181, 93 S.Ct. 1257, 1267 (1973) (rejecting the view that a state law imposing income tax on individual Indians did not affect the Tribe, the Court stated: **"when Congress legislates on Indians matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights."**)(emphasis added); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 594 (9th Cir. 1983) (quoting *McClanahan*).

Moreover, the court also ignored the settled rule of construction that legislation with Native American Indians must be construed as the Indians themselves would have understood it, so that any ambiguities are construed against the United States and in favor of the Indians. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 1334 (1970) (treaties with Indians must be interpreted as the Indians would have understood them, and any doubtful expressions should be resolved in the Indians' favor); *see also Absentee Shawnee Tribe of Indians of Oklahoma v. State of Kan.*, 862 F.2d 1415, 1417-18 (10th Cir.

1988) (summarizing the rules of construction announced by the Supreme Court and stating, among other things, that language chosen by the United States in legislation with the Indians should never be construed to their prejudice) (quoting *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832)).

Further, the court did not give effect to the factual allegations in the Complaint as to the understanding of the individual Miccosukee Indians, even though such factual allegations must be accepted as true. *See, e.g., McElmurray,* 501 F.2d at 1251. The factual allegations in the Complaint articulate the Miccosukee Indian Plaintiffs' understanding that use of the word "Tribe" did not strip them of their individual rights to enforce treaties, legislation and agreements with the United States. (A 1:4-6) The Plaintiffs' understanding, as alleged, is controlling. *See, e.g., id.*

Clearly, the Plaintiffs' understanding as alleged in their Complaint is that rights accorded to the "Tribe" confers individual rights on the Plaintiffs, as well as the Tribe. Use of the word Tribe does not limit the Plaintiffs' right to sue to enforce the MMRA and the related legislation described below. The court erred by doing so without considering anything other than the statutory language.

Plaintiffs alleged that Congress passed the Miccosukee Settlement Act of 1997 and the 1998 MRAA contemporaneously, so that Congress was presumed to be aware of the 1997 Settlement Act when shortly after its passage, it passed the

1998 MMRA. (A 1:29-33) *See, e.g., Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411, 88 S.Ct. 1705, 1709, 20 L.Ed. 697 (1968). It is well-established that federal statutes on the same subject which are enacted contemporaneously should be construed *in pari materia,* if possible. (A 1:29-33).

Although federal statutes involving the same parties and subject matter which are enacted contemporaneously should be construed *in pari materia*, *see, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196-202, 119 S.Ct. at 1196-1201; *Suquamish Indian Tribe*, 435 U.S. at 195-212, 98 S.Ct. 1014-1023, the court did not do so even when noted in Plaintiffs' Supplemental Memoranda of Law. (A 26:) (citing to 1997 Miccosukee Settlement Agreement, 25 U.S.C. § 1750(a)). The court erroneously construed the MMRA in isolation to determine its meaning and effect, notwithstanding a contemporaneously enacted statute affecting Miccosukee land and taxation. In 1997, Congress enacted the Miccosukee Settlement Act of 1997, 25 U.S.C. § 1750, *et seq.* Pursuant to the 1997 Settlement Act, which occurred because the Tribe had commenced a lawsuit that involved the taking of certain lands in connection with the State of Florida's construction of Industry Highway 75, *see* 25 U.S.C. § 1750(5), the Tribe received certain monetary payments and new reservation lands. *Id.,* 25 U.S.C. § 1750d.

The Act further provided that:

(a) Rule of construction

Nothing in this part or the Settlement Agreement shall—

(1) affect the eligibility of the Miccosukee Tribe **or its members** to receive any services or benefits under any program of the Federal Government; or

(2) diminish the trust responsibility of the United States to the Miccosukee Tribe **and its members**. (Emphasis added)

Moreover, consistent with policy accords and Treaty obligations reached between the United States and Miccosukee clans, the 1997 Settlement Act further provided:

(c) Taxation

(1) In general

(A) Moneys

None of the moneys paid to the Miccosukee Tribes under this part of the Settlement shall be taxable under Federal or State law.

(B) Lands

None of the lands conveyed to the Miccosukee Tribe under this part or the Settlement Agreement shall be taxable **under Federal or State law** (emphasis added).

(2) Payments and conveyances not taxable events

No payment or conveyance referred to in paragraph (1) shall be a taxable event.

As a matter of fact, the legislative process involving the 1998 MRAA was ongoing when the Interior Secretary approved the 1997 Settlement Act. (A 1:29) Plainly, the contemporaneous passage of the 1997 Settlement Act and 1998 MRAA support imputing knowledge to Congress of both of these Acts. Consequently, a number of the court's rulings based upon the MRAA alone appear to be wrong. These rulings include that: 1) the Tribe, and not individual Miccosukee Indians, only was granted rights under the MRAA; and 2) taxation is not referenced in the MRAA alone, so a suit under it is unauthorized. (A 1:5)

2. SECTION 702 OF THE ADMINISTRATIVE PROCEDURE ACT

The court also rejected Plaintiffs' contention that Congress expressly waived sovereign immunity in an action for equitable relief, but not money damages, in Section 702 of the APA, 5 U.S.C. § 702 (1976). *See Bowen v. Massachusetts*, 487 U.S. 879, 891-95, 108 S.Ct. 2722, 2731-33 (1988). "Section 702 is ... a general waiver of sovereign immunity for suits against the United States seeking nonmonetary relief, even if the claim does not arise under the APA." *Miccosukee Tribe of Indians of FL v. U.S.*, 680 F.Supp. 1308, 1315-16 (S.D. Fla. 2010) (citations omitted), *affirmed*, 716 F.3d 535 (11th Cir. 2013). Plaintiffs seek declaratory relief and not damages as defined in the Act, so the sovereign immunity of the United States has been waived for Plaintiffs' claims. *Id.*

Section 702 provides, in pertinent part, that:

> **A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. (Emphasis added)**

Notwithstanding this language, the court found that the equitable tax relief Plaintiffs sought was barred by the Act, 26 U.S.C. § 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). The Act provides, in pertinent part, that:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a).

The Declaratory Judgment Act, while authorizing declaratory relief, limits its application "with respect to federal taxes other than actions brought under Sections 7428 of the Internal Revenue Code of 1986." 28 U.S.C. § 2201(a).

D. NEITHER THE ACT NOR DECLARATORY JUDGMENT ACTS BAR THIS LAWSUIT.

The court ruled that this lawsuit is barred by the Act, and Declaratory Judgment Act. The Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Declaratory Judgment Act states, in pertinent part, that a court may not declare the rights of the parties' with respect to the collection of federal taxes.

Preliminarily, the general restraint on actions involving taxes contained in these statutes do not govern and prohibit this lawsuit. Congress enacted specific legislation waiving sovereign immunity, declaring taxation of revenues distributed from Miccosukee Tribe to tribal members unlawful, and stating that the Miccosukee lands to belong to the Tribe and its members. Such specific legislation outweighs and controls the issue of taxation of the Plaintiffs based upon distributions from the land. Consequently, the court erred in holding that these statutory restrictions required dismissal of this lawsuit.

JUDICIAL EXCEPTION TO ACTS' BAR

Notwithstanding this statutory language, as acknowledged by the court, a judicial exception to the prohibitions exists. (A 28:6-8) *See, e.g., Enochs v.*

Williams Packing & Navigation, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961). In *Williams Packing,* the Supreme Court recognized that an injunction against the assessment or collection of a tax is permissible where: (1) equitable jurisdiction exists because the taxpayers will suffer irreparable injury unless their lawsuit is permitted, and (2) under no circumstances could the United States ultimately prevail in a lawsuit challenging the assessment. *See Williams Packing*, 370 U.S. at 5-7, 82 S.Ct. at 1127-29. It erroneously concluded, however, that Plaintiffs could not establish either one of the two prongs necessary to be entitled to the exception. (A 28:6-8)

a. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW IF THEY HAVE TO PAY THE TAX AND SUE FOR A REFUND.

Taxpayers generally have an adequate remedy when the federal government unlawfully assesses and collects a tax since they can pay the tax and then file an action against the federal government in federal court for a refund. *See* 28 U.S.C. § 1346(a)(1). However, this general rule does not apply in this case since the Plaintiffs cannot do so without joining the Tribe. Rule 19(a) provides that a person or entity over whom the Court has personal jurisdiction and whose presence will not deprive the Court of subject matter jurisdiction, must be joined if he/it claims an interest in the subject of the action and is "so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the

person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring ... inconsistent obligations because of the interest." Fed.R.Civ.P. 19(a)(1)(B).

The court rejected Plaintiffs' contention that the Tribe is an indispensable party to any such suit since the Plaintiffs' claims arise out of treaties, statutes and laws between the Tribe and the United States and disposing of the action without the Tribe readily could impair its interests. *See Klamath Tribe Claims Committee v. U.S.*, 106 Fed.Cl. 87, 95-96 (Fed.Cl. 2012), *aff'd*, 541 Fed.Appx. 974 (Fed.Cir. 2013); *Rosales v. U.S.*, 89 Fed.Cl. 565, 584-86 (Fed.Cl. 2009); *United Keetoowah Band of Cherokee Indians of OK v. U.S.*, 67 Fed.Cl. 695, 699-705 (Fed.Cl. 2005), *reversed and remanded*, 480 F.3d 1318 (Fed.Cl. 2007). Yet, the Tribe is a sovereign which cannot be joined involuntarily in such a lawsuit. *See Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224, 1002 1228-29 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 664, 81 USLW 3199 (2012); *Klamath Tribe*, 106 Fed.Cl. at 92-97; *United Keetoowah Band*, 67 Fed.Cl. at 702. Inability to join the Tribe as an indispensable party would require the dismissal of any lawsuit for a tax refund which would determine the rights of the Tribe. *See Klamath Tribe*, 106 Fed.Cl. 92-97; *United Keetoowah Band*, 67 Fed.Cl. at 699-705. Since the Tribe is the named beneficiary of the rights Congress granted in the 1997 and 1998 Acts referenced above, and was granted an exemption from taxation under 25 U.S.C.

§ 459e, any lawsuit under these statutes could impair the Tribe's rights, making it "indispensable" under Rule 19. As a result, the Plaintiffs' lawsuit for a tax refund without the Tribe as a party would have to be dismissed before reaching the merits, the remedy at law is inadequate.

Moreover, as noted in the pleadings, the Tribe would not agree to join this lawsuit voluntarily. The Tribe is stated to have refused to bring this lawsuit on the Plaintiffs' behalf. Indeed, the United States asserts that the Tribe now has rejected the very arguments advanced by the Plaintiffs herein in other litigation accusing its then-attorneys of malpractice. Clearly, the inability to join the Tribe as an indispensable party and the resulting dismissal of Plaintiffs' action render the Plaintiffs' remedy woefully inadequate.

b. PLAINTIFFS WILL SUSTAIN IRREPARABLE INJURY IF THEY HAVE TO PAY TAXES ON THE TRIBE'S TRUST DISTRIBUTIONS.

The lack of an adequate remedy at law through a suit for a refund is not the only reason that the Act does not bar this lawsuit. As alleged in the Complaint, Plaintiffs may suffer irreparable injury if they are forced to pay the taxes, since:

> The disbursements of trust income ... [without taxation] are essential to sustaining tribal members in their existing communities where they continue to maintain [their] ... separate language, identity and culture. Disruption and interference with the ability of Miccosukee's [sic] to live together on what is left of their tribal lands might well force, in effect, removal of Miccosukee's [sic] to find

> livelihoods elsewhere, thereby effectively imposing an assimilation that Miccosukee's continue to oppose. (A 1:37).

The court did not address the irreparable injury prong of the *Williams Packing* exception. Nor could it readily have done so, since this is not simply a financial hardship. Instead, taxation could cause serious consequences to the Plaintiffs regarding their very way of life as members of the Miccosukee Tribe, a lifestyle of living without federal governmental assistance (or interference) that has developed in South Florida over centuries. Certainly, the destruction of the Plaintiffs' very way of life amounts to irreparable injury and escapes the bar of the Tax Anti-Injunction and Declaratory Judgment Acts.

c. THE UNITED STATES UNDER NO CIRCUMSTANCES CAN PREVAIL IN ITS ATTEMPT TO ASSESS AND TO COLLECT TAXES ON ALL GROSS RECEIPTS.

The court apparently agreed with the United States' assertion that the Plaintiffs cannot prevail on the merits since they are "subject to payment of federal income taxes, ... unless an exemption from taxation can be found...." (A 11;12) (quoting *Comm'r v. Walker*, 326 F.2d 261, 263 (9th Cir. 1964)). It rejected the exemption for the planned taxation enacted by Congress in 1975, Title 25 U.S.C. § 459e, styled "**Tax exemption for conveyed lands and gross receipts; distribution of gross receipts to tribal members.**" This provision expressly provides that:

> All property conveyed to tribes pursuant to this subchapter and all the receipts therefrom referred to in section 459d of this title, shall be exempt from Federal, State, and local taxation so long as such property is held in trust by the United States. **Any distribution of such receipts to tribal members shall neither be considered as income or resources of such members for purposes of any such taxation**.... (emphasis added)

25 U.S.C. § 459e (1975). *See also* Rev. Rul. 60-96, 1960-1 C.B. 18, 1960 WL 13007 (IRS RRU) (income directly derived from homestead allotted to member of Indian tribe exempt from tax for income received by him); Rev. Rul. 57-523, 2 C.B. 51, 1957 WL 11009 (IRS RRU) (income directly derived from Indian lands, while held in trust, exempt under the General Allotment Act from federal income tax); Rev. Rul. 56-342, C.B. 1956-2, 20 (oil lease bonus, grazing fees, and farm income received by taxpayer exempt from federal income tax, to extent such income arose from lands held for taxpayer in trust).

Plaintiffs submit that assessing and collecting federal income taxes on the distribution of gross receipts to members of the Miccosukee Tribe is illegal.

II. THE COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFFS LEAVE TO AMEND THE COMPLAINT.

The court denied Plaintiffs' Conditional Motion for Leave to Amend Complaint (A 23) based upon its conclusion that an amendment would be futile. (A 28:9) Settled law governs a court's exercise of its discretion in ruling on a motion for leave to amend a complaint. Pursuant to Rule 15(a)(2), Fed.R.Civ.P.,

leave to amend shall be granted freely when "justice so requires." A refusal to permit amendment, therefore, must be justified by a sufficiently compelling reason, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman*, 371 U.S. at 182.

Plaintiffs respectfully submit that none of the factors which may justify the denial of leave to amend, including futility, exist. The Plaintiffs respectfully submit that the futility of amendment as to sovereign immunity and/or subject matter jurisdiction should not be determined on the initial complaint. As a general rule, a court will not dismiss an initial complaint with prejudice for failure to state a claim unless it appears beyond a doubt that the Plaintiff cannot prove any set of facts that support a claim for relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985) (district court properly may dismiss complaint with prejudice where plaintiff had been granted opportunity to amend after court first determined that the original complaint was deficient and the plaintiff failed to properly amend to cure deficiency). Since leave to amend should be liberally granted, Plaintiffs respectfully submit that they should have been granted leave to amend at least once, particularly in light of the importance of the issues raised and the lack of any

controlling authority which is directly on point. *See Conley,* 355 U.S. at 45-46; *Friedlander*, 755 F.2d at 813.

CONCLUSION

Accordingly, Plaintiffs respectfully submit that the district court erred in dismissing their Complaint, in part, because it did not accept the allegations in the Complaint as true, nor apply settled principles of construing legislation by Congress involving native American Indians. If the court had done so, the word "Tribe" would be construed as the Plaintiffs did to include them, individually. Further, assuming that the court properly dismissed the Complaint initially, Plaintiff's should have been granted leave to amend since "justice so requires." The court's order of dismissal should be reversed on the merits or, alternatively, affirmed with the denial of leave to amend reversed so that Plaintiffs may amend the Complaint at least once.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief of Appellants, Billy Cypress, *et al.,* complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 7,244 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word-processing system Microsoft Word used to prepare the Brief; and, further that Appellee's 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 this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on August 27, 2015, I filed the foregoing Initial Brief of Appellants Billy Cypress, *et al.*, through this Court's Electronic Case Files (ECF) system. On that same day, I sent seven paper copies of the Brief to the Court Clerk via United States First Class Mail by depositing same is an official post office repository.

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