IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIALEGEE TRIBAL TOWN,	)	
	)	
Plaintiff,	)	No. 1:17-cv-01670-CKK
	)	
v.	)	Judge Kollar-Kotelly
	)	
RYAN K. ZINKE, in his official capacity as SECRETARY of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Kialegee Tribal Town hereby opposes Defendants' Motion to Dismiss Plaintiff's Amended Complaint (ECF No. 28) for the reasons set forth in the accompanying Memorandum.

Dated: December 22, 2017.

Respectfully submitted,

By: /s/ Moises T. Grayson, Esq.
Moises T. Grayson, Esq. (admitted *pro hac vice*)
Tyler A. Mamone, Esq. (admitted *pro hac vice*)
BLAXBERG, GRAYSON, KUKOFF & FORTEZA P.A.
730 Ingraham Building
25 Southeast Second Avenue
Miami, Florida 33131
Moises.Grayson@blaxgray.com
Tyler.Mamone@blaxgray.com

By: /s/ Dennis J. Whittlesey, Esq.
Dennis J. Whittlesey (D.C. Bar No. 053322)
5010 - 38th Street, NW
Washington, DC 20016
Tel: (202) 489-7178
DennisJWhittlesey@gmail.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Dennis J. Whittlesey

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIALEGEE TRIBAL TOWN,	)	
	)	
Plaintiff,	)	No. 1:17-cv-01670-CKK
	)	
v.	)	Judge Kollar-Kotelly
	)	
RYAN K. ZINKE, in his official capacity as SECRETARY of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITEIS IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. Introduction.

Plaintiff Kialegee Tribal Town (hereafter "Kialegee") opposes Defendants'[1] Motion to Dismiss. Through their Motion to Dismiss, Defendants continue to deny history.

The merits issue is whether Kialegee, as part of the historic Creek Nation, is included in the treaties signed by the historic Creek Nation such that Kialegee has jurisdiction over its lands. Jurisdiction in this sense is critical to Kialegee because it enables Kialegee to operate a court system, regulate sale of liquor and tobacco, conduct gaming and many other activities germane to a modern society. In other words, for Kialegee, jurisdiction means self-determination.

Defendants have and continue to state that Kialegee does not have jurisdiction over its lands because it does not have treaty rights, which is straightforward on the face of Defendants' own Motion: "since the removal of the Creeks in 1832 to what is now Oklahoma, federal treaties and federal legislation pertaining to the Creek Reservation in Oklahoma have been exclusively with the Muscogee (Creek) Nation, not the tribal towns." Def. Br. at 3.[2]

Defendants are wrong. Kialegee's Amended Complaint shows that Creek treaties actually bear the names of Kialegee, affixed as members of the Creek Nation. *See* Kialegee's Amended Complaint at ¶¶18, 22 (hereafter and unless otherwise noted "¶" refers to Kialegee's Amended Complaint). These treaties were ratified by the United States of America and still stand. Kialegee is part of the historic Creek Nation by law. Were this not simple enough, anthropology and ethnohistory confirm that Kialegee is part of historic Creek Nation. ¶¶15-17,

[1] Ryan K. Zinke, in his official capacity as Secretary of the United States Department of the Interior, John Tahsuda, III, in his official capacity as Acting Assistant Secretary – Indian Affairs and the United States Department of the Interior.

[2] Defendants cite *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Com'n*, 829 F.2d at 967, 971-974 as authority in support. *Indian Country* in no way concerned the issue of whether Kialegee is part of the Historic Creek Nation (nor was Kialegee ever part of that case) and the Court did not decide what the tribes compose the Creek Nation.

39-40. Layer after layer, subsequent official government acts, laws, censuses and regulations reconfirm that Kialegee is part of the historic Creek Nation. ¶¶22-28, 34-37, 41-44, 50.

After reasserting in their Motion the position that Kialegee is not part of the historic Creek Nation for purposes of treaty rights, Defendants look to defeat Kialegee's Amended Complaint by invoking immunity from suit and claiming that Kialegee's Amended Complaint fails to state a claim.[3] Specifically, Defendants claim that there has been no waiver of sovereign immunity and as a result this Court lacks jurisdiction, and that Kialegee's Amended Complaint purportedly fails to state a claim. Def. Br. at 2.

Neither argument succeeds. Defendants' first argument misapprehends the controlling law of this District and Circuit and conflates jurisdictional principles in a manner fatal to Defendants' position. Defendants' second argument fails because Kialegee's Amended Complaint satisfies the applicable pleading standard and Defendants' own statements and Motion negate the very possibility of such an argument, while the standards applicable to the resolution of Defendants' Motion also allow this Court to take judicial notice of papers attached to the pleadings as well as public records.

II. Factual and Procedural Background.

Kialegee's Amended Complaint sets forth a history of the existence of Kialegee as Creek people, the legal rights obtained by the Creek people and the uneven application of these rights to the acknowledged modern-day Creek people.[4]

A. Kialegee is Part of the Historic Creek Nation.

The Native Americans now called "Creek" once existed as a confederacy of small towns that stretched across a large portion of southeastern North America. ¶¶8-9. Around the time of

[3] Plaintiff notes that Defendants assert this solely to whether Plaintiff asserts a claim under the APA.
[4] Kialegee incorporates the Amended Complaint herein.

contact with European settlers at the end of the seventeenth century, the Creek Confederacy consisted of more than seventy tribal towns. ¶9. These towns were called tálwas, and included Kialegee Tribal Town. ¶¶9-12.

Oral histories hold that Kialegee are part of the historic Creek Nation. ¶¶10-11. Experts retained by the United States confirmed that Tribal Towns such as Kialegee were part of the historic Creek Nation. ¶15 (citing official report to Defendant the United States Department of the Interior by anthropologist Morris Opler explaining that "the Creeks were not and, strictly speaking, are not now, a tribe. The Creek Nation is a confederacy of tribes…."). Modern scholarship specifically notes that Kialegee is "a part of the historical Creek Confederacy and the contemporary Nation." ¶23.

Though Defendants refuse to acknowledge that Kialegee is Creek for purposes of treaty rights, even the Defendant Department of the Interior (hereafter "Interior") has acknowledged that tribal towns such as Kialegee were no splinter groups but rather the substance of the historic Creek Nation itself. ¶40 (citing then-Acting Solicitor of Defendant the Department of Interior statements that Creek Tribal Towns "[n]ot only were functioning subdivisions of the Creek Confederacy or Nation but they were the original independent units of government of the Creek Indians."); ¶13 (showing *e.g.,* Department of the Interior, Bureau of Indian Affairs, Notice "Indian Tribal Entities that Have a Government-to-Government Relationship with the United States," specifically listing "Kialegee Tribal Town of Creek Indians, Oklahoma." 44 Fed. Reg. 7235 (Jan. 31, 1979); Department of the Interior, Bureau of Indian Affairs, Notice, "Indian Entities Recognized and Eligible To Receive Services From The United States Bureau of Indian Affairs," providing a "current list of tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes" and

including "Kialegee Tribal Town of the Creek Indian Nation of Oklahoma" 60 Fed. Reg. 9250, 9252 (Feb. 16, 1995), *see also* Department of The Interior, National Park Service, C.F.R. Vol. 82 No. 105, dated April 3, 2017 (Listing the "[t]en present-day Indian tribes [that] include Creek descendants" including "Kialegee Tribal Town").

B. All Treaties Between Creeks and the United States Include Kialegee.

Kialegee is part of the historic Creek Nation that signed the treaties and acceded to the rights and privileges under the same. It is undisputed that Kialegee Creek signatories appear on multiple treaties with the United States as early as 1796. ¶¶18, 22. The treaties between the United States and the Creek Nation apply to all Creeks as they existed at the time, which includes Kialegee.

Defendants disagree. Defendants claim that "since the removal of the Creeks in 1832 to what is now Oklahoma, federal treaties and federal legislation pertaining to the Creek Reservation in Oklahoma have been exclusively with the Muscogee (Creek) Nation, not the tribal towns." Def. Br. at 3. Kialegee submits that this statement is false as it excludes present-day recognized tribes who were part of the Creek Nation at that time. Kialegee was part of the Creek Nation at that time – for another of the many examples, the census taken pursuant to the Treaty of 1832 required the taking of a census to identify all Creeks, and it includes Kialegee. ¶28.

Kialegee's existence as Creek is certainly not limited to 1832 and times prior; Kialegee did not simply stop being Creek. The absurdity of this concept aside, later government censuses following removal identify Kialegee (¶¶28, 37), and during the 20th century allotment to the Creeks, Kialegee were among the recipients. ¶38.

The Indian Canon of Construction mandates that treaties are understood as signatories understood them at the time. ¶53. The same also mandates that treaties should always be construed liberally in favor of all Indians and never to their prejudice.[5] Looking through the lens of this Canon exposes this issue for the absurdly dark question that it is: did the Creek people understand these treaties at the time to mean what they said – between the United States and the "whole"[6] Creek Nation? Or, did the Creek people understand these treaties to mean as between the United States and the Creeks, but with certain rights enforceable only by certain Creeks and not others based solely on an arbitrary and oversimplified naming conventions used by the United States in order to expedite Creek "assimilation"?[7]

Only the former can be true, and few know this better than Kialegee, as one of the very few Creek tribes who now stands on both sides of time – first as one of the earliest Creek Treaty signatories with the United States, then as survivor of removal and allotment and now as a litigant seeking that its rights won during such times finally be acknowledged.

C. The Present Litigation.

On August 17, 2017, Kialegee filed its Complaint for Declaratory and Injunctive relief. On October 25, 2017, Kialegee filed an Unopposed Motion for Leave to File its Amended Complaint (ECF No. 25), which the Court granted on November 1, 2017. Accordingly, on November 1, 2017, Kialegee's Amended Complaint was deemed filed. ECF No. 27.

---

[5] ¶¶52-53 (citing *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice") (Marshal, C.J.) and *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("[s]uch provisions [of agreements between Indians and the government] are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.") (Stone, J.)).

[6] ¶44(a)-(f).

[7] ¶39 ("But it is clear only that Congress has recognized the Creek Nation alone for the purpose of having one central, responsible agency with which to deal. It is not clear that Congress intended to deny the existence of the Creek towns as effective organizations. Their existence is recognized and perpetuated in the constitution and laws of the Creek Nation, a fact of which Congress must be assumed to have had knowledge and to which it has given sanction in its continued dealing with the government of the Nation so constituted as a confederacy of towns.") (Quoting Opler's official report).

Kialegee's Amended Complaint seeks a declaration that Kialegee has treaty rights as a successor to the historic Creek Confederacy, as allowing it jurisdiction over its lands. ¶80. Kialegee's Amended Complaint also seeks an injunction ordering the defendants to recognize that Kialegee is entitled to full treaty-guaranteed rights as a successor to the historic Creek Nation, as allowing it the right of jurisdiction over its lands.

III. Standard of Review.

A. Review of a Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Fed.R.Civ.P. 12(b)(1).

A court must dismiss a case pursuant to Rule 12(b)(1) when it lacks subject matter jurisdiction. In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992) (citation omitted); see also *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) ("[T]he district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction."). "At the motion to dismiss stage, counseled complaints, as well as pro se complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 937 F. Supp. 2d 18, 26 (D.D.C. 2013) (citing *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005)).

B. Review of a Motion to Dismiss for Failure to State a Claim Under Fed.R.Civ.P. 12(b)(6).

Federal Rule of Civil Procedure 8(a) requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. (8)(a),

"in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell At. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

In evaluating a motion to dismiss made under 12(b)(6), "the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff." *Nat'l Postal Prof'l Nurses v. U.S. Postal Serv.*, 461 F.Supp.2d 24, 27 (D.D.C. 2006). A complaint must contain sufficient factual matter, accepted as true to state a claim for relief that is "plausible on its face." *Twombly*, 550 U.S. at 570. When a plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged, then the claim has factual plausibility. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

When evaluating a Rule 12(b)(6) motion to dismiss, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," or "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by [the parties]." *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 937 F. Supp. 2d 18, 27 (D.D.C. 2013) (Kollar-Kotelly, J.) (citing *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F.Supp.2d 117, 119 (D.D.C. 2011)). The Court may also consider documents in the public record of which the Court may take judicial notice. *Singh v. Tillerson*, 2017 WL 4232552, at *2 (D.D.C. 2017) (Kollar-Kotelly, J.).

IV. Argument.

A. Sovereign Immunity Is Waived.

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(6) arguing that this Court lacks jurisdiction because Kialegee "fails to allege any statute that supplies the express waiver of sovereign immunity for the Court to consider its claim." Def. Br. at 1.

The United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). In suits against the government, a court must consider whether Congress has waived the United States' immunity to suit. *Yee v. Jewell*, 228 F. Supp. 3d 48, 53 (D.D.C. 2017). Defendants claim that "Plaintiff pleads that 28 U.S.C.§ 1331, the federal question jurisdictional statute, 28 U.S.C. § 1362, and section § 5123 of the Indian Reorganization Act ["IRA"] provide the grounds for the Court's subject matter jurisdiction over its Complaint" but that "[t]hese statutes, however, do not waive Federal Defendants' sovereign immunity." Def. Br. at 10.

Defendants explain that under the doctrine of sovereign immunity, the United States is immune to suit "unless Congress has expressly waived the defense of sovereign immunity by statute" and that such immunity "extends to federal agencies, including Interior." *Id*.

Defendants then argue that no such waiver is contained in 28 U.S.C. § 1331, the federal question jurisdictional statute, that no such waiver is contained in 28 U.S.C. § 1362 and that no such waiver is contained in section § 5123 of the IRA, and as a result, Kialegee fails to establish that sovereign immunity has been waived, and as a result this Court has no jurisdiction. Def. Br. at 10.

Defendants point out that § 5123, §1331 and §1362 have been determined not to waive sovereign immunity on their own. *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 139 (D.D.C. 2015), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 638, (2017). Therefore, in absence of an express sovereign immunity waiver, Kialegee "must look beyond [its] jurisdictional statutes for a waiver of sovereign immunity with respect to [its] claim." *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Under Section 702 of the Administrative Procedure Act (the "APA"), Defendants waive sovereign immunity when a plaintiff alleges wrongful inaction by an agency or its officer and seeks "relief other than money damages…." 5 U.S.C. § 702. In *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) the Supreme Court stated that "insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages"; see also *McKoy v. Spencer*, 2017 WL 4236526, at *4 (D.D.C. Sept. 21, 2017) (Kollar-Kotelly, J.) (finding that section 702 of the APA waived sovereign immunity as to plaintiff's claims for declaratory and injunctive relief). Kialegee seeks declaratory and injunctive relief, which is non-monetary relief.

Kialegee does not allege the APA as a cause of action. But to benefit from the APA's waiver of sovereign immunity under § 702, a complaint need not allege the APA as a cause of action. "There is nothing in the language of ... § 702 that restricts its waiver to suits brought under the APA. The sentence waives sovereign immunity for [a]n action in a court of the United States seeking relief other than money damages, not for an action brought under the APA. *Jack's Canoes & Kayaks*, 937 F. Supp. at 35 (citing *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006)); see also *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) (1976 amendment to section 702 "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or official acting in an official capacity"); *Sea–Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244–45 (D.C. Cir. 1981) (R.B. Ginsburg, J.) ("amended § 702 eliminates the defense of sovereign immunity in actions for specific, non-monetary relief").

Further, a plaintiff need not even mention the APA at all in its complaint in order to benefit from the waiver of sovereign immunity under § 702. "The waiver of sovereign immunity is a legal matter relating to the Court's jurisdiction. It is sufficient that Plaintiff correctly argued

that the APA provides the requisite waiver of immunity in her opposition to Defendant's motion to dismiss." *McKoy* 2017 WL 4236526, at *4.

But Defendants argue that even if Kialegee can benefit from the above – which Kialegee can – it cannot show "agency" action or inaction or if so, still cannot show that it was "final." However, under the law of this Circuit, Kialegee need not do either, as based on its Amended Complaint. In *Trudeau v. Federal Trade Commission*, 456 F.3d 178, 186 (D.C. Cir. 2006), the D.C. Circuit held that the waiver of immunity in section 702 "is not limited to APA cases" and applies "regardless of whether the elements of an APA cause of action are satisfied." In *Trudeau* the D.C. Circuit further held that even though what plaintiff had complained of was not even "agency action" at all as defined in the APA, let alone "final," it made no difference because neither of the plaintiff's causes of actions sought judicial review *under the APA.* 456 F.3d at 187; accord *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (holding that the government's "attempt to restrict the waiver of sovereign immunity to actions challenging 'agency action' as technically defined in § 551(13) offends the plain meaning of the amendment"); accord *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (rejecting the contention that the waiver in § 702 "exists only to allow review of a final agency decision," and holding that "[t]he waiver of sovereign immunity contained in section 702 is not dependent on application of the ... review standards of the APA").

Defendants' last asserted obstacle to waiver of sovereign immunity is that the APA is not jurisdictional. So, what remains then of the analysis of waver of sovereign immunity in this Case is whether Kialegee states a non-APA cause of action (because the APA is not jurisdictional it neither confers nor restricts jurisdiction). Hence it must determined whether Kialegee can supply a non-APA cause of action providing of jurisdiction. Kialegee's Amended Complaint indeed

supplies what is necessary. Section 1331 gives the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Kialegee sues to enforce its treaty rights.

Under 28 U.S.C. § 1362 district courts have "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The same is self-evident here.

Finally, and most prominent here, under 25 U.S.C. § 5123, The Indian Reorganization Act ("IRA"), Kialegee specifically has a cause of action against the government of the United States if it enhances, or diminishes the privileges and immunities available to an Indian tribe relative to other federally recognized tribes.[8] That is exactly what Kialegee complains of in this action. This cause of action could not be more applicable here. The purpose of § 5123 is to ensure that "Indian tribes recognized by the Federal Government stand on an equal footing to each other." *1*40 Cong. Rec. S11,232, S11,232-235 (May 19, 1994) (statement of Sen. Inouye). "**[W]ithout regard to the manner in which the Indian tribe became recognized by the United States**," the provisions entitle "**[e]ach federally recognized Indian tribe . . . to the same privileges and immunities as other federally recognized tribes**" and "**the right to exercise the same inherent and delegated authorities**." *Id*. at S11, 235 (emphasis added). Kialegee indisputably supplies appropriate causes of action.

[8] Defendants note that "sections of the IRA that limit alienation of restricted land, authorize the establishment of new reservations, and sanction tribal organization are inapplicable to tribes in Oklahoma," Def. Br. at 7, which is entirely irrelevant – the sections that do not apply are sections 4 (Defective record of deeds and papers legalized), 7 (Fees for furnishing certified copies of records), 16 (Transportation of Indians in Bureau vehicles) and 17 (Use of Bureau facilities). Kialegee invokes none of those here, hence Defendants' recitation is totally irrelevant.

Further, because Kialegee seeks declaratory and injunctive relief only, the waiver of sovereign immunity under § 702 is properly invoked. As made clear in this District and Circuit, this waiver applies without regard to whether the APA was used as a cause of action or even mentioned in Kialegee's Amended Complaint. Finally, Kialegee's Amended Complaint supplies the requisite jurisdictional causes of action. Sovereign immunity is waived, and this Court has jurisdiction.

B. Failure to State a Claim Under the Administrative Procedure Act.

Defendants fall back on a second and final argument – that "Plaintiff fails to State a Claim under the Administrative Procedure Act." Def. Br. at 12. In doing so, Defendants again concede that in this Circuit a suit need not have been brought pursuant to the APA in order to receive the benefit of that APA's waiver of sovereign immunity. Def. Br. at 12. In this Circuit it is indeed "clear beyond cavil that a suit need not have been brought pursuant to the APA in order to receive the benefit of that statute's sovereign immunity waiver; indeed, the APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 64 (D.D.C. 2014), aff'd sub nom. *Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015) (citation omitted).

But Defendants then try to claim that, even if properly pleaded, Kialegee still fails to state a claim under the APA because Kialegee purportedly fails "to allege any action that Federal Defendants took or failed to take giving rise to its lawsuit" and assert that "dismissal for failure to satisfy the APA's requirements for judicial review of agency action is thus a dismissal for failure to state a claim under Rule 12(b)(6)." Def. Br. at 13. But Kialegee is not invoking the APA as a *cause of action*, and it need not, as explained above. Kialegee also need not identify any "agency" action or inaction, as made clear under *Trudeau*. Kialegee has set forth the actions

of Defendants, explained why it violates that law and how this has deprived and harmed Kialegee – that is, Defendants expressly refuse to acknowledge that Kialegee has jurisdiction over its lands as a successor to the historic Creek Nation. Kialegee need not plead this with specificity, as under Rule 9(b), rather, Kialegee's Amended Complaint need only comport with the notice-pleading requirements of Rule 8. Kialegee's claims need only be sufficient to put Defendants on notice of what Kialegee alleges to be wrong and its recourse sought for the same. Kialegee's Amended Complaint succeeds under this standard, as it asserts that Defendants refuse to acknowledge Kialegee's rights as a Creek successor, though they have acknowledged the rights of other Creek successors. *See* ¶ 60 (the "Poarch Creek Letter"). Specifically, within the Poarch Creek Letter, there are findings from Defendant the Department of the Interior concluding that the Poarch Creeks are successors to the historic Creek Nation and as a result have jurisdiction over their lands for purposes of economic development. ¶60, Exhibit E to the Amended Complaint. Defendants certainly cannot claim that Kialegee's Amended Complaint fails to put Defendants on notice of Defendants' own public positions (that Defendants actually assert in their Motion to Dismiss).

Defendants' own motion shows that Defendants do not recognize Kialegee as a Creek successor having jurisdiction over its lands; this is exactly what Kialegee's pleading alleges. Kialegee has alleged it, Defendants in response have confirmed it. Defendants' Motion also states the following:

> Plaintiff currently has pending before the Indian Board of Indian Appeals an appeal from an April 26, 2017, decision of the Bureau of Indian Affairs, Eastern Oklahoma Regional Director ("RD"), declining to approve TR-2017-02-22, a Resolution of the Kialegee Tribal Town Business Committee Enacting the Kialegee Tribal Town Liquor Control Ordinance ("Ordinance"). Kialegee Tribal Town v. E. Okla. Reg. Dir., BIA, IBIA 17-094. The RD found that Plaintiff lacks jurisdiction over any area of Indian Country over which it could enact and apply a liquor ordinance and, therefore, the Secretary is not authorized to certify the

> Ordinance or publish it in the Federal Register. Plaintiff does not challenge the RD's denial in its Complaint – nor could it – because Plaintiff must exhaust its administrative remedies that are necessary to consummate Interior's decision-making process.

Def Br. at fn. 6. Defendants neglect to mention that the Indian Board of Indian Appeals action referenced has been stayed **by Defendants** pending the resolution of the instant matter – Defendants implicitly acknowledge that Kialegee's treaty rights is an issue that supersedes any agency action.

The April 26, 2017, decision mentioned by Defendants is yet another denial of Kialegee's rights that is premised on the same falsehood that Kialegee do not have treaty rights. Any agency determinations involving Kialegee do not *consider* whether Kialegee was part of the historic Creek Nation so as to have jurisdiction over its lands – rather, decisions are being *premised* on the ahistorical and frankly impossible argument that Kialegee was not part of the historic Creek Nation. Defendants have taken their position long before April 26, 2017.

In *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director*, Bureau of Indian Affairs, IBIA 90-110-A, 90-131-A (1991), Defendants based a land trust decision against Kialegee on the premise the Kialegee is not part of the historic Creek Nation – the historic reservation was established in 1832 and Kialegee was clearly documented part of the historic Creek Nation at that time – yet Defendants stated that the former Creek Reservation is "the Nation's" not Kialegee's. The same falsehood was thus again wielded against Kialegee:

> Because the former Creek Reservation is the Nation's reservation, and not appellant's reservation, section 151.8 requires the written consent of the Nation before land within the reservation may be taken in trust for the benefit of appellant.

IBIA 17-094. The result of that decision was that Kialegee was not allowed to have trust lands allocated to its people. This same falsehood was again wielded against Kialegee in a May 24,

2012 letter[9] from the National Indian Gaming Commission ("NIGC") to Kialegee straightforwardly states that Kialegee has no jurisdiction over its lands because it has no rights under the Creek treaties. NIGC is not a party to the present action, but Defendant Interior is a party, and the May 24, 2012 letter expressly stated that "the DOI concurs with this opinion."

This Court can take judicial notice of the BIA proceedings and the NIGC letter excerpted above (and any others), as well as all other relevant public records, and this Court can properly consider them without converting the motion to dismiss into a motion for summary judgment. *Duma v. JPMorgan Chase*, 828 F.Supp.2d 83, 85 n.3 (D.D.C. 2011) (courts may take judicial notice of matters of a public nature without converting a motion to dismiss into one for summary judgment); *N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 746 (9th Cir. 2009) (taking judicial notice of an NIGC letter as public record); *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222 (D.C. Cir. 1993) ("The district court may, however, examine matters of public record in ruling on a Rule 12(b)(6) motion."); *Al–Aulaqi v. Panetta*, 35 F.Supp.3d 56, 67 (D.D.C. 2014) ("A court may take judicial notice of facts contained in public records of other proceedings ...." (citing *Covad Communications co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005)).

This information is relevant to the proceedings because it shows that other historically Creek tribes, tribes no different in their status as historic Creeks just as Kialegee, *are* being recognized as successors with jurisdiction over their lands and having the commensurate powers of self-government that come with such acknowledgment, while Kialegee is not. This occurs even though Kialegee signed the same treaties under which the other Creek tribes receive their acknowledgment.

[9] Which is public record as part of agency records and published on the NIGC website, https://www.nigc.gov/general-counsel/management-review-letters.

This is why Kialegee states its claims, especially under §5123, which holds that Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

The arguments asserted by Defendants here fail. Defendants cannot hide behind contrived sovereign immunity arguments, and Defendants state in their own Motion to Dismiss that the Kialegee is not part of the Historic Creek Nation, yet Kialegee Creeks signed treaties, were included in official Creek censuses and given allotments. What is Kialegee if not part of the Historic Creek Nation?

Most troubling here is that the United States entered into treaties with Kialegee – contracts – but years later, in an ex post facto fashion, argues that these contracts are no longer valid. The United States typically honors treaties; its refusal and general lack of care toward the counterparties listed on the Creek treaties is quite telling. Perhaps little has changed after all.

V. Conclusion.

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss in its entirety. In the event Defendants' Motion is granted, Kialegee respectfully seeks leave to file an amended pleading.

Dated: December 22, 2017.

Respectfully submitted,

By: /s/ Moises T. Grayson, Esq.
Moises T. Grayson, Esq. (admitted *pro hac vice*)
Tyler A. Mamone, Esq. (admitted *pro hac vice*)
BLAXBERG, GRAYSON, KUKOFF & FORTEZA P.A.
730 Ingraham Building
25 Southeast Second Avenue
Miami, Florida 33131
Moises.Grayson@blaxgray.com
Tyler.Mamone@blaxgray.com

By: /s/ Dennis J. Whittlesey, Esq.
Dennis J. Whittlesey (D.C. Bar No. 053322)
5010 - 38th Street, NW
Washington, DC 20016
Tel: (202) 489-7178
DennisJWhittlesey@gmail.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 22nd day of December 2017, a true and correct copy of the foregoing document was filed on this Court through the CM/ECF system, and served on all parties/attorneys of record via the Court's Electronic System.

/s/ Dennis J. Whittlesey, Esq
Dennis J. Whittlesey, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIALEGEE TRIBAL TOWN,	)	
	)	
Plaintiff,	)	No. 1:17-cv-01670-CKK
	)	
v.	)	Judge Kollar-Kotelly
	)	
RYAN K. ZINKE, in his official capacity as SECRETARY of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
	)	
Defendants.	)	
	)	

[PROPOSED] ORDER

Pending before this Court is Federal Defendants', Ryan K. Zinke, in his official capacity as Secretary of the United States Department of the Interior; John Tahsuda, III, in his official capacity as Acting Assistant Secretary – Indian Affairs; and the United States Department of the Interior Motion to Dismiss (ECF No. 28) Kialegee Tribal Town's Amended Complaint for Declaratory and Injunctive Relief (ECF No. 27) under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Having reviewed the motion it is hereby **ORDERED** that:

1. Defendants' Motion to Dismiss is hereby **DENIED.**

Date: _____, 2018

_____
COLLEEN KOLLAR-KOTELLY
United States District Judge