IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIALEGEE TRIBAL TOWN,
Plaintiff,

v. **Civil Action No.: 1:21-cv-00590-CKK**

U.S. DEPARTMENT OF THE INTERIOR,
Federal Defendants.
_____)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Introduction

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

Defendant continues to maintain that Kialegee does not have jurisdiction over its lands because it does not have treaty rights, which is phrased in the Defendant's Motion to Dismiss as follows: "The Creek Nation is now federally-recognized as the Muscogee (Creek) Nation, following the ratification of the Creek Nation's modern constitution in 1979." Def. Br. at 4 Footnote 4. The Defendant, in its motion to dismiss, makes two arguments. The first is that Kialegee has not pled a cause of action in the second is that Kialegee is barred by issue preclusion.

Kialegee has filed a complaint for declaratory relief and injunctive relief. Kialegee does not deny that it filed a previous complaint and in fact Kialegee

attached a copy of this Court's order on the previous complaint. However, defendant's comments merit response:

a. "If this case sounds familiar, that's because it is. Four years ago, Plaintiff Kialegee Tribal Town ("Kialegee" or "Plaintiff") filed a nearly identical complaint in this Court. See Pl.'s Am. Compl. for Declaratory and Injunctive Relief, Dkt. No. 27, Kialegee v. Zinke, Case No. 1:17-cv01670-CKK (D.D.C. Nov. 1, 2017). The Court dismissed that prior case without prejudice for failure to state a claim. Kialegee Tribal Town v. Zinke (Kialegee I), 330 F. Supp. 3d 255 (D.D.C. 2018). The instant complaint, ECF No. 1 ("Compl."), is a verbatim reproduction of Plaintiff's first amended complaint filed in the prior action with the exception of a single added paragraph (Compl. ¶ 3)"

The above statement is correct. However, what the Defendant omits is that it took four years of bouncing around by this poor tribe Plaintiff and submitting this tribe to unforgivable and unjustifiable delays, not to mention totally ignoring 2019 freedom of information act requests. The Decision of the United States Department of Interior (Case 1:21-cv-00590-CKK Document 1 Filed 03/05/21 Page 100 of 115) attached to the Complaint shows that Kialegee has been trying to get a decision on its liquor ordinance since 2011, that the final decision was delayed years, and that the Liquor ordinance was denied because "McGirt established that the Creek Reservation in Oklahoma has never been disestablished…The Creek reservation is not a former reservation at all – it is the reservation of the MCN…" It is crazy to think that Kialegee went to Oklahoma, gave up its lands, traveled through the trail of tears, only to receive absolutely

nothing in return. Yet that is what is being argued by the Defendants in this case.

b. "Since dismissal of Plaintiff's prior suit, one salient fact has changed: on November 5, 2020, the Department of the Interior's Assistant Secretary – Indian Affairs ("AS-IA") issued a final decision affirming the Bureau of Indian Affairs ("BIA") Eastern Oklahoma Regional Director's denial of Plaintiff's request for the Department of the Interior to approve a liquor ordinance…. The AS-IA affirmed the Regional Director's conclusion that, because Plaintiff does not exercise jurisdiction over any area of Indian country, federal law did not authorize the BIA to approve Plaintiff's liquor ordinance."

This is precisely what this court stated in its Memorandum Opinion, that "Plaintiff needs to allege with some specificity the actions allegedly taken by Federal Defendants, which give rise to Plaintiff's cause of action." Moreover, footnote 11 of the Memorandum Opinion acknowledges and cites the defendant's acknowledgment that "Federal Defendants indicate that "[i]t may be that in the future, after the IBIA issues its final decision on Plaintiff's challenge to the Regional Director's April 26, 2017 decision, Plaintiff will have an action for which it may want to seek judicial review[.]" Fed. Defs' Reply at 8." This is what in fact has happened. That has been a final decision on plaintiff's challenge to the Regional Director's April 26, 2017 decision. However, the Defendant seeks to further delay, deny, and bounce around the Kialegee tribe in an effort to deny Kialegee its rights.

Factual Background

The plaintiff adopts and incorporates the findings of fact of this Court in the previous action contained in this court's Memorandum Opinion and rejects the defendant's inaccurate rendition of the factual background to this case as slanted and incomplete.

Procedural Background

The Defendant has moved to dismiss the complaint on a few grounds, most, if not all, of which were already disposed in the prior case. 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). 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.).

A. Kialegee Has Pled A Cognizable Cause of Action

The Defendant argues that Kialegee has not pled a cognizable cause of action. Defendant specifically argues that the Declaratory Judgment Act does not provide for an independent cause of action. The Defendant ignores that Kialegee has filed its complaint seeking "entitlement to a full treaty guaranteed rights as successor to the historic Creek Confederacy, as allowing at the right of jurisdiction over its Pursuant to Advisory Committee Notes, Fed. R. Civ. P. 57:

> The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory

> relief is alternative or cumulative and not exclusive or extraordinary. **A declaratory judgment is appropriate when it will "terminate the controversy" giving rise on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding**, justifying docketing the case for early hearing as on a motion…" (Bolding added for emphasis)
>
> The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 1936, 56 S.Ct. 466, 473, 297 U.S. 288, 80 L.Ed. 688. The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type, of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

In fact, Fed. R. Civ. P. 57 provides that "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action."

The Defendant cites Wilson v. On the Rise Enterprises, LLC, 305 F. Supp. 3d 5, 19–20 (D.D.C. 2018) for the proposition that "the Declaratory Judgment Act does not provide an independent cause of action." (DE 29 Page 10). However, in Wilson, the court stated that:

> The plaintiff's prayers for declaratory, injunctive, and accounting relief each fail because the plaintiff's factual allegations, even if

> accepted as true, do not "plausibly give rise to an entitlement to [the forms of] relief" she seeks. Iqbal, 556 U.S. at 679, 129 S.Ct. 1937. The plaintiff recounts the facts underlying her FLSA, WPA, and fraud claims, but identifies no legal authority by which the defendants' conduct entitles her to an ownership interest in the Restaurant or created any fiduciary relationship between the defendants and the plaintiff. Indeed, the plaintiff's lack of equity in the Restaurant is essential for her to prevail on her FLSA, WPA, and fraud claims, as the way that the defendants induced the plaintiff to work for years without pay was by causing her falsely to believe that she held equity in the Restaurant, and thus was not subject to those employee protection laws.
>
> For these reasons, the plaintiff has failed plausibly to plead an entitlement to declaratory, injunctive, or accounting relief, and so those counts must be dismissed, without prejudice.

However, in this case, Kialegee pleads in its complaint all the facts and essential elements and legal authority by which the Defendant's conduct entitles Kialegee to exercise jurisdiction over the Historic Creek Nation's lands, and that Defendant has breached its treaty with the Kialegee.

The Defendant makes the argument that Kialegee only makes a generalized allegation that the Defendant has violated the IRA's privileges and immunities clause. However, this is absolutely not true as this Court invited Kialegee to return to this Court after the agency action for the liquor license ordinance was finalized. The decision of the agency action is attached to the complaint, yet Defendant alleges that "the complaint does not allege that the "AS-IA action somehow did

not violate Section 5123 (F) of the IRA. Defendant's motion to dismiss states that "The decision simply concluded that the BIA could not approve Plaintiff's liquor ordinance because, at this time, as a factual matter, Plaintiff does not exercise jurisdiction over any Indian country" and amazingly also argues that this is not a decision that would block the Kialegee from exercising jurisdiction in the future, that Kialegee has not indicated any conduct by the Defendant has blocked Kialegee from exercising jurisdiction over any land. The Defendant misses the point entirely. It is this agency final action that is the final action needed in which this Court recognized in its memorandum opinion ("*the Regional Director's April 26, 2017 decision is on appeal before the IBIA, and Plaintiff must exhaust its administrative remedies before seeking a judicial review of that decision*" Memorandum Opinion Page 19). The plaintiff has exhausted its administrative remedies and now is back before this Court to obtain justice.

B. There is no issue preclusion barring the Kialegee's complaint

The Defendant makes the argument that Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296, 304, 1991 WL 279615, and which held that

> The Board agrees with the Area Director that BIA's assignment authority under the deed is discretionary. Arguably, 25 CFR Part 151 applies to this requested assignment; it is not necessary to this decision to find that it does, however. Even if the consent requirement in section 151.8 is not specifically applicable here, BIA's discretion under the deed is broad enough to authorize it to require the consent of the Nation in this case, where (1) the land is within the Nation's reservation; (2) the Nation has had beneficial title to the land for 50 years; and (3) the Nation, having organized under the OIWA, is itself an eligible assignee under the deed. The Board finds that the Area Director's June 26, 1990, decision should be affirmed.

Somehow constitutes issue preclusion barring the Kialegee complaint in this case. The defendant cites Novak v. World Bank, 703 F.2d 1305, 1309 (D.C. Cir. 1983) which actually holds to the contrary of what the Defendant is arguing and held that:

> Application of these principles to this case reveals that the district court erred in dismissing appellant's complaint against Madison National on the grounds of res judicata. Madison National was not a party to appellant's earlier actions,11 and, therefore, res judicata cannot bar appellant's action against Madison National. Although it is possible that Madison National could successfully invoke collateral estoppel to prevent appellant from relitigating issues actually decided in his prior actions against World Bank, the question of whether appellant has a cognizable claim under section 1985(2) was not raised in his earlier actions. In his first action appellant claimed that World

> Bank's harassment and intimidation violated the Fifth Amendment.

in this case, the Defendant was not a party to the Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs case. In addition, the issues discussed in that case was not the same issue as is being litigated in this case, that the Kialegee's treaty rights have been violated and that the reservation has not been diminished. As this Court held in its memorandum opinion, "Plaintiff has established a source for this Court's subject matter jurisdiction, pursuant to 28 U.S.C. Sections 1131 and 1362, which is uncontested by the Federal Defendants" (Memorandum opinion at Page 11) and that" Assuming arguendo that Kialegee's claim in Paragraph 68 of its Amended Complaint that Federal Defendants have "repeatedly violated 25 U.S.C. § [5123](f) by blocking the Kialegee from jurisdiction on lands located within the Creek Reservation" is enough to satisfy "stating a claim" for purposes of applying Section 702 to effect a waiver of sovereign immunity" (Memorandum at Page 15). These are very different issues than litigated in the Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs case.

Finally, the Defendant cites Nasem v. Brown, 595 F.2d 801, 802 (D.C. Cir. 1979) in support of its position. However, Nasem held to the contrary and stated that:

> Because we believe that the administrative proceeding did not meet the test for giving collateral estoppel effect to administrative action promulgated by the Supreme Court in United States v. Utah Construction & Mining Co., 384 U.S. 394, 418-23, 98 S.Ct. 1545, 16 L.Ed.2d 642 (1966), we affirm the district court's judgment.

The Defendant also cites the recent United States Supreme Court decision in *McGirt v. Oklahoma,* 140 S. Ct. 2452, 2482, 207 L. Ed. 2d 985 (2020) in support of the Motion to Dismiss. However, this decision in fact supports Kialegee's argument that Kialegee's treaty rights have been violated by the Defendant. In McGirt, the Supreme Court stated:

> The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right

Kialegee agrees that "Congress has never withdrawn the promised reservation… If Congress wishes to withdraw its promises, it must say so… To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." Kialegee further prays that this Court will not continue to allow the most brazen injustice against Kialegee's treaty rights and deny the Motion to Dismiss.

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 13, 2021

Respectfully submitted,

By: /s/ Moises T. Grayson, Esq.
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CERTIFICATE OF SERVICE

I certify that on the 13th day of December 2021, 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/ Moises T. Grayson
Moises T. Grayson

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