UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIALEGEE TRIBAL TOWN, Plaintiff, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.* Federal Defendants.	Civil Action No.: 1:21-cv-00590-CKK

UNITED STATES' REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiff first commenced suit in this Court, seeking essentially the same relief it seeks now, in 2017. Three complaints, two rounds of motion-to-dismiss briefing, and one dismissal later, Plaintiff still has not identified what viable right of action it is pursuing, nor explained how any conduct by Federal Defendants entitles Plaintiff to relief.

To be sure, unlike in the prior action, Plaintiff has now identified a final agency action in the AS-IA Decision.[1] Federal Defendants readily acknowledge the AS-IA Decision could be subject to judicial review under the APA, if such a claim were properly pled (and assuming all other requirements for justiciability had been met). *See* Br. at 13. The problem is that Plaintiff has not pursued an APA claim. Instead, the Complaint asserts the same two causes of action asserted in Plaintiff's prior case, which are styled as requests for "Declaratory Judgment" and an "Injunction." Compl. ¶¶ 80-85. But declaratory judgments and injunctions are remedies, not freestanding rights of action, and the Complaint does not otherwise set out what right of action Plaintiff is pursuing. Although the Complaint makes scattered references to historical treaty rights and to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5123(f), it never expressly alleges a cause of action under either. And Plaintiff's brief in opposition to Federal Defendant's motion to dismiss the Complaint offers no clarification.[2]

Even if Plaintiff had clearly alleged a cause of action under the IRA or historical treaties, it is entirely unclear (and Plaintiff has made no effort to show) that either of those provisions

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[1] Unless otherwise specified, capitalized terms have the meaning ascribed to them in the United States' Memorandum of Points and Authorities in Support of Its Motion to Dismiss, Dkt. No. 29 ("Br.").

[2] *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, Dkt. No. 32 ("Opp.")

gives rise to a private right of action. And even setting that aside, the Complaint is missing plausible allegations that connect the AS-IA Decision (or any other action by Federal Defendants) to a violation of law under any right of action that Plaintiff might be asserting.

This is a problem not just of form, but also of substance. The right of action Plaintiff pursues will determine the scope and standard of this Court's review, and will set the course for the entire litigation. Without a clear statement from Plaintiff as to what right of action it is alleging, there is no viable path forward. *See ACE American Ins. Corp. v. Fed. Crop Ins. Corp.*, 732 Fed. Appx. 5, 8 (D.C. Cir. 2018) (affirming dismissal of complaint that failed to reference viable right of action because court should not "manufacture a claim that is otherwise absent from the pleading").

Whatever ambiguities persist as to Plaintiff's cause of action, the central issue Plaintiff hopes to litigate is well defined: Plaintiff wants to prove that is entitled to exercise shared jurisdiction with the Muscogee (Creek) Nation "over lands belonging to the Tribe and its members located within the Creek Reservation boundaries." Compl. ¶ 49; s*ee also* Opp. at 2 ("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."). Plaintiff, however, has already litigated that very issue in a proceeding before the Interior Board of Indian Appeals ("IBIA"), and therefore is precluded from relitigating it here. *See* Br. at 13-20. The Complaint should be dismissed.

ARGUMENT

A. Plaintiff has not pled a cognizable cause of action.

It is not clear from Plaintiff's Complaint or opposition whether Plaintiff is alleging a right of action under the Declaratory Judgment Act, the privileges and immunities clause of the IRA,

historical treaties, the APA, or some combination thereof. Regardless, Plaintiff plainly has not pled a cognizable cause of action under any legal provision.

First, Plaintiff has not pled a cause of action under the APA. The Complaint does not cite the APA at all. *See* Br. at 9 n.7. And, despite Federal Defendants' frank acknowledgment that, if it had been properly pled, "Plaintiff may have a viable cause of action under the APA—seeking review of the AS-IA Decision," Br. at 20, Plaintiff does not argue that it intended its Complaint to be an APA challenge to the AS-IA Decision. Moreover, the broad relief that Plaintiff seeks—"entitlement to a full treaty guaranteed rights as successor to the historic Creek Confederacy," Opp. at 6—is unavailable under the APA. The APA authorizes courts to "hold unlawful and set aside" final agency actions if the court finds them arbitrary and capricious. 5 U.S.C. § 706. It does not authorize the sweeping relief the Complaint requests.

Because Plaintiff has elected not to pursue an APA claim, the Court should not construe the Complaint as an action under the APA. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (under party presentation rule, courts "rely on the parties to frame the issues for decision") (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)); *see also Global Tropical Imports and Exports LLC v. Bernhardt*, 366 F. Supp. 3d 110, 117 (D.D.C. 2019) (declining to join a nonparty under Federal Rule of Civil Procedure 19 because, "[a]s the master of its Complaint, [the plaintiff] could have named [the non-party] as a co-defendant if it so wished"). Our adversarial system is premised on the idea that "parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Sineng-Smith*, 140 S.Ct. at 1579 (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)). While Plaintiff need not invoke "magic words" in order to survive a motion to dismiss, the Court also

should not decide an issue Plaintiff has not presented. *ACE American Ins. Corp.*, 732 Fed. Appx. at 8 ("Although we do not require the invocation of 'magic words,' we will not manufacture a claim that is otherwise absent from the pleading."). Here, Plaintiff has not alleged a cause of action under the APA, and the Complaint should not survive a motion to dismiss on the basis of a claim Plaintiff chose not to pursue. *See id.* (affirming dismissal of complaint that contained "no reference to the APA, the proper standard of review, or even a request that the district court review the Board decision").

Second, to the extent that Plaintiff is asserting a freestanding cause of action under the Declaratory Judgment Act, 28 U.S.C. § 2201, that claim is untenable under settled law holding that the Declaratory Judgment Act provides a remedy, not an independent right of action. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) ("Nor does the Declaratory Judgment Act (DJA), 28 U.S.C. § 2201, provide a cause of action."); Br. at 10. Plaintiff attempts to distinguish another case cited by Federal Defendants—*Wilson v. On the Rise Enterprises, LLC*, 305 F. Supp. 3d 5, 19 (D.D.C. 2018)—based on the specifics of the pleadings in that case. But the facts of that case cannot change the fundamental legal principle that "declaratory judgments, [and] injunctions . . . are not freestanding causes of action, but remedies that a plaintiff may obtain only upon prevailing on some independent claim." *Wilson*, 305 F. Supp. 3d at 19.

Third, to the extent Plaintiff is alleging a cause of action under the IRA's privileges and immunities clause, that allegation also fails to state a claim. For one, the clause does not on its face confer a private right of action, and Plaintiff has made no attempt to show that Congress intended to create one. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (private rights of action to enforce federal law must be affirmatively created by Congress). Indeed, while

Federal Defendants raised this issue in their opening brief, Br. at 11, Plaintiff's opposition does not address it.

In addition, and even setting aside the question of whether a private right of action exists, Plaintiff has not adequately alleged a violation. *See* Br. at 11-12. Plaintiff responds that it has identified a specific agency action in the AS-IA Decision. *See* Opp. at 8. That is true as far as it goes. What is missing is any plausible allegation that the AS-IA Decision violated the IRA's privileges and immunities clause. And even if the Complaint had made such an allegation, it would fail to state a claim. On its face, the AS-IA Decision did not "classif[y], enhance[], or diminish[] the privileges and immunities available to the [Kialegee] relative to other federally recognized tribes by virtue of their status as Indian tribes," 25 U.S.C. § 5123(f). Rather, it merely determined that, for purposes of tribal liquor ordinances as governed by 18 U.S.C. § 1161, "prior litigation conclusively establishes that [Kialegee] does not exercise jurisdiction over any area of Indian country" and, therefore, "that 18 U.S.C. § 1161 prohibits the Secretary from certifying [a liquor ordinance] submitted by [Kialegee]." Exhibit G. at 15. Plaintiff has offered no allegation explaining how the AS-IA Decision could plausibly violate the IRA when it does not purport to change Plaintiff's legal status, but merely concurs with longstanding federal precedent as to the scope of Plaintiff's jurisdictional authority.

Fourth, to the extent that Plaintiff is asserting a cause of action arising out of historical treaties, that claim should also be dismissed. As Federal Defendants observed in briefing on their motion to dismiss Plaintiff's amended complaint in the 2017 action, treaties generally do not create private rights of action. *See* Fed. Defs.' Reply in Supp. of Their Mot. to Dismiss Pl.'s Am. Compl. at 3, Dkt. No. 31, Case No. 1:17-cv-1670-CKK (citing *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 489 (D.C. Cir. 2008) (treaties, "even those directly benefiting private

persons, generally do not create private rights or provide for a private cause of action in domestic courts")). The Court noted this very argument in dismissing the 2017 action. *See Kialegee Tribal Town v. Zink (Kialegee I)*, 330 F. Supp. 3d 255, 267 (D.D.C. 2018). But Plaintiff still has not made any attempt to demonstrate that the treaty creates a private right of action, much less alleged with any specificity how the AS-IA Decision violates those treaties. Plaintiff's bare statement that it is "seeking entitlement to a full treaty guaranteed rights as successor to the historic Creek Confederacy," is not sufficient to state a cognizable treaty rights claim under any legal theory.[3] Opp. at 6.

B. Issue preclusion bars relitigation of the Complaint's core allegation.

The central issue raised by the Complaint is whether Plaintiff has jurisdiction over certain lands within the Creek reservation. *See, e.g.*, Compl. ¶ 49 (alleging that "Kialegee may exercise jurisdiction over lands belonging to the Tribe and its members located within the Creek Reservation boundaries"); *id.* ¶ 79 (asking Court to find that "Kialegee is entitled to full treaty-guaranteed rights as a successor to the historic Creek Nation, and as a result has jurisdiction over its lands."). But Plaintiff has already litigated and lost that issue. The IBIA decided the question in 1991, finding that Plaintiff did not exercise jurisdiction over any part of the Creek Reservation. *Kialegee IBIA Decision*, 19 IBIA 296, 1991 WL 279615 (Apr. 17, 1991); *see also* Br. at 13-17. Plaintiff therefore is precluded from relitigating that issue here. Br. at 17.

Plaintiff raises several arguments in response. First, Plaintiff argues that issue preclusion cannot apply because "Defendant was not a party" to the IBIA case. Opp. at 11. That is

[3] Plaintiff claims that Federal Defendants have taken the position that Plaintiff "does not have treaty rights." Opp. at 2. That is incorrect. The AS-IA Decision merely found that, as a factual matter, Plaintiff does not currently exercise jurisdiction over any land within the historic Creek reservation for purposes of 18 U.S.C. § 1161.

incorrect as a factual matter, because the Department of the Interior, as represented by the Bureau of Indian Affairs and/or the Assistant Secretary – Indian Affairs, was the defendant in the IBIA case as well as this one.[4] It is also irrelevant as a legal matter: Regardless of whether they were parties to the IBIA action, Federal Defendants are free to assert nonmutual collateral estoppel to bar Plaintiff from relitigating an issue that it litigated and lost in a prior proceeding. *See United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984) ("Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action *against the same or a different party*.") (emphasis added).[5]

Next, Plaintiff also contends that the question at issue in this litigation—"that the Kialegee's treaty rights have been violated and that the reservation has not been diminished"—was not the same as the issue litigated before the IBIA. Opp. at 11. To the contrary, however, the IBIA found that "[t]he former Creek Indian Reservation has consistently been recognized by

[4] It does not matter for preclusion purposes whether the named officials within the Department of Interior differed between the two actions. "The real party in interest in an official-capacity suit is the governmental entity and not the named official" and thus "[t]he doctrine of res judicata bars a plaintiff from suing a succession of public officials on the same official-capacity claim." *Baker v. Chisom*, 501 F.3d 920, 925 (8th Cir. 2007) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)) (quotation marks omitted); *see also Velasquez v. Utah*, 2020 WL 1989388, at *4 (D. Utah Apr. 27, 2020) ("[A]n action against a government official in his or her official capacity is 'simply another way of pleading an action against an entity of which an officer is an agent.'") (citing *McDonald v. Wise*, 769 F.3d 1202, 1215 (10th Cir. 2014)). In any event, as noted above, identity of defendants is unnecessary here, where Federal Defendants have asserted defensive nonmutual collateral estoppel.

[5] *Mendoza* held that the doctrine of *offensive* nonmutual collateral estoppel announced in *Parklane* cannot be asserted *against* the government. 464 U.S. at 162. Subsequent cases have confirmed that *defensive* collateral estoppel may nevertheless be raised *by* the government. *See, e.g.*, *Securities Indus. Assoc. v. Bd. of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 364 n.7 (D.C. Cir. 1990).

the Federal government as the [Muscogee (Creek)] Nation's reservation, over which the Nation has authority to exercise jurisdiction" based in part on its review of historical treaties. *Kialegee IBIA Decision*, 19 IBIA 296, 1991 WL 279615 at *5 (citing as examples Treaty of August 7, 1856, 11 Stat. 699; Treaty of June 14, 1866, 14 Stat. 785). Plaintiff also identifies certain other issues addressed by this Court in *Kialegee I* but not litigated before the IBIA, such as this Court's subject matter jurisdiction, and whether Plaintiff's amended complaint "stat[ed] a claim for purposes of applying Section 702 to effect a waiver of sovereign immunity." Opp. at 11. But the existence of those distinct issues does not change the fact that Plaintiff is precluded from relitigating the core jurisdictional issue that was decided by the IBIA.

Finally, Plaintiff points out that two of the cases cited by Federal Defendants ultimately declined to apply issue preclusion. Opp. at 10, 12 (citing *Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983) and *Nasem v. Brown*, 595 F.2d 801, 802 (D.C. Cir. 1979)). That other courts have declined to apply collateral estoppel based on the facts before them does not undermine the application of the doctrine here. As Federal Defendants demonstrated in their opening brief, all the elements of collateral estoppel are met here: (1) the question of Kialegee's jurisdiction over lands within the Creek reservation was actually litigated before the IBIA, as evidenced by the IBIA's description of Kialegee's claims and arguments; (2) the question was "actually and necessarily" resolved by the IBIA, because the jurisdictional finding was central to the IBIA's conclusion that it could not take lands within the historic Creek reservation into trust for the Kialegee without the Muscogee (Creek) Nation's consent; and (3) applying preclusion here would not work an unfairness, as Plaintiff was afforded an opportunity to appeal the IBIA decision but elected not to do so. *See* Br. at 17.

CONCLUSION

In dismissing without prejudice Plaintiff's prior complaint, this Court made clear that "Plaintiff needs to allege with some specificity the actions allegedly taken by Federal Defendants, which give rise to Plaintiff's cause of action." *Kialegee I*, 330 F. Supp. 3d at 269. The Complaint has failed to do that. Although it added a paragraph noting the AS-IA Decision, the Complaint fails to identify a viable right of action, and lacks plausible allegations to connect the AS-IA Decision (or any action by Federal Defendants) to a violation of law under a viable right of action. In addition, Plaintiff has already litigated and lost the central issue pressed by the Complaint, and therefore is precluded from relitigating that issue here. For these reasons, and those set forth in Federal Defendants' opening brief, the Complaint should be dismissed.

Dated: December 20, 2021

Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

/s/ Angela N. Ellis
ANGELA N. ELLIS
D.C. Bar No. 1670713
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
Tel. (202) 598-7942
Fax (202) 305-0506
Angela.Ellis@usdoj.gov

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Angela N. Ellis
Angela N. Ellis