NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-5314

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KIALEGEE TRIBAL TOWN,
Plaintiff/Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants/Appellees.

Appeal from the United States District Court for the District of Columbia
No. 1:21-cv-00590 (Hon. Colleen Kollar-Kotelly)

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellees.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellees.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ *Helia Bidad*
Helia Bidad

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INTRODUCTION

This case represents the Kialegee Tribal Town's ("Plaintiff" or "Kialegee") latest attempt to assert jurisdiction over the Creek Reservation. Plaintiff seeks declaratory relief ordering that Kialegee is "part of the Whole Creek Nation of Indians" and "has treaty-protected rights of shared jurisdiction within the Creek Reservation" in common with other Creek tribes. Kialegee also seeks injunctive relief requiring the Federal Defendants to recognize Kialegee's "treaty-guaranteed rights" with respect to the Creek Reservation. Kialegee identifies no cause of action that entitles it to such relief.

Plaintiff filed a near-identical suit in 2017, and the district court dismissed the case, finding that Plaintiff had identified no agency action that could support a claim. *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255 (D.D.C. 2018) ("*Kialegee I*"). This suit fares no better. The only development since 2018 is that the Assistant Secretary-Indian Affairs has now issued a final decision affirming the denial of Plaintiff's liquor ordinance, based on Plaintiff's lack of jurisdiction over the Creek Reservation. But Plaintiff did not bring a proper challenge to that decision, and the district court correctly dismissed the complaint for failure to plead any cause of action. And even if Plaintiff had identified a cause of action to support its assertion of jurisdiction over the Creek Reservation, the district court correctly held that such a claim would be barred by issue preclusion based on a

1991 Interior Board of Indian Appeals ("Board") decision ("1991 Decision") addressing this exact question. This Court should affirm the dismissal.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331.[1]

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment that disposes of all claims. App'x 10. That judgment was entered on September 29, 2022. App'x 10.

(C) Plaintiff timely appealed on November 28, 2022. App'x 7.[2]

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed the complaint for failure to state a claim where Plaintiff failed to plead or otherwise identify a cognizable cause of action.

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[1] As discussed below, it is unclear what statutes (if any) Plaintiff purports to rely on for purposes of stating a cause of action. But because Plaintiff's complaint appears to rest generally on the Indian Reorganization Act, we accept that Plaintiff's claims arise under federal law.

[2] Plaintiff later filed a Rule 59(e) motion to alter or amend the judgment on October 27, 2022, App'x 30-44, which the district court denied on August 12, 2024. Supp. App'x 123-26; *see* FRAP 4(a)(4)(B)(i) (noting that, if a party files a notice of appeal after a judgment is entered but before certain motions, including a Rule 59 motion, is decided, the notice of appeal becomes effective after the last such motion is decided).

2. Whether Plaintiff is collaterally estopped from challenging the Bureau of Indian Affairs' finding that Plaintiff lacks jurisdiction over the Creek Reservation by the decision in *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director*, 19 IBIA 296 (1991), where the 1991 Decision determined that Kialegee did not exercise jurisdiction over Indian lands within the Creek Reservation—the precise question that is dispositive in this case—and where Plaintiff's sole counter-argument (that 1994 statutory amendments had the effect of voiding the 1991 Decision) is forfeited and lacks merit.

3. Whether the district court abused its discretion when it dismissed Plaintiff's complaint without leave to amend, where Plaintiff did not properly move for leave to amend before the judgment was entered, did not attach a proposed amended complaint, and did not explain how any amended complaint would cure the defects identified by the district court.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are reproduced herein.

STATEMENT OF THE CASE

A. Statutory background

Congress enacted the Indian Reorganization Act to support "principles of tribal self-determination and self-governance[.]" *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The

"overriding purpose" of the Indian Reorganization Act was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

The Indian Reorganization Act was amended in 1994 to include two new provisions. Because, as discussed below, Plaintiff contends that these provisions had the effect of overriding the 1991 Decision finding that it lacked jurisdiction over the former Creek reservation, we reproduce the text of these provisions in full:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, 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.
>
> **(g) Privileges and immunities of Indian tribes; existing regulations**
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 5123(f)-(g). Although sections 5123(f) and (g) largely contain the same language, section 5123(f) is prospective and section 5123(g) applies retroactively to regulations or decisions "in existence or effect on May 31, 1994." *Id.*

B. Factual background

1. The Creek Nation

"The Creek Nation, historically and traditionally, is actually a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership." *Harjo v. Andrus*, 581 F.2d 949, 951 n.7 (D.C. Cir. 1978). Kialegee is one of these tribal towns. In the eighteenth and early nineteenth centuries, the Creek Nation was located in present-day Alabama and Georgia but in the 1830s was forcibly removed from these lands to what is now Oklahoma. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440 (D.C. Cir. 1988). Congress established a reservation for the Creeks in Oklahoma. *McGirt v. Oklahoma*, 591 U.S. 894, 899-900 (2020).

In 1867, the Creeks established a constitutional form of government and code of laws for the Nation. *Hodel*, 851 F.2d at 1442. And in 1979, the Creek Nation adopted a constitution under the Oklahoma Indian Welfare Act, Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5210). That constitution provided that the "political jurisdiction of The Muscogee (Creek) Nation shall be

as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America." Const. of the Muscogee (Creek) Nation, art. 1, § 2 (1979). The Muscogee (Creek) Nation is on the list of entities recognized by and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe. *See* 89 Fed. Reg. 99899 (Dec. 11, 2024).

2. The Kialegee Tribal Town

Section 3 of the Oklahoma Indian Welfare Act allows "any recognized tribe or band of Indians residing in Oklahoma . . . to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." 25 U.S.C. § 5203. In 1937, Interior's Acting Solicitor opined that the Creek Tribal Towns, including Plaintiff, could organize as bands within the meaning of this provision, separate and distinct from the Creek Nation. Kialegee organized under Section 3 of the Oklahoma Indian Welfare Act and adopted a constitution in 1941. App'x 71.

Kialegee Tribal Town is on the list of federally recognized Indian tribes. 89 Fed. Reg. at 99899. But Kialegee has no reservation, and the United States does not hold any lands in trust for Kialegee's benefit. *See, e.g.*, *Kialegee Tribal Town of Okla.*, 19 IBIA at 303 ("[T]he former Creek Reservation is the [Muscogee (Creek)] Nation's reservation, and not [Kialegee Tribal Town's] reservation[.]");

see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991) (holding that trust land qualifies as tribal reservation land for tribal immunity purposes).

3. 1991 Decision concluding that Plaintiff did not exercise jurisdiction over any part of the Creek Reservation

In 1990, Plaintiff requested that Bureau of Indian Affairs take into trust two pieces of land within the boundaries of the Creek Reservation. *Kialegee Tribal Town of Okla.*, 19 IBIA at 298. The Bureau of Indian Affairs Area Director declined to take the parcels into trust without the concurrence of the Muscogee (Creek) Nation. *Id.* at 299. Kialegee appealed to the Board, which affirmed Bureau's denial "[b]ecause the former Creek Reservation is the [Muscogee (Creek)] Nation's reservation, and not [Kialegee's] reservation." *Id.* at 303. In turn, the court found the Muscogee (Creek) Nation's written consent was required for the trust acquisition. *See id*. Plaintiff did not appeal the 1991 Decision, which has long since been final. *See Kialegee I*, 330 F. Supp. 3d at 268-69 (noting that any challenge to that decision would be time-barred).

4. *Kialegee I*

In 2017, Plaintiff sued the Department of the Interior, the Secretary of the Interior, and the Assistant Secretary - Indian Affairs, seeking a declaratory judgment that it exercises shared jurisdiction over the Creek Reservation with all

Creek tribes and an injunction that all lands within the Creek Reservation are Plaintiff's "Indian lands" for purposes of the Indian Gaming Regulatory Act. Supp. App'x 1-31. In its amended, operative complaint, Plaintiff alleged that it is a signatory to the Treaty of 1833 establishing the Creek Reservation and that the Creek Reservation is also properly considered Plaintiff's reservation. Supp. App'x 1-31; *Kialegee I*, 330 F. Supp. 3d at 261. In turn, Plaintiff argued that it may exercise jurisdiction in common with other Creek tribes over lands within the boundaries of the historic Creek Reservation. *Id*. Plaintiff further alleged that the "[Federal] Defendants' position is that the Muskogee Tribe alone exercises jurisdiction over the entirety of those lands that were explicitly reserved for the 'whole Creek Nation,'" Supp. App'x 2, 18, 93, and that Federal Defendants had "repeatedly violated 25 U.S.C. § 5123(f) by blocking [Plaintiff] from jurisdiction on lands located within the Creek Reservation." *Id*. at 27, 93, 98, 119. Plaintiff referenced its construction of a restaurant facility on an Indian allotment owned by an enrolled member of Kialegee within the Creek Reservation, and alleged that Federal Defendants "publicly declared their intention to take administrative and legal steps to oppose the [ ] development[.]" *Kialegee I*, 330 F. Supp. 3d at 261.

Federal Defendants moved to dismiss Plaintiff's amended complaint for lack of jurisdiction and for failure to state a claim, and the district court granted the motion. *Id.* at 258, 269. The district court explained that although "Plaintiff ha[d]

alleged that it ha[d] a cause of action pursuant to 25 U.S.C. Section 5123, Plaintiff ha[d] not indicated any conduct by Federal Defendants that is actionable under this cause of action." *Id.* at 269. The court rejected the possibility—raised in Kialegee's briefing on the motion to dismiss—that a 2017 Bureau of Indian Affairs Regional Director decision declining to approve Kialegee's liquor ordinance could form the basis of an actionable challenge, in part because Kialegee had not yet exhausted its administrative remedies. *Id.* at 268-69. In a footnote, the court stated that "Federal Defendants indicate that [i]t may be that in the future, after the Board 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[.]" *Id.* at 268 & n.11 (quotation and citation omitted). The court dismissed the amended complaint without prejudice. *Id.*

C. Proceedings below

In March 2021, Plaintiff filed a complaint substantively identical to the 2017 amended complaint in *Kialegee I*. *Compare* Supp. App'x 1-31, *with* App'x 58-88. Plaintiff's complaint again sought recognition of its alleged treaty rights and declaratory and injunctive relief finding that it exercises shared sovereignty and jurisdiction with the Muscogee (Creek) Nation over the entire Creek Reservation. *See* App'x 18-20. The only meaningful change in the new complaint was the addition of a new paragraph noting that on November 5, 2020, the Assistant

Secretary - Indian Affairs issued a final decision affirming the 2017 Bureau of Indian Affairs Regional Director's decision declining to approve Kialegee's liquor ordinance ("2020 Decision"). *See* App'x 59 (Compl. ¶ 3). That paragraph is the only reference to the 2020 Decision in the complaint and the complaint does not request that the court set aside the 2020 Board decision or otherwise request relief from that decision. *See generally* App'x 58-88.

The United States moved to dismiss Plaintiff's complaint. App'x 5. The district court granted the motion for two independent reasons. App'x 22, 28. First, the court reasoned that Plaintiff "failed to plead a freestanding cause of action." App'x 22. On this point, the court noted that the complaint's two counts are a request for a declaratory judgment and a request for injunctive relief, which are remedies, not a cause of action. App'x 19. The court assumed arguendo that Plaintiff's complaint purported to state a claim under the Indian Reorganization Act but concluded that section 5123(f) does not provide a cause of action. App'x 18-22. The Court found further support for its conclusion in caselaw from this Circuit recognizing that a claim alleging a violation of § 5123(f) is properly pled as an Administrative Procedure Act (APA) claim, which Plaintiff did not bring here. App'x 21-22.

Second, the court concluded that in the alternative, the 1991 Decision barred Plaintiff from re-litigating the "critical" question at issue in the case: whether

Plaintiff exercises jurisdiction over Indian lands within the Creek Reservation. App'x 22-28. The court noted, among other points in support of this conclusion, "that the plain text of the regulations makes clear that the legal standard governing the jurisdiction issue arising under the land trust acquisition regulation in the 1991 dispute is the same standard at issue here." App'x 25. As discussed further below, Plaintiff does not contest any of these conclusions on appeal, or otherwise engage with the district court's preclusion ruling (with the exception of one argument, discussed in the next paragraph, that Plaintiff raised for the first time in its Rule 59 motion).

Plaintiff filed a motion for reconsideration under Federal Rule of Civil Procedure 59. App'x 30-43. In that motion, Plaintiff did not meaningfully engage with the district court's preclusion analysis, except to argue (for the first time) that "the 1991 BIA conclusions were declared null and void by 25 U.S.C. § 476(g)," as amended in 1994.[3] App'x 42. The district court denied the motion, observing (among other things) that "the arguments Plaintiff now presents all could have been raised in the earlier motion to dismiss briefing (but were not)" and that Plaintiff otherwise only expressed disagreement with the district court's opinion

[3] Section 16 of the Indian Reorganization Act was previously codified at 25 U.S.C. § 476; since 2016, it has been codified at 25 U.S.C. § 5123.

granting the United States's motion to dismiss, without meaningfully engaging with the district court's analysis. Supp. App'x 124-25.

SUMMARY OF ARGUMENT

1. The district court correctly held that Plaintiff failed to plead a cognizable cause of action. Plaintiff's two stated claims in its complaint are for declaratory and injunctive relief, which (as the district court correctly noted) are merely remedies. The district court construed Plaintiff's complaint as attempting to plead a cause of action under 25 U.S.C. § 5123(f); Plaintiff's opening brief now appears to abandon any claim under this provision. In any event, the plain language of section 5123(f) and relevant canons of construction support the district court's conclusion that section 5123(f) does not provide a right of action. Instead, a claim under section 5123(f) must be brought under the Administrative Procedure Act, which Plaintiff has consistently refused to do. This Court should uphold the district court's dismissal on this ground.

2. If the Court disagrees and finds that Plaintiff has identified a right of action, it should still affirm dismissal because the district court correctly held that Plaintiff is collaterally estopped from challenging the jurisdictional finding in *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director*, 19 IBIA 296, 304 (1991). The 1991 Decision decided the same core issue of whether Kialegee exercises jurisdiction over the Creek Reservation. Plaintiff does not dispute this

and does not otherwise challenge any of the district court's preclusion analysis. Instead, Plaintiff's sole argument against applying issue preclusion here is that the 1994 amendments to the Indian Reorganization Act voided the 1991 Decision. This argument is forfeited because Plaintiff raised it for the first time in its motion for reconsideration below, and the district court properly declined to consider it. In any event, the argument lacks merit.

3. The district court did not err when it dismissed Plaintiff's complaint without leave to amend. In opposing the motion to dismiss, Plaintiff only included brief language requesting an opportunity to amend and did not comply with procedural requirements in doing so. Moreover, amendment would be futile and Plaintiff does not meaningfully argue otherwise.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Statewide Bonding, Inc. v. U.S. Dept. of Homeland Sec.*, 980 F.3d 109, 114 (D.C. Cir. 2020). "This Court reviews a district court's denial of leave to amend the Complaint for abuse of discretion, except for denials based on futility, which we review *de novo*." *Ramos v. Garland*, 77 F.4th 932, 940 (D.C. Cir. 2023) (citation omitted). This Court also reviews a district court's determination regarding collateral estoppel *de novo*. *See Montgomery v. Internal Revenue Serv.*, 40 F.4th 702, 709 (D.C. Cir. 2022) (citation omitted).

ARGUMENT

I. The district court correctly concluded that Plaintiff failed to plead a cognizable cause of action.

The district court correctly held that Plaintiff did not plead a right of action because: (1) the two counts listed in the complaint are a request for declaratory judgment and a request for injunctive relief, which are remedies and not causes of action; (2) 25 U.S.C. § 5123(f) does not provide a private right of action and is instead properly plead as an APA claim; (3) Plaintiff has repeatedly made clear that it does not wish to plead any APA claim. We address each point in turn.[4]

A. The only two claims in Plaintiff's complaint are remedies, not rights of action.

Kialegee's complaint alleges two counts: Count I seeks a declaratory judgment, and Count II requests an injunction. App'x 86-88. However, "declaratory judgments[and] injunctions . . . are not freestanding causes of action,

[4] Plaintiff argues that it has stated a cause of action under both sections 5123(f) and (g). *See* Op. Br. at 10-22. But Plaintiff only specifically cited section 5123 in its complaint, App'x 60, and Plaintiff did not make an argument under or cite section 5123(g) in the court below before its rule 59(e) motion. In any event and as discussed above, sections 5123(f) and (g) have almost the same language, except section 5123(f) applies prospectively and section 5123(g) applies retroactively to any law "in existence or effect on May 31, 1994." *See* 25 U.S.C. § 5123(f)-(g). Thus, Plaintiff's argument that section 5123(g) provides it with a right of action also fails for the same reasons its argument concerning section 5123(f) fails (to the extent it even makes an argument concerning section 5123(f) which, as discussed below, is itself unclear).

but remedies that a plaintiff may obtain only upon prevailing on some independent claim." *Wilson v. On the Rise Enters., LLC*, 305 F. Supp. 3d 5, 19 (D.D.C. 2018) (citing *C&E Servs. Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002)). Thus, the district court correctly recognized that a request for a declaratory judgment and an injunction, standing alone, fails to identify a cause of action. App'x 19; *see 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."); *see also Johnson v. Mao*, 174 F. Supp. 3d 500, 523-24 (D.D.C. 2016) (recognizing that injunctive relief is a remedy and not an independent cause of action).

To support its request for either declaratory or injunctive relief, Plaintiff must identify an underlying cause of action. Plaintiff did not do so. *See Norton v. Larney*, 266 U.S. 511, 515 (1925) ("[T]he jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings.").

B. 25 U.S.C. § 5123 does not provide for a right of action.

Although neither the complaint nor Plaintiff's briefing before the district court sought such relief directly, "[c]onstruing the complaint as generously as possible," App'x 18, the district court construed Plaintiff's claims as seeking relief under § 5123(f), which states:

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, 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.

Initially, and as the district court correctly concluded, the text of this provision "contains no *explicit* provision of a private right of action." App'x 20 (emphasis added); *see* 25 U.S.C. § 5123(f). Plaintiff does not contend otherwise and that alone is ordinarily dispositive. *See, e.g.*, *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) ("If the text of a statute does not provide a cause of action, there ordinarily is no cause of action.").

The question, then, is whether section 5123(f) provides for an implied right of action. *See id.* ("To be sure, on rare occasions, the Supreme Court has recognized *implied* causes of action." (emphasis in original)). This Circuit has considered four factors when evaluating whether a statute provides an implied right of action:

> (1) [W]hether the plaintiff is one of the class for whose benefit the statute was enacted; (2) whether some indication exists of legislative intent, explicit or implicit, either to create or to deny a private remedy; (3) whether implying a private right of action is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law, such that it would be inappropriate for the court to infer a cause of action based solely on federal law.

El Paso Nat. Gas. Co. v. United States, 750 F.3d 863, 889 (D.C. Cir. 2014). But "[i]f the statute itself does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (cleaned up)).

As an initial matter, section 5123(f) is bereft of rights-creating language, let alone rights-creating language directed at Indian tribes in particular. Rather, the focus of the provision is the agencies that are regulated by it. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander v. Sandoval*, 532 U.S. at 289 (citation omitted). As the district court correctly noted, "[t]he text of 5123(f) is directed not to Indian tribes but rather to federal agencies," which itself counsels strongly against reading it as conferring an implied right of action. App'x 20 (citing 25 U.S.C. § 5123(f)).

The broader statutory scheme also weighs against interpreting section 5123(f) as conferring a private right of action. Most obviously, another nearby provision of the statute, section 5123(d)—which provides for Secretarial approval of tribal constitutions, bylaws, and amendments thereto under certain circumstances—"explicitly provides a private right of action to enforce the

procedure for constitutions proposed by Indian tribes[.]" App'x 21 ("The fact that Congress explicitly provided a private cause of action in another sub-section[, § 5123(d),] suggests that, if Congress intended to create a private cause of action under § 5123(f), Congress would have done so explicitly."); *see also* 25 U.S.C. § 5123(d) ("Actions to enforce the provisions of this section may be brought in the appropriate Federal district court."). Similarly, here, the existence of a nearby provision in the same statute explicitly granting a private right of action makes clear that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (citation omitted).

Indeed, this Circuit has concluded that a neighboring provision of section 5123(f) does not provide a right of action. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008). Section 5123(h) provides that "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section." 25 U.S.C. § 5123(h). Like section 5123(h), section 5123(f) contains no rights-creating language, and this Court stated that it "offers no private cause of action." *Cal. Valley Miwok Tribe*, 515 F.3d at 1266. Indeed, unlike section 5123(h)—which is at least arguably directed at Indian tribes—section 5123(f) is focused solely on the regulated agency.

For all of these reasons, section 5123(f) plainly does not furnish Plaintiff with a cause of action. Indeed, it is not clear that Plaintiff is even *contending* otherwise. Plaintiff's opening brief states that "[t]he Kialegee is not suing under 25 U.S.C. §5123." Op. Br. at 21. Plaintiff goes on to state that "the effect of 25 U.S.C. § 5123 is to make *Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 298 (1991) have no force or effect and therefore the Kialegee do state a cause of action." *Id.* at 21-22. As discussed below, Plaintiff's contention that subsequent statutory amendments somehow override the 1991 Decision is both forfeited and wrong. *See infra* pp. 27-28. In any event, this is a non-sequitur. Even if Plaintiff were right that their invocation of this provision defeats collateral estoppel, they would still need to identify a cause of action to support their claim. Plaintiff has not done so—particularly now that they are affirmatively *disclaiming* that they are suing under 25 U.S.C. § 5123.

C. Plaintiff has consistently disavowed pleading any APA claim.

Even assuming that a claim alleging violation of section 5123(f) may be asserted under the APA, Plaintiff has made clear—*repeatedly*—that it does not purport to do so here.

To begin with, in *Kialegee I*, "Plaintiff affirmatively state[d] that its cause of action is not based upon the Administrative Procedure Act[, but that] Plaintiff relie[d] upon Section 702 of the APA to support a waiver of sovereign immunity."

Kialegee I, 330 F. Supp. 3d at 264. Plaintiff reiterated in that case that it did not "need to allege the APA as a cause of action to benefit from waiver under Section 702," and that it was only relying on the APA for a waiver of sovereign immunity. *See id.* at 265 (citations omitted).

That refusal to rely on the APA continued into this case. Plaintiff's complaint does not cite, let alone purport to bring a claim under, the APA. App'x 58-88. And even after the district court held that Plaintiff failed to state a cause of action—and that any claim would need to be brought under the APA—Plaintiff's opening brief in this Court *still* does not cite or reference the APA. Because Plaintiff has repeatedly made clear that it does not intend to pursue an APA claim, this Court should give effect to that litigation choice. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) ("[P]laintiff is the master of the complaint." (quotation and citation omitted)). The Court should affirm dismissal of Plaintiff's complaint for failure to state a claim.

II. Any claim Plaintiff might have is barred by issue preclusion.

Even if Plaintiff had brought a proper claim challenging the 2020 decision, the district court correctly held that issue preclusion bars Plaintiff from challenging the conclusion that it lacks jurisdiction over the Creek Reservation. This provides an alternative ground for affirming the district court.

Under the doctrine of issue preclusion, or collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983) (citing and quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The underlying rationale for issue preclusion is that a party or its privy that "has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983). There are three requirements for issue preclusion to apply: (1) "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case"; (2) "the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 301 (D.C. Cir. 2015) (quotation and citation omitted).

In the administrative context, "an administrative decision will be given collateral estoppel effect when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Nasem v. Brown*, 595 F.2d 801, 807

(D.C. Cir. 1979) (quotation and citation omitted); *see also B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148-49 (2015) (reaffirming that issue preclusion generally applies to adjudicative proceedings before an administrative agency). Issue preclusion in the administrative context applies to factual issues, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966), and to mixed issues of fact and law, *B&B Hardware, Inc.*, 575 U.S. at 154. Moreover, issue preclusion may still apply where the issue in the cases arise under different statutes, because "[o]ften a single standard is placed in different statutes." *Id.*

Applying these principles, the district court correctly concluded that issue preclusion bars Plaintiff's challenge to the 2020 Decision. At the outset, in this Court, Plaintiff does not dispute the district court's preclusion analysis; that is, it does not dispute that the 1991 Decision was preclusive when that decision was issued. Rather, Plaintiff's sole assertion on appeal related to collateral estoppel is a legal argument that 1994 amendments to the Indian Reorganization Act somehow "voided" the 1991 Decision. As discussed below, that argument has not been properly preserved and is in any event meritless. But for present purposes, "[a] party forfeits an argument by failing to raise it in his opening brief." *Al-Tamimi v. Adelson*, 916 F.3d 1 (D.C. Cir. 2019) (citing *Herron v. Fannie Mae*, 861 F.3d 160, 165 (D.C. Cir. 2017)). Plaintiff's opening brief does not dispute that the 1991 Decision generally meets the requirements for issue preclusion and does not

otherwise challenge the district court's analysis of this issue. *See generally* Op.'s Br. at 22-31. As a result, Plaintiff has forfeited any contrary argument.

Notwithstanding this forfeiture, we will address the district court's preclusion analysis here. As the district court concluded, the 1991 Decision meets the requirements for issue preclusion. The 1991 Decision concluded that Plaintiff did not exercise jurisdiction over any part of the Creek Reservation—the central issue in Plaintiff's case here. Plaintiff did not further appeal or challenge the 1991 Decision and, as the court recognized in *Kialegee I*, any challenge to that decision is barred by the applicable six-year statute of limitations. *See Kialegee I*, 330 F. Supp. 3d at 268-69; 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). Issue preclusion thus bars relitigation of this issue in this case. *See Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983) (finding litigation of an issue would violate the six-year statute of limitations in the APA when "each event that might be deemed final agency action occurred substantially more than six years before [the plaintiff] filed its complaint").

The 1991 Decision collaterally estops Plaintiff's challenge here. The 1991 Decision concluded that Plaintiff does not exercise jurisdiction on any part of the Creek Reservation. *Kialegee Tribal Town of Okla.*, 19 IBIA at 302-03. As the district court concluded, "the legal standard governing the jurisdiction issue arising

under the land trust acquisition regulation in the 1991 dispute is the same standard at issue here." App'x 25. "[P]reclusion because of a prior adjudication results from the resolution of a question *in issue*, not from the litigation of specific *arguments* directed to the issue." *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Rsrv. Sys.*, 900 F.2d 360, 364 (D.C. Cir. 1990) (emphasis in original); *see also Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) ("[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case" (emphasis in original)). It thus makes no difference that the request at issue in the 1991 case (that the agency take land into trust for Plaintiff's benefit) is different from the request at issue here (that the agency issue a liquor control ordinance).

As the district court noted, the critical question in both contexts is whether Plaintiff has jurisdiction over the land at issue. In its 1991 Decision, the Board squarely addressed Plaintiff's argument that "the former Creek Reservation is [Kialegee's] reservation[.]" *Kialegee Tribal Town of Okla.*, 19 IBIA at 301. Rejecting that argument, the Board concluded that "the former Creek Reservation is not [Plaintiff's] reservation," and "[b]ecause the former Creek Reservation is the [Muscogee (Creek)] Nation's reservation, and not [Plaintiff's] reservation," Plaintiff would need the consent of the Muscogee (Creek) Nation to pursue its request for land to be taken into trust for Plaintiff's benefit. *Id.* at 303. The Board

thus necessarily determined that Plaintiff did not exercise jurisdiction over the Muscogee (Creek) Reservation. *See* 19 IBIA at 301; *see also Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (finding the first requirement of issue preclusion is met when the prior case and the case at hand resolved the same core question).

Second, the district court also correctly found it "indisputable" that the central issue here was "actually and necessarily" resolved by the Board's decision. App'x 27. As discussed above, the issue here was necessary to the resolution of Plaintiff's case before the Board. Moreover, the Board proceeding makes clear the issue was actually litigated. Plaintiff briefed, presented evidence, and argued its justifications for why it thought it had jurisdiction over the Muscogee (Creek) Reservation, and the Board thoroughly considered, evaluated, and decided the case Plaintiff brought before it. *See Aenergy, S.A. v. Republic of Angola*, 123 F.4th 1351, 1358 (D.C. Cir. 2024).

Third, the district court correctly found that applying issue preclusion in this case would not create a basic unfairness. *See id.* at 1358-59. The limited circumstances under which such basic unfairness occurs generally include situations where "there is risk that 'prior proceedings were seriously defective'" or where "the losing party clearly lacked any incentive to litigate the point in the first trial, but the stakes of the second trial are of a vastly greater magnitude." *Yamaha*

Corp. v. America, 961 F.2d 245, 254 (D.C. Cir. 1992) (citations omitted). Here, Plaintiff had the opportunity and every incentive to seek further review of the 1991 Decision but chose not to.

Fourth, the particular circumstances of the 1991 Decision also support finding it precludes Plaintiff's arguments. As the district court noted, the Board was acting in a judicial capacity when it issued that decision. *See* App'x at 28. And the decision was issued following multi-level proceedings in which Plaintiff was permitted to present evidence and argument. *See, e.g.*, *Van Beneden v. Al-Sanusi*, 12 F. Supp. 3d 62, 71-72 (D.D.C. 2014) (finding administrative proceedings warranted the application of issue preclusion because of the opportunity for argument and evidence presentation, as well as the overlap in the interests and issues between the administrative proceeding and that federal court case); *cf. Nasem v. Brown*, 595 F.2d 801, 807 (D.C. Cir. 1979) (finding a lack of procedural adequacy in an administrative proceeding did not support finding issue preclusion was effective in the case).

In any event and as noted previously, *see supra* pp. 22-23, Plaintiff does not dispute any of this and has forfeited the opportunity to do so by failing to present any argument on these points in its opening brief.

As to the one argument Plaintiff *does* make, Plaintiff's contention that the 1994 amendments somehow overrode the 1991 Decision is also plainly not a basis

for disturbing the decision below. Plaintiff contends that the 1991 Decision cannot be squared with the 1994 Indian Reorganization Act amendments' proscription of agency actions that classify, enhance, or diminish the privileges and immunities available to an Indian tribe relative to other federally recognized tribes because of their status as tribes.

Initially, this argument too is forfeited but for a different reason: Plaintiff did not make this argument below until its Rule 59(e) motion, where the argument could not be raised for the first time.[5] *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (stating that a party may not use Federal Rule of Civil Procedure 59(e) "to raise arguments or present evidence that could have been raised prior to the entry of judgment"). The district court declined to address the merits of this argument in its reconsideration decision, and Plaintiff does not address this forfeiture in its opening brief. Indeed, it also does not even mention that it raised this argument for the first time at the reconsideration stage and that the district court chose not to address it.

Although the Court should thus not entertain this argument, it also fails on the merits. Nothing in the 1991 Decision triggers § 5123: "The key purpose of [the

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[5] Indeed, Plaintiffs' complaint asserted that "Defendants have repeatedly violated 25 U.S.C. §[5123](f) by blocking the Kialegee from jurisdiction on lands located within the Creek Reservation," App'x 84, but Plaintiffs never argued (in their complaint or at any time before their motion for reconsideration) that the 1991 Decision had been somehow voided by these amendments.

privileges-and-immunities provisions of the Indian Reorganization Act] is to 'prohibit[] disparate treatment between similarly situated recognized tribes.'" *Native Vill. of Eklutna v. U.S. Dep't of Interior*, 2021 WL 4306110, at *7 (D.D.C. Sept. 22, 2021) (quoting *Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 14, 54 (D.D.C. 2019)). Thus, those provisions require "only that Interior apply the same legal rule in the same manner, not that Interior necessarily reach the same outcome" in every case. *Id.*

Here, the 1991 Decision did not "classif[y], enhance[], or diminish[] the privileges and immunities available" to Plaintiff relative to the Muscogee (Creek) Nation, or any other tribe. 25 U.S.C. § 5123(g). Instead, it applied general legal principles that apply to all tribes (the regulations at 25 C.F.R. § 151.8), to the specific facts pertaining to Plaintiff. The decision simply recognized that, based on the evidence and existing precedent, the Muscogee (Creek) Nation, not Plaintiff, exercised jurisdiction over the Creek Reservation, and that the Bureau of Indian Affairs could not take lands within that reservation into trust for Plaintiff's benefit without the Muscogee (Creek) Nation's consent. *Kialegee Tribal Town of Okla.*, 19 IBIA at 299-300 (citing 25 C.F.R. § 151.8).[6] Thus, the district court correctly

[6] Plaintiff also devotes considerable space in its brief to disputing that a district court case, *Oklahoma v. Hobia*, also provides for issue preclusion. *See* No. 12-cv-054, 2012 WL 2995044 (N.D. Okla. July 20, 2012), *modified in part*, No. 12-cv-054, 2012 WL 3112306 (10th Cir. 20914), *opinion vacated and superseded on reh'g*, 775 F.3d 1204, 1247 (10th Cir. 2014), *and rev'd and remanded*, 775 F.3d

held that issue preclusion bars Plaintiff's argument that it has jurisdiction over the Creek Reservation.

III. The district court did not err when it dismissed Plaintiff's complaint without leave to amend.

Finally, Plaintiff's contention that its complaint should not have been dismissed without leave to amend, *see* Op. Br. at 32, is meritless. Initially, although a district court should freely grant leave to amend, Plaintiff must first *actually move* for leave to amend. "[A]bsent a motion, there is nothing to 'be freely given.'" *Belizan v. Hershon*, 434 F.3d 579, 582 (D.C. Cir. 2006). Additionally, according to D.D.C. Local Rule 15.1, "[a] motion for leave to file an amended pleading shall attach, as an exhibit, a copy of the proposed pleading as amended." D.D.C. Local Rule 15.1.

1204 (10th Cir. 2014). Plaintiffs wrongly assert that the district court relied in part on *Hobia* in its finding of preclusion. Op. Br. at 22. Because that district court decision was subsequently vacated, the district court "decline[d] to give *Hobia* issue-preclusive effect or otherwise consider the decision in the issue preclusion analysis." App'x 25. Similarly, since the 1991 Decision independently precludes Plaintiff's claims, we also do not rely on *Hobia* in this appeal. Plaintiff also argues that *Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14, 52 (D.D.C. 2019), rejected Federal Defendants' argument that the 1991 Decision does not implicate sections 5123(f) and (g). The *Koi* court found that a Department of Interior regulation that denied the Koi Nation eligibility under the Indian Gaming Regulatory Act, while granting eligibility to others similarly situated, diminished the Koi Nation's privileges and immunities guaranteed in § 5123(f), and that, in turn, the Interior regulation was invalid under the APA's arbitrary and capricious standard. *Id.* at 56. Putting aside that Plaintiff has disclaimed any intent to bring suit under the APA, the 1991 Decision—as explained above—is based on neutral legal principles and does not diminish Plaintiff's privileges and immunities compared to any *similarly situated* tribe.

Plaintiff did not comply with these requirements. Although Plaintiff made a bare request for leave to file an amended complaint in the district court in its opposition to Federal Defendants' motion to dismiss, *see* Supp. App'x 125, Plaintiff did not take the critical steps to move under Rule 15 for leave to amend. *See Belizan*, 434 F.3d at 582 ("[A] request for leave [to amend] must be submitted in the form of a written motion, as is made clear by the local rules of the district court and implied by our decision [in *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004)]."). As this Court has made clear, "a bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion within the contemplation of Rule 15(a)." *United States ex rel. Williams*, 389 F.3d at 1259 (quotation and citation omitted).

Plaintiff also did not attach a proposed amended pleading to its opposition, as required by D.D.C. Local Rule 15.1. By itself, this too was sufficient grounds to deny leave to amend. *See Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 130-31 (D.C. Cir. 2012) ("[Plaintiff's] request neither included a proposed amended complaint nor otherwise indicated that she would be able to plead sufficient facts to state a plausible claim for relief. As a result, it could hardly have been an abuse of discretion for the district court to deny leave to amend." (quotation and citation omitted)).

And although Plaintiff had brief language requesting leave to amend in its 59(e) motion, *see generally* App'x 30-44, that request was even more obviously deficient. Plaintiff again did not move under Rule 15 for leave to amend, did not provide a proposed amended pleading, and did not comply with the local rules. But more fundamentally, the district court correctly found Plaintiff did not satisfy "Rule 59(e)'s more stringent standard," which was necessary for the court to determine whether to grant leave to file an amended complaint. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Instead, Plaintiff raised new arguments that it could have raised in the motion to dismiss briefing or that merely expressed disagreement with the court's motion to dismiss order, while not engaging with the district court's ruling that Plaintiff did not plead a cognizable cause of action. *See* Supp. App'x at 124-25.

Finally, even if Plaintiff had complied with the procedural requirements for seeking leave to amend—and even if it had pled a claim under the APA—the district court made clear that amendment would be futile because of issue preclusion, as discussed above. App'x 22-28; *see also Firestone*, 76 F.3d at 1208 (stating that conditions that support denying leave to amend include "undue delay, bad faith or dilatory motive . . . repeated failure to cure deficiencies by [previous] amendments . . . [or] *futility of amendment*" (emphasis added) (quotation and citation omitted)). That conclusion was correct—as discussed above, Plaintiff does

not provide a persuasive response to the district court's preclusion analysis, let alone explain how a new complaint would cure the defect the district court identified.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ *Helia Bidad*

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/s/ *Helia Bidad*
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