Oral argument set for Tuesday, May 6, 2025

CASE NO.: 22-531

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

KIALEGEE TRIBAL TOWN,

Plaintiff/Appellant,

v.

U.S. 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-CKK (Hon. Colleen Kollar-Kotelly)

Reply Brief filed on behalf of the Kialegee Tribal Town

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Statutes

Jurisdictional Statement

The basis for this court's jurisdiction is D.C. Rule App. 3 (a)(1) appeal from a final order or judgment that disposes of all parties' claims the Noice of appeal was timely filed.

Statement of Issues

The issues presented for review are:

1. The Court below overlooked 25 U.S.C. § 476(f) and 25 U.S.C. § 476(g) and the decisions that are controlling authority, including but not limited to United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs (U.S. Dept. of Interior) (June 24, 2009).

2. Did the Court below err when it dismissed the Plaintiff's complaint for failure to state a cause of action, saying in the order of dismissal, "This is a final appealable order, without allowing a chance for KTT to amend.

3. Is KTT collaterally estopped by *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 296, 304, 1991 WL 279615.

Statement of the case

The Kialegee Tribe filed the case below because the US denied its rights and decided that it is not part of the "Whole Creek Nation of Indians," as defined in Article 4 of the Creek Treaty of February 14, 1833, that the tribe is not a

beneficiary of Article 4 of said treaty when it refers to the property of the whole Muskogee or Creek nation, and that the tribe does not exercise jurisdiction over any lands, including its own allotments.

The tribe sued below-filed Case No. 1:17-cv-01670 ("Kialegee One"), which was dismissed as not being ripe for lack of conduct by US. The lower court ruled that Kialegee "needs to allege with some specificity the actions allegedly taken by "Federal Defendants", which gave rise to Plaintiff's cause of action." In addition, Footnote 11 of the lower Court's "Memorandum Opinion" states 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. This happened and the Kialegee filed a second case ("Kialegee Two"). Thus, since the 2017 memorandum opinion required a specific action, this occurred when the application for a liquor license was denied to the Tribe, and the claim was ripe. Thus, the Kialegee Tribe brought this action before the lower court. However, the lower court, surprising the Tribe, and dismissed on totally different grounds, that the Kialegee Tribe is not a part of the Whole Creek nation of Indians or beneficiary of article 4 of the Creek Treaty of February 14, 1833, and finally, that the Kialegee did not state a cause of action below.

Summary of the arguments.

The arguments made in this appeal are that

I. The US violated 25 U.S.C.A. § 5123, against the Kialegee because it diminishes the Kialegee's rights relative to the present-day Creeks (which are not the historic Creek nation)

II. The Court below should have allowed the amendment of the Complaint and not dismissed it with prejudice.

III. Collateral estoppel cannot apply against the Kialegee when the law relied upon to collaterally estop the Kialegee tribe has been voided by Congress' amendment of §476 of the IRA to add subsections (f) and (g) ("1994 IRA Amendment").

Argument

The Kialegee Tribe filed the case below because the US denied its rights and decided that it is not part of the "Whole Creek Nation of Indians," as defined in Article 4 of the Creek Treaty of February 14, 1833, that the tribe is not a beneficiary of Article 4 of said treaty when it refers to the property of the whole Muskogee or Creek nation, and that the Kialegee Tribe does not exercise jurisdiction over any lands, including its allotments.

The tribe sued in the below-filed Case No. 1:17-cv-01670 ("Kialegee One"), which was dismissed as not being ripe due to a lack of conduct by the US. The lower court ruled that Kialegee "needs to allege with some specificity the actions allegedly taken by 'Federal Defendants', which gave rise to Plaintiff's cause of action." In addition, Footnote 11 of the lower Court's "Memorandum Opinion" states 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. The IBIA did in fact issue its decision (which was final and went against Kialegee) and so Kialegee properly filed a second case ("Kialegee Two"). In other words, in Kialegee One, there is an express invitation to file a renewed lawsuit and an acknowledgment by the government following the decision on the liquor license application. Amazingly, it took many months, and only after a Freedom of Information Act request was filed, that a decision was made on the liquor license application. Hence, the present matter ("Kialegee Two")[1] was filed.

The government argues that 25 U.S.C.A. § 5123, does not provide a right of action. Again, said statute states that the United States shall not make a decision with respect to a federally recognized Indian tribe that diminishes the privileges available to the Indian tribe relative to other recognized tribes and that any such regulation or decision shall have no force or effect. In this case, the government sites *El Paso Nat. Gas Co. v United States,* 750 F.3d 863 (DC Cir. 2014) to state that as of action because the statute itself did not display an intent to create one. Under the El Paso case, there are four factors when determining whether a statute provides an implied right of action. Two of these factors are "whether some indication exists of legislative intent, explicit or implicit, either to create or deny a private remedy" and "whether

implying a private right of action is consistent with the underlying purposes of the legislative scheme." In the present case, the Kialegee tribe falls squarely within the legislative intent that the small Kialegee tribe should not be discriminated against in favor of a larger tribe (or for any other reason). Furthermore, the statute creates an implied private remedy consistent with the purposes of the legislative scheme that one tribe should not be favored over another. § 5123 could not be clearer that the subject IBIA decision (which is prior to May 31, 1994) enhances the Muscogee (Creek) Nation's rights (hereafter the "MCN") and most certainly "diminishes" the privileges of the Kialegee tribe under that section – it outright denies them.

It is disingenuous to argue that the 1991 IBIA decision "simply recognize that the MCN, not the plaintiff, exercised jurisdiction over the Creek reservation" and that the IBIA simply recognized, as a factual matter, Plaintiff does not presently exercise jurisdiction." Uncontested historical facts render this impossible (the Second Amended Complaint and the attachments thereto are replete with such information, including treaties between Kialegee and the United States that predate those of the MCN).[2]

Somehow, the defendants continue to ignore that the Plaintiff is a successor in interest to Historic Creek Nation by stating the MCN has exclusive jurisdiction as a

matter of fact. However, the issue of exclusive jurisdiction is a question of law for the court. *U.S. v. Hart,* C.C.N.D.Fla.1908, 162 F. 192. Moreover, there is not a single decision or agency action that states that the MCN has exclusive jurisdiction. They only state that the MCN can assert jurisdiction if deemed to be applicable, but Kialegee is allowed to do the same – they did not strip the Kialegee Tribal Town of their rights as successors in interest.

For example, in Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296, 302, 1991 WL 279615, the decision is devoid of the word exclusive – the MCN has claimed that they control the reservation, but that does not make it so.

The Kialegee are being treated differently and therefore are being diminished by not being treated as a successor in interest where other similarly situated tribes are, and this is exactly why 25 USC 5123 (f) and (g) were enacted. In the present case, the Kialegee have equal rights to the MCN because they are both descendants from the historic Creek nation. Moreover, any interpretation, decision, regulation, or law that is contrary, including but not limited to the IBIA 1991 decision "shall have no force or effect."

Concerning the failure to state a cause of action, although the Kialegee stated a cause of action in Kialegee No.1, it is respectfully requested that this Court agrees

with Plaintiff that there is no issue preclusion, that this Court grant an extension of time for Plaintiff to file an amended complaint with the appropriate motions because justice requires it. Fed. R. Civ. P. 15 states that:

> **(2)** ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Nonetheless, Defendant's argument that 25 U.S.C. §5123 does not grant a private cause of action is circular. 25 U.S.C. §5123 prohibits the Defendants from any action or inaction 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." 25 U.S.C. §5123(g). Any such regulation is declared by Congress to "have no force or effect." The Kialegee is not suing under 25 U.S.C. §5123. However, the effect of 25 U.S.C. §5123 is that *Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 298 (1991) "ha[s] no force or effect" and therefore the Kialegee do state a cause of action.

Finally, as to the collateral estoppel argument, the government argues that the 1994 amendment somehow does not override the prior 1991 decision of *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 296, 304, 1991 WL 279615. This makes absolutely no sense at all. It would

be akin to stating that a state that legalizes marijuana use for medical purposes or for recreational purposes cannot do so because of their prior decisions that make it illegal.

Conclusion stating the relief sought.

The Kialegee Tribe requests that this Court reverse the lower court and rule that § 5123 controls and that the MCN, and the Kialegee exercise jurisdiction over the Creek reservation, and the there is no collateral estoppel because the law that supports issue preclusion is contrary to § 5123, and finally that the Complaint should not have been dismissed with prejudice and without leave to amend.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with Fed. R. App. P. 27(d)(2)(A) because it contains 1755 words. I further certify that the motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because I prepared it using Microsoft Word in a proportionally spaced typeface, Times New Roman 14-point. See Fed. R. App. P. 27(d)(1)(E).

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Appellate Electronic Filing system on April 9, 2025. All case participants registered as CM/ECF users will be served by the CM/ECF system.

/s/ Moises T. Grayson
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