IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FREEMANVILLE WATER SYSTEM, INC. Plaintiff, v. POARCH BAND OF CREEK INDIANS, P.C.I. GAMING, and CREEK INDIAN ENTERPRISES, Defendants.	)	CIVIL ACTION NO. 07-688-WS-M

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Plaintiff Freemanville Water System, Inc. ("FWS") objects and responds to Defendants' Motion to Dismiss on the grounds that this Court has federal question jurisdiction, that any purported immunity has been abrogated by Act of Congress or waived by Defendants, and that Defendants are not immune to suit for the declaration and injunction sought related to illegal conduct or activities on or between Defendants' lands, as alleged in the Complaint. As further response and objection to Defendants' motion, Plaintiff provides the following memorandum of law in support.

MEMORANDUM OF LAW

Factual Background

Freemanville Water System, Inc. ("FWS") is a rural water authority in Escambia County, Alabama. FWS has received federal loans for support in establishing and providing this rural

water service, and the terms of these loans remain in effect.[1] FWS serves several unincorporated rural areas in Escambia County, including the communities of Freemanville, Poarch, Martinville, and McCullough. A map of FWS's Service Area is attached as Exhibit 1, which map exhibit represents the as-built drawings and geographical map for the Freemanville Water System, Alabama. The FWS water system lines and associated infrastructure facilities currently service the entire geographic area depicted on Exhibit 1, including all of Defendants' properties and facilities within Escambia County, Alabama.

Defendants are a federally recognized Indian tribe (the "Tribe") primarily situated in Escambia County, Alabama, and the Tribe's related economic development and commercial entities are also located within Escambia County. All of the principal tribal lands at issue in this dispute, including the reservation or trust[2] lands within the neighboring Poarch and Freemanville Communities, and other non-contiguous parcels throughout Escambia County, are within FWS's service area and served by FWS.[3] Inset A on Exhibit 1 (circled and enlarged at the foot of the map) encompasses the main Poarch Creek Indian Reservation in Escambia County, Alabama, covering portions of Sections 27, 28, 33 and 34, Township 5 East, approximately one mile northwest of Interstate 65, at Exit 54.

In addition to the main reservation included within Inset A of Exhibit 1, the Poarch Creek non-trust properties are currently scattered throughout the FWS Service Area., with the Tribe's gambling operations and bingo hall located several miles away, near the intersection of Escambia County highway 21 and Interstate 65, at Exit 57, in Sections 28, 29, 32 and 33, of Township 6

[1] *See* Complaint.

[2] Trust lands are lands taken into trust by the United States Department of the Interior and managed by the Bureau of Indian Affairs for the benefit of the tribe, pursuant to the Indian Reorganization Act, § 5, 25 U.S.C. § 465; *see also* 15 CFR 151.10, 151.11.

[3] *Id*.

East.[4] The geographic separation and location of these tribal properties are also shown, without surrounding geographical context, in the American Indian Tribal Census Tract Map, attached as Exhibit 2, which map is also available from the U.S. Census Bureau.[5]

Defendants have planned and begun construction of a competing water system that will effectively overbuild the FWS system, throughout the FWS Service Area shown on Exhibit 1. Federal law prohibits curtailment of the service areas of protected water service associations, such as FWS. Plaintiff filed this action to seek a declaration of the rights of the parties and enjoin Defendants from further acts in violation of this federal law. Defendants' motion to dismiss on grounds that the Court lacks subject-matter jurisdiction and that they are immune from suit is due to be denied.[6]

I. Standard of Review

The standard for a motion to dismiss requires "accepting the factual allegations of the complaint as true and drawing all reasonable inferences in the plaintiff's favor."[7] Accepting the facts as true, this Court has federal question jurisdiction to enjoin Defendants' illegal conduct of curtailing FWS's service, and Defendants are not totally immune from this suit.

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[4] Exhibit 1.

[5] http://ftp2.census.gov/geo/maps/tribaltract2000/2865_PoarchCreek

[6] *Id*.

[7] *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004).

II. Subject-Matter Jurisdiction

This Court has federal question jurisdiction under 28 U.S.C. § 1331, and pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C § 1921, et seq. (the "Act"), and specifically 7 U.S.C. § 1926(b) (the "anti-curtailment provision"). The Act expressly prohibits curtailment or limitation of water service provided by a rural water authority, such as FWS, during repayment of a loan it receives from the United States of America (USA) under a program created by the Act. The complaint seeks enforcement of this federal law.[8] Federal courts have routinely upheld the Act and enforced its anti-curtailment provisions against all attacks,[9] and Defendants' sovereign immunity defense should fail. Defendants' Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction should, therefore, be denied.

III. Defendants are not immune from suit to enforce the act.

Indian tribal immunity is not absolute.[10] Tribal immunity was created by courts but may be – and has been – abrogated by Congress.[11] Tribal immunity was created almost by accident.[12] And "Congress . . . need not make its intent to abrogate 'unmistakably clear' in a single section

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[8] *See* Complaint ¶ 16.

[9] *See*, *e.g.*, *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996), *cert. denied*, 519 U.S. 1029 (1996) (upholding injunction under the Act); *College Station v. USDA*, 395 F. Supp. 2d 495 (S.D. Tex. 2005) (same).

[10] *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).

[11] *United States v. USF&G*, 309 U.S. 506 (1940) (Indian tribes are dependent quasi-sovereign nations that can't be sued without Congressional consent).

[12] *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 764-66 (1998) (Stevens, J., dissenting).

or in statutory provisions enacted at the same time."[13] In part to ensure that these federal loans can be repaid, the statute includes an anti-curtailment provision:

> The service provided or made available through any such association *shall not be curtailed or limited* by inclusion of the area served by such association within the boundaries of *any municipal corporation or other public body*, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.[14]

Defendants plan to curtail or limit FWS's service, and any of their quasi-sovereign immunity has been either abrogated by federal statute or waived by the Tribe.

A. The Act expressly abrogates tribal immunity.[15] Congress expressly abrogated any relevant immunity an Indian tribe may have had by specifically including Indian tribes within the definition of beneficiaries as municipal corporations or other public bodies subject to the anti-curtailment provision, requiring tribal compliance with the Act.[16] The anti-curtailment provision expressly prohibits any "municipal corporation or other public body" from curtailing or limiting the service provided under this federal loan program during the term of the loan. Each Defendant is a "municipal corporation or public body," as this loan program specifically

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[13] *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000) (determining whether ADEA abrogated State immunity), quoted in *Krystal Energy*, 357 F.3d at 1058; *see also Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174, 1181-82 (10th Cir.1999), *cert. denied*, 530 U.S. 1229 (2000) (holding that the Safe Drinking Water Act "contains a clear and explicit waiver of tribal immunity" despite the fact that the court had to piece together various subsections of the statute to arrive at that conclusion).

[14] 7 U.S.C. § 1926(b) (emphasis added).

[15] *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989); *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 148 (D.C. Cir. 1996); *Osage Tribal Council v. United States Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000).

[16] *Id*.

provides funding for Indian tribes and defines "public body" or "public bodies" throughout the statutory framework for this program to include Indian tribes.[17] Further, the Act, and related federal loan and grant programs, benefits

> associations, including corporations not operated for profit, *Indian tribes* on Federal and State reservations and another federally recognized *Indian tribes*, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes.[18]

For the Indian tribes to participate and benefit as entities, tribal corporations or other public body, Congress expressly, albeit narrowly, limited Indian tribes' quasi-sovereign immunity. Since Indian tribes are expressly included within the loan program and protected by the anti-curtailment provision, Congress expressed its clear intent that Indian tribes may participate in the loan program as public bodies or municipalities, and must comply with its restrictions. Indian tribes' immunity, therefore, is abrogated by the Act to prevent curtailment of all beneficiaries, including the Indian tribes.

Other federal statutes have been interpreted similarly. Courts have found abrogation of tribal sovereign immunity in cases where Congress has included "Indian tribes" in definitions of

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[17] *See*, *e.g.*, 7 U.S.C. § 1926(a)(13) ("In the making of loans . . . the Secretary shall accord highest priority to the application of any municipality or other public agency (including an Indian tribe . . ."); § 1927(a)(3)(A) (regarding interest rates on loans . . . to public bodies or agencies (including Indian tribes . . ."); § 1992 ("No loan (other than one to a public body or nonprofit association (including Indian tribes . . .))").

[18] *See* 7 U.S.C. § 1926(a)(1) (2007) (emphasis added).

parties who may be sued under specific statutes.[19] For example, under the federal solid waste program within RCRA, 42 U.S.C. § 6903(31), Indian tribes are also eligible for federal funds as municipalities.[20]

> The term "municipality" (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, *or an Indian tribe or authorized tribal organization* or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.
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> 42 U.S.C. § 6903(13). As "municipalities," Indian tribes are eligible for federal funding to develop solid waste management and resource recovery programs, 42 U.S.C. § 6948, and are also subject to citizen suits to enforce the revised criteria. 42 U.S.C. § 6972; *see Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d 1094, 1097 (8th Cir.1989) (since citizen suits may be brought against any "person" alleged to be in violation of RCRA, and municipalities are "persons" under the statute, Indian tribes are subject to citizen suits).[21]

In *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), the Eighth Circuit further explained how that statute expressly abrogated this quasi immunity:

> Over the course of the last two centuries Indian tribes have evolved into dependent associations with limited powers of self-government. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-57, 98 S.Ct. 1670, 1675-76, 56 L.Ed.2d 106 (1978). Where Congress clearly indicates that Indian tribes are subject to a given law, no tribal sovereignty exists to bar the reach or enforcement of that law. *Id.* at 58-59, 98 S.Ct. at 1677; *United States v. United States Fidelity and Guar. Co.,* 309 U.S. 506, 512-13, 60 S.Ct. 653, 656-57, 84 L.Ed. 894 (1940); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 94 (8th Cir.1956).
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[19] *See infra*.

[20] *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 148 (D.C. Cir. 1996) ("[RCRA] defines Indian tribes as municipalities, not states.").

[21] *Id.* at 149 (emphasis added).

> Congress also decided to regulate the disposal of discarded materials on reservations. Under the RCRA, citizens are permitted to bring compliance suits "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency * * *) who is alleged to be in violation * * *." 42 U.S.C. § 6972(a)(1)(A). "Person" is subsequently defined to include municipalities. 42 U.S.C. § 6903(15). Municipalities include "an Indian tribe or authorized tribal organization * * *." 42 U.S.C. § 6903(13)(A). *See also* House Report, *supra* note 1, at 37, USCAN 6275 (specific examples of harm to be avoided, including Indian children playing in dumps on reservations); *State of Washington Dep't of Ecology v. E.P.A.,* 752 F.2d 1465, 1469-71 (1985) (RCRA applies to Indian tribes). It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.[22]

Courts have followed the same analysis in finding Congress' clear, express, unequivocal intent to abrogate tribal immunity in the Clean Water Act[23] and the Safe Drinking Water Act.[24] Just as the courts found Congressional abrogation of sovereign immunity under these other statutes, Congress has also abrogated tribal immunity under the Act, especially by its anti-curtailment provision.[25] Indian tribes are expressly subject to the Act, just as the court found under RCRA. Again, the express Congressional abrogation does not have to come from a single section of the statute but may be deduced by syllogism, which the court did in *Blue Legs*. The Tenth Circuit

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[22] *Blue Legs,* 867 F.2d at 1096-1097 (footnote omitted) (also concluding that "exhaustion of tribal remedies" was not required); *accord Washington Dept. of Ecology v. United States EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).

[23] *National Resource Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1301 (9th Cir. 1991) (Clean Water Act, 33 U.S.C. § 1362(4), defines Indian tribes as municipalities); *Ohio Pub. Interest Research Group v. Laidlaw Env. Svcs., Inc.*, 963 F. Supp. 635, 638 (S.D. Ohio 1996) (same); *accord Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*, 827 F. Supp. 608 (D. Ariz. 1993).

[24] *Osage Tribal Council*, 187 F.3d at 1181 (concluding that the "express language of the Act abrogated any tribal immunity based on its finding that the definitional sections of SDWA define the term "person" to include a "municipality," which is defined to include "an Indian tribe."

followed the Supreme Court's Eleventh Amendment decisions to note that these "definitional inclusions [are] sufficiently explicit waiver of immunity," rejecting arguments that "such definitional exercises can never constitute the explicit waiver of immunity required under *Santa Clara*."[26] Congress could be more clear, but it's clear enough:

> We hold that where Congress grants an agency jurisdiction over all "persons," defines "persons" to include "municipality," and in turn defines "municipality," to include "Indian Tribe[s]," in establishing a uniform national scheme of regulation of so universal a subject as drinking water, it has unequivocally waived tribal immunity. We note that Congress *could* have been more clear. Congress could have included a provision directly stating its intent to waive tribal immunity. However, "that degree of explicitness is not required." *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir.1990) (noting Congress need not state in "so many words" its intent to abrogate state sovereign immunity). Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the *Santa Clara* requirement than that Congress unequivocally state its intent. Indian tribes were intended to benefit and be protected by the Act and are, therefore, bound by the Act's restrictions or limitations, including the anti-curtailment provision.[27]

The Tribe's court's self-serving opinion in *Powell v. Tallapoosa Entertainment Center*, 2007 WL 439057 (Creek Tribal Court Feb. 2, 2007), which Defendants cite in support of this motion, simply has no persuasive value.

B. Defendants have waived any alleged immunity by their conduct and contract with the United States of America (USA) accepting loan funding under a similar federal loan program. Indian tribes may waive their sovereign immunity.[28] In or around 1987, Defendants applied for

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[25] Congressional abrogation of immunity has been determined under numerous other statutes, such as the Federal Hazardous Materials Transportation Act, *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993).

[26] *Osage Tribal Council*, 187 F.3d at 1181-82 (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978)).

[27] *Osage*, 187 F.3d at 1182.

[28] *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

and received a federal grant from USA through the Department of Housing and Urban Development ("HUD") for construction of a housing and subdivision project. News accounts of this grant are included with and a copy of the 1987 Preliminary Engineering Report of Neal Gibson & Associates, Inc., Construction Surveyors and Engineers, attached as Exhibit 3. Along with the federal HUD grant for construction of the tribal housing project, FWS obtained the FmHA loans described above to provide expanded water service to the area, including Defendants' new housing and subdivision project. The area to be served plainly includes tribal lands, both trust and non-trust properties.[29] FWS has obtained multiple FmHA loans to, in part, provide water for the Tribe. The Tribe's grant included an elevated water storage tank, situated within FWS's service area for the expected benefit of FWS to provide the Tribe's water needs from FWS's water supply well and treatment facility.[30] The Tribe can and has benefited from the Act, in conjunction with FWS. The facilities proposed for by FWS in applying for this 1987 loan were based on expected growth of tribal housing, and the added facilities from both parties were meant to be mutually beneficial. The Tribe's growth was part of the basis for FWS's growth plan to enable it to re-pay these loans.[31] In applying for this grant from the federal government, through HUD, Defendants were necessarily expected to cooperate with FWS in order to complete the FWS project, also funded by HUD, which would service the tribal projects. USA's grant through HUD expected and required this cooperation with FWS to ensure water service for that project, which was constructed over a large geographic area, both on and off of reservation or trust property. The engineering study as to the project's feasibility focused on the cost and revenues from the system expansion, and concluded and recommended to FWS and Farmers

[29] Exhibit 3, p. 1.
[30] Exhibit 3, p. 4.
[31] Exhibit 3, pp. 3-6.

Home Administration that FWS could re-pay this loan based on this understanding that "Freemanville Water System, Inc., in conjunction with the Poarch Band of Creek Indians can only benefit financially, as well as providing better water service to the existing and new customers."[32] This report, Exhibit 3, plainly shows the relationship and cooperation represented between or among these parties for the Tribe to receive its grant and FWS to obtain its loans.

By extending the promises and commitments necessary to receive and accept this federal grant and the innumerable community benefits flowing from the grant funds and FWS's water system expansion, Defendants waived their immunity with respect to this water service provided by FWS and the Act's corollary anti-curtailment protections.

C. Defendants are not immune from injunctions for illegal conduct beyond reservation or trust property. Indian tribes are not immune from suit for acts occurring off of their reservation or trust property that violate federal or state laws.[33] "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state."[34] In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and other cases cited there by the Supreme Court, it has been held that a state could enforce its laws on an Indian tribe, even for conduct on trust property. This doctrine is analogous to the present situation where Defendants are violating federal law on land that is not their property, and any protection by immunity that a tribe may

[32] Exhibit 3, p. 8.

[33] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (accepting jurisdiction over Indians' illegal salmon fishing did not violate alleged tribal immunity). As explained above, Defendants and Congress have expressly waived and abrogated any sovereign immunity for the alleged conduct or activities on this reservation, trust property, or other lands owned by the Defendants. Plaintiff does not concede that Defendants are immune from suit for any alleged conduct or activities.

[34] *Mescalero*, 411 U.S. at 148-49.

have should not extend beyond the trust property. Simply stated, Indian tribes' quasi-sovereign immunity, as far as land use purposes or trespass, does not go beyond tribal lands.

Defendants have one contiguous parcel of their property, some or all of which is trust property, and parcels of land throughout Escambia County, Alabama, some or all of which are not trust property. If Defendants attempt to construct facilities and infrastructure between their non-contiguous properties, necessarily using the public rights-of-way of Escambia County, Alabama, this activity will require prohibited conduct or activity on or through non-trust land and non-tribal land, both public and private, which will curtail FWS's water system. Assuming, *arguendo*, that an Indian tribe's sovereignty somehow permits curtailment, in contravention of the statute, such infringements on the FWS Service Area should only be allowable within the boundaries of tribal trust property.

Defendants' arguments that this Court can't enjoin Defendants' activities are logically disingenuous. Suppose one of the defendants decided that it wanted to cut a 3-mile road between the Tribe's reservation trust property, and a non-contiguous parcel of tribal land miles away, and the Tribe's bulldozer was poised to cut the road? Would this Court or any court stand powerless to stop the bulldozer, just because this equipment is controlled by an Indian tribe? No.[35] Defendants are positioning themselves, by their acts both on and off of their property, to violate federal law, seriously impair FWS's ability to repay its federally guaranteed loans and serve the rest of its service area, and damage the federal government and FWS, which defeats the purpose of this federal loan program and the anti-curtailment provision. It's unnecessary, damaging and illogical to refuse jurisdiction over Defendants' conduct or activities beyond its trust property for this violation of federal law.

[35] *Mescalero*, 411 U.S. at 148-49.

Notwithstanding Defendants' attempt to take the federal grant and then ignore federal limitations for its acceptance, which is essentially a breach of its obligations promised to the government for receipt of this grant, this is not strictly a breach of contract action where a plaintiff is seeking damages from the tribe's treasury, distinguishing this action from *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), a case upon which Defendants rely heavily. In *Kiowa*, a plaintiff was seeking judgment on a promissory note, seeking monetary damages from the tribe.[36] While a slim majority of that court found the tribe immune, Justice Stevens' dissent is highly persuasive under the present distinguishing facts, where this action seeks, in part, to enjoin activity completely removed from the reservation and the Tribe's treasury. Defendants' reliance on *Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999), is misplaced, as that case is clearly distinguished by its analysis of the broad Americans with Disabilities Act (ADA) rather than a clear, narrow right granted protection by this anti-curtailment provision. This is not akin to a claim under § 1983[37] or ADA, which never even mentions Indian tribes, where tribal decisions are being questioned. These are exactly the circumstances that the Supreme Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973),[38] envisioned to judicially limit the overreaching claims of immunity that Indian tribes so boldly claim.

WHEREFORE, Plaintiff Freemanville Water System, Inc. respectfully requests that Defendants' Motion to Dismiss be denied.

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[36] *Kiowa*, 523 U.S. at 753-54.

[37] *See generally Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (refusing to allow an Indian tribe to use § 1983 for its own suit).

[38] *See also Kiowa*, 523 U.S. at 760-66 (Stevens, dissenting) (raising doubts about the viability or logic behind Indian tribes' immunity, especially for acts off of tribal lands).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 6, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing, or by United States mail, first class postage prepaid as follows:

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