

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

**FREEMANVILLE WATER SYSTEM,  
INC.,**

**Plaintiff,**

V.

**POARCH BAND OF CREEK INDIANS, et  
al.,**

**Defendants.**

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**CIVIL ACTION NO.**  
**07-0688-WS-M**

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendants the Poarch Band of Creek Indians, P.C.I. Gaming Authority (f/k/a P.C.I. Gaming) and Creek Indian Enterprises Development Authority (f/k/a Creek Indian Enterprises) (collectively Poarch Band of Creek Indians)<sup>1</sup> submit this memorandum brief in support of their contemporaneously filed motion to dismiss.

## I. INTRODUCTION

Plaintiff filed its complaint against the Poarch Band of Creek Indians, P.C.I. Gaming Authority, and Creek Indian Enterprises Development Authority purporting to invoke this Court's federal question subject matter jurisdiction. Plaintiff's two count complaint alleges the Poarch Band of Creek Indians have acted or will act in violation of 7 U.S.C. § 1926(b) of the Consolidated Farm and Rural Development Act. Plaintiff alleges the Poarch Band of Creek Indians planned construction of a water system will curtail or limit Plaintiff's water service. Because this Court lacks subject matter jurisdiction and Plaintiff has therefore failed to state a

<sup>1</sup> The defendant P.C.I. Gaming Authority is an unincorporated instrumentality and integral part of the Poarch Band of Creek Indians, and Creek Indian Enterprises Development Authority is a political subdivision of the Poarch Band of Creek Indians. Both are wholly owned by the Tribe.

claim upon which relief may be granted, as the following discussion explains, the complaint must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure:

## II. DISCUSSION

Tribal sovereign immunity is well-settled. “Indian tribes retain their original natural rights which vested in them, as sovereign entities, long before the genesis of the United States.” *Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (quotation omitted). This sovereign immunity bars actions – whether for monetary damages or equitable remedies – against Indian tribes. *Id.* (holding tribe was immune from suit seeking injunctive relief to compel tribe to conform a facility to the requirements of the Americans With Disabilities Act). While not absolute, immunity precludes suits against Indian tribes unless the tribe has consented to be sued, the tribe has waived its immunity, or Congress has clearly abrogated its immunity. *See, e.g. Kiowa Tribe v. Mfg Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702-03 (1998).

The Poarch Band of Creek Indians has not consented to suit and has not waived its immunity. In fact, the Poarch Band of Creek Indians has adopted a Tribal Constitution and a Tribal Code specifically reserving sovereign immunity. *Powell v. Tallapoosa Entertainment Center*, No. 06-55, 2007 WL 439057, at \*1 (Poarch Band of Creek Indian Tribal Court February 2, 2007). Moreover, the immunity extends to tribe-run business enterprises. *See Miccosukee Tribe of Indians of Florida*, 166 F.3d at 1129-35. The defendant P.C.I. Gaming Authority is an unincorporated instrumentality and integral part of the Poarch Band of Creek Indians, and Creek Indian Enterprises Development Authority is a political subdivision of the Poarch Band of Creek Indians. Both are wholly owned by the Tribe. These enterprises are for the benefit of the tribe and are, therefore, instrumentalities of the tribe, which enjoy tribal immunity.

Similarly, Congress has not abrogated the Poarch Band of Creek Indians's immunity from suit with the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, *et seq.*, and particularly not under § 1926(b) under which Plaintiff purports to bring its claims. Congressional abrogation of Indian tribunal sovereignty "cannot be implied but must be unequivocally expressed. . . [Congress must] mak[e] its intention unmistakably clear in the language of the statute." *Florida Paralegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999) (quotations and citations omitted). There is no language in 7 U.S.C. § 1921, *et seq.*, and particularly not in § 1926 regarding tribal sovereign immunity. Accordingly, Congress did not express an unequivocal intent, or any intent, to waive tribal immunity under the 7 U.S.C. § 1926(b) of the Consolidated Farm and Rural Development Act.

### III. CONCLUSION

Based upon the foregoing, the Poarch Band of Creek Indians's sovereign immunity bars all of Plaintiff's claims against it. For this reason, these claims must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted this 23rd day of October, 2007.

/s/ Robin G. Laurie

One of the Attorneys for Poarch Band of Creek  
Indians

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**CERTIFICATE OF SERVICE**

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing and/or that a copy of the foregoing has been served upon the following by placing a copy of same in the United States mail, properly addressed and postage prepaid, on this 23rd day of October, 2007:

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