IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO. 08-10602-BB

FREEMANVILLE WATER SYSTEM, INC.

Plaintiff-Appellant

v.

POARCH BAND OF CREEK INDIANS, P.C.I GAMING, AND CREEK INDIAN ENTERPRISES

Defendants-Appellees

On Appeal From The United States District Court
For The Southern District Of Alabama
Southern Division

BRIEF OF PLAINTIFF-APPELLANT
Freemanville Water System, Inc.

H. WILLIAM WASDEN
THOMAS M. WOOD
BURR & FORMAN LLP
POST OFFICE BOX 16046
MOBILE, ALABAMA 36616
(251) 344-5151
(251) 344-9696 (fax)
Attorneys for Plaintiff-Appellant
Email: Bill.Wasden@burr.com
Tom.Wood@burr.com

March 24, 2008

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FREEMANVILLE WATER SYSTEM, INC.,	)	
Plaintiff-Appellant,	)	
v.	)	**Docket No: 08-10602-B**
POARCH BAND OF CREEK INDIANS, P.C.I. GAMING AND CREEK INDIAN ENTERPRISES,	)	
Defendants-Appellees.	)	

Certificate of Interested Parties and
Corporate Disclosure Statement

Counsel for the appellant Freemanville Water System, Inc. certifies the following:

1. The District Judge:

   Judge William H. Steele

2. Appellant:

   Freemanville Water System, Inc.

3. Appellant's Counsel:

   H. William Wasden; Thomas M. Wood; Burr & Forman, LLP

4. Appellees:

Poarch Band of Creek Indians; P.C.I. Gaming; Creek Indian Enterprises

5. Appellees' Counsel:

Robin G. Laurie

Kelly F. Pate

Balch & Bingham

BURR & FORMAN LLP
Post Office Box 16046
Mobile, Alabama 36616
(251) 344-5151

By: */s/ H. William Wasden*
H. William Wasden

Statement regarding Oral Argument

Appellant requests oral argument because the specific issue raised in this appeal is one of first impression. Appellant believes oral argument would be beneficial to the resolution of this appeal, and further demonstrate that the adverse decision of the trial court is due to be reversed.

Certificate of Compliance

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,959 words.

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman 14 point type.

Table of Contents

Page

Certificate of Interested Persons and Corporate Disclosure Statement C-1

Statement Regarding Oral Argument C-3

Certificate of Compliance C-3

Table of Citations C-5

Statement of Jurisdiction C-8

Statement of the Issues C-8

Statement of the Case C-9

Summary of the Argument C-13

Argument 1

I. The Tribe is not immune from suit under 7 U.S.C. § 1926(b) 1

A. Introduction and Background of the Statute 1

B. The Tribe is expressly subject to the Act, including the anti-curtailment provisions 2

C. Section 1926(b) should not be construed separately from the remainder of the statute 5

D. Tribal Immunity was abrogated under the Act to the extent necessary to enforce the protections of Section 1926(b) 7

II. Conclusion 14

Certificate of Service 15

Table of Citations

Cases

Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996).....11

Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir.1989) 8, 10, 11, 12

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 112 S.Ct. 1146 117 L.Ed.2d 391 (1992).....5, 6

Edwards v. Valdez, 789 F.2d 1477 (10th Cir.1986) 6

Florida Paraplegic Association v. Miccosukee Tribe, 166 F.3d 1126 (11th Cir.1999) 7

Florida v. Seminole Tribe, 181 F.3d 1237 (11th Cir.1999).....7

Glenpool Utility Services Authority v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211 (10th Cir. 1988) citing *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1059 (5th Cir. 1987).....2, 4

In re Griffith, 206 F.3d 1389 (11th Cir. 2000), citing *Moskal v. United States,* 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990) (quoting *Richards v. United States,* 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962)) 5, 6

Jennings Water, Inc. v. City of North Vernon, Ind., 682 F.Supp. 421 (S.D.Ind.1988) 2

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).....9

Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998).....9

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

Natural Resource Defense Council, Inc. v. EPA, 966 F.2d 1292 (9th Cir. 1991).....12

NLRB v. Bildisco & Bildisco, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984), superseded by statute on other grounds, 11 U.S.C. § 1113 (1984).....6

Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir.1993).....8, 12

Osage Tribal Council v. United States Dep't of Labor, 187 F.3d 1174 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000).....13

Public Service Co. v. Shoshone-Bannock Tribes, 30 F.3d 1203 (9th Cir.1994).....8

Rural Water Dist. No. 3 v. Owasso Utils. Auth., 530 F.Supp. 818 (N.D.Okla.1979).....2

United States v. USF&G, 309 U.S. 506 (1940).....9

Washington Dept. of Ecology v. United States EPA, 752 F.2d 1465 (9th Cir. 1985).....11

Wilson v. Stocker, 819 F.2d 943 (10th Cir.1987).....6

Statutes

7 U.S.C. § 1921.....1

7 U.S.C. § 1926(a)(1).....1, 3

7 U.S.C. § 1926(a)(13).....3

7 U.S.C. § 1926(b).....1, 4

7 U.S.C. § 1926(c).....3

Other Authorities

Resource Conservation and Recovery Act of 1976 § 6903(13), (15).....8

Statement of Jurisdiction

The jurisdiction in the District Court below was pursuant to 28 U.S.C. § 1331, and 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").

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the final decision of the district court dismissing this case on the basis of the Poarch Band of Creek Indians' sovereign immunity and on the basis that the Tribe was not subject to the anti-curtailment provisions of 7 U.S.C. § 1926(b).

Statement of the Issues

Whether the Poarch Band of Creek Indians is subject to the Anti-Curtailment provisions of 7 U.S.C. 1926(b) such that its tribal sovereign immunity has been abrogated for off-reservation conduct that is violative of said section?

Statement of the Case

A. Course of Proceedings and Disposition in the Court Below

This case is an appeal of an order dismissing the complaint of the Freemanville Water System, Inc., ("FWS") against the Poarch Band of Creek Indians, and two affiliated entities, P.C.I. Gaming and Creek Indian Enterprises (collectively, "the Tribe"). FWS filed its complaint on September 28, 2007 [Doc. 1] alleging that the Tribe was violating the provisions of 7 U.S.C. 1926(b) by infringing on the geographical service area of FWS.

The Tribe responded on October 23, 2007 with a motion to dismiss under Rule 12(b)(1) on the grounds of tribal sovereign immunity [Doc. 13].

On January 7, 2008, the District Court granted the Tribe's motion to dismiss based on tribal sovereign immunity, specifically holding that the Tribe was not subject to the anti-curtailment provisions of 7 U.S.C. § 1926(b). [Doc. 19]

FWS' Notice of Appeal was filed on February 1, 2008, or within the 30 days required for such filing under Rule 4 of the Federal Rules of Appellate Procedure. [Doc. 21]

B. Statement of Facts

Appellant FWS is a rural water authority in Escambia County, Alabama, which has received federal loans in order to establish and provide water service to the rural residents of the unincorporated community of Freemanville, Alabama,

and the terms of these loans remain in effect. [Complaint, Doc. 1, para. 5-13]. In addition to Freemanville, FWS serves several other unincorporated rural areas in Escambia County, including the communities Poarch, Martinville, and McCullough. A map of FWS's Service Area shows the as-built system and geographical map for the Freemanville Water System, Alabama. [Doc 16, Exhibit 1] The FWS water system lines and associated infrastructure facilities currently serves the entire geographic area depicted in the map [Doc 16, Exhibit 1], which area also encompasses all of the Tribe's properties and facilities within Escambia County, Alabama.

Appellee Poarch Band of Creek Indians is a federally recognized Indian tribe (the "Tribe") primarily situated in Escambia County, Alabama, doing business through related economic development and commercial entities also named as defendants before the District Court and appellees in this appeal[1] (collectively, all referenced as "the Tribe"). 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. Insert A on

[1] P.C.I. Gaming and Creek Indian Enterprises (Doc. 17, Ex. 1)

[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

Doc. 16, 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 Doc. 16, Exhibit 1, the Poarch Creek non-trust properties are currently scattered throughout the FWS Service Area., with Poarch'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 East. [Doc. 16, Exhibit 1] The geographic separation and location of these tribal properties are also shown, without surrounding geographical context, in the American Indian Tribal Census Tract Map, Doc. 17, Exhibit 2, which map is also available from the U.S. Census Bureau.[3]

The Tribe has planned and begun construction of a water distribution system that will effectively overbuild the FWS system, throughout the FWS Service Area shown on Exhibit 1 to Doc. 16, servicing customers now being served by FWS.

---

tribe, pursuant to the Indian Reorganization Act, § 5, 25 U.S.C. § 465; *see also* 15 CFR 151.10, 151.11.

[3] *See* http://ftp2.census.gov/geo/maps/tribaltract2000/2865_PoarchCreek

C. Standard of Review

This Court's review of the district court's decision is *de novo.* ("[w]e review *de novo* a district court's grant of a motion to dismiss, taking as true the facts as alleged." *Doe v. Pryor*, 344 F.3d 1282, 1284 (11th Cir. 2003). 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." *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004).

Summary of the Argument

As an expressly designated eligible borrower under 7 U.S.C. § 1926(a)(1), and a current federal debtor as of the date of this action, Freemanville Water System is a protected party under 7 U.S.C. § 1926(b) and has a right to be free from infringement on its geographical service areas lying outside the reservation or trust properties of the Poarch Band of Creek Indians.

The Poarch Band of Creek Indians, a federally recognized Indian tribe, is also an expressly designated eligible borrower under 7 U.S.C. § 1926(a)(1) and is expressly included as a "public agency" for purposes of the statute, and is expressly subject to the provisions of 7 U.S.C. § 1926(b) as "public bodies" subject to the Act's anti-curtailment provisions prohibiting infringement on the service area of water authorities with debt obligations under the Act guaranteed by revenues earned within such service areas.

The Tribe's common law immunity from suit was abrogated to the extent that its off-reservation conduct is violative of 7 U.S.C. § 1926(b) and the Freemanville Water system has a right of action cognizable in the United States District Court to enforce its federally guaranteed rights. The decision of the District Court is due to be reversed.

Argument

I. The Tribe is not immune from suit under 7 U.S.C. § 1926(b)

A. Introduction and Background of the Statute

The Consolidated Farm and Rural Development Act ("the Act"), 7 U.S.C. § 1921, *et seq.,* provides for the making and insuring of "loans to associations, including corporations not operated for profit, *Indian tribes on Federal and State reservations*" for a wide variety of rural community development projects, including "the conservation, development, use, and control of water." *Id.,* §1926(a)(1). 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.

7 U.S.C. § 1926(b) (emphasis added).

Section 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional

permit requirements, or similar means." *Glenpool Utility Services Authority v. Creek County Rural Water Dist. No. 2,* 861 F.2d 1211 (10th Cir. 1988) citing *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1059 (5th Cir.1987).

In addition, courts have recognized that in order to achieve its federally mandated purpose, the statute should be applied broadly to protect rural water associations from competition. *Jennings Water, Inc. v. City of North Vernon, Ind.,* 682 F.Supp. 421, 425 (S.D.Ind.1988). ("[S]tatute ... should be applied broadly to protect rural water associations indebted to the FmHA from competition…); see also *Rural Water Dist. No. 3 v. Owasso Utils. Auth.,* 530 F.Supp. 818, 824 (N.D.Okla.1979) (statute prohibits adjoining governments' exercise of their powers to sell water "when their exercise would result in competition with a Rural Water District").

B. The Tribe is expressly subject to the Act, including the anti-curtailment provisions.

Congress specifically included Indian tribes within the coverage of the Act, within the initial descriptive term "associations" as set forth in the introductory general statement of those parties entitled to benefits under the Act:

> [T]he Secretary is also authorized to make or insure loans to *associations*, including corporations not operated for profit, *Indian tribes on Federal and State reservations and other 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.

7 U.S.C. § 1926(a)(1) (2007) (emphasis added)

Also included within the Act's initial coverage section 1926(a) is the following mandate:

> [I]n the making of loans and grants for community waste disposal and water facilities under paragraphs (1) and (2) of this subsection the Secretary shall accord highest priority to the application of *any municipality or other public agency (including an Indian tribe on a Federal or State reservation or other federally recognized Indian tribal group)* in a rural community

Id., § 1926(a)(13) (emphasis added)

Specific lending and granting authority for water supply facilities is found in section 1926(c):

> The Secretary shall make or insure loans and make grants to rural water supply corporations, cooperatives, or similar entities, *Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public agencies,* to provide for the conservation, development, use, and control of water …

Id., § 1926(c) (emphasis added).

Situated squarely between sections 1926(a) and 1926(c) above is the anti-curtailment provision of section 1926(b) declaring that "[t]he 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*…"

On its face, the statute expresses the clear intent of Congress that indebted rural associations receive protection from curtailment or limitation by encroaching public bodies. Section 1926(b) "sets forth both the mechanism for making the loans and the conditions that are to accompany them. The conditions of section 1926(b), moreover, serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Glenpool Utility Services Authority*, supra, at 1215.

Equally clear from the context of the statute is that federally recognized Indian tribes are considered public agencies under the statute such that such tribes logically would be subject to the provisions of section 1926(b).

C. Section 1926(b) Should Not Be Construed Separately from the Remainder of the Statute.

While acknowledging the inclusion of federally recognized Indian tribes within the language of the Act, before and after section 1926(b), with the tribes specifically included as a "public agency," the district court concluded section 1926(b) was still "ambiguous" as to whether Indian tribes were to be included within the definition of "public body." The court discounted the repetitive recitation of tribes as public agencies or similar entities, explaining only that "those definitions do not purport to *bleed over* to Section 1926(b)." Doc. 19, *at* 3. (emphasis added)

When interpreting the language of a statute, this Court has followed the maxim that "[t]he 'words used' (shall be given) their 'ordinary meaning.' " *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000), citing *Moskal v. United States,* 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990) (quoting *Richards v. United States,* 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962)). Canons of construction "are no more than rules of thumb that help courts determine the meaning of legislation." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992). Among these canons of construction are the principles "that Congress is presumed to be aware of judicial interpretations of a statute," *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 524, 104 S.Ct. 1188, 1195, 79 L.Ed.2d 482 (1984), superseded by statute on other grounds,

11 U.S.C. § 1113 (1984), that "courts should disfavor interpretations of statutes that render language superfluous," *Connecticut Nat'l Bank,* 503 U.S. at 253, 112 S.Ct. at 1149.

"Interpretation of a statute begins 'with the language of the statute itself.' As a general rule, if the language of the statute is plain, then our interpretative function ceases and we should 'enforce [the statute] according to its terms.' " *Griffith, supra* at 1328 (*en banc*) (*quoting United States v. Ron Pair Enters*., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (internal citations omitted)). In construing a statute, a court must begin with the statutory language itself. *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir.1987). When, as in this case, the statute is unambiguous and free of irrational result, that language controls. *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir.1986).

By carving out Section 1926(b) from the remainder of the statute, and construing the anti-curtailment provision without the applicable context of the entire statute, the district court is <u>not</u> construing the statute as a whole so as to effectuate its intended purpose. Furthermore the district court's interpretation of the statute leads to the distinctly anomalous result whereby one federally protected water authority is allowed to encroach upon another in direct violation of the statute. It is a rather remarkable proposition that an Indian tribe can be a "public agency" entity for the purposes of one part of a federal statute, yet be excluded

from the definition of a "public body" in the same statute. The district court's conclusion that an Indian tribe isn't to be considered a "public body" within the language of Section 1926(b) is in conflict with this Court's stated principles of statutory construction.

D. Tribal Immunity Was Abrogated under the Act to the Extent Necessary to Enforce the Protections of Section 1926(b).

The district court relied in part on two prior decisions of this Court addressing tribal sovereign immunity of federally recognized tribes, *Florida v. Seminole Tribe,* 181 F.3d 1237, 1242 & n. 7 (11th Cir.1999) and *Florida Paraplegic Association v. Miccosukee Tribe,* 166 F.3d 1126, 1131 (11th Cir.1999) Both decisions dealt with on-reservation activities, with the *Seminole* opinion arising from alleged gaming violations, and the *Miccosukee* case dealing with alleged disabled access issues at reservations gaming facilities. The district court quoted the *Miccosukee* opinion as follows:

> [E]ven if an Indian tribe constitutes a public body under Section 1926(b), that establishes at most that a tribe is obligated to comply with its anti-curtailment provision; it does not suggest that a tribe may be sued for violation of the provision. On the contrary, "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions."

Doc. 19 at 3.

In the *Miccosukee* decision, this Court recognized three different occasions where its sister circuit courts of appeal had found the language of particular statutes had manifested Congress's intent to abrogate tribal immunity: See *Public Service Co. v. Shoshone-Bannock Tribes,* 30 F.3d 1203 (9th Cir.1994); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir.1993), and *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir.1989).

In *Blue Legs*, supra, the Eighth Circuit was presented with claims against an Indian tribe arising under the Resource Conservation and Recovery Act of 1976 ("RCRA"), aimed at remedying pollution caused by improper disposal of hazardous and solid waste. Within RCRA, the definition of "person" includes a "municipality," which in turn encompasses "an Indian tribe" by express statutory delineation. *Id*., § 6903(13), (15). The appeals court found that these terms, in conjunction with the history of the RCRA, "clearly indicate[ ] congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA." *Blue Legs,* 867 F.2d 1094, 1097 (8th Cir.1989)

Indian Tribal immunity "not absolute"

Indian tribal immunity is not absolute and was created almost by accident. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*,

543 U.S. 871 (2004); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 764-66 (1998) (Stevens, J., dissenting)[4]. Tribal immunity was created by courts but may be – and has been – abrogated by Congress. *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). And "Congress . . . need not make its intent to abrogate 'unmistakably clear' in a single section or in statutory provisions enacted at the same time." *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). "There is very little case law defining the precise scope of the "unequivocal expression" of waiver required." *Osage Tribal Council,* supra, at 1181.

---

[4] The *Kiowa Tribe* majority, while upholding the common law immunity of the petitioner tribe, warily noted that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.,* at 757. Justice Stevens' dissent stridently noted that the Court's rote recitation of immunity was "with little analysis…and in none of our cases have we applied the doctrine to purely off-reservation conduct. *Id.,* at 758.

In statutory settings similar to the instant case, Courts have found abrogation of tribal sovereign immunity in cases where Congress has included "Indian tribes" in definitions of parties who may be sued under specific statutes. In *Blue Legs,* supra, 867 F.2d 1094 (8th Cir. 1989), the Eighth Circuit further explained how RCRA 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).
>
> * * *
>
> 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 * * *." 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.

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).

Eight years after *Blue Legs,* the D.C. Circuit applied the same contextual approach in linking cross-referenced definitions to support tribal amenability to suit. In *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 148 (D.C. Cir. 1996), the court noted as follows:

> 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.
>
> * * *
>
> 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).

Id. at 149 (emphasis added).

Courts have followed the same analysis in finding Congress' clear, express, unequivocal intent to abrogate tribal immunity in the Clean Water Act, *Natural 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 at 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), and the Safe Drinking Water Act. *Osage Tribal Council*, supra, 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."

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). Congressional abrogation does not require a single emphatic and express statement, but may be applied from construing interdependent definitional sections of a statute together in context, which is the approach utilized in *Blue Legs*. In *Osage Tribal Council,* supra, the Tenth Circuit observed that these "definitional inclusions [are] sufficiently explicit waiver of immunity," rejecting arguments such as those advanced by the Tribe

here that "such definitional exercises can never constitute the explicit waiver of immunity required under *Santa Clara*." *Osage Tribal Council*, 187 F.3d at 1181-82 (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978)). 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.

Osage, 187 F.3d at 1182.

II. Conclusion

Tribal sovereign immunity does not extend to shield Indian tribes from conduct beyond their tribal reservation boundaries which is violative of 7 U.S.C. 1926(b), and the Act abrogates tribal immunity from liability for these federal violations. The decision of the District Court should be reversed insofar as it held that the Tribe was immune from suit for acts violative of 7 U.S.C. 1926(b).

Respectfully submitted,

/s/ H. William Wasden
H. WILLIAM WASDEN (WASDH4276)

/s/ Thomas M. Wood
THOMAS M. WOOD (WOODT3844)

Attorneys for Appellant,
Freemanville Water System, Inc.

OF COUNSEL:

BURR & FORMAN LLP
Post Office Box 16046
Mobile, Alabama 36616
Telephone: (251) 344-5151
Facsimile: (251) 344-9696

Certificate of Service

I certify that on March 24, 2008, a copy of the foregoing has been served on the following by directing same to their office addresses through first-class, United States mail, postage prepaid:

Robin G. Laurie, Esquire (rlaurie@balch.com)
Kelly F. Pate, Esquire (kpate@balch.com)
Balch & Bingham, LLP
Post Office Box 78
Montgomery, Alabama 36101-0078

/s/ Thomas M. Wood
COUNSEL