

**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**

**REPLY BRIEF OF PLAINTIFF-APPELLANT
Freemanville Water System, Inc.**

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,332 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

	<u>Page</u>
Certificate of Compliance	C-1
Table of Citations	C-3
Argument	1
I. Congressional Abrogation Of Tribal Immunity From Suits For Injunctive Relief Must Be Determined By Construction Of The Entire Statute at Issue	1
A. Section 1926(b) Must be Construed in its Statutory Context	1
B. Indian Tribal Immunity Does Not Bar Suits for Injunctive Relief As A General Prohibition	2
II. No Tribal Immunity Shields The Tribe From Injunctive Relief Address The Tribes' Planned Off-Reservation Violations Of Section 1926(B)	3
Conclusion	5
Certificate of Service	6

Table of Citations

<u>Cases</u>	<u>Page</u>
<i>Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians</i> , 166 F.3d 1126 (11th Cir. 1999).....	2
<i>Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.</i> , 523 U.S. 751 (1998)	3, 4
<i>Laughlin v. Riddle Aviation</i> , 205 F.2d 948 (5th Cir. 1953).....	1
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).....	3, 4
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).....	2
<u>Statutes</u>	
7 U.S.C. §1926, <i>et seq.</i>	1, 3
Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341	2
42 U.S.C. § 12181, <i>et seq.</i>	2

Argument

I. Congressional Abrogation Of Tribal Immunity From Suits For Injunctive Relief Must Be Determined By Construction Of The Entire Statute At Issue.

A. Section 1926(b) Must be Construed in its Statutory Context

By carving out Section 1926(b) from the remainder of the Consolidated Farm and Rural Development Act ("the Act"), 7 U.S.C. §1926, *et seq.*, and construing the anti-curtailment provision without the applicable context of the entire statute, the Tribe is urging an illogical and untenable statutory construction that renders section 1926(b) largely superfluous. The Tribe's argument, adopted below by the District Court, asserts that the numerous definitions of Indian Tribes as "public bodies" does not "bleed over" into section 1926(b). [Doc. 19, at 3]; [Appellees' Brief, at 12]

The logical effect of such a construction would provide Indian Tribes with the benefits of the statute (priority status on loan applications as a preferred borrower with a service area protected under the Act's anti-curtailment provisions) while at the same time allowing the Tribes to infringe on the service area of a neighboring party who is also a protected borrower under the Act.

Congress cannot be said to have created a mere illusory right, which would fail for lack of means to enforce it. *Laughlin v. Riddle Aviation*, 205 F.2d 948 (5th Cir. 1953) 'A legal right without a remedy would be an anomaly in the law.' *Id.*

B. Indian Tribal Immunity Does Not Bar Suits for Injunctive Relief As A General Prohibition.

The Tribe cites *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-57, 98 S.Ct. 1670, 1675-76, 56 L.Ed.2d 106 (1978) and *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130-31 (11th Cir.1999) for the proposition that tribal immunity bars suits for injunctive relief. [Appellees' Brief, at 4: "This sovereign immunity bars actions—whether for monetary actions or equitable remedies—against Indian Tribes."]

The Tribes' reliance on these decisions for such a blanket application of immunity is misplaced. In each of those decisions the reviewing courts (including this Court) were concerned with whether Congressional abrogation was discernable from a very specific statute. In *Santa Clara Pueblo*, the statute under scrutiny was the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1341, and the Court found that ICRA did not impliedly authorize actions for declaratory or injunctive relief against either the Tribe or its officers. *Santa Clara Pueblo*, *supra*, at 56. Similarly, in *Florida Paraplegic Association*, *supra*, this Court held that 42 U.S.C. § 12181, *et seq.* ("Title III of the ADA" or "Title III") did not provide for a private right of action for injunctive relief as against the Miccosukee Tribe. However, this Court held that the Tribe was *not* immune from actions by the United States seeking to enforce Title III. *Florida Paraplegic Association*, 166 F.3d at 1134-35.

In the instant case, the language of 7 U.S.C. §1926, *et seq*, when construed in context and in its entirety, supports a finding of Congressional abrogation of Indian Tribal immunity as to actions for injunctive relief seeking to enforce the anti-curtailment provisions of the federal statute.

II. No Tribal Immunity Shields The Tribe From Injunctive Relief Address The Tribes' Planned Off-Reservation Violations Of Section 1926(B).

This case actually presents a novel issue among the many factual settings in which Indian tribal immunity has been examined. Does Indian Tribal Immunity shield a Tribe from private actions for injunctive relief as to purely off-reservation activities which violate federally protected interests, particularly when those interests are those of the federal government itself, designed to protect its loan repayment security?

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510, 111 S.Ct. 905, 909-910, 112 L.Ed.2d 1112 (1991), the leading case on tribal immunity prior to the *Kiowa Tribe* decision, *infra*, the Supreme Court was confronted with a state's available remedies for sales tax enforcement on cigarette sales. The court determined the location of the sale was in fact reservation land for purposes of determining immunity. *Id.*, at 511. The Court did not address whether an action for injunctive relief would survive an

assertion of tribal immunity. In fact, in his strident dissent, Justice Stevens noted "[T]he Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." *Id.*, at 516.

The decision principally relied upon by the District Court below, and cited repeatedly by the Tribe--*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 764-66 (1998)—addressed a simple action for money damages arising from a promissory note executed by the Tribe with an off-reservation lender. Again, that decision addressed the *situs* of the acts in question, but did not dispositively address whether the nature of the relief or remedy sought would have a bearing on application of tribal immunity.

Conclusion

Tribal sovereign immunity does not extend to shield Indian tribes from private actions for injunctive relief for violations of federal laws beyond a tribe's reservation lands. The Act abrogates tribal immunity from suit for these violations of federally protected rights under section 1926(b) of the Act. Appellant Freemanville Water System, Inc. respectfully requests that the ruling of the District Court be reversed to the extent that it holds Indian Tribal immunity deprives the Court of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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