No. 08-10602-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FREEMANVILLE WATER SYSTEM, INC.,

***Appellant*,**

v.

POARCH BAND OF CREEK INDIANS, ET AL.,

***Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
07-0688-WS-M

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. P. and Eleventh Circuit Rule 26.1-1, it is hereby certified to the best of the undersigned's knowledge that the following persons or entities have an interest in the outcome of this case:

1. Balch & Bingham LLP, Law Firm for Defendants/Appellees
2. Burr & Forman, LLP, Law Firm for Plaintiff/Appellant
3. Freemanville Water System, Inc., Plaintiff/Appellant
4. Laurie, Robin G., Attorney for Defendants/Appellees
5. Pate, Kelly F., Attorney for Defendants/Appellees
6. Poarch Band of Creek Indians, Defendants/Appellees
7. P.C.I. Gaming Authority (f/k/a P.C.I. Gaming), an unincorporated instrumentality of the Poarch Band of Creek Indians, Defendants/Appellees
8. Creek Indian Enterprises Development Authority (f/k/a Creek Indian Enterprises), a political subdivision of the Poarch Band of Creek Indians, Defendants/Appellees
9. Steele, William H., United States District Judge, Southern District of Alabama
10. Wasden, H. William, Attorney for Plaintiff/Appellant
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STATEMENT REGARDING ORAL ARGUMENT

Defendants/Appellees Poarch Band of Creek Indians, P.C.I. Gaming Authority, and Creek Indian Enterprises Development Authority do not request oral argument in this case.

Oral argument is unnecessary in this appeal because this case is neither novel nor complex. It involves application of tribal sovereign immunity to claims allegedly arising under the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, et. seq. The factual context in which this case arises is relatively simple and easily understood. The legal principals which govern this case have been addressed by this Court and the Supreme Court on numerous occasions so that there should be no misunderstanding that applicable law dictates this Court's affirmance of the District Court's judgment.

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal because it is from a final decision of the United States District Court for the Southern District of Alabama. 28 U.S.C. § 1291. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE ISSUE

Whether Congress clearly and unequivocally abrogated Indian tribal sovereign immunity in the Consolidated Farm and Rural Development Act with regard to the anti-curtailment provision that gives rise to a cause of action, 7 U.S.C. § 1926(b), where Congress did not include Indian tribes within the definition of "public body" for purposes of the Act or the anti-curtailment provision.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On September 28, 2007, Freemanville Water System, Inc. ("FWS") filed a complaint against 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 "the Tribe") alleging the Tribe was violating or was preparing to violate provisions of the Consolidated Farm and Rural Development Act ("the Act"), 7 U.S.C. § 1926(b).[1] (R.1.)[2]

On October 23, 2007, the Tribe filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that the court lacked subject matter jurisdiction because the Tribe's sovereign immunity precluded the suit. (R.13.) FWS responded on November 6, 2007 and the Tribe filed its reply brief on November 13, 2007. (R.16-17.)

On January 7, 2008, the district court granted the Tribe's motion to dismiss holding that the Tribe was immune from the suit. (R.19.) FWS filed its notice of appeal on February 1, 2008. (R.21.)

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[1] 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. (R.13 at 1 n.1; *accord* R.17 at Ex. 1, ¶¶ 4-7.)

[2] This brief cites to the record by showing "R." and then providing the document number that corresponds to the district court's docket sheet.

II. STATEMENT OF FACTS

In the Spring of 2007, the Tribe began planning to improve and develop its own water distribution facilities to enable the Tribe to meet the water needs of its tribal properties. (*See* R.1 at Ex. B.) The Tribe had determined that "self-supply" would most dependably and economically meet the Tribe's needs. (*Id.*)

FWS, which provides water to certain rural parts of Escambia County, Alabama, objected to the Tribe creating its own water facilities to serve tribal properties. (*See* R.1 at ¶ 5 and Ex. A.) Because it objected to the Tribe serving its own water needs, FWS filed suit in an attempt to halt the Tribe's plans and alleged that the Tribe's plans to serve its properties will violate the anti-curtailment provision of 7 U.S.C. § 1926(b) of the Act.

III. STANDARD OF REVIEW

This Court reviews *de novo* the district court's ruling on a motion to dismiss on sovereign immunity grounds; a question of law. *See, Fla. Paraplegic Ass'n. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1128 (11th Cir. 1999); *Florida v. Seminole Tribe*, 181 F.3d 1237, 1240 (11th Cir. 1999).

SUMMARY OF THE ARGUMENT

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." *Fla. Paraplegic Ass'n*, 166 F.3d at 1130; *see also, e.g. Kiowa Tribe v. Mfg Techs, Inc*., 523 U.S. 751, 754, 118 S. Ct. 1700, 1702-03 (1998). This sovereign immunity bars actions, like FWS's, against Indian tribes. *Id.* (holding tribe was immune from suit under the Americans with Disabilities Act). Tribal sovereign immunity is, moreover, not limited to on-reservation conduct. *See Kiowa Tribe*, 523 U.S. at 754 - 758.

Congress may abrogate tribal immunity. However, Congressional abrogation of Indian tribal sovereignty "cannot be implied but must be unequivocally expressed." *Fla. Paraplegic Ass'n*, 166 F.3d at 1130 (quotations and citations omitted). Congress has not abrogated the Tribe's immunity from suit with the Act, and particularly not with § 1926(b) under which a cause of action is created against certain other specified non-tribal entities. There is no language in 7 U.S.C. § 1921, *et seq*., and particularly not in § 1926(b) purporting to abrogate tribal sovereign immunity. Indian tribes are not included as "public bodies" under § 1926(b). Accordingly, Congress did not express an unequivocal intent, or any intent, to abrogate tribal immunity under § 1926(b) of the Act.

ARGUMENT AND CITATIONS OF AUTHORITY

I. BACKGROUND OF TRIBAL IMMUNITY

Indian tribes were not a part of the Constitutional Convention and did not otherwise participate in the creation of our governing Constitution. *See, e.g.,* R. Spencer Clift, II, The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code & Related Matters, 27 Am. Indian L. Rev. 177, 233-34 (noting that tribes "are sovereigns predating the Constitution"). Accordingly, tribal interests must be protected through other means. Tribal sovereign immunity, much like state sovereign immunity, pursuant to the Eleventh Amendment, provides that protection. "Indian tribes retain[] their original natural rights which vested in them, as sovereign entities, long before the genesis of the United States." *Fla. Paraplegic Ass'n.*, 166 F.3d at 1130 (quotation omitted); *Seminole Tribe*, 181 F.3d at 1241 ("'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978)). 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 otherwise waived its immunity, or Congress has clearly abrogated its immunity. *See, e.g., Kiowa Tribe v. Mfg Techs, Inc.*, 523 U.S. 751, 754,118 S. Ct. 1700, 1702-03 (1998). Only Congressional abrogation is here at issue.

II. THE TRIBE'S IMMUNITY IS NOT LIMITED TO RESERVATION PROPERTY

The Tribe plans to self-supply the water needs of its tribal properties because doing so is the most economically sound approach, and it will provide the tribal properties with dependable water service. (*See* R.1 at Ex. B.) Whether the Tribe plans to service the water needs of tribal properties on *and/or* off its reservation does not change the protection to which it is entitled based on tribal sovereign immunity.

The Supreme Court has declined to draw a distinction for immunity purposes between off-reservation activity and on-reservation activity. *Kiowa Tribe of Okla.*, 523 U.S. at 754-58. In *Kiowa*, a tribal entity agreed to buy stock under a payment plan, signed the promissory note on trust land, but executed and delivered the note to the plaintiff off of tribal land and the tribe was required to make payments at a location beyond tribal land. *Id*. at 753-54. The *Kiowa* Court noted "[t]o date, our cases have sustained tribal immunity from suit *without drawing a distinction based on where the tribal activities occurred*." *Id*. at 754-55 (emphasis

added) ("[t]o say substantive state laws apply to off-reservation conduct [as in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)] . . . is not to say that a tribe no longer enjoys immunity from suit."). The Court declined the plaintiff's argument that it should limit tribal immunity to reservations or to noncommercial activities and "defer[ed] to the role Congress may wish to exercise in this important judgment." *Id*. at 758. Accordingly, the fact that the Tribe's plans to serve the water needs of tribal properties will include service of off reservation tribal properties is not material to whether the Tribe retains its immunity.

III. THE TRIBE'S SOVEREIGN IMMUNITY BARS FWS'S SUIT

A. Congressional Abrogation of Tribal Immunity Must be Expressed "Unequivocally"

While tribal immunity is not absolute, Congress, as with State sovereign immunity, must expressly and unequivocally abrogate tribal immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240, 105 S. Ct. 3142, 3146 (1985) ("[I]n determining whether Congress . . . has abrogated the States' Eleventh Amendment immunity, we have required an **unequivocal expression** of congressional intent to overturn the constitutionally guaranteed immunity of the several states.") (internal quotations omitted) (emphasis added); *Seminole Tribe*, 181 F.3d at 1241 ("A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity or Congress **expressly abrogated** that immunity by authorizing the suit.") (emphasis added). The Supreme Court has articulated this

high standard which precludes abrogation of immunity by implication: "It is settled that a waiver of sovereign immunity '**cannot be implied** but must be **unequivocally expressed** . . . . In the absence . . . of any unequivocal expression of contrary legislative intent . . . suits against the tribe . . . are barred by its sovereign immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 1677 (1978) (emphasis added). This Court, consistent with this test, has held "Congress abrogates tribal immunity only where **the definitive language of the statute itself states an intent** either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Fla. Paraplegic Ass'n*, 166 F.3d at 1131 (emphasis added). Moreover, "ambiguities in federal laws implicating Indian rights, *must be resolved in the Indians' favor*." *Seminole Tribe*, 181 F.3d at 1242 (emphasis added). It is clear in applying this analytical framework that Congress did not unequivocally abrogate tribal immunity under the Act.

B. Congress Has Not Expressed "Unequivocal" Abrogation of Tribal Immunity with the Act

1. The Words Congress Used Must be Given Effect

To abrogate Indian tribal immunity Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Fla. Paraplegic Ass'n*, 166 F.3d at 1131. Accordingly, the general principles of statutory construction are crucial to determining whether Congress has expressed a clear intent to abrogate immunity.

Analysis of a statute begins with the premise that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1150 (1992). The canons of statutory construction further provide that Congress is presumed to be "aware of existing law when it passes legislation." *Miles v. Apex Marine Corp*., 498 U.S. 19, 32, 111 S. Ct. 317, 325 (1990). That is, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Delgado v. U.S. AG*, 487 F.3d 855, 862 (11th Cir. 2007). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id*. (quotations omitted).

Synchronizing these canons of statutory construction with the well-settled rules regarding abrogation of tribal immunity dictates that where Congress clearly expresses an intention to abrogate immunity, tribes will be subject to suit, but where Congress' language does not clearly express such intent, that deliberate choice must be given effect.

2. The Act Does Not Abrogate Tribal Immunity

While 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. Fla.*

Bd. of Regents, 528 U.S. 62, 76 (2000), the intent, nevertheless, must be expressed unequivocally. *Fla. Paraplegic Ass'n, Inc*., 166 F.3d at 1131. Congress may express its clear intent to abrogate immunity through multiple sections of a statute; however, the test for determining whether Congress has expressed such intent remains "a simple but stringent test." *Kimel*, 528 U.S. at 73. For example, when applying this test to determine whether Congress intended to abrogate the States' immunity under the Age Discrimination in Employment Act of 1967, the *Kimel* Court reiterated, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court *only by making its intention unmistakably clear in the language of the statute*." *Id*. (quotation omitted) (emphasis added). This principle applies with equal force to abrogation of tribal immunity. *Fla. Paraplegic Ass'n*, 166 F.3d at 1131 (stating that Congress' intent to abrogate immunity must be "unequivocally expressed" and that this waiver standard applies to both tribal immunity and to federal and state governments' immunity). Although Congress' clear intent to abrogate immunity may be gleaned from multiple sections of a statute, the intent, nevertheless, **must be unequivocal**. For instance, in *Kimel*, the Court found Congress' intent clear under the ADEA based on its creation of a cause of action and on the definitions section of the statute.

> The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U.S.C. § 626(b). Section

> 216(b), in turn, **clearly provides for suits by individuals *against States***. That provision authorizes employees to maintain actions for backpay "**against any employer (including a public agency)** in any Federal or State court of competent jurisdiction . . . ." Any doubt concerning the identity of the **"public agency"** defendant named in § 216(b) is dispelled by looking to § 203(x), which **defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State."** Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Kimel, 528 U.S. at 73-74 (internal quotations omitted) (emphasis added).[3]

Similarly, in *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), upon which FWS relies, the court found *express* language in the definitions sections of the statutes at issue that made Congress' intent to abrogate tribal immunity unequivocally clear. The *Blue Legs* Court interpreted the Resource Conservation and Recovery Act ("RCRA") wherein Congress

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[3] The statute contains a definitional section that applies to the ADEA, and it is this definitional section, which clearly defined "public agencies" to include states.

> § 203. Definitions
>
> As used in this Act—
>
> . . .
>
> (x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission [Postal Regulatory Commission]), *a State*, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x) (emphasis added).

specifically provided that citizens may bring compliance suits "against *any person*" and defined "person" to include municipalities. *Id*. at 1097 (emphasis added). Congress defined "municipality" to *specifically include Indian tribes* in RCRA's statutory scheme:

> 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 . . . .

42 U.S.C. § 6903(31) (emphasis added); *Blue Legs*, 867 F.2d at 1097. Accordingly, Congress' intent to abrogate tribal immunity was unequivocally expressed through the statute's authorization of suits against "any person" defined to include municipalities; which in turn is defined to include Indian tribes. *Id*.; *accord Backcountry Against Dumps v. EPA*, 100 F.3d 147, 149 (D.C. Cir. 1996) (same).

In the same way, in *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999), upon which FWS relies to argue abrogation here, the court held that Congress had unequivocally abrogated tribal immunity under the Safe Drinking Water Act ("SDWA") where "Congress *grant[ed] an agency jurisdiction* over all 'persons,' define[d] 'persons' to include 'municipality,' and in turn define[d] 'municipality,' to include 'Indian Tribe[s].'" *Id*. at 1182 (emphasis

added). Thus, Congress unequivocally granted courts jurisdiction to entertain actions against Indian tribes pursuant to the SDWA. *Id*.

Unlike the ADEA, the RCRA, and the SDWA, the Act has no global definitional section that defines Indian tribes for purposes of the entire Act, and it does not expressly and clearly provide for suits against Indian tribes. Instead, the Act in various sections defines and refers to terms differently. This varying use of terms -- some defined and some not -- demonstrates Congress' intent to define the terms with specificity with regard to the section in which the terms appear.

FWS argues that this Court should not only piece together sections of the Act that do refer to Indian tribes, but that this Court should go further and ignore the specificity with which terms are defined and used in the Act and *infer* that Congress intended, without ever saying so or even hinting at such an intent, to abrogate tribal immunity. Following this disjointed construction would plainly violate the canons of statutory construction and would ignore that Congress knows how to abrogate tribal immunity,[4] and would further ignore the language Congress chose to use in the Act.

Demonstrating its intent to be specific, in some sections of the Act, Congress specifically refers to Indian tribes and defines certain terms to include tribes. For

[4] *See* discussion *supra* at 9-11 regarding abrogation in the ADEA, the RCRA, and the SDWA.

example, under 7 U.S.C. § 1926(a), Indian tribes are defined as an "association" to which a loan may be made: "The 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. . . ." 7 U.S.C. § 1926(a)(1) (emphasis added). Additionally, in § 1926(a)(13), the Act specifically includes Indian tribes for the limited purpose of sections § 1926(a)(1) and (2):

> In the making of loans and grants for community waste disposal and water facilities *under paragraphs (1) and (2) of this subsection [(a)]* 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 . . . .

7 U.S.C. § 1926(a)(13) (emphasis added). Later, the Act also specifically refers to Indian tribes as it relates to the community facilities grant program. 7 U.S.C. § 1926(a)(19) ("The Secretary may make grants, in total amount not to exceed $10,000,000 for any fiscal year, to associations, units of general local government, nonprofit corporations, Indian tribes (as such term is defined under section 4(e) of Public Law 93-638 [25 USCS § 450b(e)]) and federally recognized Indian tribes. . . ."); *accord* 7 U.S.C. § 1926(20)(B); (21).

In other sections, however, Indian tribes are not included. The Act refers to the Secretary's ability to make grants to "qualified private, nonprofit entities" with no mention of Indian tribes being included therein. 7 U.S.C. § 1926(a)(2)(B). Still

further, the Act, in placing limitations on grants made by the Secretary, states "[t]he Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to *public bodies* or *such other agencies*." 7 U.S.C. § 1926(a)(6) (emphasis added). This section makes no mention of and does not purport to include Indian tribes within the meaning of "public bodies or such other agencies." Similarly, in § 1926(a)(11) when referring to rural business opportunity grants, the Act places limits on grants made "to *public bodies*, private nonprofit community development corporations or entities, *or such other agencies*." (emphasis added). Again, the Act, in this section, makes no mention or indication that Indian tribes are to be considered as the "public bodies" or "other agencies" to which this section refers.

The anti-curtailment provision, on which FWS's complaint is premised, and under which FWS contends that the Tribe is subject to suit, states:

> (b) Curtailment or limitation of service prohibited. 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). Nowhere in the Act, and not in this provision, is "public body" or "municipal corporation" globally defined. Instead,

as the forgoing demonstrates, Congress was particular with its choice of words and when it intended to include Indian tribes, it did so, and when it did not, it made no mention of them. The words Congress chose to use must be given effect.

FWS contends that Congress intended "public *body*" to include Indian tribes because in other sections of the Act Congress defined "public *agency*" to include Indian tribes. Congress' choice of words, however, must be given effect. If Congress had intended to subject tribes to suit as "public bodies," it would have stated that Indian tribes are included within that provision, as it did in other sections of the Act as it relates to use of the term "public agency." Congress did not.

Even if Congress' intent to specifically define terms relevant to the sections of the Act in which they appear could be ignored and the term "public agency," which includes Indian tribes for purposes of certain sections, could be carried over through other sections of the Act, Congress *did not use that term* – "public agency" – in creating a cause of action with the anti-curtailment provision. Instead, Congress used a different term – "public body" – and its decision to do so must be given meaning, lest this distinction would be rendered superfluous. *See, e.g., Cooper Indus. v. Aviall Servs*., 543 U.S. 157, 166, 125 S. Ct. at 584 (2004) ("*Aviall's* reading would render part of the statute entirely superfluous, something we are loath to do.") Congress did not, in the creation of a cause of action for

certain entities include Indian tribes as it did in other sections of the Act. This distinction must be presumed to be intentional – otherwise, the Court and not the Legislature will be creating law rather than interpreting it. *See Kiowa*, 523 U.S. at 758, 118 S. Ct. 1700, 1705 (declining plaintiff's argument that the court should limit tribal immunity to reservations or to noncommercial activities and "defer[ring] to the role Congress may wish to exercise in this important judgment").

FWS argues that Congress must have intended to abrogate tribal immunity because tribes are subject to certain provisions of the Act, and, therefore, FWS's argument goes, upholding tribal immunity somehow thwarts the intended purpose of the entire Act. However, Congress' decision to subject tribes to certain provisions or even protections of a statute does **not** also mandate that Congress abrogate tribal immunity in order to provide a means to enforce that statute. As this Court has recognized "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." *Fla. Paraplegic Ass'n*, 166 F.3d at 1130 (holding plaintiffs were not entitled to pursue suit for injunctive relief under the ADA because Congress had not abrogated tribal immunity even though the Court found the ADA governed the tribe's operations); *see also Kiowa*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to

enforce them."). Thus, that the Tribe is entitled to some of the benefits or even subject to some of the restrictions of the Act, does not also mean that it is subject to suit under the anti-curtailment provision creating a cause of action under the Act against certain non-tribal entities.

The anti-curtailment section, which is the only section in the Act that provides for a cause of action, presents no *indication, much less an unequivocal intention*, that Congress intended to subject Indian tribes to suit and abrogate their immunity. Congress did not expressly and unequivocally communicate its intent to abrogate tribal immunity under the Act. Accordingly, the Tribe is immune from suit brought under § 1926(b).

CONCLUSION

Because Congress did not expressly and unequivocally abrogate tribal immunity under the Act, the Tribe is immune from FWS's suit brought under § 1926(b). The District Court's judgment dismissing FWS's complaint is due to be affirmed.

/s/Kelly F. Pate
One of the Attorneys for Poarch Band of Creek Indians, P.C.I. Gaming Authority and Creek Indian Enterprises Development Authority

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CERTIFICATE OF COMPLIANCE

Defendants/Appellees hereby certify that this brief, in Times New Roman 14-point type face, contains 4,891 words and therefore does not exceed the word limitation set forth in Fed. R. App. P. 32(a)(7)(B).

/s/Kelly F. Pate
One of the Attorneys for Poarch Band of Creek Indians, P.C.I. Gaming Authority, and Creek Indian Enterprises Development Authority

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2008, a copy of the foregoing has been served by first-class United States Mail, postage prepaid and properly addressed, upon the following:

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STATEMENT REGARDING ORAL ARGUMENT

Defendants/Appellees Poarch Band of Creek Indians, P.C.I. Gaming Authority, and Creek Indian Enterprises Development Authority do not request oral argument in this case.

Oral argument is unnecessary in this appeal because this case is neither novel nor complex. It involves application of tribal sovereign immunity to claims allegedly arising under the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, et. seq. The factual context in which this case arises is relatively simple and easily understood. The legal principals which govern this case have been addressed by this Court and the Supreme Court on numerous occasions so that there should be no misunderstanding that applicable law dictates this Court's affirmance of the District Court's judgment.

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal because it is from a final decision of the United States District Court for the Southern District of Alabama. 28 U.S.C. § 1291. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE ISSUE

Whether Congress clearly and unequivocally abrogated Indian tribal sovereign immunity in the Consolidated Farm and Rural Development Act with regard to the anti-curtailment provision that gives rise to a cause of action, 7 U.S.C. § 1926(b), where Congress did not include Indian tribes within the definition of "public body" for purposes of the Act or the anti-curtailment provision.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On September 28, 2007, Freemanville Water System, Inc. ("FWS") filed a complaint against 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 "the Tribe") alleging the Tribe was violating or was preparing to violate provisions of the Consolidated Farm and Rural Development Act ("the Act"), 7 U.S.C. § 1926(b).[1] (R.1.)[2]

On October 23, 2007, the Tribe filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that the court lacked subject matter jurisdiction because the Tribe's sovereign immunity precluded the suit. (R.13.) FWS responded on November 6, 2007 and the Tribe filed its reply brief on November 13, 2007. (R.16-17.)

On January 7, 2008, the district court granted the Tribe's motion to dismiss holding that the Tribe was immune from the suit. (R.19.) FWS filed its notice of appeal on February 1, 2008. (R.21.)

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[1] 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. (R.13 at 1 n.1; *accord* R.17 at Ex. 1, ¶¶ 4-7.)

[2] This brief cites to the record by showing "R." and then providing the document number that corresponds to the district court's docket sheet.

II. STATEMENT OF FACTS

In the Spring of 2007, the Tribe began planning to improve and develop its own water distribution facilities to enable the Tribe to meet the water needs of its tribal properties. (*See* R.1 at Ex. B.) The Tribe had determined that "self-supply" would most dependably and economically meet the Tribe's needs. (*Id.*)

FWS, which provides water to certain rural parts of Escambia County, Alabama, objected to the Tribe creating its own water facilities to serve tribal properties. (*See* R.1 at ¶ 5 and Ex. A.) Because it objected to the Tribe serving its own water needs, FWS filed suit in an attempt to halt the Tribe's plans and alleged that the Tribe's plans to serve its properties will violate the anti-curtailment provision of 7 U.S.C. § 1926(b) of the Act.

III. STANDARD OF REVIEW

This Court reviews *de novo* the district court's ruling on a motion to dismiss on sovereign immunity grounds; a question of law. *See, Fla. Paraplegic Ass'n. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1128 (11th Cir. 1999); *Florida v. Seminole Tribe*, 181 F.3d 1237, 1240 (11th Cir. 1999).

SUMMARY OF THE ARGUMENT

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." *Fla. Paraplegic Ass'n*, 166 F.3d at 1130; *see also, e.g. Kiowa Tribe v. Mfg Techs, Inc*., 523 U.S. 751, 754, 118 S. Ct. 1700, 1702-03 (1998). This sovereign immunity bars actions, like FWS's, against Indian tribes. *Id.* (holding tribe was immune from suit under the Americans with Disabilities Act). Tribal sovereign immunity is, moreover, not limited to on-reservation conduct. *See Kiowa Tribe*, 523 U.S. at 754 - 758.

Congress may abrogate tribal immunity. However, Congressional abrogation of Indian tribal sovereignty "cannot be implied but must be unequivocally expressed." *Fla. Paraplegic Ass'n*, 166 F.3d at 1130 (quotations and citations omitted). Congress has not abrogated the Tribe's immunity from suit with the Act, and particularly not with § 1926(b) under which a cause of action is created against certain other specified non-tribal entities. There is no language in 7 U.S.C. § 1921, *et seq*., and particularly not in § 1926(b) purporting to abrogate tribal sovereign immunity. Indian tribes are not included as "public bodies" under § 1926(b). Accordingly, Congress did not express an unequivocal intent, or any intent, to abrogate tribal immunity under § 1926(b) of the Act.

ARGUMENT AND CITATIONS OF AUTHORITY

I. BACKGROUND OF TRIBAL IMMUNITY

Indian tribes were not a part of the Constitutional Convention and did not otherwise participate in the creation of our governing Constitution. *See, e.g.,* R. Spencer Clift, II, The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code & Related Matters, 27 Am. Indian L. Rev. 177, 233-34 (noting that tribes "are sovereigns predating the Constitution"). Accordingly, tribal interests must be protected through other means. Tribal sovereign immunity, much like state sovereign immunity, pursuant to the Eleventh Amendment, provides that protection. "Indian tribes retain[] their original natural rights which vested in them, as sovereign entities, long before the genesis of the United States." *Fla. Paraplegic Ass'n.*, 166 F.3d at 1130 (quotation omitted); *Seminole Tribe*, 181 F.3d at 1241 ("'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978)). 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 otherwise waived its immunity, or Congress has clearly abrogated its immunity. *See, e.g., Kiowa Tribe v. Mfg Techs, Inc.*, 523 U.S. 751, 754,118 S. Ct. 1700, 1702-03 (1998). Only Congressional abrogation is here at issue.

II. THE TRIBE'S IMMUNITY IS NOT LIMITED TO RESERVATION PROPERTY

The Tribe plans to self-supply the water needs of its tribal properties because doing so is the most economically sound approach, and it will provide the tribal properties with dependable water service. (*See* R.1 at Ex. B.) Whether the Tribe plans to service the water needs of tribal properties on *and/or* off its reservation does not change the protection to which it is entitled based on tribal sovereign immunity.

The Supreme Court has declined to draw a distinction for immunity purposes between off-reservation activity and on-reservation activity. *Kiowa Tribe of Okla.*, 523 U.S. at 754-58. In *Kiowa*, a tribal entity agreed to buy stock under a payment plan, signed the promissory note on trust land, but executed and delivered the note to the plaintiff off of tribal land and the tribe was required to make payments at a location beyond tribal land. *Id*. at 753-54. The *Kiowa* Court noted "[t]o date, our cases have sustained tribal immunity from suit *without drawing a distinction based on where the tribal activities occurred*." *Id*. at 754-55 (emphasis

added) ("[t]o say substantive state laws apply to off-reservation conduct [as in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)] . . . is not to say that a tribe no longer enjoys immunity from suit."). The Court declined the plaintiff's argument that it should limit tribal immunity to reservations or to noncommercial activities and "defer[ed] to the role Congress may wish to exercise in this important judgment." *Id*. at 758. Accordingly, the fact that the Tribe's plans to serve the water needs of tribal properties will include service of off reservation tribal properties is not material to whether the Tribe retains its immunity.

III. THE TRIBE'S SOVEREIGN IMMUNITY BARS FWS'S SUIT

A. Congressional Abrogation of Tribal Immunity Must be Expressed "Unequivocally"

While tribal immunity is not absolute, Congress, as with State sovereign immunity, must expressly and unequivocally abrogate tribal immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240, 105 S. Ct. 3142, 3146 (1985) ("[I]n determining whether Congress . . . has abrogated the States' Eleventh Amendment immunity, we have required an **unequivocal expression** of congressional intent to overturn the constitutionally guaranteed immunity of the several states.") (internal quotations omitted) (emphasis added); *Seminole Tribe*, 181 F.3d at 1241 ("A suit against an Indian tribe is therefore barred unless the tribe clearly waived its immunity or Congress **expressly abrogated** that immunity by authorizing the suit.") (emphasis added). The Supreme Court has articulated this

high standard which precludes abrogation of immunity by implication: "It is settled that a waiver of sovereign immunity '**cannot be implied** but must be **unequivocally expressed** . . . . In the absence . . . of any unequivocal expression of contrary legislative intent . . . suits against the tribe . . . are barred by its sovereign immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 1677 (1978) (emphasis added). This Court, consistent with this test, has held "Congress abrogates tribal immunity only where **the definitive language of the statute itself states an intent** either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Fla. Paraplegic Ass'n*, 166 F.3d at 1131 (emphasis added). Moreover, "ambiguities in federal laws implicating Indian rights, *must be resolved in the Indians' favor*." *Seminole Tribe*, 181 F.3d at 1242 (emphasis added). It is clear in applying this analytical framework that Congress did not unequivocally abrogate tribal immunity under the Act.

B. Congress Has Not Expressed "Unequivocal" Abrogation of Tribal Immunity with the Act

1. The Words Congress Used Must be Given Effect

To abrogate Indian tribal immunity Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Fla. Paraplegic Ass'n*, 166 F.3d at 1131. Accordingly, the general principles of statutory construction are crucial to determining whether Congress has expressed a clear intent to abrogate immunity.

Analysis of a statute begins with the premise that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1150 (1992). The canons of statutory construction further provide that Congress is presumed to be "aware of existing law when it passes legislation." *Miles v. Apex Marine Corp*., 498 U.S. 19, 32, 111 S. Ct. 317, 325 (1990). That is, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *Delgado v. U.S. AG*, 487 F.3d 855, 862 (11th Cir. 2007). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id*. (quotations omitted).

Synchronizing these canons of statutory construction with the well-settled rules regarding abrogation of tribal immunity dictates that where Congress clearly expresses an intention to abrogate immunity, tribes will be subject to suit, but where Congress' language does not clearly express such intent, that deliberate choice must be given effect.

2. The Act Does Not Abrogate Tribal Immunity

While 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. Fla.*

Bd. of Regents, 528 U.S. 62, 76 (2000), the intent, nevertheless, must be expressed unequivocally. *Fla. Paraplegic Ass'n, Inc*., 166 F.3d at 1131. Congress may express its clear intent to abrogate immunity through multiple sections of a statute; however, the test for determining whether Congress has expressed such intent remains "a simple but stringent test." *Kimel*, 528 U.S. at 73. For example, when applying this test to determine whether Congress intended to abrogate the States' immunity under the Age Discrimination in Employment Act of 1967, the *Kimel* Court reiterated, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court *only by making its intention unmistakably clear in the language of the statute*." *Id*. (quotation omitted) (emphasis added). This principle applies with equal force to abrogation of tribal immunity. *Fla. Paraplegic Ass'n*, 166 F.3d at 1131 (stating that Congress' intent to abrogate immunity must be "unequivocally expressed" and that this waiver standard applies to both tribal immunity and to federal and state governments' immunity). Although Congress' clear intent to abrogate immunity may be gleaned from multiple sections of a statute, the intent, nevertheless, **must be unequivocal**. For instance, in *Kimel*, the Court found Congress' intent clear under the ADEA based on its creation of a cause of action and on the definitions section of the statute.

> The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U.S.C. § 626(b). Section

> 216(b), in turn, **clearly provides for suits by individuals *against States***. That provision authorizes employees to maintain actions for backpay "**against any employer (including a public agency)** in any Federal or State court of competent jurisdiction . . . ." Any doubt concerning the identity of the **"public agency"** defendant named in § 216(b) is dispelled by looking to § 203(x), which **defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State."** Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Kimel, 528 U.S. at 73-74 (internal quotations omitted) (emphasis added).[3]

Similarly, in *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), upon which FWS relies, the court found *express* language in the definitions sections of the statutes at issue that made Congress' intent to abrogate tribal immunity unequivocally clear. The *Blue Legs* Court interpreted the Resource Conservation and Recovery Act ("RCRA") wherein Congress

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[3] The statute contains a definitional section that applies to the ADEA, and it is this definitional section, which clearly defined "public agencies" to include states.

> § 203. Definitions
>
> As used in this Act—
>
> . . .
>
> (x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission [Postal Regulatory Commission]), *a State*, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x) (emphasis added).

specifically provided that citizens may bring compliance suits "against *any person*" and defined "person" to include municipalities. *Id*. at 1097 (emphasis added). Congress defined "municipality" to *specifically include Indian tribes* in RCRA's statutory scheme:

> 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 . . . .

42 U.S.C. § 6903(31) (emphasis added); *Blue Legs*, 867 F.2d at 1097. Accordingly, Congress' intent to abrogate tribal immunity was unequivocally expressed through the statute's authorization of suits against "any person" defined to include municipalities; which in turn is defined to include Indian tribes. *Id*.; *accord Backcountry Against Dumps v. EPA*, 100 F.3d 147, 149 (D.C. Cir. 1996) (same).

In the same way, in *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999), upon which FWS relies to argue abrogation here, the court held that Congress had unequivocally abrogated tribal immunity under the Safe Drinking Water Act ("SDWA") where "Congress *grant[ed] an agency jurisdiction* over all 'persons,' define[d] 'persons' to include 'municipality,' and in turn define[d] 'municipality,' to include 'Indian Tribe[s].'" *Id*. at 1182 (emphasis

added). Thus, Congress unequivocally granted courts jurisdiction to entertain actions against Indian tribes pursuant to the SDWA. *Id*.

Unlike the ADEA, the RCRA, and the SDWA, the Act has no global definitional section that defines Indian tribes for purposes of the entire Act, and it does not expressly and clearly provide for suits against Indian tribes. Instead, the Act in various sections defines and refers to terms differently. This varying use of terms -- some defined and some not -- demonstrates Congress' intent to define the terms with specificity with regard to the section in which the terms appear.

FWS argues that this Court should not only piece together sections of the Act that do refer to Indian tribes, but that this Court should go further and ignore the specificity with which terms are defined and used in the Act and *infer* that Congress intended, without ever saying so or even hinting at such an intent, to abrogate tribal immunity. Following this disjointed construction would plainly violate the canons of statutory construction and would ignore that Congress knows how to abrogate tribal immunity,[4] and would further ignore the language Congress chose to use in the Act.

Demonstrating its intent to be specific, in some sections of the Act, Congress specifically refers to Indian tribes and defines certain terms to include tribes. For

[4] *See* discussion *supra* at 9-11 regarding abrogation in the ADEA, the RCRA, and the SDWA.

example, under 7 U.S.C. § 1926(a), Indian tribes are defined as an "association" to which a loan may be made: "The 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. . . ." 7 U.S.C. § 1926(a)(1) (emphasis added). Additionally, in § 1926(a)(13), the Act specifically includes Indian tribes for the limited purpose of sections § 1926(a)(1) and (2):

> In the making of loans and grants for community waste disposal and water facilities *under paragraphs (1) and (2) of this subsection [(a)]* 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 . . . .

7 U.S.C. § 1926(a)(13) (emphasis added). Later, the Act also specifically refers to Indian tribes as it relates to the community facilities grant program. 7 U.S.C. § 1926(a)(19) ("The Secretary may make grants, in total amount not to exceed $10,000,000 for any fiscal year, to associations, units of general local government, nonprofit corporations, Indian tribes (as such term is defined under section 4(e) of Public Law 93-638 [25 USCS § 450b(e)]) and federally recognized Indian tribes. . . ."); *accord* 7 U.S.C. § 1926(20)(B); (21).

In other sections, however, Indian tribes are not included. The Act refers to the Secretary's ability to make grants to "qualified private, nonprofit entities" with no mention of Indian tribes being included therein. 7 U.S.C. § 1926(a)(2)(B). Still

further, the Act, in placing limitations on grants made by the Secretary, states "[t]he Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to *public bodies* or *such other agencies*." 7 U.S.C. § 1926(a)(6) (emphasis added). This section makes no mention of and does not purport to include Indian tribes within the meaning of "public bodies or such other agencies." Similarly, in § 1926(a)(11) when referring to rural business opportunity grants, the Act places limits on grants made "to *public bodies*, private nonprofit community development corporations or entities, *or such other agencies*." (emphasis added). Again, the Act, in this section, makes no mention or indication that Indian tribes are to be considered as the "public bodies" or "other agencies" to which this section refers.

The anti-curtailment provision, on which FWS's complaint is premised, and under which FWS contends that the Tribe is subject to suit, states:

> (b) Curtailment or limitation of service prohibited. 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). Nowhere in the Act, and not in this provision, is "public body" or "municipal corporation" globally defined. Instead,

as the forgoing demonstrates, Congress was particular with its choice of words and when it intended to include Indian tribes, it did so, and when it did not, it made no mention of them. The words Congress chose to use must be given effect.

FWS contends that Congress intended "public *body*" to include Indian tribes because in other sections of the Act Congress defined "public *agency*" to include Indian tribes. Congress' choice of words, however, must be given effect. If Congress had intended to subject tribes to suit as "public bodies," it would have stated that Indian tribes are included within that provision, as it did in other sections of the Act as it relates to use of the term "public agency." Congress did not.

Even if Congress' intent to specifically define terms relevant to the sections of the Act in which they appear could be ignored and the term "public agency," which includes Indian tribes for purposes of certain sections, could be carried over through other sections of the Act, Congress *did not use that term* – "public agency" – in creating a cause of action with the anti-curtailment provision. Instead, Congress used a different term – "public body" – and its decision to do so must be given meaning, lest this distinction would be rendered superfluous. *See, e.g., Cooper Indus. v. Aviall Servs*., 543 U.S. 157, 166, 125 S. Ct. at 584 (2004) ("*Aviall's* reading would render part of the statute entirely superfluous, something we are loath to do.") Congress did not, in the creation of a cause of action for

certain entities include Indian tribes as it did in other sections of the Act. This distinction must be presumed to be intentional – otherwise, the Court and not the Legislature will be creating law rather than interpreting it. *See Kiowa*, 523 U.S. at 758, 118 S. Ct. 1700, 1705 (declining plaintiff's argument that the court should limit tribal immunity to reservations or to noncommercial activities and "defer[ring] to the role Congress may wish to exercise in this important judgment").

FWS argues that Congress must have intended to abrogate tribal immunity because tribes are subject to certain provisions of the Act, and, therefore, FWS's argument goes, upholding tribal immunity somehow thwarts the intended purpose of the entire Act. However, Congress' decision to subject tribes to certain provisions or even protections of a statute does **not** also mandate that Congress abrogate tribal immunity in order to provide a means to enforce that statute. As this Court has recognized "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." *Fla. Paraplegic Ass'n*, 166 F.3d at 1130 (holding plaintiffs were not entitled to pursue suit for injunctive relief under the ADA because Congress had not abrogated tribal immunity even though the Court found the ADA governed the tribe's operations); *see also Kiowa*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to

enforce them."). Thus, that the Tribe is entitled to some of the benefits or even subject to some of the restrictions of the Act, does not also mean that it is subject to suit under the anti-curtailment provision creating a cause of action under the Act against certain non-tribal entities.

The anti-curtailment section, which is the only section in the Act that provides for a cause of action, presents no *indication, much less an unequivocal intention*, that Congress intended to subject Indian tribes to suit and abrogate their immunity. Congress did not expressly and unequivocally communicate its intent to abrogate tribal immunity under the Act. Accordingly, the Tribe is immune from suit brought under § 1926(b).

CONCLUSION

Because Congress did not expressly and unequivocally abrogate tribal immunity under the Act, the Tribe is immune from FWS's suit brought under § 1926(b). The District Court's judgment dismissing FWS's complaint is due to be affirmed.

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CERTIFICATE OF COMPLIANCE

Defendants/Appellees hereby certify that this brief, in Times New Roman 14-point type face, contains 4,891 words and therefore does not exceed the word limitation set forth in Fed. R. App. P. 32(a)(7)(B).

/s/Kelly F. Pate
One of the Attorneys for Poarch Band of Creek Indians, P.C.I. Gaming Authority, and Creek Indian Enterprises Development Authority

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2008, a copy of the foregoing has been served by first-class United States Mail, postage prepaid and properly addressed, upon the following:

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