No. 1111250

SUPREME COURT OF ALABAMA

JERRY RAPE,
Appellant,

v.

POARCH BAND OF CREEK INDIANS; PCI GAMING; CREEK INDIAN ENTERPRISES; CREEK CASINO MONTGOMERY; JAMES INGRAM; LORENZO TEAGUE, et al.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY
CIVIL ACTION NO. CV-11-901485

BRIEF OF APPELLEES (Volume I)

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April 17, 2013

STATEMENT REGARDING ORAL ARGUMENT

Because the law is well-settled and the facts are undisputed, oral argument would not aid this Court in deciding this case.

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STATEMENT OF JURISDICTION

The Circuit Court of Montgomery County entered its order of dismissal on May 2, 2012. (C. 166) (App. A). Mr. Rape timely filed his notice of appeal on June 12, 2012. (C. Notice of Appeal).[1]

This Court and the trial court lack subject-matter jurisdiction over Mr. Rape's lawsuit because the Poarch Band of Creek Indians, its entities, and its employees enjoy sovereign immunity. See Freemanville Water Sys. v. Poarch Band of Creek Indians, 563 F.3d 1205, 1206 (11th Cir. 2009). Additionally, this Court and the trial court lack subject-matter jurisdiction over Mr. Rape's claims because they involve a commercial lawsuit against Indian defendants based on events occurring on Indian lands over which the Tribe's courts have exclusive subject-matter jurisdiction. See Williams v. Lee, 358 U.S. 217 (1959).

[1] The trial court clerk placed the notice of appeal after the court reporter's transcript in the record on appeal, but did not number the pages consisting of the notice of appeal.

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF THE CASE

THE NATURE OF THE CASE

Jerry Rape claims that he won, but was not paid, a jackpot at a casino owned and operated by the Poarch Band of Creek Indians ("PBCI" or the "Tribe") on tribal land located within the exterior boundaries of Montgomery County (the "land at issue"). The Tribe moved to dismiss Mr. Rape's claims based on its sovereign immunity and the exclusive subject-matter jurisdiction of its courts. The circuit court granted the Tribe's motion.

COURSE OF THE PROCEEDINGS

The Montgomery Circuit Court Action: On November 16, 2011, Appellant Jerry Rape filed a complaint in Montgomery Circuit Court, alleging breach of contract and tort claims arising from the Tribe's refusal to pay a $1.3 million jackpot allegedly won at the Tribe's casino. (C. 6-36, Compl.) Mr. Rape named as defendants the Tribe; the Tribe's entities, PCI Gaming (a/k/a P.C.I. Gaming Authority), Creek Indian Enterprises (a/k/a Creek Indian Enterprises Development Authority), and Creek Casino Montgomery; and Tribal employees James Ingram and Lorenzo

Teague (collectively, the "Tribal defendants"). (C. 6-36.) On January 20, 2012, the Tribal defendants moved to dismiss Mr. Rape's complaint, arguing that: (1) the Tribal defendants enjoy sovereign immunity, which precludes suit against them; and (2) the Tribal courts have exclusive subject-matter jurisdiction. (C. 67-81; see also C. 150-159.)

Following an April 12, 2012, hearing on the Tribe's motion to dismiss, the circuit court entered a two-word order: "Granted. Dismissed." (C. 166) (App. A). Mr. Rape appealed the May 2, 2012 order of dismissal to this Court.

The Tribal Court Action: Also on November 16, 2012, Mr. Rape filed an action against the same parties (the Tribe, its entities, and two of its employees) in the PBCI Tribal Court. (See C. 39.) Though Mr. Rape failed to place the result of the tribal court proceeding in the record on appeal for this case, he did not prosecute his action there, the tribal court granted the Tribe's motion to dismiss, and he chose not to appeal to the Tribal Supreme Court.

STATEMENT OF THE ISSUES

I. Does the doctrine of sovereign immunity bar Mr. Rape's lawsuit against the Tribe, its entities, and its employees?

Answer: Yes.

Indian tribes enjoy sovereign immunity and are subject to suit only where that immunity has been abrogated by Congress or waived by a tribe. See, e.g., Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998); Freemanville Water Sys. v. Poarch Band of Creek Indians, 563 F.3d 1205, 1206 (11th Cir. 2009). Congress has not abrogated and the Tribe has not waived its sovereign immunity. Furthermore, the United States Supreme Court's opinion in Carcieri v. Salazar, 555 U.S. 379 (2009), in no way abrogates, limits, or even addresses tribal sovereign immunity.

II. Do the Tribe's Courts have exclusive subject-matter jurisdiction over this case against the Tribal defendants arising from conduct on Indian lands leaving no subject-matter jurisdiction in the state courts?

Answer: Yes.

Because Mr. Rape did not address in his Opening Brief the exclusive subject-matter jurisdiction of tribal courts over matters arising on Indian lands, he waived the issue, and this Court must affirm the judgment. Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006). Even if Mr. Rape had not waived the issue, Indian tribal courts have exclusive subject-matter jurisdiction over events that, like those at issue in this case, (a) occur on Indian lands and (b) involve the economic interests of the Tribe. See Williams v. Lee, 358 U.S. 217 (1958).

STATEMENT OF THE FACTS

BACKGROUND

In 1790, George Washington's Secretary of War, Henry Knox, signed a treaty with the Creek Nation that provided that "all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whosoever." Treaty of 1790, art. II, 7 Stat. 35 (1790).[2]

As the War of 1812 approached, the "Creeks, more powerful in numbers than the others [i.e., other tribes], were particularly urged to join the English." Albert James Pickett, Pickett's History of Alabama 510 (1851, 1962 ed.) [Pickett]. (App. B.)[3] While the Upper Creeks, the "Red

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[2] This Court may take judicial notice of historical facts on appeal. See Rule 201(f), Ala. R. Evid. (stating that a court may take judicial notice of a document at "any stage of the proceeding"); II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 480.01(6), p. 2257 (6th ed. 2009) ("Judicial notice may be taken at any stage of a proceeding. This includes both at the trial and appellate levels."); Carpigiani v. Hall, 55 So. 248, 250 (Ala. 1911) ("The treaty of 1878 between Italy and the United States, of which we take judicial notice . . . .").

[3] See Malone v. La Croix, 41 So. 724, 725 (Ala. 1905) ("[A]n event that connected itself with the history of the country, and from its notoriety, courts will take judicial notice of it without proof.") (internal quotation marks and

Sticks," followed a "powerful British incendiary" named Tecumseh, the Lower Creeks joined with "the Big Warrior" and "remained true to the United States." Id. at 510, 514.

In 1813, the Red Sticks burned the properties of several of the friendly Creeks, including Sam Moniac, James Cornells, and Leonard McGhee. See Historical Report on the Poarch Band of Creeks 11 (Bureau of Indian Affairs 1983) [BIA History] (App. C).[4] In 1814, General Andrew Jackson "marched [his men] across the Coosa to the late battle ground of Talladega, where he was joined by two hundred Cherokees and Creeks . . . ." Pickett at 579. At the Battle of Horseshoe Bend, the "friendly Indians and Americans . . . reached the town and wrapped it in flames," helping to defeat the hostile Creeks. Id. at 589.

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citation omitted); Ex parte Alabama Alcoholic Bev. Control Bd., 683 So. 2d 952, 960 (Ala. 1996) (Houston, J., concurring) (citing "Rogers, Ward, Atkin[s], and Flynt's Alabama: The History of a Deep South State (1994)"); Harris v. Cosby, 55 So. 231, 236 (Ala. 1911) (citing "Motley, in his great History of the Rise of the Dutch Republic, . . . Volume 3, p. 515.").

[4] available at http://www.bia.gov/idc/groups/xofa/documents/text/idc-001321.pdf; see supra, note 2.

The Creek War ended with the Treaty of Fort Jackson on August 9, 1814.[5] In that Treaty, the United States confiscated approximately 21 million acres of land from both friendly and hostile Creeks:

> The United States demand an equivalent for all expenses incurred in prosecuting the war to its termination, by a cession of all the territory belonging to the Creek nation within the territories of the United States, lying west, south, and south-eastwardly, of a line to be run and described by persons duly authorized and appointed by the President of the United States . . .

Treaty of Fort Jackson, art. I, 7 Stat. 120 (1814) (App. D); BIA History 13. In exchange for ceding millions of acres, some of the friendly Creeks received 640-acre parcels, or one square mile: "any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war and taken an active part therein, . . . every such person shall be entitled to a reservation of land within the said territory of one mile square." Id.

On the land that was left after the United States took the 21 million acres, several friendly Creek families "secured reservations immediately after the treaty."

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[5] See Carpigiani v. Hall, 55 So. 248, 250 (Ala. 1911) ("The treaty of 1878 between Italy and the United States, of which we take judicial notice . . . .").

History of the Poarch Band of Creek Indians, State of Alabama Indian Affairs Commission, http://aiac.alabama.gov/tribes_poarchcreek.aspx (App. E).[6] They lived in the old Tensaw settlement on the Alabama River, 50 miles north of Mobile and later moved inland to the hamlets of Perdido, Bell Creek, Hog Fork, and Poarch Switch near present-day Atmore, Alabama. See Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Poarch Band of Creeks of Alabama pursuant to 25 C.F.R. 83, at pp. 2-3 (Bureau of Indian Affairs 1983) [BIA Recommendation] (App. F.).[7]

The availability of cheap formerly Indian land on which to plant profitable cotton set off "Alabama Fever." White settlers flocked to Alabama to claim land without being particular as to which lands were formerly owned by Indians and which were still owned by the friendly Indians. See BIA History 14 (App. C); Alabama Fever, Encyclopedia of Alabama. (App. G.)[8]

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[6] See supra, note 2.

[7] available at http://www.bia.gov/idc/groups/xofa/documents/text/idc-001321.pdf; see supra, note 2.

[8] available at http://www.Encyclopediaofalabama.org/face/Article.jsp?id=h-3155.

In 1832, through another treaty, the United States confiscated all Creek lands east of the Mississippi River and encouraged, but did not require, the removal of the Creeks from Alabama to Oklahoma. Treaty with the Creeks, art. I, XII (Mar. 24, 1832), 7 Stat. 366. This Treaty also provided that 90 chiefs of the friendly Creeks would have sections (i.e., 640 acres) and heads of families half sections (i.e., 320 acres). Id. at art. II. See Rose v. Griffin, 33 Ala. 717, 724 (1859) (discussing treaty). "This agreement resulted in much unhappiness, as many of these half sections of land were fraudulently certified to the land speculators and the Creeks got little benefit therefrom." Marie Bankhead Owen, The Story of Alabama 105 (1949) [Story of Alabama] (App. H). "Throughout the entire period from 1832 to 1837, an endless repertoire of frauds and tricks were used by whites and certain of their Creek conspir[a]tors to steal land from the Indians." BIA History 22 (App. C).

Nonetheless, Congress passed an Act in 1836 setting aside 640-acre parcels as reservations under the 1814 Treaty of Fort Jackson for certain of the friendly Creeks. BIA History at 24 (App. C); 24th Cong. Sess. I, ch. 333, 6

Stat. 677 (1836) ("Be it enacted, That Samuel Smith, Lynn MacGhee [sic], and Semoice, friendly Creek Indians, who were entitled, under the treaty with the Creek nation of Indians, ratified on the sixteenth of February, eighteen hundred and fifteen, to reservations of six hundred and forty acres of land each. . . .").

In 1836-37, most of the Creeks in Alabama, including some friendly Creeks, were forcibly removed or gave up and were transported in terrible conditions along the "Trail of Tears" to a reservation in Oklahoma. See Story of Alabama 107. (App. H.) "The Poarch Band remained in Alabama after the Creek Removal of the 1830's, and shifted within a small geographic area until it settled permanently near present-day Atmore, Alabama." Final Determination for Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 24083 (June 11, 1984) (Bureau of Indian Affairs, U.S. Dep't of Interior) (App. I).[9]

The Poarch Creeks grew up with Alabama, fighting, bleeding, and dying with her. In 1836, David Moniac, a

[9] See supra, note 2; 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.").

friendly Creek and the first Indian to graduate from the United States Military Academy at West Point, died fighting for America in the Seminole War in Florida. See BIA History 18 (App. C).[10] During the War Between the States, Poarch Creeks fought for the Confederacy. Id. at 28. During the era of segregation, the PBCI demanded that the children of the Tribe attend Atmore city schools, instead of the segregated Indian school, and won the right for them to do so. Id. at 38, 43.

In 1984, after an arduous administrative process, the United States granted the Tribe formal recognition as an Indian tribe. 49 Fed. Reg. 24083 (App. J).[11] In the mid-1980s, the U.S. Secretary of the Interior (the "Secretary") took land belonging to the PBCI within the exterior boundaries of Elmore and Escambia Counties into trust for the benefit of the Tribe. 50 Fed. Reg. 15502 (April 18, 1985). In the 1990s, the Secretary took additional land into trust for the benefit of the Tribe, including the

[10] See supra, note 2.

[11] By contrast, the Bureau of Indian Affairs has not recognized the Mowa Band of Choctaw Indians, while the State of Alabama has. See 60 Fed. Reg. 1874 (1995); Mowa Band of Choctaw Indians, available at http://www.mowa-choctaw.com/overview.html.

lands at issue where Mr. Rape alleges he won a jackpot. See (C. 8-9, 76); (App. J).[12]

MR. RAPE SUES FOR A PRIZE HE ALLEGEDLY WON ON INDIAN LANDS

This action arises from Mr. Rape's dealings with the PBCI, its entities, and two of its employees, on tribal land located within the exterior boundaries of Montgomery, Alabama (the "lands at issue"), and held in trust for the Tribe by the United States. (See C. 8-14 at ¶¶ 10-23; C. 76 at ¶ 6; C. 78 at ¶ 4; C. 80 at ¶ 4.)

Mr. Rape was a patron of the Tribe's Creek Casino Montgomery on November 19, 2010. (C. 11 at ¶¶ 10-11.) He alleges that while playing $0.25 increments on a machine in the Tribe's casino, he won $1,377,015.30. (C. 12-13 at ¶¶ 15-16.) After the Tribe concluded that the machine had malfunctioned and that Mr. Rape was not entitled to his alleged winnings, he filed this case. (See C. 14 at ¶ 23.)

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[12] The parties agree that the United States took the land into trust. See Rape's Br. 9-10, 12, 59; State Amicus Br. 8; Tax Assessor's Amicus Br. 10; C. 119. While it is unusual for a court to take judicial notice of a deed, see Elba v. Cooper, 93 So. 853, 854 (Ala. 1922), the parties do not question the accuracy of the deed conveying the land to the Secretary for the benefit of the Tribe, see Ala. R. Evid. 201(b)(2) (allowing judicial notice of adjudicative facts "whose accuracy cannot reasonably be questioned").

STATEMENT OF THE STANDARD OF REVIEW

In considering a Rule 12(b)(1) motion, "the plaintiff's jurisdictional averments are entitled to no presumptive weight." Ex parte Safeway Ins. Co. of Ala., 990 So. 2d 344, 350 (Ala. 2008). Instead, where the defendant challenges the factual basis for jurisdiction, the court "'must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.'" Id. (quoting Phoenix Consulting, Inc. v. Republic of Angola, 342 U.S. App. D.C. 145, 216 F.3d 36, 40 (D.C. Cir. 2000)).

SUMMARY OF THE ARGUMENT

The circuit court properly granted the Tribe's motion to dismiss based on the Tribe's sovereign immunity. While Mr. Rape quotes a policy discussion from Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998), he does not quote the holding of the case, which reaffirmed the continuing vitality of tribal sovereign immunity. While he cites a number of federal cases, he does not cite any of the recent, post-Carcieri opinions specifically holding that the PBCI, its entities, and its employees have sovereign

immunity from lawsuits. See, e.g., Freemanville Water System v. Poarch Band of Creek Indians, 563 F.3d 1205 (11th Cir. 2009) (Tribe immune); Sanderford v. Creek Casino Montgomery, No. 2:12-CV-455-WKW, 2013 U.S. Dist. LEXIS 3750, at *3-*4 (M.D. Ala. Jan. 10, 2013) (Tribe's entities immune); Terry v. Smith, No. 09-00722-KD-N, 2011 U.S. Dist. LEXIS 122160, *20-*21 (S.D. Ala. July 19, 2011) (Tribe's employees immune).

Dismissal was also proper because the Tribe's courts have exclusive subject-matter jurisdiction over this case, which involves a lawsuit against an Indian tribe arising from conduct on Indian lands. See Williams v. Lee, 358 U.S. 217 (1959). By failing to raise this issue in his Opening Brief, Mr. Rape waived a ground for affirmance and forfeited this appeal. Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006).

Carcieri v. Salazar, 555 U.S. 379 (2009), does not impact either sovereign immunity or the exclusive subject matter jurisdiction of the Tribe's courts. Neither Carcieri nor the statute it interpreted, the Indian Reorganization Act of 1934 (the "IRA") address or mention immunity. Whether a tribe is recognized for immunity

purposes is governed by a different statute -- the Federally Recognized Indian Tribe List Act of 1994 (the "Recognition Act"), 108 Stat. 4791, 4792, codified at 25 U.S.C. §§ 479a et seq. -- and regulations promulgated by the Secretary at 25 C.F.R. Part 83. The Recognition Act and the regulations do not require that a tribe be recognized in 1934 to have sovereign immunity.

For purposes of taking land into trust, Carcieri dealt only with an ongoing action regarding a present trust acquisition. It expressly disclaimed dealing with a trust action completed ten years earlier. In any event, Justice Breyer's concurrence in Carcieri, the administrative decisions of the Department of the Interior, and the leading treatise on Indian law all confirm that the Secretary may take land into trust for a tribe that is formally "recognized" by the United States after 1934. This Court should affirm.

ARGUMENT

I. This Court Should Affirm The Circuit Court's Dismissal Because The Tribal Defendants Enjoy Sovereign Immunity.

A. Federal Courts Have Consistently Recognized that the Tribe, its Entities, and its Employees Enjoy Sovereign Immunity in the Absence of Clear Congressional Abrogation or Waiver by the Tribe.

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986). Tribal sovereign immunity is a firmly established, well-settled doctrine, and the trial court properly relied on it as one basis for dismissing Mr. Rape's suit.

1. The Poarch Band of Creek Indians Enjoys Sovereign Immunity from Lawsuits.

Since the Supreme Court decided Carcieri, the federal courts in Alabama have continued to recognize, in cases not

cited by Mr. Rape, that the Tribal defendants enjoy sovereign immunity:

> "'**Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.**'" Florida v. Seminole Tribe, 181 F.3d 1237, 1241 (11th Cir. 1999) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978)). Thus, "**an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.**" Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 1702, 140 L. Ed. 2d 981 (1998). **Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought.**

Freemanville Water System v. Poarch Band of Creek Indians, 563 F.3d 1205, 1207-08 (11th Cir. 2009) (emphases added).

In 2011, the U.S. District Court for the Middle District of Alabama also affirmed the Tribe's immunity in the course of dismissing claims against the Tribe and its Creek Casino Wetumpka:

> **Where tribal sovereign immunity has not been waived by the tribe or abrogated by Congress as to claims brought before the court, the court lacks subject matter jurisdiction to entertain the claims.** See Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1292 (11th Cir. 2001) ("[T]he tribe's sovereign immunity deprives the district court of subject matter jurisdiction over [plaintiff's] claims."). **Sovereign immunity extends to a tribe's commercial activity;** it is not limited to non-commercial governmental activity. See Kiowa Tribe, 523 U.S. at 758. . . .

Allman v. Creek Casino Wetumpka, No. 2:11CV24-WKW, 2011 U.S. Dist. LEXIS 65158, *3 (M.D. Ala. May 23, 2011) (emphases added); id., adopted by, complaint dismissed by 2011 U.S. Dist. LEXIS 62726 (M.D. Ala., June 13, 2011).[13] See also Hardy v. IGT, Inc., 2011 U.S. Dist. LEXIS 90852 (M.D. Ala. Aug. 15, 2011) (Watkins, C.J.)(dismissing a gaming case against the PBCI after finding that the Tribe enjoys sovereign immunity).

Mr. Rape has not alleged congressional abrogation or tribal waiver of the Tribe's sovereign immunity, and neither has occurred. (C. 6-36.) Accordingly, the Tribal defendants enjoy sovereign immunity, and the Montgomery Circuit Court and this Court lack subject-matter jurisdiction over Mr. Rape's claims.

[13] See also Freemanville, 563 F.3d at 1206 ("Indian tribes have sovereign immunity from lawsuits unless Congress has abrogated it in the statute creating the right of action that is asserted against the tribe."); Contour Spa at the Hard Rock, Inc. v. Seminole Tribe, 692 F.3d 1200, 1209 (11th Cir. 2012) ("The law is crystal clear that tribal immunity applies unless there has been congressional abrogation or waiver by the tribe.").

2. The Tribe's Entities And Enterprises Also Enjoy Sovereign Immunity.

The Tribe's sovereign immunity extends to tribal entities. As the Federal District Court of the Middle District of Alabama has explained in dismissing an action against the Creek Casino Montgomery:

> As a threshold issue, **Defendant Creek Casino is indistinguishable from the Tribe for the purposes of tribal sovereign immunity.** . . . Defendant is a gaming operation wholly owned and operated by the Tribe. Poarch Band of Cr. Ind. Code § 20-1-1(d). It exists to fund and support, among other things, the Tribe's "operations or programs," the "general welfare of the Tribe and its members," and "economic development." Poarch Band of Cr. Ind. Code § 20-1-1(c).

Sanderford v. Creek Casino Montgomery, No. 2:12-CV-455-WKW, 2013 U.S. Dist. LEXIS 3750, at *4-*5 (M.D. Ala. Jan. 10, 2013) (Watkins, C.J.) (emphasis added).[14]

Mr. Rape concedes that PCI Gaming, Creek Indian Enterprises, and Creek Casino Montgomery are instrumentalities of the Tribe that carry out the Tribe's gaming activities. (C. 9-10 at ¶¶ 3-5.) He does not

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[14] See generally Miller v. Wright, 705 F.3d 919, 924 (9th Cir. 2013) ("[T]ribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.") (internal quotation and citation omitted); Breakthrough Mgmt. Group v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1195-96 (10th Cir. 2010) (tribal casino enjoys immunity unless waived).

allege that the Tribe or these tribal entities have waived their immunity from suit or that Congress has abrogated it. (C. 6-36.) Accordingly, the Montgomery Circuit Court lacked subject-matter jurisdiction over the claims against those entities. See, e.g., Freemanville, 563 F.3d at 1206-07.

3. The Individual Tribal Defendants Also Enjoy Sovereign Immunity.

The Tribe's sovereign immunity also extends to its employees. The U.S. District Court for the Southern District of Alabama recently held that tribal sovereign immunity covered two of the PBCI's employees (its treasurer and its policy chief) and dismissed the plaintiffs' claims against them:

> **The Tribe's sovereign immunity extends to its governmental personnel (i.e., tribal officials** such as tribal council members and the tribal police chief). . . . Consequently, even if plaintiffs could state a claim, any such claim is barred by the Tribal Officials' sovereign immunity. . . .

Terry v. Smith, No. 09-00722-KD-N, 2011 U.S. Dist. LEXIS 122160, *20-*21 (S.D. Ala. July 19, 2011) (emphasis added),

adopted by, claim dismissed by 2011 U.S. Dist. LEXIS 119791 (S.D. Ala., Oct. 14, 2011) (DuBose, J.).[15]

While Mr. Rape's complaint labels his claims as against the Tribal employees in their official and individual capacities, they challenge actions of the Tribal employees taken solely in their official capacities. For example, his respondeat superior claim asserts "[a]t the time of the occurrence forming the basis of this civil action, Defendants JAMES INGRAM and LORENZO TEAGUE . . . were acting within the line and scope of their employment with Defendants." (C. 28 at ¶ 60) (emphasis added). The actions taken with respect to Mr. Rape were taken by Teague

[15] See generally Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999) ("Tamiami III"); accord, e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949) ("[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign [which] . . . cannot be enjoined."); Chayoon v. Sherlock, 877 A.2d 4, 10 (App. Ct. Conn. 2005); Garcia v. Akwesasne Housing Auth., 105 F. Supp. 2d 12, 19 (N.D.N.Y. 2000), aff'd in part and vacated in part on other grounds, 268 F.3d 76 (2d Cir. 2001); Fall v. Grand Traverse Band of Ottawa and Chippewa Indians, No. 03-07-560, 2006 WL 6285475 (Grand Traverse Band Of Ottawa and Chippewa Indians Tribal Court Jan. 17, 2006) (holding tribal manager immune where she exercised her delegated authority to discharge tribal employees); see also Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985) (tribal officials had acted within the scope of their delegated authority to remove non-member; sovereign immunity barred suit).

and/or Ingram in their capacity and within their authority as casino/Tribe employees, and the complaint asserts no allegation to the contrary. (C. 78, 80.)

Stripped to its essence, Mr. Rape's complaint says he won a prize, and the Tribe says he did not. The jackpot award could be bestowed or denied only by the Tribe, and that relief could only be obtained against the tribal sovereign.[16] Under the federal cases discussed above, the Tribe has sovereign immunity from this lawsuit.[17]

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[16] Similarly, the State's sovereign immunity bars a lawsuit against the State and its officials when the gist of the action is one for recovery of money from the sovereign. See, e.g., Ex parte Moulton, 2013 Ala. LEXIS 9, at *70 (Ala. Jan. 25, 2013) (State's immunity under § 14 barred claims asserted against state employees in their official and individual capacities); Wilson v. Thomas, 2012 Ala. LEXIS 143, at *12 (Ala. Oct. 26, 2012) (state agency immune from suit; "In general, the State is immune from any lawsuit that would directly affect a contract or property right of the State or result in the plaintiff's recovery of money from the State."). Where the alleged actions fall within the scope of the Tribal employees' authority and duties of employment, the Tribe's fisc and interests are at stake, and the employees are entitled to the Tribe's immunity. See, e.g., Paszkowski v. Chapman, 2001 WL 1178765 (Sup. Ct. Conn. August 30, 2001) (holding a negligence action for slip and fall against casino facilities operations director and casino building official barred by tribal immunity).

[17] The only exception to this settled rule is a narrow one under Ex parte Young, 209 U.S. 123 (1908), for prospective, non-monetary relief to keep tribal officials from acting beyond their authority. See Tamiami III, 177

Without disclosing these federal cases, Mr. Rape seeks a holding from this Court that would create a split between the federal courts and this Court on a matter of federal law -- the immunity of the Tribe. An examination of the authorities that Mr. Rape cites demonstrates that no such split is warranted.

4. Mr. Rape's Authorities Support Tribal Sovereign Immunity.

The opinions upon which Mr. Rape relies, when reviewed in their entirety rather than through the lens of his selective quotations, actually reinforce the trial court's decision. To support his argument against sovereign immunity, Mr. Rape quotes part of a policy discussion from the Supreme Court's decision in Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). But he omits the holding of the case, which reaffirmed that Indian tribes are protected from lawsuits by sovereign immunity:

> There are reasons to doubt the wisdom of perpetuating the doctrine. . . .

F.3d at 1226. Mr. Rape does not seek an injunction, however, only money; his claims are not within the scope of the Ex parte Young exception. (C. 6-36.)

. . . .

> In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case. The contrary decision of the Oklahoma Court of Appeals is
>
> Reversed.

Kiowa Tribe, 523 U.S. at 758-60 (emphasis on words not quoted in Mr. Rape's Brief 17-18) (citations omitted).

The Eleventh Circuit recently underscored the true significance of Kiowa Tribe, explaining that "at the end of the day, notwithstanding the Supreme Court's reservations about the tenuous origins of the tribal immunity doctrine and the wisdom of the doctrine's current breadth . . ., the Court could not have been clearer about placing the ball in Congress's court going forward: '[W]e decline to revisit our case law and choose to defer to Congress.'" Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224, 1229 (11th Cir. 2012) (quoting Kiowa Tribe, 523 U.S. at 760).[18]

[18] Mr. Rape also selectively quotes from Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 152 (1973). See Rape's Br. 13, 16-17. However, Mescalero had nothing to do with tribal immunity from suit. Rather, it addressed only

Mr. Rape also relies on Cossey v. Cherokee Nation Enters', LLC, 212 P.3d 447 (Okla. 2009), for the proposition that a state court has jurisdiction over a non-Indian casino customer's tort claim. See Rape's Br. 14. In Cossey, the Oklahoma state court ignored tribal sovereign immunity and stretched an interpretation of the State's gaming compact to conclude that the Oklahoma state courts were courts of competent jurisdiction to hear a non-Indian's tort claims against a tribe or tribal entity. Id.

Mr. Rape fails to note that (1) there is no compact between the PBCI and the State of Alabama that could support a similar holding here,[19] and (2) after Cossey, the U.S. District Court for the Western District of Oklahoma enjoined the State of Oklahoma and its officials from exercising civil-adjudicatory jurisdiction over such

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the ability of a state to tax a tribe's off-reservation business activities. It confirmed the "historic immunity from state and local control" over the tribe's reservation lands and found "no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . absent congressional consent." Mescalero, 411 U.S. at 147-48.

[19] See Poarch Band of Creek Indians v. Ala, 776 F. Supp. 550, 552 (S.D. Ala. 1991), aff'd sub nom., Seminole Tribe v. Fla., 11 F.3d 1016 (11th Cir. 1994).

claims, explaining that Oklahoma's state courts are not courts of "competent jurisdiction" under the compact because there had been no waiver or Congressional abrogation of tribal sovereign immunity. See Choctaw Nation v. Oklahoma, 2010 WL 5798663 at *4 (W. D. Okla. June 29, 2010) ("[A]ny attempt by any Oklahoma State court, including the Oklahoma Supreme Court, to exercise jurisdiction over a Compact-based tort claim . . . lawsuit is a violation of the sovereignty of the Nations . . . ."); accord Harris v. Muscogee (Creek) Nation, No. 11-654, 2012 WL 2279340, at *4 (N.D. Okla. June 18, 2012) (finding no waiver of tribal immunity under state gaming compact).

Mr. Rape's reliance on Nevada v. Hicks, 533 U.S. 353 (2001), and A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996), aff'd, Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997), is likewise misplaced. Neither Hicks nor Strate addressed sovereign immunity. Instead, they concerned a tribal court's jurisdiction over a non-Indian defendant. In Hicks, a tribal court was held not to have jurisdiction over a defendant who was a state official in an action brought under 42 U.S.C. § 1983. Similarly, Strate found no tribal court jurisdiction in an action

against non-Indians involving an accident on a state highway. Neither decision affects the Tribal defendants' immunity from suit in a state court action -- nor, for that matter, the propriety of the PBCI's tribal court jurisdiction over the present action brought by a non-Indian against a Tribe based on actions that occurred on Indian land.

Mr. Rape also relies on Bittle v. Bahe, 192 P.3d 810, 819 (Okla. 2008), to support his narrative of the weakening of tribal sovereign immunity. See Rape's Br. 18-20. Bittle, however, was a dram shop case involving an express congressional abrogation and a tribe's waiver of tribal immunity in the context of state liquor laws. Unlike Bittle, this case involves no federal statutory abrogation or tribal waiver of the PBCI's immunity.[20]

Finally, Mr. Rape mistakenly relies on Rice v. Rehner, 463 U.S. 713, 719 (1983), and White Mountain Apache Tribe

[20] See Furry, 685 F.3d at 1234 n.7 (declining to follow Bittle and reiterating the principle that congressional abrogation of immunity must be clear and unequivocal) (citing Bittle, 192 P.3d at 829, 833 (Kauger, J., dissenting) (observing that "the majority opinion 'ignores controlling precedents' and that '[i]t takes a great leap of jurisprudence to determine that Rice v. Rehner is dispositive of the issue of sovereign immunity as it relates to private dram shop actions'")).

v. Bracker, 448 U.S. 136, 144 (1980), to support his argument that the Tribe's sovereign immunity has been diminished. Rape's Br. 15-17. Rice and Bracker did not address sovereign immunity. Instead, they discussed the distinct doctrine of federal preemption -- whether a state can regulate the activities of non-Indians on Indian lands in light of the federal government's plenary authority over Indian affairs. In Bracker, the Court held that the state taxation of the activities of a non-Indian logging company doing business exclusively in "Indian Country" was preempted by the federal government's extensive regulation of the lumber industry on Indian lands. By contrast, the Rice Court concluded that a state could require that a non-Indian selling alcohol in Indian Country be licensed where the federal government had specifically authorized state regulation of liquor sales on Indian lands. 463 U.S. at 734-35.

Bracker and Rice have nothing to do with this case. This is not a preemption case. Mr. Rape is not a State. He is not attempting to impose a state licensing or taxation scheme on non-Indians engaged in business on Indian lands. (C. 6-36.) His lawsuit for breach of

contract and tort is barred by the separate doctrine of sovereign immunity. See Freemanville, 563 F.3d at 1206-07.

B. Mr. Rape Misconstrues Carcieri, Which Has Nothing to Do with Tribal Sovereign Immunity.

1. Carcieri Does Not Address or Affect Immunity.

Mr. Rape relies on Carcieri, 555 U.S. 379, for the proposition that a tribe must have been "recognized" (i.e., acknowledged by federal officials as being a tribe to which the federal government owes duties) in 1934 in order to enjoy sovereign immunity. Rape's Br. 27-45. This argument fails because neither Carcieri nor the statute it interprets, the IRA, address or affect sovereign immunity.[21] Carcieri and the IRA involve only the taking of lands into trust for Indian tribes, an issue that is entirely unrelated to tribal sovereign immunity. See, e.g., Kiowa Tribe, 523 U.S. at 760 ("Tribes enjoy immunity from suit on contracts . . . whether they were made on or off a

[21] Unlike an appellant, "[a]n appellee can defend the trial court's ruling with an argument not raised below, for this Court will affirm the judgment appealed from if supported on any valid legal ground." Smith v. Equifax Servs., Inc., 537 So. 2d 463, 465 (Ala. 1988) (internal quotation marks and citation omitted).

reservation." (emphasis added)); Freemanville, 563 F.3d at 1210.[22]

Federal recognition is governed not by the IRA, but by a different statute, the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791), codified at 25 U.S.C. §§ 479a et seq. (the "Recognition Act") and regulations promulgated by the Secretary at 25 C.F.R. Part 83.

Before 1978, there was no official, federal "recognition" process for Indian tribes. See Montoya v. United States, 180 U.S. 261, 266 (1901); United States v. Wright, 53 F.2d 300, 307 (4th Cir. 1931). In 1978, the Department of the Interior issued the Federal Acknowledgment Process regulations that applied only to those tribes "which are not currently acknowledged as

[22] The immunity of Indian tribes from lawsuits arises from their status as former sovereign nations, not from the IRA or any other statute. See Kiowa Tribe, 523 U.S. at 757 ("As sovereigns or quasi-sovereigns, the Indian Nations enjoyed immunity 'from judicial attack' absent consent to be sued."). While there is abundant "federal legislation relating to Indian affairs, such as the Indian Reorganization Act or the Nonintercourse Act, the doctrine of tribal sovereign immunity does not arise out of federal legislation, but rather arises from the 'inherent sovereign authority' of the Indian tribes." Gristede's Foods, Inc. v. Unkechauge Nation, No. 06-CV-1260 (CBA), 2006 U.S. Dist. LEXIS 98321, *14-*15 (E.D.N.Y. Dec. 22, 2006).

Indian tribes by the Department." 25 C.F.R. § 54.3(a) (1978) (emphasis added) (App. R).

In 1994, Congress enacted the Recognition Act, which did not change the Department's process for recognizing tribes after 1978.[23] Congressional findings in the Recognition Act included:

> (4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
>
> . . . .
>
> (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

Recognition Act, § 103, 108 Stat. 4792.

The Recognition Act defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C.

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[23] Congress' leaving the regulations in place is persuasive evidence that Congress approved of the recognition of Indian tribes after 1978. See Young v. Cmty. Nutrition Inst., 476 U.S. 974, 983 (1986) ("[I]n revisiting § 346, Congress did not change the procedures . . . [A] congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."). (Internal quotation marks and citations omitted) (second emphasis added).

§ 479a(2). The Secretary's regulations state that a recognized tribe is "entitled to the immunities and privileges available to other federally acknowledged Indian tribes." 25 C.F.R § 83.2 (emphasis added).

The PBCI is on the list published by the Secretary after Carcieri. 77 Fed. Reg. 47868, 47871 (Aug. 10, 2012) (listing "Poarch Band of Creeks" as a federally recognized tribe). Congress has not removed the Tribe from the list; this Court cannot. PCBI's status as a federally recognized tribe entitled to sovereign immunity is indisputable.

2. A Challenge to the Department of Interior's Decisions Must Be Brought Under the APA and Cannot Be Collaterally Attacked In State Court.

Any challenge the Secretary's actions under the Recognition Act and the regulations, must be brought under the federal Administrative Procedure Act, 5 U.S.C. § 701 et. seq. ("APA") the Department of the Interior's administrative processes, and in federal court, and it would have to name the Secretary as a party. See 5 U.S.C. § 701, et seq.; 25 C.F.R. § 83.11; Carcieri, 555 U.S. at 385-86. Because Mr. Rape and his amici did not file a federal APA action or otherwise challenge the Secretary's

decision, they cannot now collaterally attack that decision in state court. And the Attorney General admits he has no jurisdiction over these issues. See Section II.C.2 & 3 of this Brief, incorporated here.

The Tribal defendants continue to enjoy sovereign immunity from suits such as Mr. Rape's. Sovereign immunity deprives a court of subject-matter jurisdiction. See Sanderlin v. Seminole Tribe, 243 F.3d 1282, 1292 (11th Cir. 2001) ("Accordingly, the Tribe's sovereign immunity deprives the district court of subject matter jurisdiction over Sanderlin's complaint."); Cf. Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 21 (Ala. 2007) ("'[A]n action contrary to the State's immunity is an action over which the courts of this State lack subject-matter jurisdiction.'") (quoting Larkins v. Dep't of Mental Health & Mental Retardation, 806 So. 2d 358, 363 (Ala. 2001)). This Court should affirm the trial court's dismissal of this lawsuit.

II. This Court Should Affirm The Circuit Court's Dismissal Because The Tribe's Courts Have Exclusive Subject-Matter Jurisdiction Over Mr. Rape's Claims and Mr. Rape Forfeited This Argument.

A. Mr. Rape Forfeited the Exclusive Subject-Matter Jurisdiction Argument By Not Making It In His Opening Brief.

This Court has repeatedly held that when a trial court's final judgment does not specify the basis for the ruling and the appellant does not argue one of the arguments the appellee made in the trial court, the appellate court must affirm:

> "'When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order **does not specify a basis** for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief **constitutes a waiver** with respect to the issue.'"
>
> Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006) (footnote omitted) (emphasis added). **This waiver, namely, the failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment.** Id. That is so, because 'this court will not presume such error on the part of the trial court.' Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478, 2010 Ala. Civ. App. LEXIS 123 (Ala. Civ. App. 2010) (emphasis added).

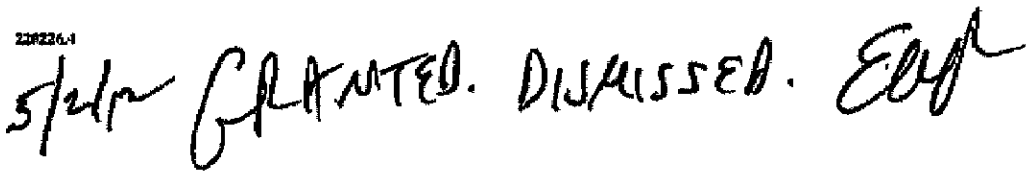
Scrushy v. Tucker, 70 So. 3d 289, 306-07 (Ala. 2011) (bold emphases added).

In this case, the Tribe made two arguments for the lack of subject-matter jurisdiction in the circuit court: (1) the Tribe's courts have exclusive subject-matter jurisdiction over claims against the Tribe arising from conduct on Indian land; and (2) the Tribe has sovereign immunity. (C. 68-74.) With respect to the first basis for judgment, the Tribe argued:

> Plaintiff has asserted claims against the Tribe, tribal entities, and tribal employees arising out of events that took place entirely on tribal trust land. **Assertion of state court jurisdiction under these facts would plainly and impermissibly infringe upon the Tribe's firmly established right of self-governance. Plaintiff's remedy, if any, lies in Tribal court** (where Plaintiff has in fact brought suit), and this Court must dismiss the complaint due to lack of subject matter jurisdiction. *Accord* Poarch Band of Creek Indians Tribal Code § 4-1-5(b) ("**The State of Alabama shall have no jurisdiction, criminal or civil, within the reservation or territorial jurisdiction of the tribe ... for civil or criminal matters.**").

(C. 69-70) (emphases added).

The trial court's final judgment consists of the following handwritten note at the bottom of a copy of the first page of the Tribe's motion to dismiss:



(C. 166) (App. A).

Plainly, the above order "does not specify a basis for its ruling." Fogarty, 953 So. 2d at 1232.

In his Opening Brief, Mr. Rape failed to address the Tribe's first argument -- that the state courts lack subject-matter jurisdiction due to the exclusive subject-matter jurisdiction of the Tribe's courts. Instead, he argued only sovereign immunity, contending that there is no immunity in this case because the Secretary did not properly take the land at issue into trust for the Tribe. See Rape's Br. 12-13, 45. He mentions neither tribal courts (except to say that he filed there too, see id. at 1), nor Tribal Code § 4-1-5 (App. T), which provides the Tribe's courts have exclusive subject-matter jurisdiction, leaving the state courts with none.[24] This waiver requires

[24] While the State appears to argue the alternative grounds of the exclusive subject-matter jurisdiction of tribal courts over conduct on Indian trust lands, see State's Amicus Br. 6-11, (cf. Tax Assessor's Amicus Br. 9-14), Mr. Rape did not raise this alternative ground in his Opening Brief and thus, this ground cannot be injected into

affirmance. Tucker, 70 So. 3d at 306-07; Fogarty, 953 So. 2d at 1232.

Having failed to raise the exclusive subject-matter jurisdiction of tribal courts as a grounds for the lack of state court subject-matter jurisdiction in his Opening Brief, Mr. Rape may not address this basis for dismissal in his Reply Brief. See Fox Alarm Co. v. Wadsworth, 913 So. 2d 1070, 1075 (Ala. 2005) ("Arguments made for the first time in a reply brief will not be addressed on appeal."). The reply brief prohibition is strict. In Fox Alarm, as here, the appellant mentioned the critical arguments in its opening brief, but only insofar as they related to a different issue. Because the appellant failed to relate the arguments to the issue it later raised in its reply brief, this Court concluded that the issue raised in the reply was waived. See id. at 1074. Under these rules, Mr. Rape cannot resuscitate a response to the Tribal court's

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the appeal by an amicus curiae. See Anderson v. Smith, 148 So. 2d 243, 244-45 (Ala. 1962) ("Assignment of error No. 3 is not directly or indirectly referred to in appellant's brief, and must be deemed waived. . . . The appellant having waived assignment of error No. 3, the same cannot be injected into this review by any action on the part of the amicus curiae.").

exclusive subject-matter jurisdiction ground for dismissal by reference to its sovereign immunity argument.

The Tribal defendants are well aware that subject-matter jurisdiction can generally be raised at any time. The purpose of the Fogarty rule, however, is to prevent an appellant from sandbagging an appellee by raising an argument in the appellant's reply brief to which the appellee cannot respond. See Fogarty, 953 So. 2d at 1232 ("If the [forfeiture] rule were otherwise, an appellant could 'sandbag' an appellee by withholding an argument on an issue until the reply brief, thereby depriving the appellee of the opportunity to respond.").

B. The Tribe's Courts Have Exclusive Subject-Matter Jurisdiction Over This Case, and Alabama State Courts Thus Lack Jurisdiction.

Whether the argument is a forfeiture or a sandbag, the Tribe's courts still have exclusive subject-matter jurisdiction over claims against the Tribal defendants arising from conduct on Indian trust lands.[25] The Tribe's

[25] See 25 U.S.C. § 2703(4) ("The term 'Indian lands' means -- (A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or

code provides that the tribal courts retain exclusive jurisdiction over claims brought by a non-Indian plaintiff against an Indian defendant based on occurrences in Indian territory (i.e., lands held in trust by the United States for the Tribe). See Poarch Band of Creek Indians Tribal Code § 4-1-5 (App. S); see also id. at § 4-1-5(b) ("The State of Alabama shall have no jurisdiction, criminal or civil, within the reservation or territorial jurisdiction of the tribe . . . for civil or criminal matters."); (C. 69-70). Mr. Rape also filed his lawsuit in tribal court (where he lost and chose not to appeal).[26] (C. 39.)

Federal law confirms that state courts have no subject-matter jurisdiction over this lawsuit. The key factors in determining the propriety of a court's jurisdiction involving tribal parties are the tribal identity of the defendant and whether conduct in issue occurred on Indian lands. See Smith v. Salish Kootenai College, 434 F. 3d 1127, 1131 (9th Cir. 2006). See also Hicks, 533 U.S. at

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individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.").

[26] Mr. Rape did not include the post-filing events in the Tribe's court in the record of this appeal.

382 (Souter, J., concurring) ("It is the membership status of the unconsenting party . . . that counts as the primary jurisdictional fact."); Philip Morris U.S.A., Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 937 (9th Cir. 2009).

Although Mr. Rape erroneously cites this Court to cases involving tribal court jurisdiction over non-Indian defendants, it is settled law that tribal courts retain exclusive subject-matter jurisdiction over, among other things, lawsuits by non-Indians against Indian tribes, their members, and tribal employees arising from conduct on Indian lands. Williams v. Lee, 358 U.S. 217, 219-20 (1959);[27] Diepenbrock v. Merkel, 97 P.3d 1063 (Kan. Ct. App. 2004) (holding that tribal court had exclusive jurisdiction over claims alleging on-reservation injuries to casino patrons); Kizis v. Morse Diesel Int'l, Inc., 794 A.2d 498

[27] See generally Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) ("Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), their civil jurisdiction is not similarly restricted. See National Farmers Union [Ins. Cos. v. Crow Tribe, 471 U.S. 845,] 854-855, and nn. 16 and 17 [(1985)]. If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. See Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, supra.").

(Conn. 2002) (holding that state courts lacked jurisdiction over personal injury action brought against tribal employees and entity by patron of casino on Indian lands).

In Williams, 358 U.S. at 217, a non-Indian operated a store on Indian lands, sold goods to an Indian on credit, and sued in Arizona state court to collect the amount owed. The Indian defendant filed a "motion to dismiss on the ground that jurisdiction lay in the tribal court rather than in the state court," but the state trial court denied the motion. Id. at 218. The Supreme Court of Arizona affirmed. Id.

The U.S. Supreme Court reversed the Arizona Supreme Court, holding that state courts lack subject-matter jurisdiction over lawsuits by a non-Indian against a member of an Indian tribe arising out of a commercial transaction that occurred on Indian lands. Id. at 223. Justice Black explained:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. **He was on the Reservation and the transaction with an Indian took place there.** Cf. Donnelly v. United States, *supra;* Williams v. United States, *supra.* The cases in this Court have consistently guarded

the **authority of Indian governments over their reservations.**

Williams, 358 U.S. at 223 (emphases added).[28] See also Philip Morris, 569 F.3d at 940 ("Williams makes clear that tribal courts have exclusive jurisdiction over suits against tribal members on claims arising on the reservation"); Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 28 (1st Cir. 2006) ("state courts historically have had no jurisdiction over civil suits against tribal members when the cause of action arose out of on-reservation activities"). As the Eleventh Circuit has explained, absent waiver by the tribe, "a state court may

[28] The analysis of an Indian tribe's inherent power to adjudicate, tax, regulate, or exercise some other attribute of sovereignty is the same for Indian land held as a reservation or held in trust by the Secretary of the Interior for the Tribe. See Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.") (emphasis added); Citizen Band Potawatomi Indian Tribe, 498 U.S. at 511 ("Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated 'reservation,' but on land held in trust for the Potawatomis. Neither Mescalero nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges.").

not exercise jurisdiction over a recognized Indian tribe," and "[t]he Supreme Court has continuously acknowledged tribal courts' inherent power to exercise civil jurisdiction over non-Indians in conflicts affecting the interests of Indians on Indian lands." Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 508 n.11 (11th Cir. 1993) ("Tamiami I").[29]

Williams is dispositive of Mr. Rape's lawsuit. First, Mr. Rape engaged in the consensual relationship of a patron with Creek Casino Montgomery, entering into a commercial

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[29] The district court in Allman recognized the Tribe's judicial system's exclusive subject-matter jurisdiction over claims against Indian defendants based on events occurring on Indian lands:

> The Tribal Court is empowered, according to the Tribal Code, to try "all civil causes of action and defenses thereto which are cognizable in the trial courts of the State of Alabama" and to exercise jurisdiction over "[a]ll persons . . . present with-in or upon reservation property" and all real and personal property located on or within the reservation. Poarch Band of Creek Indians Tribal Code, §§ 3-1-3, 4-1-1(a), 4-1-3, 4-1-4(a), 11-1-1. The Tribal Code further provides that where a defendant in a general civil action is "Indian," and the claim arose on "Indian country," the Tribal Court has exclusive jurisdiction. Id., § 4-1-5.

Allman, 2011 U.S. Dist. LEXIS 65158, at *13 (citations omitted).

gambling contract on land held in trust for the Tribe by the United States. See C. 8-9, 11 Compl. at ¶ 2; accord (C. 76 at ¶ 6; C. 78 ¶¶ 4-6; C. 80 ¶¶ 4-6). See generally Macon County Greyhound Park v. Knowles, 39 So. 3d 100, 107 (Ala. 2009) (stating a wager is an agreement that creates a contract).[30]

Second, his attempt to collect $1.3 million from the Tribe impacts the ability of the Tribal members to govern themselves. See Williams, 358 U.S. at 223 ("There can be

[30] That Mr. Rape's claims are founded on an allegation that he won a gaming prize confirms that state courts have no jurisdiction. Congress enacted the Indian Gaming Regulatory Act ("IGRA"), which (1) recognizes that Indian tribes have jurisdiction over gaming on Indian lands, and (2) delegates to the National Indian Gaming Regulatory Commission the power to regulate gaming activities occurring on Indian lands. See 25 U.S.C. §§ 2710(a)(2) ("Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter."); 2703(7)(A)(i) ("The term 'class II gaming' means -- the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)"); Seminole Tribe of Fla, 181 F.3d at 1247 ("A central feature of this balance is IGRA's thoroughgoing limits on the application of state laws and the extension of state jurisdiction to tribal lands.") (Citing S. Rep. No. 100-446, at 5-6 (1988)); Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 544 (8th Cir. 1996) ("Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law.").

no doubt that to allow the exercise of state jurisdiction here [i.e., collection of damages in civil suit] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").

Third, he filed a civil action in PBCI Tribal Court, the appropriate jurisdiction, but elected not to prosecute that claim, which was dismissed.[31] He cannot now seek to undermine the Tribal Court's authority by litigating identical issues in Alabama's state courts. See Tamiami I, 999 F.2d at 508 n.12 (explaining deference is owed to tribal court's decision where that court had subject-matter jurisdiction over the matter).

Alabama's state courts have no subject-matter jurisdiction over this case. See, e.g., Hatcher v. Harrah's NC Casino Co., LLC, 610 S.E.2d 210, 213 (N.C. Ct. App. 2005) (holding that the state courts lacked subject-matter jurisdiction over a plaintiff's claim for payment of a disputed slot machine jackpot and noting that asserting such jurisdiction "would plainly interfere with the powers

[31] Mr. Rape did not place the post-filing events in the Tribe's court into the record of this appeal.

of self-government" of the tribal defendant).[32] This Court should affirm the trial court's dismissal on the merits.

C. The Carcieri Challenge Fails to Alter the Exclusive Subject-Matter Jurisdiction of the Tribe's Courts And Is in the Wrong Forum.

Mr. Rape (for purposes of immunity), the State (for purposes of subject-matter jurisdiction), and the Tax Assessor (for purposes of taxation)[33] argue that the Secretary's taking of the Tribe's land into trust was invalid in light of Carcieri. This argument fails substantially and procedurally.

Substantively, Carcieri did not address a previous trust acquisition, and Justice Breyer in his concurrence in

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[32] See also Diepenbrock, 97 P.3d at 1068; Kizis, 794 A.2d at 505-06; Cohen's Handbook of Federal Indian Law § 6.01(1).

[33] While the Tax Assessor, as an amicus cannot raise an issue (i.e., taxation) not raised by his appellant, Mr. Rape, see Anderson, 148 So. 2d at 244-45, the Tax Assessor, cites City of Sherrill, New York v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). He cites Sherrill for the proposition that land that has not always been tribal land should not be exempt from taxation. Tax Assessor's Br. 6, 7, 16-20. Sherrill, however, dealt with taxation of land that a tribe owned in fee and that had not been taken into trust by the United States under the IRA, which provides a tax exemption. It is thus wholly irrelevant to this case, which involves Indian trust lands and does not involve any taxation issues.

Carcieri, the Department of the Interior, and the Cohen treatise all conclude that post-Carcieri the Secretary can take land into trust for a tribe that is recognized after 1934. Procedurally, the Secretary's actions are governed by the federal APA can be challenged only before the Department of the Interior and in federal court, and cannot be collaterally attacked in state court.

1. Carcieri Did Not Alter the Tribal Court's Exclusive Subject-Matter Jurisdiction.

(a) Carcieri Does Not Apply to Lands Previously Taken into Trust.

The Attorney General argues that the Tribe's courts do not have exclusive subject-matter jurisdiction over the trust land at issue because Carcieri supposedly held that the Secretary lacked authority to place the land into trust for a tribe. State's Amicus Br. 6-11. Carcieri, however, involved an attack on the Secretary's present taking of land into trust for a tribe. The Supreme Court expressly declined to address the Secretary's separate action of taking other lands into trust for the Narragansett Tribe ten years earlier:

> After obtaining federal recognition, the Tribe began urging the Secretary to accept a deed of

> trust to the 1,800 acres conveyed to it under the Rhode Island Indian Claims Settlement Act. . . . The Secretary acceded to the Tribe's request in 1988.[3]
>
> [3] The Tribe, the town, and the Secretary previously litigated issues relating to the Secretary's acceptance of these 1,800 acres, and that matter is not presently before this Court.

Carcieri, 555 U.S. at 385 n.3 (emphasis added).

The Court's explicit refusal to revisit the status of lands already taken into trust by the Secretary years earlier is fatal to the Attorney General's argument that Carcieri applies retroactively to divest the United States of title to the lands at issue and deprive the Tribe's courts of exclusive subject-matter jurisdiction over those lands.

(b) Carcieri Did Not Hold That Lands Could Be Taken Into Trust Only for Tribes Formally "Recognized" In 1934.

While the merits of the Secretary's decisions to take land into trust for the PBCI are not properly addressed in this case or by this Court, the fact of the matter is that Carcieri did not hold that a tribe had to be "recognized" in 1934 in order for the Secretary to take land into trust

for its benefit under the IRA.[34] Justice Breyer explained in his concurrence in Carcieri that "[t]he statute [i.e., the IRA], after all, imposes no time limit upon recognition." Carcieri, 555 U.S. at 398 (Breyer, J., concurring) (emphasis added). Justice Breyer further recounted: "We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 Tribes covered by the Act; and we also know that it wrongly left certain tribes off the list." Carcieri, 555 U.S. at 397-98 (Breyer, J., concurring) (emphasis added).

Since Carcieri, the Department of the Interior has taken land into trust for multiple tribes that were "under federal jurisdiction" in 1934 even though they were not formally "recognized" until later. See, e.g., Record of Decision Trust Acquisition of and Proclamation of Reservation for the 151.87-acre Parcel in Clark County,

[34] The Supreme Court did not decide whether a tribe's post-1934 "recognition" (i.e., acknowledgement of the tribe and the federal government's duties toward it) had any impact on whether the tribe was "under federal jurisdiction" in 1934 because the tribe in Carcieri did not even argue that it was "under federal jurisdiction" in 1934. Carcieri, 555 U.S. at 395 ("None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934.").

Washington, for the Cowlitz Indian Tribe at 1, 87-97 (U.S. Dep't of Int., Bureau of Indian Affairs Dec. 2010) (land taken into trust in 2010 for tribe formally recognized in 2002)[35]; Record of Decision Trust Acquisition for the 228.04-acre Plymouth Site in Amador County, California, for the Ione Band of Miwok Indians 57-59 (U.S. Dep't of Int., Bureau of Indian Affairs May 2012) (land taken into trust in 2012 for tribe formally recognized in 1972);[36] see also Stand up for California! v. United States Department of the Interior, --- F. Supp. 2d ----, No. 12-2071 (BAH), 2013 U.S. Dist. LEXIS 11592, *13 (D.D.C. Jan. 29, 2013) (concluding that the Secretary could take land into trust for tribe recognized after 1934).

While Mr. Rape cites to the 2005 edition of the Cohen treatise several times in his Brief to support his immunity

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[35] available at http://www.bia.gov/cs/groups/mywcsp/documents/text/idc012719.pdf (App. N). Because certain items were omitted from the record of decision, the district court remanded the Cowlitz Tribe's case to the Department of the Interior to issue a new decision without ruling on the substance of the decision. See Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Salazar, Nos. 11-cv-00284-BJR and 11-cv-278-BJR (D.D.C. March 13, 2013) (App. K).

[36] available at http://ioneeis.com/documents/recordofdecision/ROD.pdf (App. O).

arguments, Rape's Br. 22, 29, 33, 34, 39, neither Mr. Rape nor his amici cite to the 2012 edition of that treatise. The 2012 edition of the Cohen treatise concludes that under Carcieri a tribe does not have to be formally recognized in 1934 for the Secretary to take its land into trust:

> As Justice Breyer noted in concurrence, however, a tribe might be under federal jurisdiction in 1934 without having been formally recognized. [Carcieri,] 555 U.S. 379, 396.
>
> . . . .
>
> Since Carcieri, the question of what it means to be 'under federal jurisdiction' for purposes of the IRA, has acquired great importance. . . . Any tribe subject to federal plenary power over Indian affairs could be considered "under federal jurisdiction," especially if the federal government has at any time taken some action, such as treaty negotiations, provision of federal benefits, inclusion in a BIA census, or forcible relocation, that reflects and acknowledges federal power and responsibility toward the tribe. The Supreme Court has affirmed that Indian tribes remain under federal power (jurisdiction) unless they have ceased tribal relations or federal supervision has been terminated by treaty or act of Congress. Furthermore, any tribe that has been federally recognized through the process administered by the federal Office of Federal Acknowledgment [, a process that began in 1978,] has had to demonstrate its continuous existence as a social and political group (tribal relations) and the absence of federal termination, thereby also establishing its subjection to federal power over Indian affairs. Therefore, any tribe federally recognized by that means should be able to show that it was "under federal jurisdiction" in 1934.

Cohen's Handbook of Federal Indian Law § 3.02[6][d] p. 150 (2012) (emphases added) (App. Q).

These authorities confirm that a tribe did not have to be formally recognized in 1934 for the Secretary to take its land into trust, that the PBCI's land was properly taken into trust, and that the Tribe's courts have exclusive subject-matter jurisdiction over lawsuits against the Tribe arising from conduct on its Indian trust lands.

2. A Challenge to the Department of the Interior's Decisions to Take Its Land into Trust is Not Proper in State Court.

(a) Challenges to the Secretary's Actions Can Only be Brought Under the APA and in Federal Court.

Congress has delegated decisions on whether to take land into trust for an Indian tribe to the Secretary. See, e.g., 25 U.S.C. § 465.[37] Similarly, Congress charged the

[37] Courts defer to the BIA and the Secretary in determining whether a tribe is under federal jurisdiction and is eligible to have its land taken into trust. See, e.g., New York v. Salazar, Nos. 08-00644, 08-00648, 08-00633, 08-00647, 08-00660, 2012 U.S. Dist. LEXIS 136086, at *58-*60 (N.Y.N.D. Sept. 24, 2012) (remanding State's case to the BIA to weigh the complex historical information and make a decision as to whether that tribe had been under federal jurisdiction at the time the Act was passed); Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar, No. 11-cv-00278 (D.D.C. March 13, 2013),

Bureau of Indian Affairs ("BIA") -- not the Circuit Court of Montgomery County -- with making the fact-intensive, historical determination of whether a tribe was "under federal jurisdiction" in 1934. See 25 U.S.C. § 2 (stating that the Commissioner of the BIA shall "have the management of **all** Indian affairs and of **all** matters arising out of Indian relations") (emphases added).

The BIA and the Secretary exercised their congressionally delegated authority in making the decisions that Mr. Rape's amici ask this Court to disregard. After publishing notice of intent to do so, 49 Fed. Reg. 1141 (Jan. 9, 1984), the Secretary formally recognized the PBCI as an Indian Tribe in 1984. Final Determination for Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 24083 (June 11, 1984) (Bureau of Indian Affairs, U.S. Dep't of Interior) (App. J). Recognition decisions are subject to review under the Department of the Interior's regulations and the federal APA. 83 C.F.R. § 83.11 (providing for Interior Board of Indian Appeals

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(remanding a 2010 trust acquisition decision back to the Secretary so that he might issue a new decision based on a complete record regarding whether the Cowlitz Indian Tribe was under federal jurisdiction in 1934) (App. K).

("IBIA") review of Secretary's decision); Muwekma Ohlone Tribe v. Salazar, 813 F. Supp. 2d 170, 172 (D.D.C. 2011) (reviewing decision declining to list tribe as federally recognized).

The Secretary also took action in the 1990s by taking the land at issue into trust for the Tribe. (C. 8-9, 76.)[38] This action was subject to administrative review by the Interior Board of Indian Appeals ("IBIA") and by federal courts under the APA. For example, in Carcieri, 555 U.S. at 385, the Secretary accepted land into trust for the Narragansett Tribe and the "[p]etitioners [the State of Rhode Island, its Governor, and the town of Charlestown] sought review of the IBIA decision pursuant to the Administrative Procedure Act." (emphasis added).

Although they were free to do so, neither Mr. Rape nor his amici directly challenged the Secretary's final actions in 1984 or the 1990s at the agency level or in federal court. Instead, they now attempt to collaterally attack the Secretary's decisions in a state court action. "A party may not collaterally attack the validity of a prior

[38] The Secretary also took action in 1985 by taking other land into trust for the PBCI. 50 Fed. Reg. 15502 (April 18, 1985).

agency order in a subsequent proceeding." United States v. Howard Elec. Co., 798 F.2d 392, 394 (10th Cir. 1986) (internal quotation omitted).[39] This state court, non-APA attack on the Secretary's recognition of the PBCI and decisions to take land into trust for the Tribe is improper and must be rejected.

(b) In a Challenge to the United States' Title to Land, the United States is an Indispensable Party.

Challenging the validity of the Secretary's decision to take the PBCI's land into trust necessarily challenges the

[39] See also United States v. Backlund, 677 F.3d 930, 943 (9th Cir. 2012) ("parties may not use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions"); United States v. Metro. Petroleum Co., 743 F. Supp. 820, 825-826 (S.D. Fla. 1990) (declining to entertain an untimely collateral challenge to an agency order); see generally Phillips Petroleum Co. v. Stryker, 723 So. 2d 585, 590 (Ala. 1998) ("Orders by administrative agencies frequently are subject to limited judicial review and generally are not subject to collateral attack.") (quoting Mize v. Exxon Corp., 640 F.2d 637 (5th Cir. 1981)); Bryan v. Alabama Power Co., 20 So. 3d 108, 119 (Ala. 2009) (rejecting common law argument that would have overruled federal agency guidelines for operation of hydroelectric dam, stating "we are mindful of the fact that operating Martin Dam to attain such storage would require APCo to maintain a lake level below the operating curve established by the FERC [Federal Energy Regulatory Commission] and approved by the [U.S. Army] Corps of Engineers").

validity of the United States' title to the lands, which makes the Secretary an indispensable party. See Ala. R. Civ. P. 19(a). See Minnesota v. United States, 305 U.S. 382, 387 (1939) (holding that, in cases involving Indian trust land, "no effective relief can be given in a proceeding to which the United States is not a party and . . . the United States is therefore an indispensable party" to any such suit); United States v. Hellard, 322 U.S. 363, 367 (1944) ("Restricted Indian land is property in which the United States has an interest . . . . The governmental interest . . . is as clear as it would be if the fee were in the United States."); see also Chicago Title Ins. Co. v. Am. Guar. & Liab. Ins. Co., 892 So. 2d 369, 371 (Ala. 2004) ("Failure of the plaintiff or the trial court to add a necessary and indispensable party . . . can be raised for the first time on appeal by the parties or by the appellate court ex mero motu."(internal quotation marks and citation omitted)).

Mr. Rape's failure to join the Secretary is another, independently sufficient reason to affirm dismissal of this case. See Withington v. Cloud, 522 So. 2d 263, 265 (Ala. 1988); see generally 28 U.S.C. § 1442 (where a federal

officer is a party to a state court action, that officer can remove the action to state court).

3. The Attorney General Has Admitted That Even After Carcieri He Has No Jurisdiction over the Indian Lands at Issue and That His Concerns about Activities on Those Lands Belong in a Federal Forum.

Notwithstanding the Attorney General's current position in his amicus brief, he has admitted that the State has no jurisdiction over gaming activities on Indian lands. For example, in a letter to counsel for Victoryland, which is located on private land in Macon County, the Attorney General contrasted non-Indian gaming facilities, where Alabama law applies, and Indian gaming facilities, where "the State does not have jurisdiction":

> You also are likely aware of the situation with Class II gaming on Indian land. Federal law governs those facilities, and I do not have jurisdiction to enforce either federal or Alabama law against them. . . . In any event, your clients should be fully aware that they cannot justify opening operations within state jurisdiction that are illegal under state law, based on the fact that Indian casinos are operating on land over which the State does not have jurisdiction, and where federal law governs.

Letter from Atty. Gen. Strange to Mr. Espy (Oct. 19, 2012) (emphases added) (App. L).[40]

The Attorney General also knows that federal administrative agencies and courts are the appropriate bodies to entertain the challenges raised in his amicus brief as indicated by his repeated requests that the National Indian Gaming Commission amend its regulations over gaming laws on Indian lands:

> Because the Commission has previously told me that I do not have authority over gambling conducted on Indian lands, . . . The Commission's regulations should either give me the authority to enforce the law or make clear that gambling devices that look and operate like slot machines are "facsimiles" of games of chance under IGRA, regardless of whether they purport to aid in playing the game of "bingo."

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[40] This Court may take judicial notice on appeal of public records in the files of government agencies. See Broadway v. Ala. Dry Dock & Shipbuilding Co., 246 Ala. 201, 212 (Ala. 1944) ("[I]t is apparent from the annual report of the Director of Industrial Relations to the Governor for the Fiscal Year ending September 30, 1942, matters of which the court takes judicial notice . . . ."); Johnson v. Hall, 10 So. 3d 1031, 1034 (Ala. Civ. App. 2008) ("This court may take judicial notice of public records."); Ruth Bader Ginsburg, Brown v. Board of Education in International Context (Oct. 21, 2004), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07a-06.html (noting that the Attorney General's brief in Brown attached a letter from the Secretary of State).

Ex. B to State's Amicus Br. (Ltr. of Atty. Gen. Strange to Nat'l Indian Gaming Comm'n, p. 4) (April 25, 2012) (emphases added).[41]

And the Attorney General is currently litigating his Carcieri theory against the Tribe in the United States District Court for the Middle District, of Alabama. See State v. PCI Gaming Authority, et al, No. 2:13-cv-00178-WKW-WC (M.D. Ala.) (App. S).[42] The Attorney General's litigation of his administrative challenge raised in his amicus brief outside of state court underscores the fact that Alabama's courts lack subject-matter jurisdiction over this action.

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[41] While Congress has allowed States to bring certain claims against the National Indian Gaming Commission to enjoin unauthorized Class III gaming, see 25 U.S.C. § 2710(d)(7)(A)(ii), it has not afforded an action against tribal defendants. In a federal forum, Mr. Rape and his amici's administrative challenges would face a number of defenses, including the statute of limitations, laches, lack of standing, etc.

[42] See supra notes 2 & 12.

CONCLUSION[43]

Amidst the partial quotations, omitted citations, and self-serving press releases, Mr. Rape and his amici ultimately ask this Court to make a political decision against "Indian gambling." The Poarch Band of Creek Indians asks this Court to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

It may well be that if the Members of this Court were members of Congress, they would vote against gaming on Indian lands and elsewhere as a matter of legislative policy. But that policy question is not before this Court. Instead, the narrow, legal question before this Court is whether it has subject-matter jurisdiction to rule at all. The controlling federal law is that there is no subject-matter jurisdiction over a case against this federally recognized Indian tribe because:

(1) The Tribe, its entities, and its employees have sovereign immunity. See Freemanville, 563 F.3d at 1205; and

(2) The Tribe's courts have exclusive territorial subject-matter jurisdiction. See Williams, 358 U.S. 217.

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[43] Appellees adopt and incorporate each and every argument and authority cited in any section of this Brief into every other section of this Brief.

This Court should affirm the trial court's judgment dismissing this case.

/s/ Ed R. Haden
One of the Attorneys for
Appellees

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by electronic mail on this the 17th day of April, 2013, and by placing a copy of same in the United States mail, properly addressed and postage prepaid, on the 18th day of April, 2013:

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Appendix A

Circuit Court's Order Dismissing Case

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

JERRY RAPE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CV-2011-901485.00**
	)	
POARCH BAND CREEK INDIANS; PCI GAMING; CREEK INDIAN ENTERPRISES; CREEK CASINO MONTGOMERY; JAMES INGRAM, individually; LORENZO TEAGUE, individually, etc.	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants the Poarch Band of Creek Indians, PCI Gaming (a/k/a P.C.I. Gaming Authority), Creek Indian Enterprises (a/k/a Creek Indian Enterprises Development Authority), and Creek Casino Montgomery, James Ingram and Lorenzo Teague (collectively "Poarch Band of Creek Indians" or "the Tribe") respectfully move the Court, pursuant to Rule 12(b)(1) of the *Alabama Rules of Civil Procedure*, to dismiss the complaint, and all counts thereof, against them. As grounds therefore, the Poarch Band of Creek Indians assert the following showing the Court has no jurisdiction and Plaintiff cannot state a claim:

THIS ACTION MUST BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION

Plaintiff's complaint must be dismissed for two, independently sufficient reasons: (1) this is a Tribal matter over which this state Court has no jurisdiction and (2) the Tribe, the Tribal entities, and the Tribal employees enjoy sovereign immunity.

124116.1

5/2/12 GRANTED. DISMISSED. EHF

Appendix B

Albert James Pickett, Pickett's History of Alabama (1851, 1962 ed.) -- Excerpts

HISTORY

OF

ALABAMA

AND INCIDENTALLY OF

GEORGIA AND MISSISSIPPI

FROM THE EARLIEST PERIOD

ALBERT JAMES PICKETT

FOREWORD BY WAYNE GREENHAW
INTRODUCTION BY PHIL BEIDLER

REPUBLISHED BY
RIVER CITY PUBLISHING
MONTGOMERY, ALABAMA

1719 Mulberry Street
Montgomery, AL 36106

Pickett's history was first published in Charleston in 1851 by the firm of Walker and James. The original copyright page of Pickett's *History of Alabama* bears the following notice:

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CHAPTER XXXV.

TECUMSEH—CIVIL WAR AMONG THE CREEKS.

THE United States and Great Britain were upon the verge of war. British agents, in Canada and Florida, sought to procure the co-operation of the whole southwestern Indian force. The Creeks, more powerful in numbers than the others, were particularly urged to join the English. Colonel Hawkins had managed them, with much wisdom and policy, for several years, but they always remained dissatisfied, and were particularly so now, in consequence of a portion of their Chiefs having
1811 granted a public road through the heart of their country, which had been cut out by Lieutenant Luckett and a party of soldiers. This thoroughfare, called the "Federal Road," and which run from Mims' Ferry, upon the Alabama, to the Chattahoochie, was filled, from one end to the other, with emigrants for the western part of the territory. The Creeks, with their usual sagacity, foresaw that they should soon be hemmed in by the Georgians on one side, and the Tombigby people on the other, and many of them contemplated the expulsion of the latter, at some day not very distant. The Spaniards also hated the emigrants, who had continued to drive them, inch by inch, from the soil which they claimed. With both them and the Indians the British agents began to operate, to make secret allies of the one and open ones of the other. But the most powerful British incendiary was Tecumseh. His father and mother, of the Shawnee family, were born and bred at Souvanogee,* upon the Tallapoosa, in Alabama.

* Old Augusta, now the property of Henry Lucas, on the railroad, where there are some mounds.

use of gifted and cunning Indians, to carry out his plans, after he should have left the country. One of these was Josiah Francis, the son of a Creek woman, by a trader of Scotch and Irish descent, named David Francis.* The Shawnee prophet, it was said, inspired him. He placed him in a cabin by himself, around which he danced and howled for ten days. He said that Francis was then blind, but that he would again see, and would then know all things which were to happen in future. When the ten days expired the prophet led him forth, and attended him all day, for Francis stepped high and irregular, like a blind man. Towards night the vision of Francis suddenly came to him, and after that he was the greatest prophet in the whole Creek nation, and was empowered to make many subordinate prophets. Tecumseh having made numerous proselytes, once more visited the Big Warrior at Tookabatcha, whom he was particularly desirous to enlist in his schemes, but whom he had hitherto entreated to no effect, although his house was his headquarters. The Big Warrior still remained true to the United States, more from fear of the consequences of a war than any love he entertained for the Americans. Tecumseh, after talking with him for some time to no purpose pointed his finger in his face and emphatically said: "Tustinuggee Thlucco, your blood is white. You have taken my red sticks and my talk, but you do not mean to fight. I know the reason. You do not believe the Great Spirit has sent me. You shall believe it. I will leave directly, and go straight to Detroit. When I get there I will stamp my foot upon the ground and shake down every house in Tookabatcha." The Big
1812 Warrior said nothing, but puffed his pipe and enveloped
Nov. himself in clouds of smoke. Afterwards he thought much upon this remarkable speech.

The common Indians believed every word of Tecumseh's

* This David Francis lived for many years in the Autauga town, where he had a trading establishment. He was also a silversmith and made buckles, ornaments and spurs of silver for the Indians. Josiah, his son, also learned the trade. David Francis was a great uncle to Dr. Francis, an intelligent and highly respectable gentleman of Benton county, Alabama.

CHAPTER XLI.

Battles of Emuckfau, Enitachopco and Calebee.

Since the battle of Talladega, Jackson had encountered innumerable difficulties and mortifications, owing to the failure of contractors and the mutiny of his troops, who were finally reduced to one hundred men by the expiration of their time of service. He was now compelled to employ Cherokees to garrison Fort Armstrong, upon the Coosahatchie, and protect the stores at Ross's. Almost alone, in a savage land, he yet constantly rode between Fort Strother and Ditto's Landing to hasten supplies for the new army, which he had employed Governor Blount to raise for him. At last two regiments, one of them commanded by Colonel Perkins and the other by Colonel Higgins, numbering together eight hundred and fifty men, who had only enlisted for sixty days, reached Fort Strother. Well understanding the character of minute men like these, who must be constantly employed, Jackson immediately marched them across the Coosa to the late battle ground of Talladega, where he was joined by two hundred Cherokees and Creeks, who evinced great alarm at the weakness which the command presented. Continuing the march towards the Tallapoosa, the army encamped at Enitachopco, a Hillabee village, and the next day fell into many fresh beaten trails, indicating the proximity of a large force. Here Jackson determined to halt for the purpose of reconnoitre. Before dark his encampment was formed, his army thrown into a hollow square, his pickets and spies sent out, his sentinels doubled, and his fires lighted some distance out-

1814 Jan. 14

1814 Jan. 16

1814 Jan. 21

yards distant from the nearest part of the Indian defence, and, at ten o'clock in the morning, began to open them upon the enemy. These pieces, accompanied by occasional discharges from the muskets and rifles, effected but little. In the meanwhile, the Cherokees, under Coffee, swimming the river, took possession of the canoes, and returning with them to the opposite bank, they were presently filled with friendly Indians and Americans, the latter headed by Colonel Morgan and Captain Russell. They reached the town and wrapped it in flames. Jackson then ordered his troops to storm the breast-work, behind which all the warriors had posted themselves. A short contest was maintained at the port-holes, but presently the impetuous Americans mounted the breast-work, and, dyeing the huge logs with their blood and that of the enemy, they finally, after a most desperate struggle, became masters of the interior. The Red Sticks, now assailed in front by Jackson, who had taken possession of their breast-work, and attacked from behind by a portion of Coffee's troops, who had just completed the conflagration of their village, fought under great disadvantages. However, none of them begged for quarter, but every one sold his life at the dearest rate. After a long fight, many of them fled and attempted to swim the river, but were killed on all sides by the unerring rifles of the Tennesseans. Others screened themselves behind tree-tops and thick piles of timber. Being desirous not to destroy this brave race, Jackson sent a messenger towards them, who assured them of the clemency of the general, provided they would surrender. They answered by discharges from their guns and shouts of defiance. The artillery was then ineffectually brought to bear upon them. The Americans then applied fire to their retreat, which soon forced them to fly, and, as they ran, they were killed by American guns. It was late in the evening before the dreadful battle ended. The Red Sticks numbered about one thousand warriors, and, out of that number, five hundred and fifty-seven were

1814
Mar. 27

CHAPTER XLIII.

Treaty of Fort Jackson—Attack Upon Mobile Point—March Upon Pensacola.

On the resignations of Generals Hamilton and Harrison, Jackson had been promoted to the rank of major-general. Leaving the Hermitage once more, he proceeded with a small escort to Fort Jackson, where he safely arrived, and assumed the command of the Southern army. He had been empowered by the Federal Government to conclude a treaty of peace with the Creek nation. After much opposition from the Big Warrior and other Chiefs to the surrender of the territory which was demanded, a treaty was signed. It was stipulated that a line should commence upon the Coosa, at the southern boundary of the Cherokee nation, and continue down that river to Wetumpka, and thence eastwardly to Georgia. East and north of that line, containing upwards of one hundred and fifty thousand square miles, remained to the Indians. West and south of it was secured to the United States. This territory was obtained as an indemnification for the expenses incurred by the government in prosecuting the war. Before the treaty was signed the Big Warrior addressed Jackson and Hawkins in a long speech, and tendered them, in the name of the friendly Chiefs, a reservation of three miles square of land each, "to be chosen where you like, from that we are going to give, as near as you can to us, for we want you to live by us and give us your advice." To George Mayfield and Alexander Curnells, their interpreters, they also gave one mile square each. Jackson accepted of this national mark of re-

1814 July 10

Aug. 9

gard for him if approved by the President, who, he said, "would doubtless appropriate its value in aid of your naked women and children." Colonel Hawkins said:

"I have been long among you—I have grown grey in your service—I shall not much longer be your agent. You all know that when applied to by red, black or white, I looked not to color, but to the justice of the claim. I shall continue to be friendly and useful to you while I live, and my children, born among you, will be so brought up as to do the same. I accept your present, and esteem it the more highly by the manner of bestowing it, as it resulted from the impulse of your own minds, and not from any intimation from the general or me."*

Among other gallant officers present upon this occasion was Colonel Arthur P. Hayne, who, after the peace, resided in Autauga county, Alabama, and was there much esteemed and respected. He was born in Charleston, South Carolina, on the 12th March, 1790, and descended from a family distinguished in the Revolution. Although not of age when the attack was made by the British upon the Chesapeake, he entered Colonel Wade Hampton's regiment of light dragoons as a first lieutenant. In 1809 he was stationed upon the Mississippi with Scott and Gaines, who then held the same rank with himself. When war was declared against England, Hayne was ordered to the North, and he presently participated in the battle of Sackett's Harbor, in which he displayed so much gallantry and judgment that he was immediately promoted to the command of a squadron of cavalry, with the rank of major. He was with Wilkinson in 1813 on the St. Lawrence. General Hampton, who wanted Hayne to join *his* wing of the army, in one of his letters to the Secretary of War, employed this complimentary language: "Send me Hayne; I want his constitutional ardor—it will add much to the strength of my army." After Major Hayne had been in several severe engagements at the North, he received the

* Indian Affairs, vol. 1.

Appendix C

Historical Report on the Poarch Band of Creeks (Bureau of Indian Affairs 1983)

TECHNICAL REPORTS

regarding

THE POARCH BAND OF CREEKS

of

ATMORE, ALABAMA

Prepared in response to a petition submitted to the Secretary of the Interior for Federal acknowledgment that the Poarch Band of Creeks exists as an Indian tribe.

NOTES TO THE READER

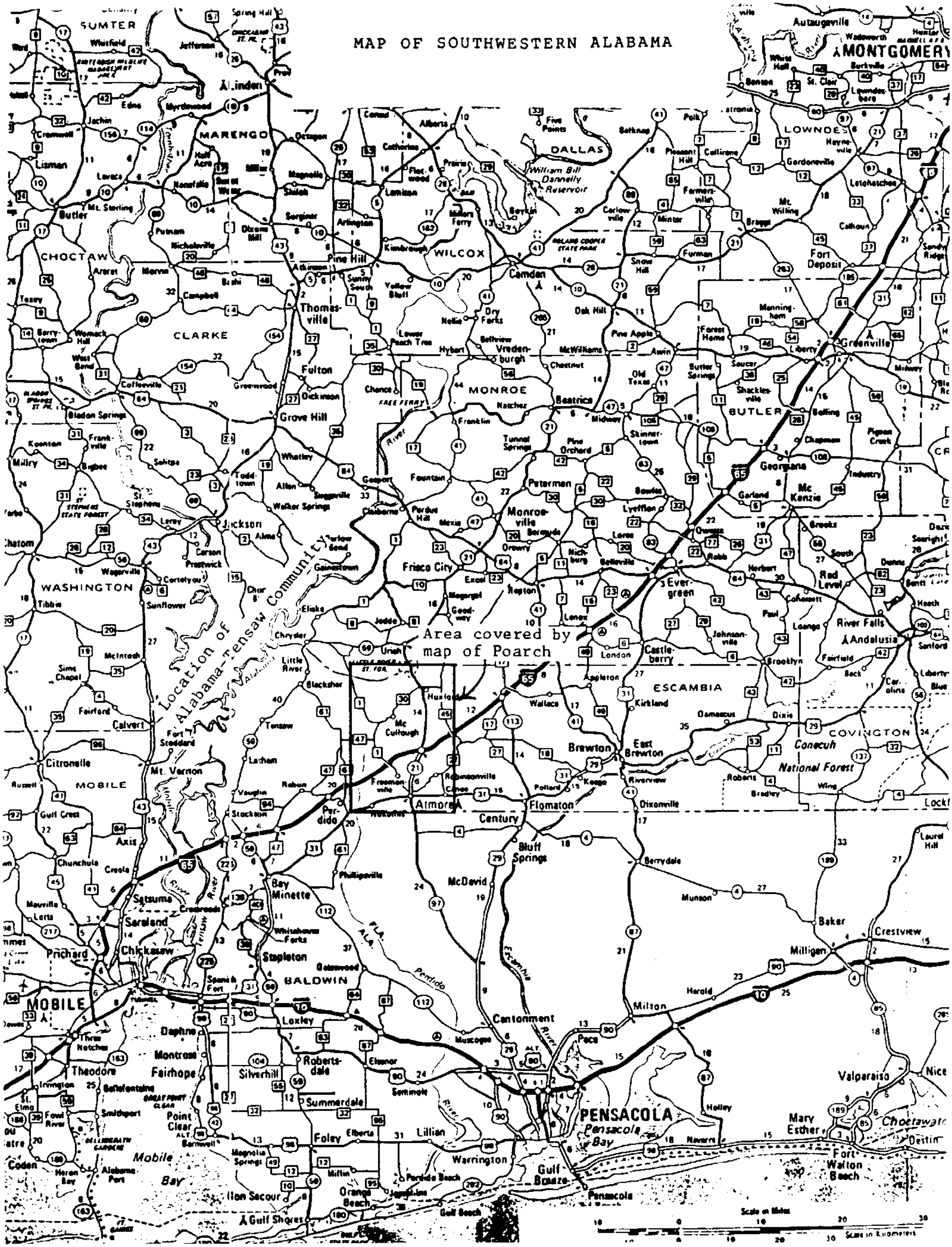
For the purpose of this report, all surname spellings have been standardized, except where they appear as direct quotations. The most frequently used standard spellings and the variations they reflect are listed below:

Standard	Variations
Deas	Dees, Deese
Horsford	Hasfor, Hausford, Horsefoot, Horseford, Hosford
McGhee	MacGee, MacGhee, MaGee, McGee
Moniac	Macknac, MacNac, Manac, Manack, Monac
Rolin	Rolan, Roland, Rollin, Rowland, Rowlands
Semoice	Semoi, Semoyce, Semoye, Shemach, Simmoice, Symac
Sizemore	Sizemoor, Sizemor, Sizmore
Steadham	Stedham
Tarvin	Turvin
Tate	Tait

Abbreviations

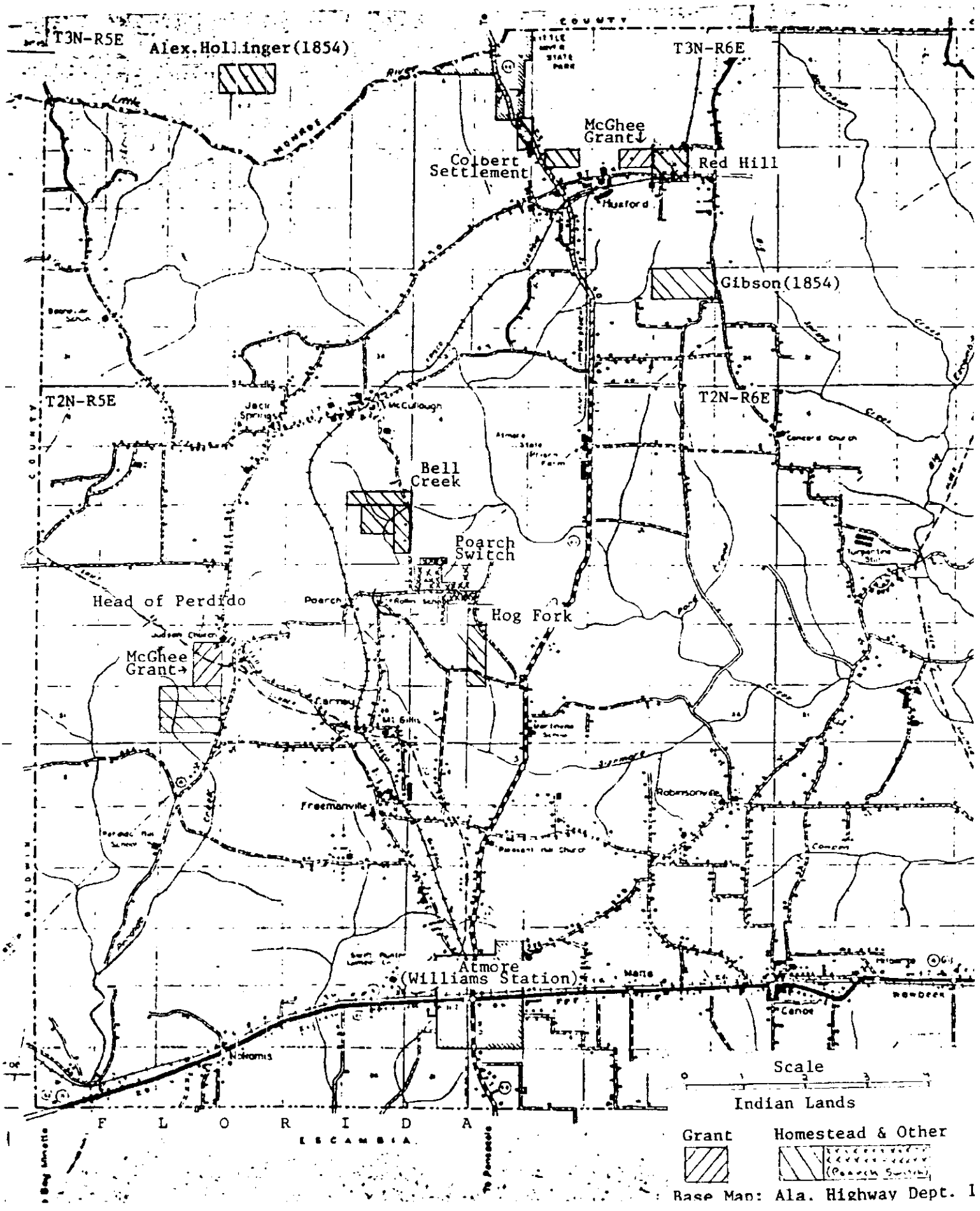
BFA	Branch of Federal Acknowledgment
CNEM	Creek Nation East of the Mississippi, Inc.
FRC	Federal Records Center, Suitland, Maryland (All records center references are to Suitland, unless otherwise cited.)
NARS	National Archives and Records Service, Washington, DC
PBC	Poarch Band of Creeks or Poarch Band of Creek Indians
Pet.	Petition (includes initial petition and all supplements)
RG	Record Group (All archives and records center references are to Record Group 75, Records of the Bureau of Indian Affairs, unless otherwise cited.)
T3N,R5E	Township 3 North, Range 5 East of St. Stephens Principal Meridian

MAP OF SOUTHWESTERN ALABAMA



MAP OF POARCH CREEK

SETTLEMENTS AND LANDS: 1850-1983



HISTORICAL REPORT ON THE POARCH BAND OF CREEKS

The Poarch Band of Creek Indians is located in three hamlets near modern-day Atmore, Alabama. This report describes how they came to be situated in this locality and the duration and degree to which they have maintained communal autonomy. This required examining not only those tribes which occupied aboriginally the area just east of the confluence of the Alabama and Tombigbee Rivers, but also tracing the history of the so-called "Upper Creeks" found living at the time of European contact along the drainage of the Coosa and Tallapoosa Rivers in northeastern Alabama, from whom the present members of the Poarch Band of Creeks are descended.

Though not named the Poarch Band in the earlier years, this group established a community at Tensaw in what is now southwestern Alabama in the late eighteenth century and, forced out by non-Indian settlers, grouped themselves in clusters—first along the Alabama River and then in the area now called Poarch. They remained in Alabama both during and after the vast majority of Creeks were removed to Indian Territory in the 1830's. Throughout the entire time period, they have maintained close social ties and tribal relations, with an extraordinarily high degree of inter-marriage, and they have remained within a relatively small geographical area. They have thus been determined to meet all the criteria in 25 CFR 83 pertaining to identification as Indian, having a distinct community, and maintaining tribal relations.

> **83.7(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years.**

The Poarch Band of Creeks has only been referred to by that name since approximately 1870, due to the lack of a place-name for the location known today as Poarch. However, sources in Federal, state, and county records clearly identify a group of half-blood and mixed-blood Creeks (often of a higher blood quantum than half) as having lived in the same general vicinity in southwestern Alabama within an eighteen-mile radius for a time period beginning in the late 1700's to the present. This group is further identified in church and school records, newspapers, scholarly publications and historical accounts, and in legal proceedings. Benjamin Hawkins, United States Agent to the Creek nation from 1795 to 1826, refers to the community of half-bloods in Tensaw--a small settlement on the Alabama River fifty miles north of present Mobile—as an autonomous town within the Creek Nation, and was personally familiar with several half-bloods there with whom he had working relations. For the most part friendly towards the United States during the Creek War of 1813-14, they suffered depredations to their property and persons at the hands of the hostile "Red Stick" Creeks, and were cited in many Federal lists concerning indemnification for losses and land grants throughout the first half of the nineteenth century.

During the period of the Civil War and reconstruction, they are shown in military records and in county records, but not as Indian. Given both the difficult conditions and total pre-occupation with the War in the south, this does not appear unusual. Designations as Indian reappear, however, towards the later decades of the nineteenth century, particularly in U.S. Decennial Censuses and in church records. At the turn of the twentieth century, Creeks of the Poarch Band are again designated in Federal records as Indian, especially in the report of Special Commissioner Guion Miller and in

a Federal Timber Trespass suit involving the General Land Office and a local mill company.

From 1910 onward, they are segregated in separate Indian schools, named as such, and are clearly cited in newspaper accounts, Federal and local records, and in various church records as Creek Indians. In the 1930's the St. Anna's Indian Mission (Episcopal) was begun to service the Indians at Poarch now gathered into four hamlets within three miles of each other: Hedapeada, Poarch Switch, Bell Creek, and Hog Fork. In the 1940's they were visited by anthropologist Frank Speck, who published a brief ethnography of the group. In the 1950's they intervened in the Creek Nation v. the United States in the Indian Claims Commission and eventually received a share of the monetary distribution awarded to the claimants. By the 1970's they had had a tribal council for two decades, and officially incorporated themselves as the Creek Nation East of the Mississippi. In recent years they have been active participants in the National Congress of American Indians and the Coalition of Eastern Native Americans, and have received numerous grants from various governmental agencies by virtue of their being a Native American group.

The Poarch Band of Creeks has been identified as an American Indian tribe from historical times until the present and has met the criterion in 25 CFR 83.7 (a).

83.7(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area and that its members are descendants of an Indian tribe which historically inhabited a specific area.

The Poarch Band of Creeks lives today on land which was traditionally and aboriginally Creek. While there has been shifting of location of the various clusters into which they usually congregated, this shifting has been limited to a relatively small area, i.e., within a radius of eighteen (18) miles. Moreover, this shifting of dwelling clusters within this 18-mile radius had all occurred within a time span of 190 years. Through this period, the group has exhibited a high degree of endogamy (i.e., intermarriage), so that virtually all of the present members of the community can trace to earlier historical figures in the community shown in the first records. Additionally, the current kinship structure in the community shows a highly integrated blood-relation pattern.

Other factors indicative of community are also evident. Members of the Poarch Band of Creeks have historically acted as witnesses for each other in depositions, homestead applications, land claims, etc. They have historically been shown in estate and probate records to have bequeathed items of considerable value to each other, such as land, slaves (prior to 1863), household goods, cattle, etc. In censuses and lists they often appear in clusters—usually reflecting geographical proximity--when they are so listed. There has been a high incidence of land transfer between the members of the community in the form of trades, bequests, and sales. Finally, there has been a high degree of mutual assistance: they act as healers for each other, help provide for subsistence to indigent community members, and help protect each other from aggressive "outsiders."

A substantial portion of the Poarch Band of Creeks forms and has formed since historical times a community viewed as American Indian and distinct from other populations, thus the group has met the criterion in 25 CFR 83.7 (b).

83.7(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

The Poarch Band of Creeks has always had either a formal government or an informal leadership role of prominent men in the community. It must be remembered that aboriginal Creek chiefs or miccos ruled by persuasion and usually reflected the consensus opinion of the town, and not by absolute authority. In modern times, the government of the Poarch Creeks has been formal. The current Chairman of the Tribal Council is Mr. Eddie Tullis, who attained this position in 1978. Mr. Tullis succeeded Mr. Houston McGhee, who was "Chief," who followed his father Calvin McGhee. Calvin McGhee attained the actual position of Chief in 1950 but was, prior to that, informally the leader of the group.

The anthropologist Frank Speck cites Fred Walker as leader of the group in 1941, and refers to him as "provisional chief." Walker lived to a relatively old age, and can be traced back as leader of the group through oral history accounts to approximately 1895. His burial record in 1941 lists him as "Indian Chief." Reliable oral history accounts cease around 1890, but county records show several responsible citizens filling a number of positions for the county—men who were chosen from among the prominent members of the community around Poarch. For the period between 1860 and 1890, records show that David A. Moniac, John V. Steadham, and William Gibson served in such positions for the county as apportioner, road overseer, auctioneer, and even sheriff.

From the beginning of the half-blood community in Tensaw to 1840, accounts of leadership are clear. History records that at the skirmish at Burnt Corn Creek in 1813, a "Captain" Dixon Bailey and David Tate led a contingent of separate half-blood soldiers to fight the hostile Creeks under the command of Peter McQueen (a hostile half-blood leader). These men under Bailey and Tate rode with a company of their non-Indian neighbors to intercept McQueen's forces. David Tate lived until 1829, but Captain Dixon Bailey was killed at the massacre of Ft. Mims in 1813. David Tate's nephew, David Moniac, was also clearly a leader in the half-blood community there. Moniac was the first Indian ever to graduate from the United States Military Academy at West Point, and upon his graduation, due to serious family problems, he had to resign his commission as 2nd Lieutenant and return home. He lived in the Tensaw area and served in a leadership capacity until the Seminole War of 1836, at which time he volunteered for service and was made a Brevet Major and placed in command of a Creek force. Major Moniac was killed in action in northern Florida in 1836, fighting the Seminoles.

There have been certain junctures in the history of the Poarch Creeks at which they have collectively rallied to present a unified front to an outside entity or governmental agency, though participation at these junctures was varied and did not always include everyone without exception. At each of these instances, however, the prominent members or otherwise able-bodied members of the community represented the group as a whole. These group mobilizations include a letter petition to President Madison in 1815, a group memorial to the U.S. Congress through the Alabama State legislature in 1832, a near-consensus of military participation in the same Confederate units during the Civil War (though this involved only the men), religious activities and the founding of Judson Baptist church in 1891, a timber trespass suit in 1912, a school boycott in 1947, an Indian Claims Commission suit in 1956, and legal incorporation in 1971.

The Poarch Band of Creeks has maintained tribal political influence and authority over its members throughout history to the present and has thus met the criterion in 25 CFR 83.7(c).

THE ABORIGINAL AND COLONIAL PERIOD

The year 1540 marks the beginning of the historic record for the aggregation of indigenous peoples in the Southeastern United States who have come to be known as the Creeks. This was the year in which the Spanish explorer, Hernando De Soto, travelled the area with a small expeditionary force among whom was his chronicler, the unnamed "Gentleman of Elvas." The documents and accounts which he left comprise the first ethnographic descriptions of the Creek Indians. Between these and other early European accounts, in addition to the research findings of archeology and later oral history, a fairly accurate picture of pre-contact Creek life can be drawn.

Before proceeding to a brief description of Creek life, a clarification must be made concerning terminology and the nature of that collectivity of peoples usually termed "Creek." "Creek" is the colonial English term, and Swanton claims that "The name Creek early became attached to these people because when they were first known to the Carolina colonists and for a considerable period afterward the body of them which the latter knew best was living upon a river, the present Ocmulgee, called by Europeans 'Ocheese Creek.'" (Swanton, 1952: 157) The native term for Creek is Muskogee or Muscogee; it is not certain from where this term derives, but it is thought to be a Shawnee (Algonkian) term for "swamp" or "swampy ground." Constitutionally, the Creeks were not a homogenous people, but were rather a confederation of various different groups--some with radically different linguistic and cultural bases--contained within the same geographical area, and continuously incorporating groups from other regions with a high degree of acceptance and tolerance. Michael Green states that

> The Creek Nation was a confederacy--an alliance of separate and independent tribes that gradually became, over a long period, a single political organization. Through most of its history, however, the Confederacy was a dynamic institution, constantly changing in size as tribes, for whatever reason, entered the alliance or left it. The evidence suggests that many more groups joined that withdrew . . . They were the only native group Adair knew of that was not declining in numbers. This means, of course, that the definition of Creek was constantly changing. (Green, 1979: vii)

Given this caveat, a description of pre-contact Creek life can now be made, keeping in mind that the descriptions are general, and may not address specifically or apply to the more culturally divergent groups within the Creek confederacy like the Yuchi, Alabama, Shawnee, and Natchez.

The social structure of the pre-contact Creek confederacy was built around a town-village system, with the town occupying a central role in relation to its outlying villages. The numbers of villages outlying a given town varied greatly, from one or two to over a score. The towns were then divided into a basic two-part system comprised of "White" or peace towns and "Red" (Chiloki) or war towns; these two types of town were said to be of different "fires." Within the governmental town and moiety structure, matrilineal clans were the basic building blocks of Creek society. Clans were named, and Swanton lists some 46 different ones among which were Alligator, Arrow, Bear, Beaver, Bison, Cane, Corn, Deer, Fish, Panther, Salt, Wind, and Wolf. (Swanton, 1928: 115) Certain clans were considered superior to others, like the Wind clan which had special privileges,

and this had a significant bearing on the ascent to power of Alexander McGillivray in later Creek history. Clans were further combined into a larger unnamed grouping system in which several clans would share an affinity based on commonalities in the clan totems, and which directed marriage and division of labor. Within clans were household units, the final subdivision of Creek society. The household units were comprised of a basic nuclear family: a woman, who owned the house, her husband, their children, and often certain of the woman's relatives. Children were born into the clan of the mother, and remained lifelong members of that clan.

Leadership and governmental power were bestowed in a micco or miko and the town council. The micco was head of civil authority, and there existed as well a war chief or leader whose authority was applicable only in military matters. The micco was usually chosen from the same clan as his predecessor, and in later times this position became almost entirely hereditary. The civil administration, headed by the micco, also had local precinct officials, a category known as heniha who directed public works, and the town's "beloved men" (and women) who had achieved a position of respect and leadership through their accomplishments. These combined formed the town council, at which legal and other governmental decisions were made. The micco and his council did not, however, retain an absolute power or authority over the town, but acted more in the capacity of arbitrator, facilitator, and representative of the public opinion and consensus.

The economy of the pre-contact Creeks was varied, combining horticulture with hunting/gathering in a semi-sedentary lifestyle. The calendar was divided into twelve months, but only two major seasons. During the winter season, hunting away from the town or village was the rule, and during the summer season—which included most of the ceremonial cycle of Creek religion--residents of the towns stayed close to home tending crops, storing for the winter months, and preparing for the annual busk. Crops consisted of various types of corn, sunflowers, beans, pumpkins, squashes, and melons. In addition to these domestic crops, the Creeks gathered wild rice, cane seed, different types of tubers, including sweet potato, and a variety of nuts, fruits, and berries. All these flora in the diet were supplemented by various fauna which were taken with the bow, the blowgun, and traps. Fowl, fish, shellfish, small game, primarily deer and occasionally bear were commonly included in the diet. Preservation of food was mainly by sun drying and smoking, and nearly every type of food could be preserved and stored for the lean winter season. Tanned deerskins were the principal item of trade, but other furs, shells, beads, and craft implements were also traded with neighboring groups.

The trading system of the pre-contact Creeks was well established, and artifacts from a variety of different tribes and geographical regions have been found in excavations. This developed system, in addition to the inherent ability of the Creeks to trade and maintain such a trading system, proved to be a natural and adaptable point of interaction with the similar interests of European traders in later years.

The entrance of DeSoto into Creek country in 1540 was soon followed by that of Tristan de Luna in 1559. De Luna's forces, like those of Juan Pardo who followed him, began the Spanish practice of assisting one town or tribe within the Creek confederacy in its warfare against another. European weaponry was thus introduced into the Creek nation during this time, irrevocably changing Creek life. For almost an entire century, the principal European players in Creek history were the Spanish, who by 1670 had colonized much of the Atlantic seaboard of present northern Florida. During this period, the Spanish struck a trail westward, and established a chain of missions west across Florida and through the panhandle, ultimately reaching Pensacola. The missions consisted of small garrisons with a contingent of clergy, under whose supervision and tutelage were

numbers of pacified Indians. Pensacola, owing to its fine deep-water harbor, became an important center for the Spanish later in the 17th century. While the condition of the confederacy among the Creeks at the time of De Soto's arrival is unclear, by 1670 the confederacy was thriving, no doubt due to the increased trading and military activity of the Spanish during the first century of European settlement.

In 1670 the historical picture of the region changed with the founding of the British settlement of Charleston in present South Carolina. Charleston became the center of Creek-English trade and commerce, and it was from Charleston, for example, that Lachlan McGillivray, father of the famous half-blood leader Alexander, made his first venture into the Creek nation. Some 32 years later, French colonists under Jean-Baptiste Le Moyne established a fort roughly thirty miles north of the mouth of the Mobile River. This lasted only nine years, and was relocated in 1711 to the site of present Mobile at which point it became capital of French Louisiana until 1720. The French and the Spanish were thus bordering each other in the southwest part of the Creek nation (the Spanish boundary never went west of the Perdido River), and the Spanish and English bordered each other in the eastern part of the Nation at the Savannah. "Occupying as they did a central position," says Swanton, "between the English, Spanish, and French colonies, the favor of the Creeks was a matter of concern to these nations, and they played a more important part than any other American Indians in the colonial history of the Gulf region." (Swanton, 1952: 166)

In 1685 a significant event took place relative to Creek history. Henry Woodward, an English trader, supervised an expedition of other traders with a large supply of goods and arrived in Coweta. Upon his arrival, the Creeks allowed him to construct the first English trading post in the Nation. The ultimate effects of this new commerce are described by Corkran: "Through the media of intensified warfare, hunting and trading, the Creeks became, comparatively speaking, a fiercely acquisitive and affluent Indian society. They lost many of their old manual arts and became abjectly dependent upon the English trading system . . ." (Corkran, 1967: 53) Woodward's English outpost flourished and others were begun. In 1705, the English colonists from Charleston signed a treaty of alliance with the Lower Creeks at Coweta. The French, however, did not sit idly by. In 1714 they sent an expedition north along the Alabama River to the fork of the Coosa and Tallapoosa, where they established a garrison and trading post which they named Fort Toulouse. Fort Toulouse, which remained there for some 45 years, figures into the history of the Poarch Band of Creeks, since it was there in 1720 that the French Captain Marchand married Sehoy of the Wind Clan. Their only daughter, Sehoy Marchand, is an ancestor to the McGillivrays and Weatherfords.

The year following the establishment of Fort Toulouse, the Yamasee Indians living to the south of the Savannah River in present Georgia, attacked the settlements in South Carolina—supposedly at the instigation of the Creeks. This began the bloody Yamasee war, which resulted in the near eradication of the Yamasee. One outcome of this was the incursion of the English into what the Spanish claimed was their territory. In 1733 the English colony of Georgia was settled in the area once occupied by the Yamasees, with the town of Savannah as the seat of government. The colony was headed by General James Oglethorpe, and had the direct support of the British crown. Oglethorpe negotiated a treaty with the Lower Creeks for the rights of occupancy, and the territory ceded to the Georgia colonists marked the first in a long series of cessions which led finally, in 1832, to the loss of all land for the Creeks in their native habitat.

In 1754, the French and Indian War began in the American colonies, and within two years had spread to Europe. The war involved a number of European nations and their respective colonies in America, and this included the Spanish. The war continued until

1763, at which point a peace treaty was made in Paris that was decisive in its results: the French had been thoroughly defeated, and the English were the major victors. By the Treaty of Paris in 1763, England acquired Spanish Florida and all the territory of the French east of the Mississippi River. Spain acquired that part of French Louisiana west of the Mississippi River. England, by proclamation of 1763, established the provinces of East and West Florida. It was at this point in time that English settlers from Virginia, Georgia, and the Carolinas began to infiltrate gradually into the Lower Alabama River area and established the settlement areas of Tensaw and Tombigbee, which attracted to them some of the ancestors of the present Poarch Band of Creeks. While neither the French nor Spanish had had extensive settlements in the area during their respective occupations of the region, there were nonetheless a small number of them living in the vicinity. The Tensaw/Tombigbee settlement area thus served as home for a small number of French and Spanish families, a second and more numerous wave of Englishmen from the Atlantic seaboard colonies, and somewhat later a large contingent of wealthy half-blood Creeks—many of whom were related—who were the wives, sons and daughters of "Indian country-men," i.e., non-Indians who married Indian women.

TENSAW AND THE FORMATIVE YEARS

The settlements in the Tensaw/Tombigbee area were unique in the history of the colonial South. Not only was the population there multi-national, it was also multi-racial. "The blood of these men [Tensaw/Tombigbee settlers] was various: English and Scottish traders mingled with Yankee frontiersmen, and many of them had taken native wives. The half-breeds were often men of wealth, and no distinction of race seems to have been made in the rugged life of the frontier." (Abernathy, 1965: 18) Prior to the American Revolution, cotton was introduced into the area, which brought in its wake a large number of slaves to work the fields. Lachlan McGillivray established a large cattle ranch in the settlement, and with the help of his son Alexander, sold hides to John Panton of Pensacola for shipment around the world. Charles Weatherford, the father of William Weatherford, had a large plantation there, and further had the distinction of building the first horse race track in the territory. Charles Weatherford and Lachlan McGillivray both married Creek women, and were thus considered "Indian country-men." Both had been traders among the Upper Creeks, and had made alliances with other Indians, Indian country-men, and their half-blood relatives in the Upper Creek territory.

These alliances were maintained into the Tensaw/Tombigbee area, downriver from the Upper Creek country, so that many of the half-blood property owners like the Durants, Moniacs, Cornells, and others had property in both areas. A greater number, however, seem to have relocated altogether from the Upper Creek country to the Tensaw region—people like the McGhees, Stiggins', Baileys, and Smiths. This relocation and settlement of these half-bloods occurred gradually between 1780 and 1800. There was a high incidence of intermarriage among these early half-blood ancestors of the present Poarch community, many were related from earlier connections in the Upper Creek country, and many of the half-blood men initially married native women. Thus, the embryo of the community known later as the Poarch Band of Creeks was formed during this period. Even in its embryonic stage, however, the community was both autonomous and sanctioned by the council of the Creek Confederacy. Because the half-bloods did not live harmoniously with their full-blood kinsmen in the Upper Creek towns, they applied for and ultimately obtained from the Creek Convention "leave to settle" on Indian land in the Tensaw area. (Grant, ed. 1980: 768) This allowance by the Creek Nation was not without precedent, and though this community was half-blood and not another culturally diverse but full-blood Indian group, the pattern was the same. The half-blood settlement near Tensaw was, like the Yuchis, Shawnees, etc., a legitimate

town of the Creek Confederacy maintaining full political relations with the Convention meeting alternately in Tuckabatchee and Coweta.

It appears from the evidence that the Tensaw/Tombigbee settlements were places of cultural synthesis; places where Spanish, French, English, and Indian cultures converged. Until the later advent of Judge Harry Toulmin in the first decade of the nineteenth century, the Tensaw region was without laws and formal governmental structure. Pickett, for example, in his famous history of Alabama and Mississippi, writes that "Upon the Tombigby and Lake Tensaw, the people still lived without laws [circa 1800], and without the rite of matrimony." He continues: "Down to this period [circa 1803], no Protestant preacher had ever raised his voice, to remind the Tombigby and Tensaw settlers of their duty to the Most High. Hundreds, born and bred in the wilderness, and now adult men and women, had never even seen a preacher." (Pickett, 1851: 183 and 194) It seems clear from descriptions of the settlement that Indian culture made a significant contribution to the collective culture of the unique community, and that the Indian culture in question was primarily Upper Creek.

Swanton reports that the two main tribes indigenous to the area were the Mobile and the Tohome, sub-groups of and later assimilated into the greater Choctaw nation. (Swanton, 1952: 159 and 171) For approximately a 40-year period during the French occupation of the area, a band of Taensa Indians from Louisiana were moved by the French to the region, which took its name from these Indians, but they were returned to Louisiana after the cession of French territory to the British in 1763. George Stiggins, curiously, who was himself half Natchez and an ancestor of the present Poarch Band of Creeks, wrote in his history of 1831 that "The first settlement we find in tracing the Alabama (a branch of the Creek or Ispocoga tribe) is at the confluence of the Alabama river and Tensaw lake near the Town of Stockton in Baldwin County— Their settlements extended up the lake & river as far as Fort Mimbs [sic] . . . The white settlers of the place call it the Tensaw Settlement." (Stiggins, 1831: 1) Neither assertion is mutually exclusive; it might well have been that all these tribes occupied the region at varying times. The main point, however, is that the region, at the time of white settlement, was and had been permeated with Indian culture, and that elements of this culture had been retained and further added to by the influx of Upper Creeks.

Events in the Americas in the late eighteenth century began to accelerate the peaceful, isolated Indian settlement of Tensaw into a growing and central position. In 1780, during the American Revolution, England was preoccupied with the Americans. Spain, sending out a force from New Orleans under Bernardo de Galvez, recaptured Mobile; a year later Galvez recaptured Pensacola. The Revolution itself had caused a number of colonial Tories to relocate to the area from the Atlantic seaboard states, increasing the population of the area significantly. After the British surrender at Yorktown in 1783, the new government was not favorably disposed toward the Creek nation, for the reason that Alexander McGillivray, leader of the nation during the Revolution, had persuaded many of his chiefs to side with the British. With other more pressing problems at hand attendant to forming the new Union, the United States waited until 1790 to clarify both its borders with and relationship to the Creek nation. The Treaty of New York was signed August 7 of that year in New York by McGillivray for the Creeks and Henry Knox, Secretary of War, for the United States. Both Lachlan Durant and David Tate accompanied their uncle, Alexander McGillivray, on that trip to New York, in addition to 24 Creek chiefs and warriors, among whom was one of the signers of the treaty, "Samoniac."

Dispossessed of his property, and his commissions in the British, American, and Spanish armies, Alexander McGillivray relocated in 1792 to his plantation on Little River in

Baldwin County near Tensaw, from his home in the Nation. In speaking of his relocation, Carolyn Forman claims that "There was a large colony of wealthy and intelligent persons of mixed blood who had plantations on Little River where they would feed their great droves of cattle on the wild vegetation that was always safe from frost." (Forman, 1929: 116) Forman quotes a letter written by William Panton, the Pensacola trader, to Lachlan McGillivray (Alexander's father) in Scotland describing the events of Alexander McGillivray s death in the following year. Panton wrote that on February 17, 1793, Alexander died ". . . of complicated disorders--inflamed lungs and the gout on his stomach. He was taken ill on the path, coming from his cow-pen, on Little River, where one of his wives, Joseph Curnell's daughter, resided, and died eight days after his arrival here." (Forman, 1929: 118)

In 1795 a little-noticed but major event took place in Creek history. Benjamin Hawkins replaced James Seagrove as U.S. Agent to the Creek Nation. As Michael Green states, "No non-Creek in the history of the Nation ever wielded such influence or played such a decisive role in Creek affairs as Hawkins." (Green, 1979: 35) In addition to being a considerate and benign man, Hawkins was also a prolific correspondent and journalist. It is in Hawkins' documents that the first significant direct accounts of the history and activities of the ancestors of the present Poarch Band of Creeks are found. In the year following his appointment, Hawkins made an extensive survey of the Creek Nation, travelling to as many towns as he could and keeping a meticulous journal of his observations. Hawkins did not describe the "colony" of half-blood Creeks in the Tensaw area, but he did place certain of its residents and principal members as originally from the Upper Creek country. Having already described Stiggins, Smith, McGillivray, Cornells, Bailey, and Weatherford in his Journal of 1796-97, Hawkins then describes Leonard McGhee for the first time in an entry dated February 11, 1797: "I have heard that there is a halfbreed in the savannas, Leonard Megee, who is of an excellent character, speaks English well." (Grant, ed. 1980: 46) This is the same Len or Lynn McGhee (both "Lynn" and "McGhee" have several variant spellings) whose reserve acted and acts today as the geographic center of the Poarch Band of Creeks.

In a letter to James McHenry dated October 23, 1797, Hawkins briefly describes the Tensaw settlement. He writes: "You have in the inclosed a narrative of a recent murder at Tensaw.[1] ([1]Not attached) In that settlement there are 60 families; in that of Tombigbee there are 40. The two settlements are on our side of the line, the first on the left bank of the Alabama, the other on the right bank of the Tombigbee." (Grant, ed. 1980: 113) While data about the constitution of the Tensaw settlement and the Creek half-blood colony there are scarce, it can be surmised from the existing evidence that it was more or less intermediate in its earlier history relative to colonial European culture and Indian culture. Hawkins states that "The whites who had Indian families took no care of them, either to educate them or to teach them any thing useful. They [the children] were left with their mothers . . ." (Grant, ed. 1980: 18) Thus, many of the half-bloods were raised with a high degree of Creek customs and worldview, and identified more as Creek than as white. This is further corroborated by the high incidence of endogamy (i.e., inter-marriage) within the half-blood colony there, in addition to many half-blood men, especially, taking full-blood Creek wives.

Of the numerous half-blood residents of the Creek colony at Tensaw who were ancestors of the Poarch Band of Creeks, or those who had property or positions in the Upper Creek nation, Hawkins mentions several in specific. In a journal entry on November 20, 1797, he mentions Benjamin Steadham, Mrs. Durand (Durant), Jeptha Tarvin, the latter being called "Johnny Haujo by the Creeks." On August 9, 1799 he writes that "Charles [Weatherford] is not now in trade, he has lately moved down the Alabama below Sehoy's . . .," (presumably Sehoy Marchand, Lachlan McGillivray's ex-wife). In

A Sketch of the Creek County, Hawkins wrote of the Upper Creek towns which had as residents "Sam Macnac [Moniac], a half breed . . .," Mrs. Durand, and Sehoy McGillivray. In a letter to William Eustis dated August 27, 1809, Hawkins describes the youngest of Alexander McGillivray's two daughters as having "an Indian husband" and, in describing inheritance customs among the Creeks, states that "according to the custom of this nation a man's children have no claim to his property, it belongs to his relations on the maternal line . . ." (Grant, ed. 1980: 556) He continues by saying that Mrs. Durand and Mrs. Weatherford took possession of the property of Alexander McGillivray, and that Mr. David Tate, whom Hawkins describes elsewhere as "a half breed of property," also inherited some of McGillivray's property through his mother and "lives on the Alabama within this agency, is careful and conducts himself well."

In the years immediately preceding the Creek War of 1813-14, one of the by-products of the War of 1812 between England and the United States, the Tensaw area grew into a full community with law, schools, and churches. The invention of the cotton gin by Eli Whitney in 1793 had helped to increase the population in the rich-soil area. Two brothers from New England, William and John Pierce, were local entrepreneurs, first establishing a school on Boatyard Lake near Tensaw in 1799 and then building the first cotton gin in the area in 1802. Children of the half-blood Weatherford, McGillivray, Tate, Stiggins, Durant and McQueen families in Tensaw (and possibly others), were known to be in attendance at the school. Of the many half-blood families which lived in the area, these were clearly the prominent ones, and the heads of these families generally occupied the positions of leadership in the community. In 1803 a land office was established at St. Stephens, a village near the Tombigbee settlement, to help arrange for the disposition of public domain. From this land office actual sales of land began in 1807. On December 21, 1809, Baldwin County was established, its territory taken from Washington County and part of the French province of West Florida included in the 1803 Louisiana purchase, and transferred in 1812 to the Territory of Mississippi. A census of the county taken in 1810 shows 127 heads of households, with some of the names of those who are ancestors of the Poarch Band of Creeks. Notwithstanding the War of 1812, life was relatively peaceful and prosperous in the Tensaw community until the tragic day of August 30, 1813.

THE CREEK WAR AND ITS AFTERMATH

Conditions in the Creek confederacy in the decade preceding the Creek War of 1813-14 grew progressively more troubled and polarized. Despite the establishment in 1799, under Hawkins' direction, of the National Council or Congress of the Creek Nation which was designed to include all towns of the Upper and Lower Creeks alike, and despite an ever-increasing European acculturation—especially among the Lower Creeks—the seeds of discontent were present, and destined to grow into outright rebellion. In June of 1802, and again in November of 1805, two large land cessions were made to Georgia and the United States for sums of money and goods and, most irritating to the Creeks, for payment of their debts. Their native homelands were gradually being taken, and the pressure and agitation of this expropriation was building in terms of resentment of the whites. Under the leadership of William McIntosh, a renown Creek half-blood, the Lower Creeks had become both more assimilated into white culture and more supportive of white perspectives than the more remote and traditional Upper Creeks, with whom the Lower Creeks were finding themselves increasingly at odds. Additionally, the British, in a move of international diplomatic strategy, had conscripted the aid of the Shawnees in their bid to defeat the Americans in the War of 1812. In 1811, the celebrated Shawnee chief and politician, Tecumseh, visited several Indian nations, Creeks included, to persuade Indians to resist American expansionism and organize—with the British—in an effort to expel the Americans from the Indian homelands. Assisting Tecumseh in this objective was a new prophetic native

religious movement begun by his brother Tenskwatawa, in the tenets of which whites would be expelled from Indian lands and Indians would regain their traditional ways and live in peaceful harmony. Tecumseh spread this gospel at his talks to various groups. He spoke at both Upper and Lower Creek villages during his stay there, and managed finally to enlist the support of most of the Upper towns.

Events leading up to the Creek War of 1813-14, otherwise known as the "Red Stick War," have already been described in several full-length works. The war served to place the pro-American half-blood community of former Upper Town Creeks into highlight, contraposing them with the hostile or anti-American faction of the Upper Creeks, so the main events of the War, at least, are included here.

Tecumseh's visit to the Creek nation in late 1811 established links between the Shawnee and the hostile Creeks. The following year, a party of Creeks under Little Warrior accompanied the Shawnee chief returning to his homeland beyond the Ohio River. Upon their return, they killed several families of white settlers near the mouth of the Duck River, apparently inspired by the teachings of Tecumseh and his prophet brother. They subsequently returned to the Creek nation, where word of these killings had spread among both the Indian community and among Hawkins and the white community. Added to this problem were the murders of Thomas Meredith in late March and William Lott in May, both in the Nation. In order to decide what action to take, the Creek National Council convened on April 9, 1813. (April 18, 1813; Lackey p.8) Hawkins had requested that Little Warrior and those responsible be apprehended and delivered to him for punishment under territorial law. The Council decided, however, to adjudicate the matter themselves, and sent William McIntosh—a Lower Creek—and a force of Creeks to kill Little Warrior and his party. The Council's order was carried out, and the execution took place shortly thereafter. This infuriated the hostile Upper Creeks, and in June they fell upon twenty-three older chiefs who were opposed to war, killing them all and destroying their property. The men comprising the Creek National Council, which up to that point had tried to preserve peace and accommodate both sides, gathered at Tuckaubatchee and fortified themselves. On July 10, they were surrounded by the hostiles or Red Sticks, and word of the situation was sent to Hawkins. Within a matter of days, Hawkins dispatched 200 Lower Creek warriors to Tuckaubatchee. After an eight-day seige, the chiefs of the Council and some of the inhabitants of Tuckaubatchee left with their rescuers and went down to Coweta, after which the beseiged town was destroyed by the hostiles. Coweta, center for the Lower Creeks and Indians friendly to the United States, became the center for the Creek Nation's activity from that point on.

July and August of 1813 was a time of crisis for everyone in the territory. The lines had been clearly drawn, and the white settlers and friendly half-blood Upper Creeks, especially, were expecting the worst. Sam Moniac, in a sworn deposition before U.S. Judge Harry Toulmin at Ft. Stoddert, states that he learned of the plans of the Red Stick Creeks, i.e., that ". . . they were to attack the Settlements on the Tombigbee and Alabama, particularly the Tensaw and Fork Settlements." He claimed that for fear of his life he was forced to leave his "house on the road," near present Montgomery, and escape to his "plantation on the river," near Tensaw. He stated that "They [the Red Sticks] have destroyed a large quantity of my cattle, and burnt my houses on my river plantation, as well as those of James Cornells and Leonard McGhee." This destruction continued as Peter McQueen, a hostile half-blood, High Head Jim, and Josiah Francis, the Local Creek prophet and half-blood, most of whom were from outside the Tensaw area, began an expedition with several hundred warriors to Pensacola from the Upper Creek country to purchase arms and munitions for the war. Along the way they terrorized friendly half bloods and destroyed crops and dwellings. At Burnt Corn Springs

on the Escambia, around mid-June, they attacked the house of James Cornells. They burned his house, ran off his slaves, and carried his wife, Betsy Coulter, and James Marlow as prisoners to Pensacola. This action struck panic in the hearts of both whites and half-bloods alike in the Tensaw settlement. Judge Toulmin, in a letter to General Ferdinand Claiborne of June 23, described the reaction of the half-bloods in the Tensaw area: "The half-breeds, however, do not think fit to trust themselves with them [the hostiles] or to embark in their measures. They have fled and have left behind them their crops & other property. I visited them yesterday. They are in confusion and distress. Not less so are my white neighbors on Tensaw." (Toulmin Papers, Alabama Dept. of Archives and History) Having procured arms and ammunition in Pensacola, the hostiles started back to the Nation, and were met by a 180-man force of whites under Colonel James Caller and half-bloods under Captain Dixon Bailey, David Tate, and James Cornells at Burnt Corn. Initially, the force surprised the hostiles and ran them off. While Caller's and Bailey's men were rumaging through the booty left by the hostile Creeks, the hostiles regrouped and attacked, thoroughly surprising the expedition and scattering them in all directions. It is significant that both a white force and a half-blood force set out to oppose the hostiles. This indicates not only a distinction between the residents of the Tensaw/Tombigbee area in terms of ethnicity, but it shows a clear leadership role, e.g., that David Tate and "Captain" Dixon Bailey, a half-blood who later died in the fighting at Ft. Mims, had mustered and led men to this skirmish.

The white and half-blood settlements in and around the Nation began bracing themselves for an all-out attack by the hostiles, who by August had worked themselves into a religious fervor under the promise of expelling the whites and redeeming their pristine aboriginal state. The Creek chiefs—Big Warrior and Alexander Cornells—had written to Judge Harry Toulmin as far back as April 18th alerting him that Little Warrior and the hostiles intended to attack Tensaw: "The settlement in the fork of the Bigby and the Alabama, are desired to take care for fear he may endeavor to commit some depredation there as it is a weak part of the settlement." (Lackey, ed. 1977: 9) This warning was endorsed by Sam Moniac in his deposition of August 2nd, previously cited. General Ferdinand Claiborne, military commander of the region, decided at that point to fortify various homesteads along the banks of the Alabama and place in charge of each a garrison or fort commander. The home of Samuel Mims, once barricaded, became Fort Mims, and General Claiborne put a Major Daniel Beasley in charge of defending it. This proved to be a mistake, for on the afternoon of August 30, despite warnings of several blacks tending cattle a distance from the stockade, the Creeks struck Ft. Mims with its gates open and its sentries inattentive. The approximately 800 hostile Creeks from 13 Upper towns quickly overran the outer fortifications and cornered the whites and half-bloods in one of the houses. Dixon Bailey, captain of a contingent of half-bloods, fought courageously. At the end of the day, Ft. Mims lay in a pile of ashes and rubble, and of the 553 inmates who took refuge there, by all accounts fewer than 40 escaped with their lives. A large number was taken captive and carried off to the Upper towns, among whom were women, children, and nearly 100 black slaves. William Weatherford, who was with the hostile faction at the time of the attack but who disagreed in principle with the wanton massacre, participated at first but left the scene and went to the home of his half brother, David Tate, some miles away on Little River.

The destruction of Ft. Mims mobilized American forces against the hostile Creeks. Generals Claiborne, Floyd and Andrew Jackson attacked the hostile forces on different fronts in consonance with an act passed by Congress a month earlier authorizing the Governors of Georgia and Tennessee to raise militias for just that purpose, were it to become necessary. After a number of battles between the hostile Creeks and these three field commanders throughout the Fall and Winter of 1813-14, the decisive day

came on March 27, 1814. On that day at a place called Tohopeka, or Horseshoe Bend, Jackson's army faced 1,000 Creek warriors. At day's end after a bloody battle and hundreds of casualties, the hostile Creeks were thoroughly defeated, and the Red Stick rebellion smashed. Many Lower Creek and friendly Upper Creeks and half-bloods had fought alongside Jackson.

Most of the hostile chiefs fled to Spanish Florida, joining established Seminole communities or starting communities of their own. William Weatherford, however, surrendered himself to Jackson's camp. For the next 18 months, raids and skirmishes continued on the part of the hostile Creeks who either were in hiding or who crossed over the Florida boundary into Alabama, but these were few. In his 1875 history, J. D. Driesbach reported that after a stay with Jackson at his home in Tennessee, Weatherford returned to his plantation on Little River, near Tensaw, where he remained until his death in 1824.

The Treaty of Ft. Jackson marks a pivotal point in the history of the Poarch Band of Creeks, for it was under the provisions of this treaty that many of the present group's ancestors, including Lynn McGhee, received grants for their land in the Tensaw area from the United States for their support in the Creek War. The treaty itself was arranged by Andrew Jackson and its content was consistent with the acquisitive, expansionist environment of the time and the anti-Creek sentiments. Signed by representatives of both sides on August 9, 1814 at Ft. Jackson located at the confluence of the Coosa and Tallapoosa Rivers (previously the site of the old French Ft. Toulouse), the treaty ceded immense portions of both Upper and Lower Creek lands to the United States, running east from Georgia to the Tombigbee River and north almost to the Tennessee border. (Royce, 1899: 1001, land area #75) The Creek signatories to the treaty signed under protest, but to no avail. Of the many Creek chiefs who were signatories to the treaty, only one was of the hostile faction; the rest were friendly to the United States. Yet, due to Andrew Jackson's appetite for land in the Southeast, the friendly Creeks were forced to cede millions of acres of their land as well, to which they protested in vehement terms. Historians and writers since have questioned the fairness of this cession of just over 21,000,000 acres, particularly as it related to the non-hostile Lower Creeks and friendly Upper Creeks. The crucial provision in the treaty relative to the history of the Poarch Band of Creeks is found in article 1, and is quoted here in full:

> Provided, nevertheless, that where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war, and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States: but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby. (7 Stat. 120)

The Creek War of 1813-14 obviously did not occur in a vacuum. Parallel to the events of the war were other occurrences which left major historical imprints on the area and in the ethnohistory of the Poarch Band of Creeks. The city of Mobile, for example, was retaken by the American forces during this period. Immediately following the peace within the territory, white settlers and pioneers streamed out of the Atlantic seaboard

states gripped by "Alabama Fever," in hopes of acquiring some of the new land ceded to and now held by the United States. Among this group was a young man named John Gayle, and his family, who moved from North Carolina to Mt. Vernon and later bought plantations in Baldwin and Monroe counties.

Specific mentions and detailed lists in contemporaneous documents describing the ancestors of the Poarch Band of Creeks and their property begin to appear for the first time following the War. It is important to note, however, that generally such mentions regarding Creek land holdings meant that the half-blood Creeks and their families had settled and cultivated the land in question, not that they held title to it. Many of these documents were drawn as a result of war-related issues, but others explain certain aspects and features of the Creek half-blood community in the Tensaw region and the Upper Creek towns. One such list, date November 1, 1812, proves that many of the half-bloods in the Tensaw area were originally from the Upper towns. This latter is found in the "Journal of John Innerarity," and titled "List of Debts Due by the Traders & Factors of the Upper Creek Towns to the Firm of Messrs. Panton, Leslie & Co. and John Forbes & Co. of Pensacola, Adjusted to November 1, 1812." This list identifies certain of the half-bloods, and includes Joseph Stiggins, John Moniac, David Cornel, Daniel McGillivray, Charles Weatherford, Sehoy Weatherford, and George Cornel.

Other lists taken of individuals, land, and property ownership show that the ancestors of the Poarch Band of Creeks grouped together geographically in clusters. In addition to the historical kinship relations between the Weatherfords, Tates, Durants, Stiggins', McGhees, Sizemores, Cornells', et.al., Marriage Book I of Baldwin County records thirteen marriages between these and other family members during the years 1812 to 1829, most of whom were ancestors common to the Poarch Creek community. Added to the high degree of endogamy among the early ancestors of the group and the reference in Harry Toulmin's letter to Claiborne about visiting "them," i.e., the half-blood community at Tensaw, is a reference made by Benjamin Hawkins in a letter to John Armstrong of September 21, 1813, just two weeks after the Ft. Mims massacre. Hawkins sent letters to "public officers in that quarter," i.e., the settlements at Ft. Stoddert and Tensaw, ". . . directing the half-breeds there to unite with their white brethren and that the people in the fork of Alabama should put themselves into the best situation they could to resist an attack." (Grant, ed. 1980: 664) Taken together, these references show that whatever the integration of the settlement during the last decades of the eighteenth century, the half-bloods in the Tensaw area had by this time intermarried and gathered into clusters or hamlets and had occupied the eastern bank area of the Alabama River and eastward along the Little River just north of the Tensaw settlement. This observation is corroborated by such lists as that of Major Howell Tatum who served as General Jackson's topographical engineer during this period. In August of 1814 he surveyed the Tensaw/Little River area, and mentions John and William Weatherford's improvements, those of Dixon Bailey and his two sisters (one "married to a white man by the name of Sizemore"), "a Mrs. Dyer, a half-breed Indian woman of the friendly party," Samuel Moniac, and "David Tait, a pretended friendly half-breed Indian," and "Mrs. Dunn, a half-breed woman." (Hamilton, 1898)

Of the lists of this era which are most indicative of the fact that the half-blood residents of the region tended to live in hamlets or clusters within the greater geographical area, is that of Judge Harry Toulmin, who took depositions from the victims of the hostile Creek depredations during the war. Toulmin's "schedule," as it is referrred to, was signed by him on November 24, 1815. It is divided into counties whose boundaries in 1815, it should be remembered, differed from those of later years as population shifted, and shows Baldwin and Monroe counties among others. In Baldwin County, Moses Steadham appears, and grouped together down the column appear the names of

Ann Tarvin, Josiah Fletcher, Richard Tarvin, and James Earle. For Monroe County, almost all the names are early relations and ancestors of the Poarch Band of Creeks: Mary Dryer, John Randon, Margaret Bailey, Dixon Bailey (deceased), James Bailey (deceased), Arthur Sizemore, George Stiggins, Semio McGhee, Lachlin Durant, John Adcock, and Peggy Summerlin.

It was around this period of time, from 1815 to 1829, that the historical focus of attention for the early ancestors of the Poarch Band of Creeks shifted from depredations and losses resulting from the Creek War to the problems created by land usurpation and land grants under the Treaty of Ft. Jackson. The basic system of surveys and land sales and grants was that used under the Land Ordinance of 1785, modified in 1796 to provide for the surveying of each township into 36 sections, each section of which was one mile square and contained 640 acres. In March of 1815, Congress passed "An act to provide for ascertaining and surveying of the boundary lines fixed by the treaty with the Creek Indians [Ft. Jackson], and for other purposes." This act further clarified that "Indian title was extinguished by the aforesaid treaty" and that "all such [now public] lands . . . shall be offered to the highest bidder." (3 Stat. 228) This act was primarily responsible for setting off what has been described as "Alabama Fever." The half-bloods, who had sided with the Americans and had had their houses burned and their crops and livestock destroyed by the hostile Creeks just a year earlier, were now having the same done to them by white American land grabbers. The half-bloods were being cheated and run off by the whites. In describing their unique and intermediate status, Hawkins wrote, "I am of opinion these people will never be suffered by their Chiefs to return again in to the nation, unless they will in all things conform to the Indian habits, which from their practical knowledge of the plan of civilization is impossible. They are in consequence of the peculiarity of their situation divested of house and home and must fly their native soil [Tensaw/Little River] unless provided for by our government." (Grant, ed. 1980: 769) This situation precipitated a letter from the half-blood community to then President Madison, which was to be a critical piece of historical evidence in the story of the Poarch Band of Creeks.

This letter, dated May 29, 1815 and signed by eleven half-bloods of the Tensaw/Little River community, opened with the sentence "We the Natives of the Creek Nation, Relations of Alexander McGillivray most respectfully beg leave to present this our humble petition to the President of the United States for a redress of grievances of the most serious nature that can happen us." The next paragraph, which describes the usurpation of lands and most significantly places the half-bloods in a time and a place in which "the greatest number" of them "were born and raised," must be quoted in full.

> After having shown an inviolable atachment [sic] for the Government of the United States through the whole of the late war in which our property has been destroyed, our lives threatened with indiscriminate carnage, not one of us but who lost Relatives both near and dear to us on that memorable day that Fort Mimms was taken by the dreadful massacre that the Hostile Indians made there; we have at all times evinced a willingness and readiness (as many of the Officers of the Army can testify) to cooperate and contribute to every measure that was calculated to prosecute the war with success on behalf of the United States — and we in common with every good citizen of the Government rejoiced at the fair prospects of peace but our prospects are darkened and we are placed in a most critical situation. Many citizens of the Mississippi Territory have moved over **the boundary line betwixt the United States and the Creek Indians on the Alabama River as high up as Fort Claiborne in which distance the greatest number of us who are called Halfbreeds were born and raised.** They have

> taken forcible possession of our fields and houses and ordered us off at the risk of our lives. They have reproached us with our origins, insulted us with the most abusive language, and not content with that they have even proceeded to blows and committed private injury in our Stocks and property. (Durant, 1815) (emphasis added)

The letter continues by saying that they had sought for redress from local authorities, but that no one yet had jurisdiction. They said further that General Jackson had given them to understand that all actual settlers ". . . who were natives and descendants of the Indians would be intitled to a lease of six hundred and forty acres of land — some think differently on this subject now, that females with families will not be intitled to any." "We have been encouraged," they continue, "to remain on our farms which we had occupied for years before the war," and they ended the letter with the usual perfunctory protocol which correspondence demanded at that time. The letter was signed by Lachlan Durant, Samuel Brashiere, William McGirt, Rachael Walker, Saphiah McComb, Peggy Summerlin, Nancy Summerlin, Leonard McGhee, Lemi (or Semi) McGhee, Alex Brashiere, and Harriet Linder.

This petition was sent to President Madison in Washington, and ultimately referred to Benjamin Hawkins for comment and suggestions. Hawkins' response to the petition was outlined in a letter to Secretary of the Treasury William H. Crawford dated January 19, 1816. The letter itself is 2½ pages in length, addressing in general the condition of the half-bloods; attached to it was a four-page list of 45 of the "Indian country men" and half-bloods living in the Tensaw/Little River settlements who were early ancestors and relations of the Poarch Band of Creeks. Hawkins clearly sides with the half-bloods, and suggests that their claims be granted, including the request that women be entitled to land and indemnification. Moreover, Hawkins describes the method by which the half-bloods of the Tensaw/Little River area came to settle there from the Upper Creek country:

> The situation of the half breeds have been peculiarly embarrassing. They embraced the plan of civilization first and by their conduct merited the attention of the Agent for Indian Affairs. They would not agree in their mode of living or pursuits with their Indian relatives or the Chiefs generally; which produced continual broils between them. This determined the half breeds to apply for, and after several years, to obtain from the Convention of the nation leave to settle down on the Alabama near the white settlements on the Indian lands. Here they were when the civil war among the Indians commenced. (Grant, ed. 1980: 768)

The four-page attachment which describes each half-blood and Indian country man lists all those who signed the original petition to James Madison, plus Sam McNac, Charles Elliott, Sam Smith, David Tate, William Hollinger, David and Peter Randon, Dixon, James, David, and Peggy Bailey, James Cornells, Arthur Sizemore, Zachariah McGirt, Josiah Fisher, Richard Tarvin, John Hinson, David Rolin, and John Weatherford, among others.

The two decades between the years 1816 and 1836 were a time of displacement and unsettled, uncertain future in the history of the Poarch Band of Creeks. By 1816, the effects of the wholesale destruction by the hostile Creeks during the war were felt less, while the effects of terrorist tactics by the white land grabbers who poured into the ceded territory were being felt more. This time was marked by residential shifting—the half-bloods being forced out of the more choice lands along the Alabama River banks had to take what was left. Significantly, the lands they chose were almost always as close to the Tensaw/Little River area and inland of the east bank of the

Alabama as was possible. It appears that geographical proximity to their neighbors and relations was an important consideration for them, thus assuring a communal continuity. Within this period, a series of depositions and testimonials in pursuit of claims for land and depredations was taken, in addition to memorials to Congress and congressional "acts of relief."

The first of these is dated April 27, 1816 and is titled an "Act for the Relief of Samuel Manac." The bill provides remuneration for the heavy losses Sam Moniac sustained during the Creek War of 1813-14 and is accompanied by an exhaustive set of supporting exhibits rich with historical details, among which is Moniac's memorial. In a letter from Gilbert C. Russell--part of the exhibits--Russell states that Moniac's "plantations were laid waste." Two or more plantations were not uncommon in Creek society, particularly that of the more wealthy half-bloods. In a letter from Thomas Freeman to Josiah Meigs dated June 30, 1816, Freeman states that there is a "great variety of positions & descriptions of those Indian Improvements." "In some instances," he continues, "the Residence with a small improvement consisting of cabins garden & small field are on the high land on one side of a river whilst the principal improvements or cultivations are on the low grounds on the Opposite side—Several small improvements of the same person are detached from each other to the extent of some miles . . ." (Carter, ed. 1938, Vol. VI: 695) Consistent with Freeman's observations were Moniac's land holdings, as well as those chosen by Lynn McGhee under his "act for relief" some years later.

With a shifting demography and a new, large influx of settlers, and with territorial status for the new Alabama only a year away, the legislature of the Mississippi Territory decided to hold a special census in 1816. Parallel to the breakdown of Creek half-bloods in the claims list of Harry Toulmin just a year earlier, the census shows only two Hollingers in Baldwin County. The census for Monroe County shows McGillivrays, Moniacs, Wards, Rolins, McGirts, Moores, Durants, Stiggins', Tarvins, Weatherfords, Hollingers. Tates, Earles, Cornells', Walkers, and others of the half-blood ancestors of the Poarch Band of Creeks. It also shows John Gayle as a considerable landowner with 22 slaves, which made him the 10th largest slaveowner in Monroe County.

LAND ISSUES AND CREEK REMOVAL

In the year 1817, center stage shifts from southern Alabama to Washington D.C. relative to events affecting the history of the Poarch Band of Creeks. In January of that year, the claim of the friendly Creeks as a whole are considered, and being reported out of the Committee of Ways and Means, Mr. Lowndes of the Committee concludes that ". . . it will be best to appropriate a definite sum to be applied, under the direction of the Secretary of War, to indemnify the friendly Creek Indians for property destroyed by the hostile Creeks, in fair proportion to their losses." (United States Congress, 1832-61: Vol. 2: 126) While no remuneration was paid out at this time, this report preceded the later payments and set the responsibility for payment on the United States. Two months later, an act was passed by Congress which played a crucial role in the history of the Poarch Band of Creeks. On March 3, 1817, a bill was enacted which provided that fee simple patents would be issued to the heirs of land grant recipients under the Treaty of Ft. Jackson, a significant departure from the original plan under which rights of occupancy would inure to the heirs as long as they did not voluntarily abandon the land. (3 Stat. 380) The act also provided for the appointment of the claims agent, or special Commissioner, and in December President Monroe chose former Georgia Governor David B. Mitchell to this post. Mitchell's mandate, then, was to ascertain the damages to the friendly Creeks to arrive at "a definite sum," and to take evidence "on the land occupied by such claimant" for those claiming a section of land under the Treaty of Ft. Jackson and modified by the act of March 3. Several of the half-bloods who were entitled to land, as it turned out later, were not in the vicinity

when Mitchell toured the area to take testimony from the claimants. Lynn McGhee was among those not present, and his absence precipitated the series of memorials to Congress several years later that ended in his descendants occupying his land grant to the present day.

Finally, in 1817 David Moniac, the son of Sam, was admitted to West Point under a provision of a treaty which called for the education of a limited number of Creek children at government expense. He was graduated and commissioned a Second Lieutenant on July 1, 1822, the first Indian ever to be graduated from West Point. Almost immediately, however, he took a leave of absence due to family difficulties and subsequently resigned his commission six months later. He returned to Baldwin County, where eventually he married and had two children. In 1836 he rejoined the Army during the Seminole War, was promoted to Brevet Major, and was killed in action in northern Florida.

Like 1817, the year 1819 was one of activity in terms of claims and congressional acts relating to the friendly Creeks. In January, Secretary of War John C. Calhoun submitted, pursuant to a house resolution calling for him to do so, copies of all accounts and correspondence relating to the claim of the friendly Creeks. David Mitchell had already begun, a year earlier, to gather evidence pertaining to the losses of the half-blood and other friendly Creeks, and much of the material Calhoun submitted was Mitchell's. It showed a partial payment to the claimants by the United States, but still a debit of "a little upwards of $100,000" in Mitchell's words. The following month, Congress passed "An act authorizing the President of the United States to purchase the lands reserved by the act of the third of March, 1817, to certain chiefs, warriors, or other Indians, of the Creek nation." (3 Stat. 484) Thus, by a gradual process, the lands granted to the friendly Creeks under the Treaty of Ft. Jackson, originally inalienable, came to be issued to heirs in fee simple under the act of March 3,1817, and finally were able to be purchased outright by the United States under this act, thereby eliminating any protection to title which the United States proferred under the treaty. On December 14 of 1819, Alabama was admitted as a state to the Union, creating what would later become jurisdictional problems between the state and the United States regarding dealings with and treatment of the Creek Indians.

Much of the testimony and depositions taken by David Mitchell in southern Alabama during 1818 and 1819 has survived, and these documents are revealing in several ways. First, they establish a pattern which was to continue in the history of the Poarch Band of Creeks to the present day--namely, the practice of testifying for each other in cases before the authorities. One example in the Mitchell documents is the witness of David Tate, James Earle, and William Hollinger for Josiah Fletcher. Several years later, in testimony taken by John Crowell, David Tate, William Hollinger, James Earle, and John Westherford all testify regarding the claim of Lynn McGhee. This practice occurs again in the congressional memorials in the 1830's, again in the homestead applications in the 1870's and 1890's, again in the Cherokee claims testimony taken by Guion Miller in the early twentieth century, again in the timber trespass suit of the 1912 period, and so on. Second, these documents reveal that most of the half-bloods and Indian country men lived in close proximity to each other along the Alabama River in the period surrounding the Creek War and that they kept abreast of each other's agricultural efforts, property holdings, and families. Third, they bear witness to the fact that their lands were in effect stolen from them, even though the usurpation might have appeared legal.

The 1815 letter of Lachlan Durant to President Monroe was quoted earlier, and described in general terms the problem of usurpation: "They [white intruders] have taken forcible

possession of our fields and houses and ordered us off at the risk of our lives . . ." The depositions taken by Mitchell and later by John Crowell get specific on this matter, and name one John Gayle and his father Matthew as chief offenders of this practice. John Gayle moved to the region in 1813, and having been college educated, he began reading law in Claiborne under A. S. Lipscomb. He was elected in 1818 as Solicitor of his circuit (Tensaw to Claiborne), was later representative of Monroe County in the state legislature, served on the Alabama Supreme Court, was re-elected to the state legislature where he become speaker of the house, and finally, in 1831, was elected Governor of Alabama and re-elected to that office in 1833. He was elected to Congress in 1847 where he served two terms; following that he was appointed a Federal district judge which post he held until his death in 1859. Clearly, nonliterate half-bloods and Indian country men would have posed little problem for Gayle's apparently unscrupulous acquisition of their untitled lands.

Gayle was not alone in this practice, but was named in testimony on several occasions. In a deposition taken by Mitchell, Charles Ehlert, a half-blood, said "And I further state on oath that Matthew Gayle has taken forcible possession of my improvements." In depositions taken by John Crowell six years later, the half-blood Semoice stated that "I remained on my place after the War untill driven off by some white people, since which time the land has been sold by the United States." At the same time, Lynn McGhee asserted that having been wounded in the Creek War, his land ". . . was under the control and management of my Brother Semoye after the war, untill driven off by the White people and the said land has since been sold by the United States." While these particular depositions do not name Gayle, later ones do. Taking sworn statements for Congressional memorials in 1831, Semoice goes into detail about Gayle:

> . . . this deponent further saith that a man by the name of John Gayle intruded on him and had his stock constantly destroying his crop, and often used means to get him to remove from the place, and often profered to wrent his place when he heard that the friendly Creeks would be entitled to their places--but that this deponent forever refused either to wrent or sell--this deponent further saith that the said Gayle did make base and false statements relative to his claim in the presence of Governor Mitchell and that the said Gayle had often threatened him that unless he would wrent or sell his place to him that he Gayle would prevent him from getting his land or a choice selection of his own . . .

This assertion is corroborated by a white settler, a Captain William Waller, who also made a deposition the same day describing testimony taken by Mitchell: "there was testimony introduced by a man by the name of John Gayle who had settled himself on the lands claimed by Symmoice and Lynn MacGhee; in order to deprive them of their claims . . ."

Records of the Probate Court for Baldwin County show that in April of 1820 John Gayle purchased $300 worth of land contiguous to the land sold to him earlier by John Randon, so that by purchase, rental, and usurpation Gayle's land holdings grew. Later that month, a major land act was passed by Congress, which made Gayle's objective easier. "An act making further provision for the sale of public lands," (3 Stat. 566) this act was in effect until the Civil War, and it was through this act that the United States sold the lands to which the half-blood Creeks of the Tensaw area had no legal title, even though they had cultivated it for years and in many cases claimed it under the Ft. Jackson treaty.

Other events in the 1820's either affect or help describe the half-blood and Creek community in the Tensaw region. On April 23, 1822, David Tate wrote to his nephew, Cadet David Moniac, at West Point. He advised him to return home upon his graduation, since his father was in an unfortunate condition, and had lost most of his property in "bad Trades." The letter claims that David's father, Sam, had to "move into the nation" to save the remainder of his property. Tate concluded by saying that Cadet Moniac's uncles, William and John Weatherford, were fine.

John Crowell replaced David B. Mitchell as Special Agent for Indian Affairs for the Creek nation, and in December of 1823 took depositions, presumably by request of Secretary of the Treasury William Crawford, from Lynn McGhee, Semoice, William Hollinger, and the heirs of Mary Dyer. This struggle for rightful claims under the Treaty of Ft. Jackson was a long and tedious one, and did not end until the mid 1830's. In the meantime, the claims for losses and depredations committed by the hostile Creeks during the Red Stick War reached a conclusion on April 15, 1824. A House Resolution was passed to "inquire into the expediency" of paying the remainder of the claims. Mr. McLane of the Committee of Ways and Means reported that no more claims should be paid; that the $85,000 appropriated in 1817 was sufficient. On March 3, 1825, "An act granting certain rights to David Tate, Josiah Fletcher, and John Weatherford" was passed by Congress. This bill gave to these men all right, title, and interest in the land which they had reserved under the Treaty of Ft. Jackson.

The following year, 1826, was a portentous one for the Creek nation. On January 24, a treaty was made between the Creeks and the United States, in which the Creeks ceded all their remaining lands in Georgia. The Lower Creeks were so outraged by this cessior that the miccos met and decided that the half-blood William McIntosh, who instigated the signing of the earlier Treaty of Indian Springs, was to be executed for treason. This sentence was carried out immediately. Neither this land cession or the last and major one of 1832 affected the half-blood community in southern Alabama—in the Tensaw region--to any great extent, but hundreds of Lower Creeks succumbed to the mounting pressure of the policy of removal and left the Southeast for Oklahoma, or "Indian Territory," in 1827. The remainder apparently relocated to the last sanctuary of the once vast Creek nation, the area of land between the Coosa and Tallapoosa Rivers. While the dedade between 1826 and 1836 was an ominous one for their Creek kinsmen to the northeast, the fortunes of the half-blood community in the Tensaw area were brighter. In May of 1826 two private acts were passed by Congress to give all right, title and interest pertaining to their reserves to William Hollinger and Samuel Brashiere, making a total of five title holders within the community in a period of two years.

Of thirty-nine land claims under the Treaty of Ft. Jackson, twenty-seven were filed by members of the half-blood community in southern Alabama, yet only thirty were processed as of December 20, 1826 showing an April 12, 1820 date of certificate. The remaining nine were processed at varying times, up to 1828. The 30 land claims which were processed, of which 25 were those of relations and ancestors of the Poarch Band of Creeks, appear in volume 14 of the Public Lands documents in the American State Papers, and lists Tate, Brashier, Stiggins, Earle, Fisher, Sizemore, Fletcher, Bailey, Hinson, Durant, Smith, McGirt, Weatherford, Ehlert, Hale, Randon, and Cornells—Dyer and Hollinger were processed at later dates.

The year 1829 marks the death of David Tate, one of the wealthier of the early ancestors. His will, dated November 17, is not of great descriptive importance other than showing the extent of his holdings, but it is significant that Tate chose as his beneficiaries John Weatherford, Captain and Mrs. Shomo, David Moniac, Mr. Hollinger,

Elisha Tarvin, and Lynn McGhee. This will establishes a pattern in the community which lasts to the present day--that of making bequests to members of the half-blood community of Creeks. It is similar to the pattern of testifying for each other to various authorities for claims, judgment awards, etc. This practice of bequests within the Creek community is more than indicative of communal cohesion, however; it had the practical ramifications of retaining both property and chattels within the community to be passed from generation to generation, providing a continuity.

On May 29, 1830 Congress passed "An act to relinquish the reversionary interest of the United States in certain Indian reservations in the State of Alabama." The Creeks George Stiggins and Arthur Sizemore were granted title to their reserves under the Treaty of Ft. Jackson as well as six Cherokee claimants under an 1817 treaty. There was a proviso in this act, however, which required that these people ". . . with their respective families, shall remove to their respective tribes west of the Mississippi River, not included within any State or Territory . . ." (6 Stat. 441) Stiggins, at least, never left Alabama. The year 1830 is also the one in which the U.S. Decennial Census was taken, and the schedules for Baldwin County, whose boundary lines were changed since the previous census, show fifteen surnames common to the ancestors of the Poarch community. These ancestors, moreover, were enumerated in clusters, which indicates a communal identity. Those for Monroe County show somewhat fewer, though it is clear that for whatever reason not everyone in the Creek community was enumerated.

In February of 1831, foreshadowing the ominous event of the following year, a delegation of Upper Creeks consisting of Tukabachee Hadjo, Octe Archee Emathla, and Paddy and Thomas Carr went to Washington to speak with Secretary of War Eaton. They stated that they did not want to leave Alabama; that they did not want to remove to Indian Territory. Andrew Jackson had taken office as President in 1830, and one of the policies of his platform was to remove all Indians in eastern settlement areas west of the Mississippi River. Pressure was mounting for legislation to require this, and the Creeks along with the other so-called "Five Civilized Tribes" were worried. Concurrent with the anxiety about removal among the Creeks in northeast Alabama was a flurry of activity among those of the Creek and half-blood community in the Tensaw region to acquire land, perhaps as a result of the tension brought about by the threat of removal. Edward Steadham, for example, an Indian country man who had been born and raised in the area, had survived the Ft. Mims massacre, and had married Nancy Earle (a half-blood daughter of James Earle and Elizabeth Tarvin), made ten land acquisitions beginning in 1831 and extending through 1843. These were all acquired in Baldwin County and the transactions made at the land office at St. Stephens. (Baldwin County Deed Record Book E) Still on the trail of their reserves, Lynn McGhee and Semoice each made sworn affidavits in October and November of 1831 to Justice of the Peace John Peebles of Monroe County, reaffirming what had befallen them during the Creek War and what had happened since to prevent their possession of the land they claimed.

More depositions, it seems, were required of the half-blood Creek claimants who unsuccessfully sought reserves under the Treaty of Ft. Jackson. On January 8 of 1832, Lynn McGhee and Semoice again gave sworn affidavits in the form of memorials to Congress to facilitate receipt of their land reserves. The content of the affidavits is essentially the same as the former ones, i.e., that they had been loyal to the United States, had cultivated land on the Alabama River near Tensaw both prior to and after the Creek War, had been forcibly driven off their lands by whites, and the lands subsequently sold by the United States. Two more memorials were considered by Congress at the same time--those of Susan Marlow, daughter of James Marlow killed at Ft. Mims, and Samuel Smith, whose original claim was recorded as rejected in David B. Mitchell's notebook. Smith claimed in his memorial that his 1819 claim was "overlooked by David B.

Mitchell" and that "improper testimony and interference had been used against your memorialist."

The last and most devastating of the Creek land cessions occurred on March 24, 1832. This treaty, signed in Washington, D.C., ceded to the United States all Creek lands east of the Mississippi River, except individual sections. According to the provisions of the Treaty, 90 principal chiefs were to have a section of land each, and every head of family a half section. At the end of five years, each Creek Indian would be given a deed to his land if he hadn't sold it. Twenty sections of land were to be selected and set aside for orphaned children, and a census to be taken on location was mandated by the treaty as well.

Work on the Creek census began in late 1832. The work was divided in two, with Benjamin Parsons counting family heads in the Upper Creek towns, and Thomas Abbott counting in the Lower Creek towns. In May of 1833 the completed census was published. Parsons' count showed a total of 14,142 members of the Upper towns in the Creek nation, with an additional 445 black slaves. Among this number were approximately 30 members of the half-blood Creek community in the Tensaw region, who apparently returned to the various towns to which they felt linked and, presumably for purposes of obtaining a half section of land from the government, had themselves placed on the Creek census. The placement of these southwestern Alabama half-blood Creeks on the census, notwithstanding the fact that they were motivated by acquiring land, was nonetheless legitimate, with none of the town Chiefs or other residents objecting. Among those who returned to the towns of their parents, their siblings, or their spouses were McGillivrays, Cornells, Tarvins, Walkers, Elliots, Hales, Weatherfords, Stiggins', Moniacs, McGirths, Sizemores, and Durants. The fact of their being included in the Creek sensus also shows a strong identification with Creek--an identification which was passed to their immediate progeny and continued throughout the nineteenth century and into the twentieth century to the present. Others, like the McGhees, Tates, and Hollingers are conspicuous by their absence, but this may be explained by a letter written September 17, 1834 by five Creek Chiefs to the Secretary of War, claiming that many were not counted in the census due to their being out hunting or their being absent for other reasons. (Creek Chiefs, 1817)

In the meantime, there was trouble in Creek country. It did not go unnoticed by greedy whites that potential profit was to be had in land speculations with thousands of non-literate Creek Indians gaining title to sections and half sections of prime Alabama farm land. Throughout the entire period from 1832 to 1837, an endless repertoire of frauds and tricks were used by whites and certain of their Creek conspiritors to steal land from the Indians. Indeed, whole companies were formed whose primary function was to defraud the Creeks and take their land. The whole, pathetic history of these speculations is told in two works by Mary E. Young: Redskins, Ruffleshirts and Rednecks: Indian Allotments in Alabama and Mississippi and "The Creek Frauds: A Study in Conscience and Corruption" in the Journal of American History. Favorite methods were inducing a state of profound intoxication and, for the promise of more whiskey or goods, having the Indian landowner place his X mark on a bill of sale in front of "witnesses"; another was extending credit for goods at exorbitant prices for unrealistic interest rates so that the unsuspecting Indian, unfamiliar with commercial procedures of white culture, would overextend and usually end up owing not only his land but all the rest of his property as well. Other, less sophisticated whites took another approach to the Indian lands--they simply moved in and took over without any regard for the Creek owner's title.

The frauds and theft perpetrated against the Creeks were so malignant that in April of 1833 Secretary of War John Eaton directed Robert L. Crawford, United States Marshall for the Southern District, to intervene and remove white intruders from Creek lands. President Jackson sent Francis Scott Key to Alabama that same year on a special mission to try to resolve the problems, but little was ever done to ameliorate the situation for the Creeks. A special commission was established under John B. Hogan to investigate the Creek frauds, but that too had little practical effect. John Gayle, then Governor of Alabama, took the side of the white settlers against the Indians, and a serious situation developed between the state and the Federal government, due to Crawford's intervention on the side of the Indians and his request for Federal troops. The situation climaxed when the frustrated and outraged Creeks struck back at the white intruders. Concurrent with the Seminole War of 1836, the few acts of violence on the part of the Upper Creeks were interpreted as war by Gayle and his followers. The general alarm was raised, and Army General Thomas Jesup was sent in to round up the Creeks in preparation for a forced march to the Indian Territory--the infamous "Trail of Tears." This mass exodus took place primarily between the years 1836 and 1837, so that by 1838 only a handful of Creeks remained in Alabama, among them those of the half-blood community in the Tensaw region.

The principal concerns back in the half-blood Creek settlements in the Tensaw/Little River area during this period were still indemnification for losses sustained in the Creek War and land acquisition, and one result of the latter was a continual shift in demography, though confined to the same general vicinity. In February of 1832, in a good example of concerted community action, a group of the half-bloods memorialized Congress through the state legislature of Alabama. In the petition they identify themselves as "native Creek Indians of mixed blood"; they summarize the losses they sustained and claim they have never received any remuneration. The three-page petition is signed by James Earle, Arthur Sizemore, John Weatherford, Sizemore for the estate of Dixon and James Bailey, Charles Elhert, Zachariah McGirt, David Moniac, Semoice, Moniac for David Tate, Armstrong for Josiah Fletcher, Lachlan Durant, George Stiggins, David Hale, William Hollinger, and Lynn McGhee, among others. (Senate Documents 2, #65-110) While the land claims of others in the half-blood community were "on track," that of Sam Moniac did not fare well. A question arose over the location and validity of the claim: George Goldwaite of the General Land Office (GLO) wrote to Commissioner of Indian Affairs Elbert Herring on January 17, 1835 that the location of Moniac's reserve was in question in GLO records. Herring replied on January 21 that "there does not appear to be anything in this office which shows that he was so located." This may have discouraged Sam Moniac enough to leave Alabama for the Indian Territory; we learn from Woodward that he died in 1837 in Pass Christian, Mississippi, one of the Indian encampments along the emigration route West. In an 1885 deposition given by Monday Durant of Indian Territory, he stated that David Hale also "started to this country and died at Pass Christian."

There is an irony of history which is exemplified in the events of the years 1836 and 1837. These two years are those in which most of the Creek Indians east of the Mississippi were removed to Indian Territory along the Trail of Tears. They are also the two years in which most of the land acquisition and special acts of relief occurred for the members of the pre-Poarch community of Creeks, enabling them to stay in their native homeland. Those half-blood Creeks who stayed appear to have assisted in the removal, as well. In a letter from Congressman John Bell of the Committee on Indian Affairs to Lewis Cass, Secretary of War, dated May 9, 1836, expenses for local interpreters in the removal effort were listed for John Rolin and Richard Tarvin under the command of Lt. Edward Deas, and for Samuel Smith and Richard Tarvin under the command of Captain John Page.

On July 2 of 1836 Congress passed "An Act for the relief of Susan Marlow," who, being the "only surviving child of James Marlow, a Creek Indian, who lost his life at the destruction of Fort Mims," was entitled to a "reservation allowed to the friendly Creek Indians." (6 Stat. 678) The same day, Congress passed "An Act for the relief of Samuel Smith, Lynn McGhee, and Semoice, friendly Creek Indians." The language in the bill is significant, for it allowed that they were "entitled, under the treaty with the Creek nation of Indians . . . to reservations of six hundred and forty acres of land each . . . to be held by them on the same terms and conditions as the reservations given by said treaty." (6 Stat. 677) This bill makes no mention of the act passed March 3, 1817 which, upon the demise of the grantee, gave title in fee simple to his heirs. This 1836 act then, makes reference only to the Ft. Jackson Treaty, which provided for rights of occupancy to the descendants of the grantee as long as they shall not voluntarily abandon the reserve. It was this oversight in the legislation which allowed the descendants of Lynn McGhee to occupy the land as a reserve, without title, until 1924. Sometime in 1836, Baldwin County Deed Record Book E shows that David Moniac, father of David Alexander Moniac, sold the northeast subdivision of fractional section 19 in T4, R3 E (130 acres) to Margaret Tate. Similarly, Elizabeth Steadham bought the northeast quarter of section 8, T3, R3 E in Baldwin County.

Early in January of 1837, after spending the summer and fall looking for land reserves, the four grantees again asked Congress for relief. The problem was that all the good land along the Alabama River in the Tensaw region had long since been bought, and little or no land of value was available as an entire section. The relief, therefore, was to be allowed to choose land in parcels--legal subdivisions--which cumulatively amounted to 640 acres. On January 12, Mr. Linn of the Committee on Private Land Claims reported on "Samuel Smith and Others," stating the essence of the problem, and suggested a bill be enacted to rectify the situation. Congress then passed such a bill on March 2 of that year, titled "An Act to amend an act approved the second of July, 1836, for the relief of Samuel Smith, Linn McGhee, and Semoice, Creek Indians; and, also, an act passed the second July, 1836, for the relief of Susan Marlow." It was under this final amendment that Smith, McGhee, Semoice, and Marlow first chose lands in and around what is today the community of Poarch.

Finally, in 1837 the first of what were to be several legal disputes over title to land granted to the friendly Creeks arose. Peter Randon had leased his land for 20 years to non-Indians, and on May 23, B. F. Butler issued U.S. Solicitor's Opinion #78 in which he held that Randon's lease of this land and his subsequent move to Louisiana constituted abandonment under the Ft. Jackson Treaty and that the United States should resume title to sell the land.

AFTER REMOVAL

As the decades of the 1820's and 1830's were ones of geographic shifting and uncertainty for the ancestors of the Poarch Band of Creeks, the decades of 1840's and 1850's--up to the Civil War--were ones of relative prosperity and growth. The constitution of the community changed as well, due to the dying out of several older family surnames like Hale, Tate, McGirth, Cornells, etc., and the adding of new ones through marriage, like Adams, Gibson, Lomax, Deas, etc. History records the activities of the immediate ancestors of the Poarch Band of Creeks during this period mainly in wills, deeds, special acts, and land transfers.

In 1839 James Steadham used certificate #7985 and certificate #7986 at the St. Stephens land office to obtain 39 acres and 38 acres, respectively, in Baldwin County. The day and exact location were not recorded. In the following year, the 1840 census showed, for Baldwin County, Poarch ancestors among whom were Lynn McGhee and the families

of Deas', Earles, Sizemores, Steadhams, Tates, Tarvins, Tunstalls, Weatherfords, and others. For Monroe County, the census showed Shomo, Weatherford, Hathcock, and Smith, and the clusters of Creek half-bloods in this region were still in close proximity to each other,-county lines notwithstanding, since the shifting lines often bisected--and later trisected--the greater half-blood community.

In 1844 George Stiggins died. Stiggins was a half-blood who was born and raised in Tensaw, and attended the Boatyard school run by John Pierce where he learned to read and write. In 1831 he began work on a manuscript which he continued until his death in 1844. The manuscript, though unfinished, is a rich source of ethnography and history about both the aboriginal customs of the Creeks and about the half-blood community and events up to and just past the Creek War of 1813-14. George's son, Joseph N. Stiggins, wrote several pages of biographical information about his father and about Stiggins genealogy in his correspondence with Lyman Draper, who was sent the original George Stiggins manuscript in 1875. The manuscript is entitled "A Historial narration of the Genealogy traditions and downfall of the Ispocaga or Creek tribe of Indians, written by one of the tribe," and appears in full in Series V of the Draper Collection; it was later transcribed by Theron A. Nunez and appears in Ethnohistory. (Vol. 5, No. 1: Winter 1958)

The year 1845 begins the recording of marriages in Marriage Book II for Baldwin County. Extending to 1856, the book shows the marriages of eight couples who are ancestors of the members of the current community of Poarch Creeks in this eleven-year period. Again in 1845, in trying to formulate a policy on what to do with the Creek Indians in Alabama at that time, some seven years after the removal to Indian Territory, Robert M. Cherry, Special Agent for the Office of Indian Affairs, wrote to Commissioner Thomas Crawford from Montgomery. Cherry wanted to know ". . . whether the contractor would be authorized to remove the Creek Indians in Alabama other than those residing in the counties embraced in the Creek purchase of 1832 and that were left from the emigration of 1836 or 37. The reason of this last enquiry is because it is understood here that there is a number of families residing in Baldwin County . . . who have been residing there since the first settlement of the state."

In 1846 another of the court cases involving clouded title appears. George Stiggins, who is named in the suit as a Creek Indian, had apparently traded "fractional section 1, T4, R3 E" containing approximately 170 acres for several slaves. The case, under the title of James v. Scott, was brought because Stiggins was never entitled to alienate the land since it was granted to him under the Treaty of Ft. Jackson. The last will and testament of Lynn McGhee is dated January 8, 1846: he leaves his livestock to be divided by his five children, who are Nancy, Peggy, Jack, Billy, and Dixon. He also leaves twelve cows to his friend and Executor, Gerald B. Hall.

Another problem involving clouded title surfaces in 1848. In this case, it involves the purchase of some land by a Mr. Charles G. Gunter which appears to have been given to Sam Moniac--"appears," since the records of Moniac's property were supposed to have been lost according to correspondence between George Goldwaite of the General Land Office and Elbert Herring, Commissioner of Indian Affairs, in 1835. In this instance of 1848, the evidence is a letter from Mr. Saltmarsh of the Cahaba land office to Richard Young, Commissioner of the General Land Office, dated November 7. Saltmarsh asserts that Gunter purchased the Moniac reserve in section 18 and 19 in T10, R16 on the Alabama River. An act for the relief of Gunter and others was considered, and Saltmarsh claims that "Several persons in this district are holding lands reserved under the Treaty of Ft. Jackson in the same manner."

The following year, another historical irony occurs in the story of the Poarch Band of Creeks. It will be remembered that in November of 1831 Semoice made a damaging deposition against John Gayle, naming him specifically as the one who, through threats of violence and intimidation, forced him off his land. Some thirty years later, on January 16, 1849, Representative John Gayle of Alabama reported on H.R. 719 (30th Congress, 2nd Session) and recommended that the children of Semoice be given patents in fee simple to the land their father had chosen under the special act of 1836. The actual bill was not introduced until 1852, but it had Gayle's support throughout.

The U.S. Decennial Census for 1850 lists approximately 70 persons in Baldwin County with surnames common to the present Poarch community. Monroe County lists approximately 30 persons with similar surnames—and, in cases, the same surname—as "colored." This type of inconsistency indicates the variation in census enumeration of this period, particularly listing as "colored" anyone who was not of white derivation. In this case the "non whites" were Indians and Indian descendants of varying blood quantum. Interestingly, the 1860 U.S. Decennial Census—and all subsequent U.S. Censuses--lists many of the same persons of the Poarch Band of Creeks as "Indian."

Just as John Gayle appears to have tried to make restitution to the heirs of Semoice for forcing Semoice off his land after the Creek War, so the state legislature of Alabama appears to have tried to make restitution to the principal members of the Poarch Band of Creeks. In January of 1852, the state assembly passed an act "For the relief of Thomas T. Tunstall and others." Alabama, like Georgia and several other eastern states, had never recognized Indians as citizens, and those Indians who happened to be resident of a given state had no vote, no voice in representation, and could not, among other things, give testimony in court. This act named specific members of the families of Tunstall, Weatherford, Tarvin, Steadham, Sizemore, Powell, Moniac, and Driesbach and stated that ". . . they and their heirs are hereby declared citizens under the law, capable of exercising all the rights, immunities and privileges of the State of Alabama as fully as they would if they were not of Indian descent." Later that year, Congress also acted on behalf of certain members of the Poarch Band of Creeks—it passed, with with the initial support of John Gayle, "An Act for the Relief of the Heirs of Semoice, a friendly Creek Indian," and the three heirs were named as Hetty Deas, Vicy Foxy, and Elizabeth Semoice. (10 Stat. 735) Congress also enacted legislation for the relief of the heirs of Josiah Fletcher, namely his sister Priscilla Blackwell and his widow, for whom they appropriated $2,000.

In the January term of 1852, the case of William Weatherford vs. Weatherford, Howell, et.al. was heard in the Alabama Supreme Court. The case was first tried in the lower Chancery Court of Mobile, and the fight involved the half brothers and half sisters of William Weatherford, Jr. William Jr. was the first son of William Weatherford, Sr., the renown Creek half-blood leader who died in 1824 and his first wife, Superlamy. The marriage did not last, and William Sr. them married Marry Stiggins, with whom he had four children. The estate of William Sr. was contested between William Jr. and his half brothers and half sisters. The court found for the children of Mary Stiggins. Of major significance in this court case is the interesting testimony given by the witnesses, which describes a significant part of the history of the Poarch Creek community. Though taken in depositions between 1847 and 1851, the testimony in the case referred generally to the period from the Creek War of 1813-14, through the time of William Weatherford, Sr.'s death in 1824, to the marriage of Levitia Weatherford to William F. Howell in 1842. Witnesses in the case included Lachlan Durant, William Hollinger, Mary Sizemore, Elizabeth Moniac, and William and Levitia Sizemore, among others. Samuel Edmunds, a non-Indian resident familiar with the half-blood community, testified to the fact that there were "but three white families living in Weatherford's

neighborhood," and that those in the half-blood community around Tensaw were "called half-breeds by their neighbors and was [sic] said to belong to the Creek tribe of Indians."

It was in the mid-1850's that the gradual process of localizing to the exact area of what is today the Poarch community began. Up to this point in time, the geographic distribution of Creeks and Creek descendants in the area had been broader. In October 1853, Gerald B. Hall, Executor of the estate of Lynn McGhee, formally filed with the Land Office in Sparta to record two parcels of land for the heirs of Lynn McGhee, the larger of which came to be known as the Head of Perdido (later corrupted to Hedapeada) in section 28, T2, R5 E. In 1854, the first of over 20 homesteads and purchases by Creeks and Creek descendants of the community were recorded in the immediate vicinity of the McGhee lands. In that year, lands were obtained by William D. Gibson and Alexander Hollinger. On December 11, 1854, Sidney Lomax, whose wife Matilda was a Creek half-blood, purchased 120 acres of land in Township 3, near the present Poarch community. A patent was issued for this purchase some 6 years later—August 14, 1860--from the local register's office of the General Land Office in Elba, Alabama.

The Alabama State legislature, in February of that year, also extended the same full rights of citizenship granted to "Thomas T. Tunstall and others" in January of 1852 to William Weatherford, James Stiggins, Elijah Paget, Charles Weatherford, and George Sizemore. Also in this year, and again in 1856, James D. Driesbach filed final inventories and settlements for the estates of George Stiggins, Lynn McGhee, David Tate, Dixon Bailey, and James Earle. Beneficiaries of the Stiggins estate were Elizabeth, Irene, Clarinda, and J. N. Stiggins, Charles Weatherford and John Tarvin. Those of the Tate estate were Elizabeth and Elisha Tarvin and Josephine Driesbach. Those of the Earle estate were James, Frank, and John Earle and Edward Steadham. Those of the McGhee estate were Richard, Jackson, Peggy, and Mary McGhee (Records of the Probate Court of Baldwin County, Book #2).

The sale of lands around the Poarch area occurred more frequently now, another factor which caused change within the community. Many land purchases, however, were made within the social parameters of the community: Elizabeth Tarvin, for example, sold a tract of land in 1855 on the east side of the Alabama River to John P. Weatherford. The acreage was not shown in Baldwin County Deed Record Book G, but the price was $3,095. Reverberations from the Treaty of Ft. Jackson were still being felt in 1855, due to clouded titles. House Report #103 of the 33rd Congress, 2nd session, outlines the case of James M. Lindsey,, for whom an act of relief was considered. It seems that the Creek half-bloods Samuel and David Hale, who had each received land under the treaty, illegally sold their land in 1826 to Adam Carson. The bill for his relief was passed August 23, 1856. By this time, however, few of the original recipients of the reserves given under the treaty were still alive; their heirs had title to the land as was provided under the act of March 3, 1817 (with the exception of the lands allowed to McGhee, Semoice, Smith, and Marlow in 1836).

CIVIL WAR AND RECONSTRUCTION

The year 1860, marking the beginning of a new decade, was a very significant one for the Poarch Band of Creeks in several ways. The two previous decades had seen growth in the community, the acquisition of land and goods, the localizing of many related families into a smaller environment, the restoration of citizenship rights in Alabama, and relatively good prosperity. The events of the impending decade, however, were to change all this.

This first event of major importance to the community was the U.S. Decennial Census of 1860. The census enumerator for Baldwin County, E. E. Carpenter, was apparently instructed to count the Indians in his district, so, for the first time on a U.S. Census, the members of the Poarch Band of Creeks are listed as "Indian" under the Color column. A total of 84 individuals in Baldwin County are so listed, and all of them have surnames common to the Poarch community. Moreover, this sets a historical precedent of sorts, since subsequent U.S. Decennial Censuses generally list either the same individuals or their offsprings as "Indian" as well.

The second important occurrence of 1860 was insignificant by normal standards, but highly significant in the history of the Poarch Band of Creeks. On May 7 that year the Commissioner's Court for Baldwin County began keeping a detailed record of its proceedings, and much valuable information regarding the community and its prominent members is found in it. During the May term, 1860, for example, the following entry is found: "Dist. 2, from double branches to Turkey Creek including the Bridge over the same. It is ordered that Francis Earle be appointed overseer." An entry for June 18 states: "It is ordered by the Court that Turner Starke, James D. Driesbach, and David A. Moniac be appointed to act with the Commissioners appointed by the Commissioner's Court of Monroe County, to let and contract for repairing or rebuilding over Little River."

The third and ultimately most relevant event affecting the lives of the Poarch Band of Creeks in 1860 occurred several hundred miles away. On December 20 of that year, the state of South Carolina seceded from the Union--the first to do so--starting a series of events which would radically alter the face of the South. The following month, in January of 1861, Alabama seceded from the Union and in February the Provisional Government of the Confederate States of America was established. The convention was held in Montgomery, making Alabama the center of Confederate activity. Finally, on April 12 of 1861, Confederate forces bombarded the Union garrison of Fort Sumter in the harbor of Charleston, South Carolina, thus beginning the long and bloody War between the States in whose battles members of the Poarch Band of Creeks also fought.

The effects of the War were not felt immediately in the Poarch community, however. Until the following year, it was still "business as usual," and the Record of the Commissioner's Court is filled with mundane matters essentially unconnected to the War. In February of 1861, D. A. Moniac was appointed auctioneer for Baldwin County, and in July of that year for the general elections which were to be held in August, the Commissioner's Court appointed as "Inspectors of the general election" Wm. S. Avery, Alex McGhee Weatherford, and G. C. Cruit for Precinct No 2, Jack Springs. Jack Springs, it should be added, was only four miles from the Lynn McGhee reserve at head of Perdido, and was a commonly used campsite by both Indians and whites in the early nineteenth century. Local legend has it that Andrew Jackson camped there. It was a way station on the old Mobile to Montgomery route, part of the old Federal road. During the mid- and later nineteenth century, Jack Springs was used by voting and census officials as a precinct or "beat" for many years, and thus serves as a convenient research device owing to its proximity to the center of Poarch Creek activity. At one point during the 1870's, Jack Springs grew into a little community, with its own post office, schools and the Mars Hill Baptist Church, but eventually it died out.

By July of 1861 the War was well under way, and the Creek Nation West, in Indian Territory, had made a treaty of alliance with the Confederate States. The remaining Creeks in the east also joined in on the side of the Confederacy, as records suggest that at least eighteen men from the Poarch Creek community enlisted in the Confederate forces. Compiled from various sources, this composite list includes David Moniac,

J. R. Moniac, Mike Moniac, George Moniac, W. W. Adams, Richard Rolin, Lynn McGhee (Jr.), Carmon McGhee, William Colbert, William Hollinger, Alex Hollinger, Martin Gibson, John Hinson, Charles Bryers, A. J. Davis, and J. V. Steadham.

As the War dragged on, the economy of the South began to suffer under the strain, and state and municipal coffers were eventually drained of their assets. In February of 1862, the Record of the Commissioner's Court for Baldwin County shows the creation of a "Fund for the aid of Indigent Families of Volunteers," with $75 being disbursed for the wife and two children of David Moniac and $30 for the sister of William and Alex Hollinger. The following November, a greater number is added to the list: the wife and five children of Richard Rolin received $400, the wife and three children of William Colbert received $300, the child of Adam Hollinger received $150, the two sisters and one brother of Carmon McGhee received $250, the wife and child of Mike Moniac received $225, the wife and two children of David Moniac received $225, and the sister of William and Alex Hollinger received $150. This list recurs five more times in the Record of the Commissioner's Court on December 22, 1862, January 3, 1863, March 9, 1863, and June 22, 1863. The final list, which appears on October 22, 1863 has a disbursement of $6.69 for the wife of Martin Gibson and $17.86 for the parents and four brothers and sisters of William Gibson. Two facts are strongly indicative of conditions in the South at this time: first, the radical decline in disbursements to indigent families is obvious, to the point where pennies are counted and, second, every able-bodied man was needed to fight, even those with whole families dependent on them.

William Gibson, for example, remained in the community during the first years of the War due to the number of his dependents, and became one of the responsible people in the locality. On May 5, 1862 he was appointed, along with James D. Driesbach and J. B. Smith, as a Road Overseer for his district. On September 10 of 1863, apparently a month before he decided to enlist, he was appointed by the Commissioner's Court to oversee the building of a bridge over Pine Long Creek. The exigencies of the War finally caught up with Gibson, however, and he left his family to fight, among the last of the Poarch Creeks to do so.

It appears that there was not a complete consensus among the Poarch Band of Creeks at the time about the legitimacy of the Southern cause. Data published in The War of Rebellion: A Compilation of the Official Records of the Union and Confederate Armies indicate that one of the Poarch Creek members, Adam Hollinger, served in the Union Army—the First Florida Cavalry. He is first mentioned in a November 18, 1864 letter from Colonel A. B. Spurling to General J. Bailey; he is mentioned again in a letter from General C. C. Andrews to General E. R. S. Canby of February 14, 1865, where Andrews states that "Sergeant Hollinger appears in the record, in which he describes in detail his reconnaissance of and familiarity with the area in which he was raised."

April 9, 1865 General Robert E. Lee surrendered to Ulysses S. Grant at the Appomattox Courthouse in central Virginia, thus ending the War. Confederate soldiers were mustered out, and on the Muster Roll of Company "C," 15th Regiment of the Confederate Cavalry, approximately 12 men can be identified as relations and ancestors of the Poarch Band of Creeks. All over the South, and the North as well, veterans were returning home. The poverty, despair, destruction, and malaise which the Confederate veterans found when they returned home was something altogether different than what they had left when they went off to enlist.

The entire South was a depressed area, and it was more than a decade until conditions improved substantively. The Poarch community was thus a depressed area within a depressed area, and the simple preoccupation of survival just after the war resulted in three major developments affecting the history of the Poarch Creeks. First, local records were not kept as meticulously as they had been before the War, the result of which is a partial hiatus of documentary evidence for the community's history during this period. Second, the relevance and/or significance of their Indian heritage were paled by the enormity of the events during and after the War, for during the last part of the nineteenth century their "Indianness" was not often mentioned in those records which were kept. Third, the difficulties of survival after the War renewed and strengthened the community or tribal cohesion of the Poarch Creeks, and so they survived in quietude amongst themselves in a near subsistence mode for the following five years, trying to rebuild and regain a normalcy to their existence. The following quote provides a graphic and succinct description of the conditions which the returning Poarch Creek veterans faced, and one extremely pertinent to the historical documentation of their case:

> Accompanying the end of the war there was a breakdown of state and local government, widespread disorder and theft, starvation and destitution, and military government that was inadequate to the systematic maintenance of law and order. The "freedmen," as the former slaves were called, roamed about, living off the country, and many of both white and black races were confronted with the danger of starvation. For a time the resources of the people had to be devoted primarily to the problem of staying alive. Of the Confederate soldiers who straggled home after the war a large part came back too late to engage in the planting of a new crop, and many suffered from wounds and debiltated health. Their homes and farms were generally in a dilapidated condition and their livestock was largely gone. The destruction of war had hit . . . a devastating blow. The labor system which had produced most of the surplus for export had been destroyed. Liquid capital had been destroyed. Buildings and fields had been neglected. Then, in the aftermath, Alabama and Mississippi planters who had held their cotton in the hope of marketing it at favorable prices after the war to provide a basis for rehabilitating their farms were confronted with a heavy federal tax on cotton and with a swarm of cotton thieves, treasury agents, unscrupulous merchants, and others who took advantage of the breakdown of law. (Doster & Weaver, 1981: 110)

In order to "take stock" of who returned and who was left, the State of Alabama conducted a census in 1866, presumably under the aegis of the military government which occupied the southern states immediately after the War. Just over 50 members of the Poarch Band of Creeks were listed in the returns for Baldwin County, though they were listed on the rolls as "Colored." Their color was of Indian derivation, however, and not of Negro derivation. The enumerators only had a choice of two--white and colored--so the Indians, with their darker complexions, were place on the colored census. In 1868, Escambia County was created from areas of Baldwin and Conecuh counties, and the county seat was placed at Pollard. Jack Springs, the McGhee reserve, and the majority of the Creek Indian land owners were now situated in extreme northwest Escambia County.

In 1869 the commissioners of the new county began the process of keeping minutes of their proceedings, and while no "Indians" are ever mentioned in the Minutes of the Commissioner's Court of Escambia County, certain prominent individuals and community leaders are mentioned. An entry for August 9 shows that Sidney Lomax and John V.

Steadham are listed as "reviewers" of county roads in their area. An entry for March 14, 1870 gives an order of the Court: "Ordered further that Gilbert Cruit, Steven Lomax and Bart Gibson be appointed apportioners for Jack Springs precinct." Later that year, results from the 1870 U.S. Decennial Census for the Jack Springs Beat in Escambia County show 78 Poarch Creek surnames on the returns, of which 39 are listed as Indian, 13 as mulatto, and 26 as white. Again, the variation in racial designations is reflective of the variation in personal judgments of the census enumerators.

It was at this time that the little community of Jack Springs, where a concentration of Poarch Creeks lived, began to grow and to take on the characteristics of a small town. In 1869 the Mars Hill Baptist church was begun in Jack Springs, and throughout the years—until 1914—the church had not only a part Indian congregation, but Poarch Creeks were involved in the administration of the church as officers. John V. Steadham, in fact, donated the land on which the church stood. The Mars Hill Baptist church was a member of the Bethel Baptist Association, in whose records its pastors and elders appear. From 1869 to 1874, the pastor was A. J. Lambert. In 1875 John D. Beck succeeded Lambert, and carried out his ministry there for two years. Beck was to play an important role in the history of the Poarch Creeks, and was involved with their welfare from 1875 to at least 1907, and perhaps longer. There were non-Indians, such as John Fiklin, who were active in the Mars Hill church at an early date. In later years, such Creek descendants as J. V. Steadham, W. T. Gibson, and D. Bryars were active participants in the administration of the church.

In addition to the church at Jack Springs, several schools were started by the state. In 1870, a year after the establishment of the church, there was a Colored school (Dist. 22, R. 11) taught by Robert Moore with 22 students, a White school (Dist. 23, R. 6) taught by Mrs. Elisha Tarvin with 40 students, and another White school (Dist. 22, R. 6) taught by James Hansel with 18 students. Student rolls are not available for these schools, but it may be presumed that the Poarch Creek children who went to school attended the white schools, since Mrs. Tarvin, herself a Poarch Creek, taught the District 23 school for Whites. At least one historian corroborated the fact that there was a group of Indians in the area. W. Brewer, in his history of Alabama published in 1872, provides a tantalizing piece of evidence but with no elaboration. He simply states that "Forty-three of the 98 Indians in the State live in Escambia." (Brewer, 1872: 246)

Notwithstanding the establishment of governmental, religious, and educational entities during the reconstruction era, economic and social conditions in the South were not improving greatly, and in the Escambia County area, specifically, things did not improve markedly until the pine lumber and turpentine industries regained momentum in the mid 1880's. Land was still the indicator of wealth, but greatly increased taxes worked to the detriment of large land owners. The renown historian of Alabama, Albert B. Moore, describes this period of despair.

> In 1873 the people of Alabama were groping in Stygian darkness . . . They were in the fathomless depths of bankruptcy; the State debt alone having advanced from about $7,000,000 in 1867 to $32,000,000. Crops had generally been poor since the surrender, and taxes were too heavy to be borne. Plantations were rented for their taxes, or parts of them were sold to pay the taxes on the rest. Thousands of farmers were unable to pay their taxes and their farms were sold by the State at public outcry. One copy of the Southern Republican in 1871 carried 21½ columns of advertisements of land sales in the four counties of Marengo, Greene, Perry, and Choctaw. One issue of the Tuscaloosa Independent Monitor advertised 2,548 lots of

> land, of forty acres or more each, for sale in Tuscaloosa county . . . Public buildings everywhere were placarded with notices of land sales. Thousands of farms that were not sold for taxes were sold under mortgage. Mortgage sales of farms and household goods were common in all of the counties. Since the surrender children had grown into young manhood or womanhood unable to read or write. As a crowning stroke of adversity, the panic of 1873 swept across the State, the rivers flooded large areas of crops, and several towns were scourged by yellow fever. (Moore, 1934: 500)

With little money to purchase land, members of the Poarch Band of Creeks, who were in the same situation as the rest of Alabama, were forced to homestead available properties in the Jack Springs vicinity. In July of 1873, Richard McGhee filed for a homestead in Township 3 near the Poarch community. McGhee's application was filed at the land office in Mobile, and had no witnesses, but it was the first homestead application among the Poarch Creeks since the War.

The years 1874 and 1875 were ones of some historical significance for the Poarch Band of Creeks, for at this point they may be distinctly and specifically referred to as the Poarch Band of Creeks. Early in 1874, the famed Lyman Draper of Wisconsin, an avid chronicler of American pioneer history, contacted John D. Driesbach of the Creek community asking for a copy of Woodward's Reminiscences and any additional data that was available. This began a series of correspondence between Draper and Driesbach which resulted in Driesbach's production of a 31-page manuscript on the history and particularly the genealogy of the early half-blood Creek community and the intricate intermarriage between all the Weatherfords, Tates, Moniacs, Hollingers, Tarvins, McGhees, et.al. The manuscript does not shed much light on the status of the Creek community at the time of its writing, but dwells on events primarily up to and through the Creek War of 1813-14. At approximately the same time, Draper instigated a correspondence with Joseph Stiggins, the son of George Stiggins. Stiggins wrote Draper first in January of 1874, but the letter was apparently lost. In February of 1875, Stiggins again wrote Draper, and enclosed with his letter a poem by his daughter, an eight-page biographical note about his father George, and the complete eighty-page manuscript of George Stiggins which was written between the years 1831 and 1844. Again, none of these documents addressed the condition of the Poarch Creeks of 1875, but they appear for the first time in that era as detailed histories of the early ancestors of the Poarch Creeks and events which placed them where they were at that time.

A single entry in the November 30, 1875 number of the Alabama Baptist proved to be a significant one for the Creek community around Poarch. It was, in fact, an obituary written by the new pastor of the Mars Hill Baptist church, John D. Beck, about Peggy McGhee—Lynn McGhee's daughter. It is also the first recorded mention of "Head of Perdido," one of the hamlets into which the Poarch Band of Creeks grouped in the later nineteenth and early twentieth centuries. Beck wrote:

> Peggy McGhee departed this life on the morning of November the 4th. She was in the 73rd year of her age, and had the testimony of many brethern and friends that she walked according to her Christian profession. She was baptised by either Brother A. J. Lambert of James Boyles in his early ministry, and has been faithful to her profession, as many tears testified; they wept not as those who had no hope, but as those who had lost one of infinite value from their midst. She was interred at her homestead, Head of Pedido [sic], a donation to her family in the Red Jacket Treaty.

This last statement is, of course, a reference to the reserve of Lynn McGhee which he obtained under the Treaty of Ft. Jackson. "Red Jacket Treaty" is one which recurs in Poarch Creek history, and its derivation is unclear. One possibility is that it might have gotten confused with the renown Seneca chief Red Jacket (1756-1830), but it is more likely that it was a corruption of "Red Stick" and "Fort Jackson."

THE END OF THE 19th CENTURY

The historical record for the remainder of the 1870's and the early part of the 1880's consists primarily of land acquisitions, domestic events, censuses, and occurences in local affairs. In June of 1876, William Adams, who appears as Indian on the 1880 U.S. Decennial Census, filed for a homestead in Township 2, near the Poarch community. Adams' application, like Richard McGhee's, who filed with Adams, had no witnesses and was filed at the land office in Mobile. The same year, David A. Moniac obtained a 160-acre homestead in the west half of section 32, Township 4 in Baldwin County (Baldwin County Deed Record Book M). In 1877 J. D. Driesbach, who had sent a historical manuscript to Lyman Draper only three years previous, was solicited by a local history professor to submit a similar paper to him in preparation for a book on Alabama history. Driesbach revised his earlier manuscript and submitted it on June 28. It was eventually published, along with an addendum written in 1883, in the January 1884 issue of the Alabama Historical Reporter. The later paper was significant because it contained the following sentence: "Being daily surrounded by the descendants of some of the prominent characters of these traditions, I feel somewhat embarrassed in expressing myself in language that will relieve me of the charge of egotistical laudation of the proginators of my own household." Driesbach thus establishes a clear link between the Creek community of the Tensaw/Little River area in the late eighteenth and early nineteenth centuries and that of 1877.

Just eleven years after Escambia County's inception, the courthouse burned down in 1879, in the county seat of Pollard. It is estimated that 90% of the records to that date were lost in the fire, and the significance of that loss for the history of the Poarch Band of Creeks can never be known. Four years later, in 1883, the county seat was moved from Pollard to the town of Brewton. While Brewton and Williams Station (later Atmore) were growing during this period with influxes of new people attracted by the expanding pine lumber and turpentine industry, the village of Jack Springs reached its peak. In September of 1879 Jack Springs got its first U.S. Post Office, and in 1880 it first appears on Alabama maps. The Post Office, however, only stayed open for three months under the management of Luck Wainright; it was officially discontinued on December 10.

In June of 1880 William D. Gibson filed application for homestead in Township 2, near the Poarch community, at the land office at Wilson, Alabama. He had as witnesses John V. Steadham, William W. Adams, and Robert F. Cruit. He claimed on the application that he had lived on the land since 1877. The year 1880 was also the one in which another U.S. Decennial Census was taken, and that census shows only 22 persons as Indian on the schedule for Escambia County, Jack Springs beat. Most of the others with surnames common to the Poarch Creek community appear as "mullatto," but of these many of the same people appear as Indian on both the 1870 and 1900 U. S. Decennial Census. For Monroe County, 73 persons appear as Indian, in start contrast to the observations of the Escambia County enumerator, for many of the people in these two counties are related and share the same surnames.

June 1, 1881 shows an entry in the marriage records of Escambia County for the marriage of Henry Colbert and Annie Taylor: due to the loss of these records during the 1870's this is the earliest of an eventual 73 marriages of Indian members of the

Poarch community recorded to the present (1981). There may have been such records during the 1870's, but due to their loss in 1879 this cannot be determined. Two years later, Baldwin County Deed Record Book M shows that David A. Moniac obtained another 160-acre homestead tract next to his first one obtained in 1876 at section 32, Township 4.

William M. Deas, the son of Hetty Semoice Deas and William Deas, wrote to the Department of the Interior on June 9, 1883 requesting information about legal claims to the land granted to the heirs of Semoice under the relief act of 1852. His letter was answered by H. Price of the General Land Office. Price, whose letter to Deas at Mt. Pleasant, Alabama was dated June 18, outlines the history of the Creek land claims relating to the case of Semoice, Smith, Marlow and McGhee, and states that approximately 280 acres of the claim are still vacant "and subject to the claim of the heirs of Semoice, whenever application is made therefor."

A year later, in 1884, a U.S. Post Office opened at Steadham, Alabama, only a few miles from Jack Springs. The first postmaster there was Robert F. Cruit who, though not a member of the Poarch Band of Creeks, is nonetheless familiar with the Indians of the community.

By 1885 the economy and the lifestyle of the citizens of Alabama, and of the Poarch Band of Creeks, had stabilized somewhat. Twenty years had elapsed since the surrender, and a new generation in addition to new settlers to the region both served to prolong the eclipse of Indian identity which the Poarch Creeks suffered as a result of the War. The partial loss of Indian identity during this period, however, was relative only to county and state authorities and new settlers; their own Creek heritage was never lost among the members of the Poarch Band of Creeks or their close neighbors. Their kinsmen—and in cases their immediate relatives—of the Creek Nation West in Indian Territory were also stabilizing socially and politically. Having sided with the Confederacy during the War, their losses were high due both to the War and the new treaty they signed with Washington, but under a new constitution and new, capable leadership, the Creek Nation West was gaining strength. It was during this period that applications for citizenship in the Creek Nation began arriving from Creeks residing in Alabama and other southern states, and sworn testimony given in behalf of applicants who appeared before the Citizenship Commission of the Creek Nation provides much useful historical information for this period and establishes a connection between the Creeks of Indian Territory (Oklahoma) and the Creeks of Southwestern Alabama of the 1880's.

The application for Creek citizenship of S. S. Strickland is one such case. In October of 1885, the Commission heard testimony on Strickland's behalf from Monday Durant, a grandson of Lachlan Durant, and he described daily life and his neighbors around Baldwin County near Tensaw during the mid-1880's. He named as Creek Indians Sam and David Hale, Sam Smith, the Sizemores, Weatherfords, Moniacs, and Fishers. Homer Cornells, related to Alexander and David Cornells, also testified for Strickland. He stated that David Hale and Sam Smith were once partners in a store in Baldwin County, and similarly connects Strickland with the community of Alabama Creeks. In an action which would affect all future applications for Creek citizenship, the Muscogee Nation I.T. passed an Act of the Council on October 26, 1889 which debarred all those current and future applicants due to their having been born "beyond the limits of I.T. . . . who have continuously resided beyond or outside of the jurisdictional limits" for more than 21 years. The Durant and Tarvin families, who would apply six years later, were initially rejected under this act.

The U.S. Decennial Census for 1890 was lost for the state of Alabama, destroyed by fire in the Commerce Building in 1921, so there is no way to determine the exact demography

or degree of Indian identity of the Poarch Creek community at that time by the use of this census alone. To help fill the historical gap created by the loss of the 1890 census, there are two items. The first is a letter by Charles Weatherford, Jr. of Mt. Pleasant, Alabama to a Mr. T. H. Ball dated October 17, 1890. Weatherford writes about the exploits of his grandfather Billy Weatherford and the events of the Creek War of 1813-14. He mentions his aunt Susan Stiggins, who later married Absalom Sizemore, living near Mt. Pleasant. Weatherford, who lived some miles away from Poarch at Mt. Pleasant in Monroe County, was not considered a fully-integrated member of the Poarch community but, like others living in Monroe and Baldwin counties, is related to many of the central or core families and family members of the Poarch community. The second and more significant item is that the oral history taken by Professor J. Anthony Paredes in 1972 from elders in the Poarch Creek community dates back with fair reliability to roughly 1890. This oral history is invaluable in terms of filling the historical spaces between the documented, recorded events pertaining to the Poarch Creeks.

From 1890 to 1893 a rash of homestead applications is filed by members of the Poarch Creek community. In September 1890, Polly Rolin, a granddaughter of Sam Moniac, filed for a homestead adjoining the McGhee tract in Township 3N R5E. In her testimony of September 5 of that year, she stated that she had begun settlement "about the years 1850." The witnesses in her behalf were Alex McGhee, Will Colbert, and Tillman Lomax. In July of 1891 William T. Deas made homestead entry #25700 in Township 3 near the Poarch community. In November of 1892 James Colbert filed for a homestead in Township 3N R6E, near the Poarch community. Colbert claimed he had farmed the land for eight years. In October of 1893, Gideon Gibson filed application for a homestead in Township 2N R5E, near the Poarch community. He filed at the Post Office at Atmore (formerly Williams Station), using J. F. McGhee, Alick (Alex) McGhee, Frank Gibson, and William D. Gibson as witnesses in his behalf. He claimed to have moved onto the land--120 acres—in 1884. On November 22, 1893 Bennetty Gibson filed an application for homestead in Township 2N R5E, near Poarch, at the land office in Montgomery, Alabama. She used as witnesses in her behalf John F. McGhee and John W. Presley. She claimed she had lived there since 1878. On the following day--November 23—four homestead applications were filed, all for the same vicinity near Poarch. The four men were William Rolin, Alex Rolin, Sam Rolin, and John F. McGhee, and all used each other as witnesses on their respective applications, in addition to Sidney Lomax who apparently accompanied them to the land office. The spatial concentration of the Poarch Creek community had reached a high level by the end of the nineteenth century. They very first settlement area was centered around the north parcel of land which the heirs of Lynn McGhee chose near what is today Huxford. This area was known within the community as "Red Hill," and has since died out. The Indian families grouped themselves into four hamlets, three of which are still extant today. The hamlets are Head of Perdido (Hedapeada), begun around 1860; Bell Creek, begun around 1877 but vanishing around 1940; Hog Fork, begun around 1885; and Poarch Switch, begun in the 1920's.

Concurrent with this concentration of the Poarch Creek community, a new Baptist church was begun in its midst. In the "Minutes of the 75th Session of Bethlehem Baptist Association" is the following, dated September 25, 1891: "A letter petitioning for admittance into the Association from the Judson church was presented by Bro. T. W. Fickling [sic]. The church was received into the fellowship of the Association." Both the founding of the Judson church and Ficklin's role are described in an undated pamphlet written by Rev. Alexander T. Sims titled "A Boy Long in Heaven." In the pamphlet, which describes the history of a bequest which Sims had received owing to a kindness he had done for a dying boy (Ollie Long), he mentions the Indian community at Head of Perdido and indicated what is to be done with the money:

> In a few weeks I visited a churchless community on the head of Perdido River about eight miles northwest of Atmore in Escambia county. I got a good congregation, some of them Indians, to meet me at night under some fine water oak trees. Bro. Dick McGhee, an Indian who had lived all of his life on the very grounds where we were holding the services, kept a good lightwood fire burning during the services so that we needed no electric lights. At the close of my sermon I related the story of the Long family and proposed to organize an Ollie Long Memorial Sunday School provided they would all pledge themselves to attend regularly winter and summer, making the school evergreen. By actual count 40 persons stood pledging themselves.

Given the existence of the Mars Hill Baptist church in Jack Springs only four miles away, with its Indian parishioners and administrative officers, it is open to question whether Head of Perdido was entirely a "churchless community" as Sims asserts. Nonetheless, until its dissolution in 1914, the Mars Hill church operated along with the new Judson church, and both had Poarch Creek community parishioners. The following year, 1892, in "Statistics of the Bethlehem Baptist Association" printed in the "Minutes of the 76th Session of the Bethlehem Baptist Association," A. T. Sims is listed as "Pastor" of the Judson Church in Williams Station, and J. W. Ficklin is "Clerk." The membership is given as 28. Similarly, in the 1896 Directory of the Bethlehem Baptist Association, Sims and Ficklin are shown again, except the town name had changed from Williams Station to Atmore. Judson Church is still in operation today with an Indian and non-Indian cemetary next to each other, and the many grave markers of the Poarch Creek Indians interred there from the late nineteenth century attest to continuous existence of the community.

The year 1893 was another one of historical significance for the Poarch Band of Creeks. In March, Susan Weatherford King applied for citizenship in the Creek Nation, I.T. The affidavit of witness was sworn by Thomas W. Ficklin of Escambia County. August 22 is the date of a letter sent to the Secretary of the Interior by John D. Beck. The letter states that Beck had been a preacher to the Creek Indians of Alabama for over 20 years, and that he was writing on behalf of his parishioners to ask if the Alabama Creeks would get any of the money from per capita distributions of settlements made to Creeks in Oklahoma and, if so, how to go about applying. The response came from the Office of Indian Affairs and expressed little encouragement for the successful intervention of the Alabama Creek descendants. In September of 1893 Marion E. Tarvin, then living in Galveston, Texas, finished his history of the Creek Indians which, in actuality, was a history of the prominent half-bloods and ancestors of the Poarch Band of Creeks. He titled it "The Muscogee or Creek Indians from 1519 to 1893"; it was written in response to a request of Professor W. S. Wyman of the University of Alabama, and Tarvin acknowledges the use of the earlier manuscript of his uncle, J. D. Driesbach. At this point, much of the history and genealogy is a repetition of previous works, but Tarvin's version contains one important statement: "Nearly all [the Creeks] were settled in the new territory with the exception of a few scattering families who remained in Alabama. A goodly number of their descendants still live there." This statement of Tarvin's is corroborated by a reference published in 1895 by Thomas Donaldson, a special agent for the Bureau of Indian Affairs. Writing primarily of the Creeks in Oklahoma, Donaldson stated that ". . . it is true that some Creek Indians are still residing in the states of Georgia and Alabama, and others are scattered through Mississippi, Louisiana, and Texas . . ." (Donaldson, 1895: 75)

In 1887, Congress passed the General Allotment Act (24 Stat. 388) which was designed by its authors to "civilize" Indians on reservations by allotting communally held tribal

lands to individual heads of families. Section 8 of that Act excepted certain tribes in Indian Territory, including the Creeks. Seven years later, however, Congress enacted an appropriations bill (27 Stat. 612) which, following the same civilizing program, allowed in Section 15 that allotments could be made on Cherokee, Choctaw, Chickasaw, Seminole, and Creek lands and established in Section 16 the Commission to the Five Civilized Tribes. The Commission was created to negotiate with the tribes, to ascertain who was to receive what, and to help maintain order in Indian Territory, among other things. The allotments brought a flood of applications for citizenship and/or enrollment into the Creek Nation, and among them, in 1895, were those of the Durant and Tarvin families.

The Citizenship Commission of the Creek Nation heard the case of Otho Durant and five of his relatives on July 15, 1895. Testifying under oath in his behalf are the same witnesses used by Marion E. Tarvin and his family two days later; they were William Fisher, Ward Coachman, and G. W. Tarvin. Otho Durant was the son of Jackson Durant, who was the son of Lachlan Durant who figured prominently in the early history of the ancestors of the Poarch Creeks. William Fisher testified that "I knew Lockland Durant the grandfather of Otho Durant well. Lockland Durant was nearly a full blood Indian. Lockland Durant has been in our house in Alabama and I have been in his house also." In the cross examination of Ward Coachman, the following questions and answers appear in the record: "Q: Did Jackson Durant come to this country with the Creeks from the old country? A: Yes, he came with the second batch and then returned to the old country . . . He came and staid [sic] two or three years on the Tombigbee River."

The Commission heard the case of Marion E. Tarvin and five of his relatives on July 17. The first witness was George W. Tarvin, "first double cousin" to Marion. Ward Coachman, who was 70 years old at the time, testified that "I was living with my uncle [Lachlan] Durant when the Tarvins came to his house in company with Charles Weatherford from Little River. Alex and Nicy Weatherford were also with them." William Fisher stated that he knew Marion Tarvin, because "In Alabama we lived neighbors about 6 or 7 miles apart." In Fisher's cross examination, the following is in the record: "Q: Were they [Tarvins] regarded Creek Indians in Alabama? A: Yes. Q: How did you know they were Indians? A: Only what the people said about them through the neighborhood." Though taken in 1895, this testimony proves that post-removal Creeks in southwestern Alabama had maintained both a community and Indian identity into the 1870's, which parallels data in the U.S. Decennial Census for 1870. Both the citizenship applications of Durant and Tarvin were approved August 24, 1896.

A letter dated November 16, 1896 from the Commissioner of the General Land Office was sent to Commissioner of Indian Affairs Browning concerning the homestead of William T. Deas, whom the local land office agent refers to as "about a half-blooded Creek Indian." Deas, it seems, had left his homestead after originally filing in 1891, and his claim to title was held in cancellation. But he returned to the land and the cancellation was rescinded. The Commissioner of the General Land Office wanted to know if Deas "should make an Indian homestead under the Act of July 4, 1884 (23 Stat. 96)," and further if "the mixed blood descendants of the Creek Indians now in the State of Alabama are considered wards of the Nation, as Indians, or as American citizens." The reply to this letter from Commissioner Browning, dated November 25, made no reference whatsoever to the questions about the status of the Poarch Creeks, and deferred to some other statute which would "obviate" the problem for Deas and the GLO. One other homestead, the last of the nineteenth century for the Poarch Creeks was filed by Tillman Lomax for a tract in Township 3 near the Poarch community. Lomax claimed he had lived on the land for six years, and used as witnesses J. M. Keller, Sidney Lomax, Louis Boone, and O. M. Richardson, all of Steadham.

BEGINNING THE 20th CENTURY

Gradually, during the last decade of the nineteenth century, the identity of the Poarch Band of Creeks as Indian began to resurface as a general perspective among non-Indians in the community and local, county officials. This occurred primarily because the total preoccupation with the Civil War and its devastating economic and social aftermath were over, in addition to and simultaneous with a large influx of new settlers and a booming timber and turpentine industry. Stratification of social classes once again became a topical issue, and the Poarch Creeks were again placed in the middle ground between white and colored: they were not whites and they were not blacks. They were in fact Indians, and came to be partially segregated on those grounds. The U.S. Decennial Census for 1900, for example, lists the highest number to date of Poarch Creeks in the area as "Indian." The returns for Escambia and Monroe counties, Jack Springs Beat and Precinct #13, respectively, list approximately 140 persons as Indian. Others, known both genealogically and by surname to be part of the Poarch community, were listed by race as either white or mulatto. In 1902 there occurred an event which bears out the assertion of reestablished Indian identity for the Poarch Creeks. During the summer of 1902, there was a "frolic," as oral history has it, in the community—a social gathering and dance. Following several warnings about rowdy behavior, John Rolin killed Will Colbert and was indicted for 2nd degree murder by the state. The indictment in The State of Alabama vs. John Rolin lists a number of witnesses present at the frolic, among them D. C. Colbert, Mack Colbert, Hettie Colbert, Alex McGhee, Fred Walker, Authureen Colbert, Emma McGhee, Tildy Woods, George Cruit, Richard Walker and John Steadham. The case is significant in that it shows that the community socialized together, and that a member of the Poarch Creek community was distinguished as "Indian." John Rolin was sentenced to prison for the murder of Will Colbert on October 2, 1902, but served only nine months before he was pardoned by Governor Jelks. The date of the pardon was July 14, 1903 and two days later The Standard Gauge, published in Brewton, ran the story. The opening sentence reads "John Roland, an old Indian of this county, who was convicted of murder a year or more ago, has been pardoned by the Governor."

Perhaps the most salient example of the reemergence of Indian identity among the Poarch Band of Creeks was the material generated by the report of Special Commissioner Guion Miller. Miller was appointed in 1906 by the U.S. Court of Claims to determine who was eligible to share in per capita disbursements of funds under the treaties between the United States and the Eastern Cherokees ratified in 1836 and 1845. Hundreds of applications were submitted by the Poarch Creeks in 1906 and 1907, and testimony was taken by Guion Miller and his staff in 1908 in Mobile and Pensacola. The outcome of it all relative to the Poarch Creeks was that they were refused on the grounds that they were not Cherokees; Miller asserts that they are in fact Creeks. Much interesting and relevant historical evidence is found in the testimony, however. On October 22, 1906 the Rev. John D. Beck wrote to the President, with a letter enclosed by Charles Weatherford, pleading for "executive clemency" on behalf of the band of Indians in southern Alabama in their quest for funds. Beck's role in the whole Guion Miller affair is questionable; he signs letters as "Indian agent," but Miller clearly denies Beck's association with the Commission. Miller's final report was published on May 28, 1908, and contains the following paragraph:

> There are several hundred persons who have filed applications for participation in the distribution of the Eastern Cherokee fund, who for the most part, live in the extreme southern section of Alabama and the western section of Florida, who are not Cherokee at all, and most of them do not claim to be Cherokees, but are Creeks. Quite a number of these claim descent from such historic Creek characters as Billy Weatherford,

> Peggy Bailey, William and Chilly McIntosh, and Alexander McGillivray, and most of these applicants claim only through the Hollinger, McGhee, McIntosh, Moniac, McGillivray, Franklin, or Killian families which are all of Creek origin. Some of these are recognized members of the Creek tribe, others while not recognized as members of the Creek tribe, claim as descendants some Creek ancestor. Most of them state in so many words in their applications and in their testimony that they are Creeks, and they file their applications under the impression that descendants of Creek Indians are entitled to share in this fund.

A census of schools for 1908 found in the records of the Escambia County School Board identifies a Gibson Indian School in District 55 and a Poarch Indian School in District 56. It is uncertain exactly when these schools were established; it is certain only that they were there in 1908. It is the first mention both of a separate facility for Indians in the Poarch area, and it is the first mention of Poarch as a school location. The community of Poarch appears to have been formed--or at least named--in the last decade of the nineteenth century or the first decade of the twentieth. Post Office records show that a U.S. Post Office was opened at Poarch on June 7, 1905, and that it operated until April of 1918, at which time it was discontinued.

Between the years 1908 and 1913, the marriage records for Escambia county show a total of 16 marriages listed as "Indian." This identification as Indian, when added to that of the 1910 U.S. Decennial Census, is another strong indication of the growing awareness among non-Indians in southwest Alabama of the existence of Indians in their region. An increase of those listed on the 1910 census returns occurred, compared to the 1900 census, making the 1910 census the highest figure yet. Approximately 200 persons appear as Indian--142 in Escambia County, Jack Springs Beat, and 57 for Monroe County, Jeddo Precinct #13. An anomaly occurs in the Monroe County returns, however. This Decennial Census contained a special "Indian Schedule," and these were used for southern Alabama; those Creeks living near the Poarch community of common surnames to the rest of the community were listed as Choctaw. There is no rational explanation for this, but the tribal designation Choctaw is clearly wrong, for many of these same people appear as Creek in the Guion Miller applications several years earlier, in addition to having been part of the established Creek community there for a century. The bulk of the Poarch community, however, showed up on the regular schedules for Escambia County as "Indian."

In 1910 another church is added to the community; the Atmore Spectrum reported that a "Free Will Baptist Church" was founded "near Poarch P.O. at the head of Perdido in the Maghee Settlement," which meant that the Judson Baptist church was no longer the only one there. Unlike the Judson church, the Free Will Baptist served primarily the Indian residents of the community, and it seeems likely that the Indian attendance began to drop at the Judson church about this time.

June 3, 1911 is a significant date in the history of the Poarch Band of Creeks, for on that date the report of the Federal Timber Cruiser J. B. Chatterton of the General Land Office was filed. The report is significant because it precipitated voluminous documentation about the Lynn McGhee reserve, the history of the Poarch Band of Creeks, the status of the community at that time, and it reawakened the Federal government to the fact that an Indian reserve still existed in southern Alabama obtained under the 1814 Treaty of Ft. Jackson--a fact apparently overlooked by both the General Land Office and the Bureau of Indian Affairs for half a century.

The specifics of the case are recorded in a variety of letters, legal briefs, and memoranda between the General Land Office, various offices of the Justice Department and the U.S. Attorney, and the William M. Carney Mill Company. Briefly, Carney's pine timber cutters had, despite the warnings by Poarch Creek's residents about its being government land, trespassed on the McGhee reserve in 1904 and cut certain stands of pine, which they sold commercially. Chatterton discovered this in 1911 and filed a report to that effect. In the report he suggested that the ". . . U.S. collect $15,552 from the William M. Carney Mill Company as compensation for the timber they removed from the McGhee grant lands and the damage to the property caused thereby." Just prior to the filing of his report on June 3, Chatterton had taken sworn affidavits from Will McGhee, Gust Rolin, F. L. McCawley, T. W. Ficklin, and from Richard McGhee, who claimed he had informed Carney that it was government property. The government considered filing suit for damages against the Carney Mill Company. On May 21, 1912 the Assistant Attorney General in Washington wrote to the U.S. Attorney in Mobile and enclosed information from the Secretary of the Interior regarding the timber trespass. The U.S. Attorney in Mobile was ordered "to give careful consideration to the facts" and determine if there was "sufficient evidence to maintain suit." On May 29 a complaint was filed by the government, with William H. Armbrecht acting as U.S. Attorney, beginning United States vs. Carney Mill Company. Due to the death soon after of William M. Carney, the complaint was amended with the defendant being H. H. Patterson.

One outcome of the case was that the government's anxiety about clouded title to Indian land grants in Alabama was rekindled. On June 4, 1912, Congress passed "An act to relinquish, release, remise, and quitclaim all right, title, and interest of the United States of America in and to all lands held under claim or color of title by individuals . . . situated in the State of Alabama which were reserved, retained, or set apart to or for the Creek tribe or Nation of Indians . . ." (37 Stat. 122) This had no effect on the Indian descendants still occupying the land, i.e., the McGhee family, but put an end once and for all to clouded title or purchasers of Creek land grants and reserves.

A. A. Jones, the 1st Assistant Secretary of Interior, wrote to the U.S. Attorney General on January 16, 1914 ordering him to reject the offer of $750 from the defendant in lieu of the new $25,515 claim from the value of the stolen timber and damages, and to proceed with a trial. The trial never occurred: the final disposition of the case resulted in the payment of damages by the defendant in the amount of $2,000 on June 1, 1915.

During September of 1912, the Jury Commissioners undertook a "thorough canvass" of Escambia County in order to determine who was eligible to sit for jury duty. This canvass covered all male citizens 21-65 years of age in the county. The Minutes of the Jury Commissioners, Escambia County show, listed as "Indian," the following men: David C. Colbert, Henry Colbert, Henry W. McGhee, Neal McGhee, Lyttles McGhee, J. C. Harrison, William Rolin, and John Taylor. Many others of Indian surname in the Poarch area were also listed, but not specifically as Indian.

As of September 17, 1918, the Tract Book A for Escambia County shows land holdings for twenty members of the Poarch Creek community. This does not include the McGhee's land reserve, or those members of the community who live just over the county line in Baldwin and Monroe counties, nor does it take into consideration the lands bought and sold prior to this date.

THE ERA BETWEEN THE WORLD WARS

These data show that the Poarch Band of Creeks is established in geographical clusters and with an emerging pride in Indian identity. With the advent of the 1920's, a new era begins for the Poarch Creeks. Their history becomes less equivocal, since every few years they are studied or cited by representatives of governmental, scholarly, or religious agencies. As the twentieth century progresses they become the subject of scores of newspaper and magazine articles. The historical documentation concerning their background, community, and activities grows exponentially. The era of Pan-Indianism about which historian Rachael Hertzburg writes is now dawning; non-traditional and forgotten Indian groups around the United States are taking pride in their heritage and beginning to fight for their rights as Indian, and while the Poarch Creeks are not immediately active in this, the following decades show a gradual renaissance of pride in Indian heritage and culture among the Poarch Band of Creeks.

Early in the year of 1920, F.L. McCawley wrote to the Department of the Interior requesting patents for the land they lived on, i.e., the Lynn McGhee reserve at Poarch, since he claimed his family and other relatives lived on this land and paid taxes on it. His response came on February 24 from Clay Tallman, Assistant Commissioner of the General Land Office. Tallman said that the Act of June 4, 1912 did not apply to the McGhee reserve: that no patent could therefore be issued for the land. Moreover, Tallman wrote to the state of Alabama and instructed them to cease collecting taxes for the land, since it was government property.

In 1921, the Poarch Band of Creeks was described in Thomas Owen's History of Alabama and Dictionary of Alabama Biography, which contained the following passage:

> Nearby [Atmore] is a small Indian Reservation on which there are still about 45 Indians. The former home and grave of the famous Indian chief, William Weatherford, are on the Little River across the line in the north part of Baldwin County. (Owen, 1921: 72)

Owen's is the first of many such descriptions for the Poarch Creeks in the twentieth century, and, though it is short, it nonetheless identifies an Indian community.

On November of 1924, the Department of the Interior issued, without any apparent rationale, a patent for the McGhee grant lands -- Patent #948359. The legality of this issuance has since been questioned, and one of the results was the loss of inalienability, i.e., the protection of title by the government. Since that point in time, small parcels of the land have been sold. Local non-Indians bought some 80 acres of the reserve land over the years, and today approximately 160 acres are left of the pre-1924 tract.

Notwithstanding the loss of federal protection for their land, the Poarch Creeks at Hedapeads and the other hamlets of Bell Creek, Hog Fork, and Poarch Switch maintained their Indian identity both among themselves and in the consciousness of their non-Indian neighbors. The May 25, 1928 entry in the "Minutes of County Board of Education, Escambia," shows, like 1908, a Gibson Indian School and a Poarch Indian School. Each school had one teacher, a seven-month term, and appropriations of $525 and $420, respectively, which were about average for the size and type of school in question.

The segregated Indian schools point to an interesting situation for the Poarch Creeks at that time in their history--they were in a distinct position between the white and black strata of southern society. The Poarch Creeks were allowed, for example, to

marry whites, but they were not allowed to attend white schools. They were allowed to sit on juries, but they were not welcome at all-white churches. What is obvious is that they were distinct; that they occupied a separate niche in the local social structure by virtue of the fact of their Indian ancestry.

During the Great Depression, the Poarch Creeks were not well off in contrast to their non-Indian neighbors. The Episcopal Church entered their history at this point, in 1930, and documented the generally depressed conditions of the community. In the May number of 1930, the Episcopal journal The Alabama Churchman ran a short feature entitled "Perdido Hills Indian Mission," which announced the beginning of the mission and clearly identified the Poarch area as an Indian community. In December of that year, Robert C. Macy, M.D., a physician working in collaboration with the missionary arm of the Episcopal Church, wrote an article titled "The Indians of the Alabama Costal Plain" which was published in the Alabama Historical Quarterly. This article was the first major ethnographic work on the Poarch Band of Creeks, and gives a full account of their constitution and living conditions. Macy makes a strong statement in the article about the leadership in the community: "I am unable to give any data concerning the Rollin ancestors, but the patriarch, and acknowledged chief of the Indians in this vicinity is an octogenarian, 'Uncle Alex' Rollin, as we call him." (Macy, 1930: 407)

The involvement of the Episcopal Church into the lives of the Poarch Creeks was to have many beneficial results for those in the community. It was decided to build a small church in the community itself, to be named St. Anna's Mission, with the first pastor being Rev. Edgar Van W. Edwards of Atmore. The March 31, 1932 edition of the Atmore Advance reported that "Sunday about noon a twister formed in the field of Frank Hixon, near Poarch, and leveled the frame work of the new church of St. Ann [sic] Episcopal, being built by Rev. Edgar Van W. Edwards for his Indian congregation at that place." This was only a minor setback, however. The Church was completed later that year, and also in that year Edwards undertook an extensive survey of the Poarch Creeks community which, in final form, was 17 pages in typescript listing all the Poarch Creeks and certain vital data. Other positive results of Edwards' service to the community was increased awareness in matters relating the health, education, basic rights, and employment.

The "Minutes of the County Board of Education, Escambia" for 1933 shows two new Indian schools. A list of teachers, along with the schools in which they taught, shows that in that year, only five years after the 1928 list, there were four Indian schools. Besides the earlier Poarch and Gibson schools from 1908, there are now the Roland Indian School and the McGhee Indian School.

In October of 1934, the first contact with the Bureau of Indian Affairs was made. Samuel H. Thompson of the Office of Indian Education visited the community and wrote a report about what he found. The report was not comprehensive; most of it deals with the four Indian schools at Poarch and the 130-40 pupils enrolled in them. Relative to the leadership of the group, however, Thompson makes a significant statement: "This group of Indians lives about nine miles out of Atmore, and they regard Will McGhee...as their leader." (Thompson, 1934) Both Will McGhee and Alex Rolin, it appears, had clear leadership roles in the early twentieth centuries.

Sometime around 1935 or 1936, Anna C. Macy, wife of Robert C. Macy, was asked to write a brief history of the Poarch Creeks, which she did. The document is several pages long, and outlines the work that she and her husband did for the community specifically, and the work that the Episcopal church did on behalf of the Indians there since 1930. This document is not long, but is well detailed for that period of time. It

does not include, however, the consolidation of the four Indian schools into one school meeting at the St. Anna's church. This happened in 1939, and the Minutes of the County Board of Education show that a "Motion was made by Mr. McCurdy and seconded by Mr. Moore to consolidate Rollin, Poarch, McGhee, and Gibson Indian schools...." From 1939 to 1970, the new school was known as the Poarch Indian Consolidated School, and appears in all subsequent education records as that. The school was finally closed in 1970 as a result of the 1969 U.S. Supreme Court desegregation order requiring Alabama to desegregate its schools.

In February of 1941, the noted anthropologist Frank Speck visited the Poarch Creeks, and made the first professional ethnographic study of the community. Speck published his findings in America Indigena under the title "Notes on Social and Economic Conditions Among the Creek Indians of Alabama in 1941." This study contains much valuable information about the community in 1941, and also discussed cultural survivals relative to customs, healing practices, and social behavior. Speck wrote that Fred Walker ". . . comes nearest to functioning as leader of the Creeks at Atmore," and that "He is provisionally called 'chief'. . ." He also noted that folk dances or frolics ". . . have served the purpose of preserving a certain degree of social cohesion among the band." As valuable and descriptive as Speck's observations of the Poarch Creeks were regarding social cohesion, his descriptions would have been far more specific and substantive had he visited the community after the school boycott and the Walker V. Weaver law suit, around which the Poarch community rallied in communal agreement. Besides Speck's writings, the Rev. George C. Merkel wrote four unpublished papers on the Poarch Creeks between 1946 and 1954.

THE MODERN PERIOD

The year 1947 marks the beginning of the current phase of history for the Poarch Band of Creeks--the modern period. From this point on, the Poarch Creeks begin a series of struggles for their rights: rights of education, of equal opportunity, of sharing in Creek judgment awards, of recognition by state and Federal authorities. In this process, they "professionalize," and become more sophisticated in operating in the world of courts and bureaucracies. While these struggles each had different effects upon the community as a whole, the overall effect was one of providing points or areas of consensus around which communal singleness of purpose and unity would flourish. It is around this time that the Mennonite Church sent missionaries to the Poarch Indians, the effects of which are still visible in the community today in terms of their services at the Poarch Community Church and in the educational advantages gained from Mennonite efforts. In 1947 Calvin McGhee organized an informal committee of Poarch Creeks to meet with county school officials, civic organizations, and even the governor in order to improve conditions in the community. The county, it seems, refused to allow the Poarch Creek children bus transportation to the Junior High School in Atmore. In a daring confrontation, Jack Daughtry, a Creek from Poarch, stood in the path of a school bus and refused to move until the driver allowed the Indian children to board. The outcome of this confrontation was a law suit. On December 2, 1948 attorneys Hugh Rozelle and C. LeNoir Thompson for the Poarch Creeks filed a petition for mandatory writ, Annie R. Walker, et al. v. O. C. Weaver, et al. They were ultimately successful in this suit, as they were in their second major legal battle in which they filed as intervenors in the The Creek Nation v. United States before the Indian Claims Commission.

Prior to this intervention, two events occurred significant to the history of the Poarch Creeks. First, in 1948, anthropologist William H. Gilbert of the Smithsonian identified the Poarch Creeks in an article on "Surviving Indian Groups of the Eastern United States," published in the Annual Report of the Smithsonian Institution. It was not a long entry, but the identification is clear. In 1950, in anticipation of the ensuing battle

with the Indian Claims Commission and ultimately with the U.S. Court of Claims, the Poarch Creeks formally organized a council to deal with claims issues. From this point on, records of the council's actions are recorded in minutes, and some twenty years later, in 1971, the council incorporated under the state laws of Alabama as the "Creek Nation East of the Mississippi."

On January 5, 1951 the Creek Nation East, using the name "The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" moved for leave to intervene in the case of the The Creek Nation v. the United States (Docket 21) which the Creek Nation filed in the Indian Claims Commission on January 29, 1948. The Creek Nation filed to recover damages for the acquisition by the United States of 23,267,000 acres of Creek lands in Alabama and Georgia under the Treaty of August 9, 1814, i.e., the Treaty of Ft. Jackson. There was to be a roll created of all descendants of the aboriginal Creek nation to whom a distribution of funds was to be made, in compensation for the expropriated land. This, of course, was the reason for the intervention by the Poarch Creeks, but the Indian Claims Commission refused to allow the intervention on the grounds that they were not an "identifiable group." The Creeks East of the Mississippi appealed to the U.S. Court of Claims May 6, 1952 to allow the intervention, which it did, effectively overruling the Indian Claims Commission. The Commission amended its findings, and 52% of the current membership of the Poarch Creeks shared in the original judgment for only 8,849,940 acres of land. This two-year battle by the Poarch Creeks generated thousands of pages of documents and correspondence, all of which collectively addressed social, historical, demographic, and genealogical issues about them.

In February of 1957, Rev. Vine Deloria visited the Poarch Creek community. He wrote a report of his observations about the community on behalf of St. Anna's Mission. His description of the community is thorough and comprehensive; he claims in his report to have visited the homes of 60 Indian families. A similar report was written eight years later by Calvin Beale of the U.S. Department of Agriculture. Beale's report, while informal, is thorough with much detail. Regarding the leadership roles, Beale writes that "The chief of the group is Calvin W. McGhee. He is easily the dominant political and community leader of the Escambia County group, and has been so for many years."

The Creek plaintiffs in Docket 21 were unsatisfied with the findings of the Indian Claims Commission, feeling that the both the award and land compensated for were two small. They appealed to the U.S. Court of Claims and the U.S. Supreme Court, but were rejected in both. In 1967 Representative Bob Sikes introduced a bill in the House (H.R. 2423) "For the relief of the living descendants of the Creek nation of 1814." Calvin McGhee went to Washington accompanied by his attorney, C. LeNoir Thompson, and testified on April 6 and again on April 24 before the Subcommittee on Indian Affairs. The bill, however, was opposed by the Attorney General and was never enacted. The proposed legislation did have one positive effect, however: it made the Congress aware of the existence and conditions among the Poarch Creeks. The Joint Economic Committee reported in America Indians: Facts and Future that 750 Creek descendants living in Escambia and Washington counties attended their own churches and segregated schools.

On August 27, 1971 the council filed articles of incorporation as the Creek Nation East of Mississippi, which officially incorporated the Poarch Creeks into a non-profit organization. This pivot in the direction of their history changed their income pattern for one thing, from small donations by community members to larger grants from various agencies, thereby having a significant economic impact on the community. By this time as well, and throughout the 1970's and 1980's, the newspaper accounts and journal

articles of which the Poarch Creeks were subjects are too numerous to delineate. Special notice should be taken of the work of Professor J. Anthony Paredes of Florida State University, however. It was around 1972 that he began his extensive ethnographic research into the community, taking oral history and eventually writing, to date, half a dozen anthropological papers on the ethnohistory of the Poarch Creeks.

In November of 1974, Chief Houston McGhee formally entered the Poarch Band of Creeks into a Consortium Agreement with the Coalition of Eastern Native Americans (CENA). The Poarch Creeks became consortium members at that point, and have remained so; in more recent years the current chairman of the council, Mr. Eddie Tullis, has held an administrative position in CENA. On May 15, 1975, The Native American Rights Fund submitted a petition for Federal acknowledgment on behalf of the Poarch Band of Creeks. The petition asserted that a trust relationship exists between the Band and the United States. The main issue involved centered around an offer by the State of Alabama to deed the land upon which the Poarch Consolidated Indian School stood to the United States, to be held in trust for the Poarch community. At that time, however, there were no criteria for Federal acknowledgment or any systematic procedure to evaluate such petitions, so that no action was taken immediately. Governor George Wallace formalized this offer of deeding the land in a letter to Commissioner Thompson on September 15, and this was followed by another letter from The Native American Rights Fund on September 22, reiterating their earlier request.

This request precipitated a study, ordered by Commissioner Thompson, in order to determine the legal status of the land and the history of its granting and transfer. After an exhaustive study by the Office of Trust Responsibilities in the Bureau of Indian Affairs, Commissioner Thompson issued a Memorandum to the Associate Solicitor of the Department of the Interior stating that "a positive evidence of record" supports the claim that the March 3, 1817 statute had no application to the Lynn McGhee reserve secured under the 1836 statute. The land claim issue for the Poarch Band of Creeks is still unresolved.

In 1976, the Poarch Creeks received a Federal grant of $117,775 from the Department of Labor for a CETA grant due to the provision of awarding monies to American Indian groups. In the summer of 1979, two more large grants were awarded to the Poarch Creeks: one from the Department of Education under Health, Education and Welfare for $64,358 and one from the Administration for Native Americans (ANA), also under Health, Education and Welfare, for $47,000. In 1982 the Poarch Band of Creeks received a "status clarification" grant from the ANA enabling them to hire professional researchers to help in the preparation of the second and revised petition they submitted for Federal acknowledgment on January 14, 1980.

In May of 1978, the State of Alabama established under the Alabama Act #677 the "Southwest Alabama Indian Affairs Commission." The Act provided, in Section 4, that the "Commission shall be composed of those members of the Council of the Creek Indians of the Mississippi [sic]." There was at that time a new wave of interest in Alabama concerning the aboriginal natives of the area, and the Poarch Band of Creeks, being the prominent surviving community in the state having maintained Indian identity, were the center of the interest. One concrete development which ensued from the establishment of this Commission was the involvement of the Poarch Band of Creeks in the "Talladega project," an archeological excavation of aboriginal artifacts conducted by Dr. Roger Nance of the University of Alabama. The Poarch Creeks were given rights to the artifacts produced by the excavation, and have placed certain of the pieces in their own museum and in others around the state.

In September of 1979, the Council of the Poarch Band of Creeks passed a resolution to become members of the National Congress of American Indians, into which they were accepted. The council's chairman, Mr. Eddie Leon Tullis, has held positions of leadership in this organization, in addition to many years of active involvement in various panels, councils, and commissions concerning Indian affairs.

Since 1980, the focus of activities in the community at Poarch has been directed toward economic and educational improvements and in social programs of benefit to senior citizens. The influx of grant monies has allowed the Poarch Creeks to build several new buildings housing the equipment for crafts and cottage industry. An audio-visual studio is utilized for production of programs for educational and informational purposes. Genealogical and historical research concerning the ancestors and background of the Poarch Creeks continues. Each Thanksgiving an annual pow-wow is held, and each year a speaker of state or national prominence is the keynote speaker for the occasion. The Poarch Band of Creeks has achieved a level of existence and survival as modern American Indians, based on adopting commercial, legal, and corporate methods, which both complements and finalizes their continuous existence as a communal entity since the late eighteenth century.

Appendix D

Treaty of Ft. Jackson (1814)

INDIAN AFFAIRS: LAWS AND TREATIES

Vol. II, Treaties

Compiled and edited by Charles J. Kappler. Washington : Government Printing Office, 1904.

TREATY WITH THE CREEKS, 1814.

Aug. 9, 1814. | 7 Stat., 120. | Proclamation, Feb. 16, 1815.

Page Images: 107 | 108 | 109 | 110

Margin Notes
Cession of territory by the Creeks as equivalent to the expenses of the war.
Guaranty of other territory of the Creeks.
Intercourse with British or Spanish posts to cease.
Establishment of military posts.
All property taken to be surrendered.
The prophets and instigators of the war to be given up.
Supplies of corn to be presented to the Creeks.
Permanent peace.
Lines of the territory.

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Articles of agreement and capitulation, made and concluded this ninth day of August, one thousand eight hundred and fourteen, between major general Andrew Jackson, on behalf of the President of the United States of America, and the chiefs, deputies, and warriors of the Creek Nation.

WHEREAS an unprovoked, inhuman, and sanguinary war, waged by the hostile Creeks against the United States, hath been repelled, prosecuted and determined, successfully, on the part of the said States, in conformity with principles of national justice and honorable warfare—And whereas consideration is due to the rectitude of proceeding dictated by instructions relating to the re-establishment of peace: Be it remembered, that prior to the conquest of that part of the Creek nation hostile to the United States, numberless aggressions had been committed against the peace, the property, and the lives of citizens of the

Page 108

United States, and those of the Creek nation in amity with her, at the mouth of Duck river, Fort Mimms, and elsewhere, contrary to national faith, and the regard due to an article of the treaty concluded at New-York, in the year seventeen hundred ninety, between the two nations: That the United States, previously to the perpetration of such outrages, did, in order to ensure future amity and concord between the Creek nation and the said states, in conformity with the stipulations of former treaties, fulfill, with punctuality and good faith, her engagements to the said nation: that more than two-thirds of the whole number of chiefs and warriors of the Creek nation, disregarding the genuine spirit of existing treaties, suffered themselves to be instigated to violations of their national honor, and the respect due to a part of their own nation faithful to the United States and the principles of humanity, by impostures [impostors,] denominating themselves Prophets, and by the duplicity and misrepresentation of foreign emissaries, whose governments are at war, open or understood, with the United States. Wherefore,

1st—The United States demand an equivalent for all expenses incurred in prosecuting the war to its termination, by a cession of all the territory belonging to the Creek nation within the territories of the United States, lying west, south, and south-eastwardly, of a line to be run and described by persons duly authorized and appointed by the President of the United States—Beginning at a point on the eastern bank of the Coosa river, where the south boundary line of the Cherokee nation crosses the same; running from thence down the said Coosa river with its eastern bank according to its various meanders to a point one mile above the mouth of Cedar creek, at Fort Williams, thence east two miles, thence south two miles, thence west to the eastern bank of the said Coosa river, thence down the eastern bank thereof according to its various meanders to a point opposite the upper end of the great falls, (called by the natives Woetumka,) thence east from a true meridian line to a point due north of the mouth of Ofucshee, thence south by a like meridian line to the mouth of Ofucshee on the south side of the Tallapoosa river, thence up the same, according to its various meanders, to a point where a direct course will cross the same at the distance of ten miles from the mouth thereof, thence a direct line to the mouth of Summochico creek, which empties into the Chatahouchie river on the east side thereof below the Eufaulau town, thence east from a true meridian line to a point which shall intersect the line now dividing the lands claimed by the said Creek nation from those claimed and owned by the state of Georgia: Provided, nevertheless, that where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby.

2nd—The United States will guarantee to the Creek nation, the integrity of all their territory eastwardly and northwardly of the said line to be run and described as mentioned in the first article.

3d—The United States demand, that the Creek nation abandon all communication, and cease to hold any intercourse with any British or Spanish post, garrison, or town; and that they shall not admit among

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them, any agent or trader, who shall not derive authority to hold commercial, or other intercourse with them, by license from the President or authorized agent of the United States.

4th—The United States demand an acknowledgment of the right to establish military posts and trading houses, and to open roads within the territory, guaranteed to the Creek nation by the second article, and a right to the free navigation of all its waters.

5th—The United States demand, that a surrender be immediately made, of all the persons and property, taken from the citizens of the United States, the friendly part of the Creek nation, the Cherokee, Chickasaw, and Choctaw nations, to the respective owners; and the United States will cause to be immediately restored to the formerly hostile Creeks, all the property taken from them since their submission, either by the United States, or by any Indian nation in amity with the United States, together with all the prisoners taken from them during the war.

6th—The United States demand the caption and surrender of all the prophets and instigators of the war, whether foreigners or natives, who have not submitted to the arms of the United States, and become parties to these articles of capitulation, if ever they shall be found within the territory guaranteed to the Creek nation by the second article.

7th—The Creek nation being reduced to extreme want, and not at present having the means of subsistence, the United States, from motives of humanity, will continue to furnish gratuitously the necessaries of life, until the crops of corn can be considered competent to yield the nation a supply, and will establish trading houses in the nation, at the discretion of the President of the United States, and at such places as he shall direct, to enable the nation, by industry and economy, to procure clothing.

8th—A permanent peace shall ensue from the date of these presents forever, between the Creek nation and the United States, and between the Creek nation and the Cherokee, Chickasaw, and Choctaw nations.

9th—If in running east from the mouth of Summochico creek, it shall so happen that the settlement of the Kennards, fall within the lines of the territory hereby ceded, then, and in that case, the line shall be run east on a true meridian to Kitchofoonee creek, thence down the middle of said creek to its junction with Flint River, immediately below the Oakmulgee town, thence up the middle of Flint river to a point due east of that at which the above line struck the Kitchofoonee creek, thence east to the old line herein before mentioned, to wit: the line dividing the lands claimed by the Creek nation, from those claimed and owned by the state of Georgia. The parties to these presents, after due consideration, for themselves and their constituents, agree to ratify and confirm the preceding articles, and constitute them the basis of a permanent peace between the two nations; and they do hereby solemnly bind themselves, and all the parties concerned and interested, to a faithful performance of every stipulation contained therein.

In testimony whereof, they have hereunto, interchangeably, set their hands and affixed their seals, the day and date above written.

Andrew Jackson, major general commanding Seventh Military District, [L. S.]

Tustunnuggee Thlucco, speaker for the Upper Creeks, his x mark, [L. S.]

Micco Aupoegau, of Toukaubatchee, his x mark, [L. S.]

Tustunnuggee Hopoiee, speaker of the Lower Creeks, his x mark, [L. S.]

Micco Achulee, of Cowetau, his x mark, [L. S.]

William McIntosh, jr., major of Cowetau, his x mark, [L. S.]

Tuskee Eneah, of Cussetau, his x mark, [L. S.]

Faue Emautla, of Cussetau, his x mark, [L. S.]

Toukaubatchee Tustunnuggee of Hitchetee, his x mark, [L. S.]

Noble Kinnard, of Hitchetee, his x mark, [L. S.]

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Hopoiee Hutkee, of Souwagoolo, his x mark, [L. S.]

Hopoiee Hutkee, for Hopoie Yoholo, of Souwogoolo, his x mark, [L. S.]

Folappo Haujo, of Eufaulau, on Chattohochee, his x mark, [L. S.]

Pachee Haujo, of Apalachoocla, his x mark, [L. S.]

Timpoeechee Bernard, Captain of Uchees, his x mark, [L. S.]

Uchee Micco, his x mark, [L. S.]

Yoholo Micco, of Kialijee, his x mark, [L. S.]

Socoskee Emautla, of Kialijee, his x mark, [L. S.]

Choocchau Haujo, of Woccocoi, his x mark, [L. S.]

Esholoctee, of Nauchee, his x mark, [L. S.]

Yoholo Micco, of Tallapoosa Eufaulau, his x mark, [L. S.]

Stinthellis Haujo, of Abecoochee, his x mark, [L. S.]

Ocfuskee Yoholo, of Toutacaugee, his x mark, [L. S.]

John O'Kelly, of Coosa, [L. S.]

Eneah Thlucco, of Immookfau, his x mark, [L. S.]

Espokokoke Haujo, of Wewoko, his x mark, [L. S.]

Eneah Thlucco Hopoiee, of Talesee, his x mark, [L. S.]

Efau Haujo, of Puccan Tallahassee, his x mark, [L. S.]

Talessee Fixico, of Ocheobofau, his x mark, [L. S.]

Nomatlee Emautla, or captain Issacs, of Cousoudee, his x mark, [L. S.]

Tuskegee Emautla, or John Carr, of Tuskegee, his x mark, [L. S.]

Alexander Grayson, of Hillabee, his x mark, [L. S.]

Lowee, of Ocmulgee, his x mark, [L. S.]

Nocoosee Emautla, of Chuskee Tallafau, his x mark, [L. S.]

William McIntosh, for Hopoiee Haujo, of Ooseoochee, his x mark, [L. S.]

William McIntosh, for Chehahaw Tustunnuggee, of Chehahaw, his x mark, [L. S.]

William McIntosh, for Spokokee Tustunnuggee, of Otellewhoyonnee, his x mark, [L. S.]

Done at Fort Jackson, in presence of—

Charles Cassedy, acting secretary,

Benjamin Hawkins, agent for Indian affairs,

Return J. Meigs, A. C. nation,

Robert Butler, Adjutant General U. S. Army,

J. C. Warren, assistant agent for Indian affairs,

George Mayfield,

Alexander Curnels,

George Lovett,

Public interpreters.

Appendix E

History of the Poarch Band of Creek Indians,
State of Alabama Indian Affairs Commission,
http://aiac.alabama.gov/tribes_PoarchCreek.aspx

State of Alabama
Indian Affairs Commission
www.aiac.alabama.gov
LISTEN TO THE DRUM

Overview/Staff

Tribes, Chiefs & Commissioners

Legislation

Genealogy

Programs & Scholarship

Areas of Interest

Special Events

History of the Poarch Band of Creek Indians

The Poarch Band of Creek Indians is a segment of the original Creek Nation, which avoided removal and has lived together for nearly 150 years. Despite the policy of removal of Southeastern Indians to Oklahoma, an indeterminate number of Creeks, with or without the government's approval, remained in the East.

The Creek Nation originally occupied a territory covering nearly all of Georgia and Alabama. The War of 1812 divided the Creek Nation between an Upper party hostile to the United States and a group of Upper and Lower Creeks friendly to the government. The United States provided military assistance when hostilities erupted from 1813 to 1814. Upon victory of the friendly Creek party and their federal allies, the Creek Nation reluctantly agreed to an enormous cession of land to the United States.

The treaty compelled the Creek Nation to cede much of the territory of those friendly to the United States including the present site of Poarch. Those Creeks who had actively fought with the United States were permitted a reservation of one square mile. Thus one party of the Creek Indians was separated from the larger portion of the Creek Nation in separate parts of Alabama.

Several Creek families including the Gibsons, Manacs, Colberts, and Weatherfords, secured reservations immediately after the treaty. Others such as Semoice and Lynn McGhee were unable to file their selections immediately. Congress in 1836 passed an Act allowing Lynn McGhee and the others to set aside 640 acres as reservations under the 1814 Treaty of Fort Jackson.

The United States continued to protect the Poarch settlement after the removal of the main Creek body to Oklahoma in 1836. The Government halted the Escambia County, Alabama tax assessor's illegal taxation of the federal trust land in Poarch in 1920. The Government instigated litigation, which continued until 1925, to penalize trespassers who had cut timber on the grant land. Despite the treaty, rights the fact that no further legislation was passed by Congress, patents were issued for land in 1924. Today, there are nearly, 2,200 members of the Poarch Band of Creek Indians with over 1,500 living in the vicinity of Poarch, Alabama (eight miles northwest of Atmore, Alabama, in rural Escambia County and 57 miles east of Mobile). The Poarch Band of Creek Indians is bound together by a complex network of kinship. Being isolated, the members Poarch Band of Creek Indians were excluded from the census of the Creek Nation that the U.S. Government recognizes as a tribe. A 1972 national study found that among all Creek descendants in the Southeast, only this group at Poarch is still "considered an Indian Community."

Since the early 1900's, organized efforts have increased to improve the social and economic situation of the Poarch Creeks. Important educational gains were made in the 1940's. A leader of this effort, Calvin W. McGhee, also pressed for a settlement of a land claims case, Eddie L. Tullis, Tribal Chairman as of 1987, led the Poarch Creek Indians in their petitioning the U.S. Government to recognize a government to government relationship. These efforts culminated in the Department of Interior's Bureau of Indian Affairs' acknowledgement that the Poarch Band of Creek Indians exists as an Indian tribe.

Acknowledgement as a federally recognized Tribe brings an end to one struggle

and starts the beginning of another. In accordance with the constitution, which was adopted on June 1,1985, the Poarch Band of Creek Indians is governed by a nine member elected Tribal Council. A full time staff is employed to provide administrative support for the operation of the Tribal government and programs.

Tribal members and the Tribal Council engaged in many discussions of goals for reservation development following federal recognition. Community development needs and priorities are evident in the Tribal Multi-Purpose Complex. This building provides a health facility, a community meeting area, and office space for Tribal Administration and program staff.

The Poarch Creek Indians Housing Authority was established in 1984 to provide new housing on the reservation for low-income Tribal households and to meet the needs of elderly Tribal members.

In an effort to provide economic development and employment for Tribal members the Tribal Council approved the building of the Creek Bingo Palace, the Western Motel and Creek Family Restaurant, and Perdido River Farms which all belong to Creek Indian Enterprises.

The Poarch Band of Creek Indians, in accordance with the Constitution, strives to help our members achieve their highest potential in education, physical and mental health, and economic development.

Appendix F

Recommendation of Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Poarch Band of Creeks of Alabama pursuant to 25 C.F.R. 83 (Bureau of Indian Affairs 1983)

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

IN REPLY REFER TO:

Tribal Government Services-FA

DEC 29 1983

MEMORANDUM

To: Assistant Secretary - Indian Affairs

From: Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: Recommendation and summary of evidence for proposed finding for Federal acknowledgment of the Poarch Band of Creeks of Alabama pursuant to 25 CFR 83.

RECOMMENDATION

We recommend that the Poarch Band of Creeks be acknowledged as an Indian tribe with a government-to-government relationship with the United States and be entitled to the same privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes.

GENERAL CONCLUSIONS

The contemporary Poarch Band of Creeks is a successor of the Creek Nation of Alabama prior to its removal to Indian Territory. The Creek Nation has a documented history back to 1540. Ancestors of the Poarch Band of Creeks began as an autonomous town of half-bloods in the late 1700's with a continuing political connection to the Creek Nation. The Poarch Band remained in Alabama after the Creek Removal of the 1830's, and shifted within a small geographic area until it settled permanently near present-day Atmore, Alabama.

The Band has existed as a distinct political unit since before the Creek War of 1813-14. It was governed by a succession of military leaders and prominent men in the 19th century. From the late 1800's through 1950, leadership was clear but informal. A formal leader was elected in 1950.

The group's bylaws describe how membership is determined and how the group governs its affairs and its members. Virtually all of the Band's 1,470 members can document descendancy from the historic Creek Nation and appear to meet the group's membership requirements. No evidence was found that the members of the Poarch Band of Creeks are members of any other Indian tribes or that the tribe or its members have been terminated or forbidden the Federal relationship by an Act of Congress.

83.7(a) **A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years.**

Identification of the Creek Nation or Confederacy, which included the aboriginal inhabitants of the American southeast, is well established. Federal, State, and county records clearly identify a group of half-blood and mixed-blood Creeks as having lived in the same general vicinity in southwestern Alabama within an eighteen-mile radius for a time period beginning in the late 1700's to the present.

Benjamin Hawkins, United States Agent to the Creek Nation from 1795 to 1826, refers to the community of half-bloods in Tensaw--a small settlement on the Alabama River fifty miles north of present Mobile--as an autonomous town within the Creek Nation, and was personally familiar with several half-bloods there with whom he had working relations. For the most part friendly toward the United States during the Creek War of 1813-14, they suffered depredations to their property and persons at the hands of the hostile "Red Stick" Creeks, and were cited in many Federal lists concerning indemnification for losses. They received grants for their improved, cultivated lands under the Treaty of Ft. Jackson in 1814. Many of them appeared on the Creek Census of 1832 under their respective native towns. Other identifications as Creek Indian appear in Lachlan Durant's letter to President Madison of 1815, a memorial to the U.S. Congress through the Alabama legislature in 1832, and pages of testimony in the 1851 court case of William Weatherford v. Weatherford, Howell, et al. They appear in local county records which give data about marriages, wills, and the acquisition and/or transfer of lands throughout the mid-nineteenth century, even though during that period their settlements were in areas of remoteness and isolation. Several of them are shown continuously as Creeks in private acts of relief in both the U.S. Congress and in the Alabama legislature between 1826 and 1856. They were not subject to the Creek Removal of the late 1830's, but rather remained in Alabama, though certain members of their community emigrated to Indian Territory during the last half of the nineteenth century.

Evidence of identification of the community that developed inland of the Alabama River in what is now Escambia County, and the group of settlements and "core" families that developed from it into the current Poarch Band of Creeks, rests initially on the consistent distinction of this group from other persons resident in their area. The 1860 census indicates the identification of a group of Indians.

During the period of the Civil War and reconstruction, they are shown in military records and in county records, but not as Indian. Given both the difficult conditions and the total preoccupation with the War in the South, this does not appear unusual. Designations as Indian reappear, however, toward the latter decades of the nineteenth century, particularly in U.S. Decennial Censuses and in church records. Reliable oral history about the group dates back roughly to this period. At the turn of the twentieth century, the members of Poarch Band of Creeks are again designated in Federal records as Indian, especially in the report of Special Commissioner Guion Miller. They are identified as an Indian group in a Federal Timber Trespass suit involving the General Land Office and a local mill company.

From at least 1908 onward, the group was segregated in separate Indian schools, named as such, and are clearly cited in newspaper accounts, Federal and local records, and in various church records as Creek Indians. In 1929 the St. Anna's Indian Mission (Episcopal) was begun to service the Indians at Poarch now gathered into the main hamlets within three miles of each other: Head of Perdido, Poarch Switch, Bell Creek, and Hog Fork. In 1941 they were visited by anthropologist Frank Speck, who published a brief ethnography of the group. In the 1950's they intervened in the Creek Nation v. the United States in the Indian Claims Commission and were allowed by the Court of Claims to sue by virtue of the fact that they were an "identifiable group." From the 1950's onward they have been dealt with by local authorities and officially incorporated themselves as the Creek Nation East of the Mississippi in 1971. In recent years they have been active participants in the National Congress of American Indians and the Coalition of Eastern Native Americans, and have received numerous grants from various governmental agencies by virtue of their being a Native American group.

Support for Federal acknowledgment of the group's petition has come from several different sources. Correspondence was received from Alabama Governor George C. Wallace as early as 1975. At that time, he stated that Alabama was ready to convey certain lands in Escambia County to the United States in trust for the petitioner. He went on to state that the ". . . offer has been made possible through the generous support and cooperation of the people and the Board of Education of Escambia County, Alabama" (Wallace, 1975). Former Governor Forrest James, Jr., also expressed the State's support during his term and Governor Wallace has recently reaffirmed Alabama's support and willingness to convey the land. The entire Alabama congressional delegation has expressed their interest and support on several occasions.

In August of 1983, the recognized Muscogee (Creek) Nation of Oklahoma formally established a government-to-government relationship with the Poarch Band of Creeks and supported the group's petition for recognition stating the PBC is "a distinct and separate band of Muscogee (Creek) Indians . . . [and] has been since . . . 1832" (Cox, 1983).

The Poarch Band of Creeks has been identified as an American Indian tribe from historical times until the present and therefore, has met the criterion in 25 CFR 83.7(a).

83.7(b) **Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.**

The Poarch Band of Creeks of today originated in the aboriginal and historical Creek Nation. More immediately, the Band is derived from a community which developed in the latter part of the 18th century in the Alabama-Tensaw River area in what is now southwestern Alabama. This community, which was within and part of the Creek Nation, was comprised of "half-blood" Creeks who applied for and were given permission by the council of the Creek Nation to settle on the Alabama-Tensaw River lands. The community drew its population from a number of different Upper Creek towns.

The "half-bloods" were a partially acculturated class of people within the Creek Nation who became increasingly influential in the Nation in the late 18th and early 19th centuries. The community on the Alabama-Tensaw Rivers was highly intermarried and formed a well-defined community, quite culturally distinct from non-Indian settlers in the area. Although called a "half-blood" community during this period, it is probable that the blood quantum was higher than half.

Most of the families in the community acquired title to their lands after the cession of this area to the United States under the 1814 Treaty of Fort Jackson and most remained after the Creek Nation was removed to Indian Territory in the 1830's.

Between 1840 and 1850, a portion of the Alabama-Tensaw community moved inland 15 to 20 miles eastward from the river and settled in what is now the northwest corner of Escambia County, Alabama. This was a previously unsettled area, one which remained isolated and thinly populated until the late 19th century. The families which settled inland were drawn from a variety of the Alabama-Tensaw community's population. This included the children of Lynn McGhee, many descendants of Sam Moniac, Sr., and members of the Weatherford, Hollinger, Semoice, Hinson, Marlow and other families. For several decades this community maintained social relationships with their kinsmen on the river and remained a part of that larger community.

The inland families settled in close, kinship-based settlements which developed, by the end of the nineteenth century, into five settlements—Head of Perdido, Red Hill, the Colbert settlement, Bell Creek, and Hog Fork. These settlements, linked by kinship and social ties, came to form a separate community from the original group on the river after the 1870's. The families in these hamlets became tightly intermarried and gradually came to be distinguished socially from other descendants of Creek half-blood families in the same area, who were no longer socially identified as Indian. The Indian community retained some degree of cultural distinction from non-Indians until probably the latter decades of the nineteenth century. Around 1900, social distinction of Indians developed into a system of segregated Indian schools and churches, based in the Indian settlements.

The Poarch Creeks have remained a very cohesive group to the present, with definite social distinctions between them and others in the area. Two of the nineteenth-century hamlets, at Head of Perdido and Hog Fork, still exist, as does another, Poarch Switch, which formed in the 1920's from residents of the earlier settlements. Although there are no longer segregated schools, there are still several churches which are exclusively or largely Indian. The three settlements form a clearly identifiable "core" community at Poarch. A significant portion of the membership resides in nearby Atmore or neighboring areas of Alabama and west Florida, such as Pensacola, and maintains extensive social and kinship relationships with the home community.

The Poarch Band of Creeks forms a community distinct from other populations in the area. Its members are descended from the historic Creek Nation, from a community within that nation which developed in the late 18th century. This community developed into several Indian settlements in Escambia County, Alabama, which form the Poarch Band of Creeks of today. We conclude, therefore, that the Poarch Band of Creeks has met the criterion in 25 CFR 83.7(b).

83.7(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

The Creek Nation or Confederacy was a well-established political entity since first European contact. By the late 18th century, the Confederacy had developed an organized National Council, which was the official agency representing Creek matters to outside entities and maintaining a strong influence and control over internal matters. Initially the Alabama-Tensaw community formed within and was politically part of the Creek Nation, whose chiefs authorized settlement on the land where the community was located. There were also several influential men who were leaders within the community itself, such as William Weatherford, Sam Moniac, Sr., Dixon Bailey, and David Tate.

The inland community formed around 1850, derived from the Alabama-Tensaw community, had a variety of clearly recognizable but not formally designated leaders. These are identifiable from oral history and indirect documentary sources such as court and church records for at least the 1880's onward until 1950. The most prominent and influential of these leaders was Fred Walker, who was a leader between 1885 and 1941. There was generally more than one informal leader at one time, with varying degrees and scope of influence. These leaders exercised influence in maintaining social control, organized community efforts such as church and school building in the settlements, saw to the employment of community members, were religious church leaders, and fulfilled other functions. At least one of these leaders may have been active as early as 1870. There is evidence available for the two previous decades that several Indian community members mentioned in those documents were informal leaders of the type more clearly identifiable in the period immediately following.

The community, led by informal leaders, took a number of actions in the late 1940's to improve community conditions. At least one attempt was made to prevent the sale of a portion of Indian-owned land to a non-Indian. Major efforts included a community boycott of the Indian school and the organization of a committee which successfully forced local school authorities to provide bus service which would allow the Indians to attend junior high and high school.

The first formal leader of the Poarch Band, in the sense of a single leader with a definite title and a clearly defined role, was Calvin McGhee, who was chosen in 1950. A charismatic leader, McGhee was referred to by one scholar as the dominant political force within the community. McGhee also led a wider claims movement among eastern Creek descendents, heading the council of the Creek Nation East of the Mississippi established in 1950. The movement was initiated by the Poarch community, including McGhee, and was dominated by Poarch community leaders. The council's functions widened after McGhee's death in 1970 to include a variety of community services which the local leadership had previously negotiated for with local non-Indian authorities. At the same time, under a new generation of leaders from within the community, the council was narrowed and developed into a governing body for the Poarch community alone.

The Poarch Band of Creeks and the predecessor community from which it evolved have maintained identifiable leaders and political processes within a highly cohesive community essentially continuously since its origins in the late 18th century within the historic

Creek Nation. We conclude that the Poarch Band of Creeks has maintained tribal political influence and authority over its members throughout history until the present and that it, therefore, has met the criterion in 25 CFR 83.7(c).

83.7(d) **A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.**

The group has submitted a copy of their current bylaws which were adopted November 14, 1982. These bylaws describe in detail how membership eligibility is determined and how the group currently governs its affairs and its members. We conclude that the tribe has met the criterion in 25 CFR 83.7(d).

83.7(e) **A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity.**

Eligibility for membership in the Poarch Band of Creeks is limited to persons who are lineal descendants of individuals who were identified as Indian on the group's cited source documents and who are of at least 1/4 Creek Indian blood. Three Federal population census schedules for Alabama are used by the group as source documents for establishing eligibility. These are the 1870 and 1900 general schedules of Escambia County and the 1900 Monroe County special Indian schedules. For tribal purposes, persons identified as "Indian" on these documents are considered to be full-bloods for the purpose of computing blood degrees.

Two membership rolls were provided; one dated 1979, the other 1982. The current roll, prepared as of October 1982, contains complete information including full names, addresses, and other personal information for the 1,470 members of the Poarch Band of Creeks.

Poarch Band members descend from ancestors who were identified as Creek in early 19th century Federal records. Because these ancestors and their descendants have continued to live in the area around modern Atmore for more than 150 years, events in their lives can be documented in the official records of the three counties immediately surrounding.

Intermarriage within the group has occurred to such an extent over the years that family lines present in the Poarch community are now extremely intertwined and many members trace their ancestry to more than one established Creek ancestor. The extent to which these families have intermarried indicates a high degree of social interaction among the Poarch families.

The tribal council appears to have been stringent in its application of the group's eligibility requirements and its evaluation of documentary evidence submitted to them. Based on our research, virtually all of the group's 1,470 enrolled members are believed to be able to document both their descent from one of the three source documents and at least the minimum 1/4 Creek blood degree requirement. Forty-five percent of the total membership are in fact of 1/2 or more Creek Indian blood quantum. Seventy-two percent of the members have been recognized as eastern Creek descendants and have shared or will share in judgment awards to eastern Creeks under Indian Claims Commission Dockets 21 and 275.

We conclude the membership of the Poarch Band of Creeks consists of individuals who have established descendancy from an historical tribe and that the tribe has met the criterion in 25 CFR 83.7(e).

83.7(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

The petitioner asserts that none of its members is enrolled in any other North American Indian tribe. The bylaws do not permit concurrent enrollment in more than one tribe. Further, members of the Poarch Band of Creeks are not eligible for membership in the Muscogee (Creek) Nation of Oklahoma. The Acknowledgment staff found no members of the group enrolled with any other North American Indian tribe; therefore, we conclude the Poarch Band of Creeks meets the criterion in 25 CFR 83.7(f).

83.7(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

The petitioner asserts that neither the group nor its members have ever been terminated or forbidden the Federal relationship. The Poarch Band of Creeks does not appear on the current list of "Indian Tribes Terminated from Federal Supervision" prepared by the Bureau of Indian Affairs under any of the names by which the group may have been known. The Poarch Band of Creeks has not been the subject of Congressional legislation which has expressly terminated or forbidden the Federal relationship.

We conclude that the Poarch Band of Creeks meets the criterion in 25 CFR 83.7(g).

Appendix G

Alabama Fever, Encyclopedia of Alabama, available at http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-3155

Encyclopedia of Alabama

Alabama Fever

The opening of present-day Alabama to settlement when the Creek War of 1813-14 ended inspired a wave of migration from the eastern United States that foreshadowed the large-scale westward movement of later decades. "Alabama Fever," an expression in use by 1817, referred to the frenzy to establish land claims in the area formerly known as West Florida or East Mississippi, which resulted in the admission of Alabama as a state by 1819. The driving force behind Alabama Fever was the global demand for cotton cultivation stimulated by new industrial textile manufacturing processes. The expression "Alabama Fever" has also been used by historians to describe the broader phenomenon of the expansion of the cotton frontier before 1860, from the seaboard states to Alabama and Mississippi and onward to northern Louisiana, Arkansas, and Texas. The establishment of cotton plantations in Alabama and the region as a whole transformed and expanded the global economy, producing unprecedented wealth in combination with the northern and European textile industry. In political terms, the emergence of the Deep South as an economic force increased the clout of slave states in the federal government, intensifying the hostilities that resulted in the Civil War.

Alabama Fever resulted from global economic forces that accelerated the drive to colonize the area initially known as East Mississippi. Great Britain's commercial interests in India beginning in the 1600s introduced Europeans to eastern cotton textiles such as calico, madras, and khaki. By the late 1700s, English textile machinery had been adapted to produce high-quality versions that earned great profits and rapidly transformed the consumer market. The invention of an industrial cotton gin capable of removing seeds allowed planters to supply short-staple cotton, a faster-growing variety of the plant, to British and New England manufacturers. Quickly, the cotton industry emerged as vital to the U.S. economy. Cotton cultivation, however, rapidly exhausts the soil; within 30 years, cotton yields in Georgia and the Carolinas had diminished, prompting planters to seek more fertile fields in the nation's Old Southwest.

Alabama, however, had largely been Indian Territory prior to the War of 1812. The decisive defeat of the Creeks and the British by Gen. Andrew Jackson in 1814 and the acquisition of 23 million acres of land under the Treaty of Fort Jackson inaugurated the era of Alabama Fever in earnest. Jackson led efforts to open the new territory to settlement and infrastructure, ordering the construction of a military road from Muscle Shoals, where he purchased property for himself, to the Gulf of Mexico.

He also urged the General Land Office to quickly survey and sell the land acquired from the Creeks. Another major point of entry was the Federal Road, which ran within the state from roughly present-day Phenix City to Mobile. A network of lesser roads and Indian trails connected Alabama to Georgia, Tennessee, and the western Carolinas.

Land sales combined with the formalization of squatter claims swelled the settled portion of the Alabama lands. In 1810, the population of Alabama was estimated as being under 10,000; by 1820, that number had risen to more than 127,000 and by 1830 had topped 300,000. The population continued to increase, so that by 1860 it was just short of one million. Early population centers emerged around Huntsville in the north, which conducted its first census in 1810 and was home to some 260 brick houses by early 1818, including some two and three stories high. At the same time, a number of fledgling towns such as Selma, Montgomery, and Marion were established in the Black Belt, where the dark soil proved excellent for cotton cultivation. More than 2.25 million acres were sold in 1819, the year Alabama successfully petitioned for statehood.

Early Alabamians demonstrated what observers would describe as the characteristic mania of the Alabama Fever, in which planters sold cotton to buy more slaves to produce more cotton, meanwhile always acquiring new acreage to maximize output. Roughly one third of the migrants were slaves, about 40,000 of whom had arrived in the new state between 1810 and 1820. Alabama Fever thus created a new demand for slaves, allowing established holders to make profits not only on cotton production but also on the sale and relocation of slaves in their prime years for labor and reproduction. Beginning in the early nineteenth century, a significant number of slaves would be relocated more than once, to Alabama then to parts farther west, as dwindling cotton yields continually expanded the frontier.

By the 1860s, the domestic trade in slaves fueled by Alabama Fever and its western variations had resulted in the forced migration of at least 875,000 persons. As many as 435,000 slaves labored in Alabama by this time. Facing geographic and political constraints, cotton magnates had turned their attention to the possible conquest and annexation of territory in the Caribbean and Central America. The global appetite for cotton only escalated as textile manufacturing and global consumer demand continued to grow. The outbreak of the Civil War and the destruction of the slave system finally checked the advance of Alabama Fever in the southern states, but the society, traditions, and physical landscape that it shaped persist in Alabama and the region to the present.

Additional Resources

Dattel, Eugene R. *Cotton and Race in the Making of America: The Human Costs of Economic Power*. Washington, D.C.: Government Institutes Press, 2009.

Libby, David J. *Slavery and Frontier Mississippi, 1720-1835*. Oxford: University Press of Mississippi, 2008.

Richmond, Robert W. *A Nation Moving West: Readings in the History of the American Frontier*. Lincoln: University of Nebraska Press, 1966.

LeeAnna Keith
Collegiate School, New York City

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Last updated October 19, 2011

Appendix H

Marie Bankhead Owen, The Story of Alabama (1949) -- Excerpts

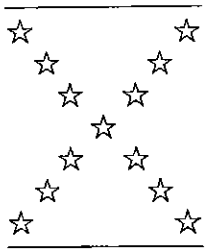
THE STORY OF ALABAMA

A HISTORY OF THE STATE

By

MARIE BANKHEAD OWEN, LL. D.

DIRECTOR, ALABAMA STATE DEPARTMENT OF ARCHIVES AND HISTORY



VOLUME I

LEWIS HISTORICAL PUBLISHING COMPANY, INC.
NEW YORK

four thousand Choctaws choosing to remain in Mississippi. In the other districts there were fewer. During the Creek disturbance of 1836, the white people in Alabama and Mississippi demanded of the Government that the Choctaws east of the Mississippi be removed to forstall their becoming involved, but not much came of this effort. In 1845, some 1,280 left Mississippi, probably going to the allotted lands on the Canadian River. The Choctaw claims in Alabama embodied much of the present Sumter, Choctaw, Washington and Mobile counties and under the Treaty of Dancing Rabbit Creek in 1831, these lands were by that session opened to entry and organized under the laws of the State of Alabama.

Creek Removal—In January 1831, the Lower Creek Indians sent a Commission to Washington protesting the laws of Alabama over them and the settling of white people on their lands. Mr. Lewis Cass, Secretary of War, advised that the President of the United States could not prevent the operation of the Alabama laws over them and urged them to consent to removal west of the Mississippi. On the 24th of March 1832, the Creek Nation ceded to the United States all their lands east of the Mississippi River except the individual selections which they were allowed to occupy for five years unless sooner sold by them. Ninety principal Chiefs were to have a section of land each, and every head of a family to have a half section, for which each would have a deed at the end of five years. These selections were to be made so as to include the improvements of the Indians. This agreement resulted in much unhappiness, as many of these half sections of land were fraudulently certified to the land speculators and the Creeks got little benefit therefrom. Reserved under this scheme were 2,187,200 acres for the Indians out of a total whole credited to the Creeks of 5,200,000 acres. The census completed May 1, 1833, taken to carry out the provisions of the Treaty, showed that there were 14,142 members of the Creek Tribe in the Upper Nation and 8,552 Creeks in the Lower Nation. There were 6,557 heads of families. Under the Treaty provisions, squatters and intruders on Indian lands would be removed. Noting a memorial to the Secretary of War, a Council of the Creek Nation held at Wetumpka, (in the present Russell County) wrote, "instead of a situation being relieved as was anticipated, we are distressed in a ten-fold manner."

Conditions continued to get worse. Many white men who had purchased the allotments of the Indians and had had these lands certified to them through the Government offices moved on to the lands and the Government made only feeble efforts to remove these white settlers so that open hostilities began to manifest themselves in 1833. The War Department maintained a heavily garrisoned post at Fort Mitchell in Russell County, Ala., in the heart of the Lower Creek Nation, but the presence of these troops had only a minimum effect. By 1835, clashes between white settlers and the Indians had reached such an extent that it became certain that forcible removal must be immediately attempted. Under the terms of the Treaty the natives were allowed five years occupancy of their allotments but in less than two and a half years, most of these allotments had been sold and entered by whites, and the natives were in dire stress for subsistence as well as disgruntled with conditions existing. During the winter of 1833 and until the late summer of 1836, conflicts took place in the Lower Nation, resulting in the so-called Creek Indian War of 1836.

An incident of particular note near the seat of the disturbance was the death of Hardeman Owens at his recently entered homestead, a short distance south of Fort Mitchell, who, while resisting arrest by a detail of United States soldiers from the post, was shot by a sergeant in this command and died from

living on his plantation on Little River on the one-time property of his kinsman, Alexander McGillivray, when he volunteered for service, and was immediately commissioned a captain. He was promoted to major on November 15, 1836, and six days later was killed at Wahoo Swamp while leading his men in a difficult clash with the Seminoles. The other incident of the period was the disaster at Profit Island Bend in the Mississippi River when 311 of these Alabama Indians, out of 611, were crowded on to the steamboat Monmouth, which sank and all on board were drowned. Four of the casualties were children of Jim Boy who had led the Upper Creeks in the Florida campaign. Large numbers of others of these Creeks died on the way West and in addition, there was much illness and loss of their property.

The Famous Canoe Fight on the Alabama River

> "The fearful responsibility for this vast sacrifice of human life rests on the contractors for emigrating the Creek Indians. The avaricious disposition to increase the profits on the speculation first induced the chartering of rotten, old, and unseaworthy boats, because they were of a class to be produced cheaply; and then to make those increased profits still larger, the Indians were packed upon these crazy vessels in such crowds that not the slightest regard seems to have been paid to their safety, comfort, or even decency. The crammed condition of the decks and cabins was offensive to every sense and feeling, and kept the poor creatures in a state unfit for human beings." (R 124 OIA Woodfin to Reynolds, Creek Emigration. Sept. 22, 1837.)

Chickasaw Removal—The transfer of the Chickasaw Nation was the culmination of the agreement of the Treaty of Pontotoc. President Andrew Jackson himself, met with a delegation of Chickasaws at Franklin, Tennessee, on August 19, 1830, and there was a three-day conference in the Presbyterian Church there, attended by Gen. John Coffee, John Eaton, Secretary of War, the President

Appendix I

Final Determination for Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 24083 (June 11, 1984) (Bureau of Indian Affairs, U.S. Dep't of Interior)

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Final Determination for Federal Acknowledgment of the Poarch Band of Creeks

June 4, 1984.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Pursuant to 25 CFR 83.9(h), notice is hereby given that the Assistant Secretary acknowledges that the Poarch Band of Creeks, c/o Mr. Eddie L. Tullis, Route 3, Box 243–A, Atmore, Alabama 36502, exists as an Indian tribe within the meaning of Federal law. This notice is based on a determination that the group satisfies the criteria set forth in 25 CFR 83.7.

Evidence indicates that the contemporary Poarch Band of Creeks is a successor of the Creek Nation of Alabama prior to its removal to Indian Territory. The Creek Nation has a documented history back to 1540. Ancestors of the Poarch Band of Creeks began as an autonomous town of half-bloods in the late 1700's with a continuing political connection to the Creek Nation. The Poarch Band remained in Alabama after the Creek Removal of the 1830's, and shifted within a small geographic area until it settled permanently near present-day Atmore, Alabama.

The Band has existed as a distinct political unit since before the Creek War of 1813–14. It was governed by a succession of military leaders and prominent men in the 19th century. From the late 1800's through 1950, leadership was clear but informal. A formal leader was elected in 1950.

The group's bylaws describe how membership is determined and how the group governs its affairs and its members. Virtually all of the Band's 1,470 members can document descendancy from the historic Creek Nation and appear to meet the group's membership requirements. Intermarriage within the group has occurred to such an extent over the years that family lines present in the Poarch community are now extremely intertwined and many members trace their ancestry to more than one established Creek ancestor.

No evidence was found that the members of the Poarch Band of Creeks are members of any other Indian tribes or that the tribe or its members have been the subject of Congressional legislation which has expressly terminated or forbidden a relationship with the Federal Government.

A proposed finding that the Poarch Band of Creeks exists as an Indian tribe was published on page 1141 of the Federal Register on January 9, 1984. Interested parties were given 120 days in which to submit factual and legal arguments to rebut the evidence used to support the finding that the Poarch Band of Creeks exists as an Indian tribe. During this period two comments were received. These comments did not oppose Federal acknowledgment of the Poarch Band of Creeks, but rather took exception to the tribe's designation of ancestors and members who appeared as "Indian" on the tribe's source documents, used for determining tribal membership eligibility, as full-bloods, especially in light of outside historical as well as self-identification as a half-blood or mixed-blood Indian community. Source documents used are an 1870 and two 1900 Federal population census schedule which list individuals as Indian. Comments focused on what was incorrectly perceived by the commentors as the report's acceptance of blood degrees, computed by the tribe for tribal membership purposes, as factual. The tribe made no representations that blood quantums generated were for anything other than tribal membership purposes, neither did the report.

While eligibility for benefits under some Federal statutes is limited to tribal members with a certain blood degree, Federal law imposes no general blood degree requirement for tribal membership. Moreover, Federal regulations for determining eligibility for acknowledgment as a tribe (25 CFR Part 83) do not contain a blood quantum requirement. Blood quantum statistics concerning the Poarch Band of Creeks which are found within the proposed finding, specifically on page 7 of both the memorandum of recommendation and its attached genealogical technical report, are solely for tribal membership purposes. Once acknowledged under 25 CFR Part 83, the Bureau's Tribal Enrollment staff will provide specific guidance in computing more factual blood quantums of persons named on the tribe's basic membership roll for use in certifying individual members for Federal purposes. Blood quantums computed for tribal purposes may not necessarily agree with those computed for Federal purposes.

No factual evidence not already considered was provided in the two comments received. The comments were considered but were determined to have no effect on the findings of fact or the decision to recommend the tribe for Federal acknowledgment.

The determination is final and will become effective 60 days from the date of publication, unless the Secretary of the Interior requests the determination be reconsidered pursuant to 25 CFR 83.10.

John W. Fritz,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 84–15480 Filed 6–8–84; 8:45 am]
BILLING CODE 4310–02–M

Appendix J

Deed of Lands At Issue Within Montgomery County to United States

RLPY 1555 PAGE 0699

STATE OF ALABAMA)
MONTGOMERY COUNTY)

WARRANTY DEED

FROM: The Poarch Band of Creek Indians

TO: United States of America in Trust for the Poarch Band of Creek Indians as authorized by Sec. 5 of the Act of June 18, 1934 (48 Stat. 985, 25 USC 465)

THIS DEED, made this 23rd day of March, 1995, between the Poarch Band of Creek Indians, party of the first part, and the United States of America in Trust for the Poarch Band of Creek Indians as authorized by Sec. 5 of the Act of June 18, 1934, (48 Stat. 985, 25 USC 465), party of the second part.

WITNESSETH, that the said party of the first part, in consideration of the sum of one dollar and other kind of considerations ($1.00), to the grantee in hand paid by the party of the second part, the receipt of which is hereby acknowledged, by these presents, does grant, bargain, and convey unto the United States of America in Trust for the Poarch Band of Creek Indians, as authorized by Sec. 5 of the Act of June 18, 1934 (48 Stat. 985, 25 USC 465) and its assigns, all that tract of land lying in Montgomery County, Alabama, described as follows:

Commence at the SW corner of Section 27, T-17-N, R-19-E, Montgomery County, Alabama and run EAST, 4340.49 feet; thence NORTH, 1806.29 feet to a point on existing fence line and being the Point of Beginning; Thence continue along said fence line S89°13'03"E, 136.34 feet; Thence continue along said fence line S23°49'20" E, 62.92 feet; Thence continue along said fence line N69°23'34"E, 219.92 feet to an existing iron pin; Thence continue along said fence line N17°23'26"W, 968.84 feet to an existing iron pin; Thence leaving said fence line N18°23'18"W, 503.62 feet to a point on the southeast edge of the Tallapoosa River; Thence along said edge S43°24'16"W, 618.01 feet; Thence leaving said edge S39°49'22"E, 150.00 feet to a point on an existing fence line; Thence along said fence line S26°17'56"E, 374.05 feet; Thence continue along said fence line S39°39'24"E, 198.60 feet; Thence continue along said fence line S17°36'01"E, 386.15 feet to the Point of Beginning. All lying in the E 1/2 Section 27, T-17-N, R-19-E, Montgomery County, Alabama, and containing 12.86 acres more or less.

TO HAVE AND TO HOLD THE SAME together with all and singular the water rights and other rights, tenements, appurtenances, and hereitaments thereunto belonging to or anywise appertaining, unto the United States of America and its assigns forever.

AND the same party of the first part, heirs, successors, executors and administrators will warrant and forever defend the rights and title to the said land unto the United States of America and its assigns against the lawful claim of all persons whomsoever.

IN WITNESS WHEREOF, the party of the first party has hereunto set hand and seal on the date first above written.

Eddie L. Tullis
Chairman, Poarch Band of Creek Indians

Laverne Pohronezny
Secretary, Poarch Band of Creek Indians

STATE OF ALABAMA)
ESCAMBIA COUNTY)

I, the undersigned authority, a Notary Public in and for said State and said County hereby certify that Eddie L. Tullis and Laverne Pohronezny, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day, that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

GIVEN under my hand and seal this the 23rd day of MARCH, 1995.

Notary Public

My Commission Expires:

My Commission Expires October 17, 1997

RLPY 1555 PAGE 0100

PAGE 2 OF 2

AFFIDAVIT

Regarding the parcel of land named as Parcel 17:

Pursuant to the authority delegated in 209 DM 8, Secretary Order Nos. 3150 and 3177, Amendment 1, dated December 28, 1994, and 10 BIAM, Bulletin 9409, dated December 29, 1994, and Memorandum from Assistant Secretary - Indian Affairs to All Area Directors, dated May 26, 1994, delegating authority to take off-reservation lands into trust I hereby accept the lands conveyed by this deed on behalf of the United States of America in Trust for the Poarch Band of Creek Indians of Alabama pursuant to Section 5 of the Indian Reorganization Act (Act of June 18, 1934, C. 576, 48 Stat. 986, 25 USC 465) and Section 203 of the Indian Land Consolidation Act.

The land which I have been authorized to accept, and do hereby accept on behalf of the United States, is:

Commence at the SW corner of Section 27, T-17-N, R-19-E, Montgomery County, Alabama and run EAST, 4340.49 feet; thence NORTH, 1806.29 feet to a point on existing fence line and being the Point of Beginning; Thence continue along said fence line S89°13'03"E, 136.34 feet; Thence continue along said fence line S23°49'20" E, 62.92 feet; Thence continue along said fence line N69°23'34"E, 219.92 feet to an existing iron pin; Thence continue along said fence line N17°23'26"W, 968.84 feet to an existing iron pin; Thence leaving said fence line N18°23'18"W, 503.62 feet to a point on the southeast edge of the Tallapoosa River; Thence along said edge S43°24'16"W, 618.01 feet; Thence leaving said edge S39°49'22"E, 150.00 feet to a point on an existing fence line; Thence along said fence line S26°17'56"E, 374.05 feet; Thence continue along said fence line S39°39'24"E, 198.60 feet; Thence continue along said fence line S17°38'01"E, 386.15 feet to the Point of Beginning. All lying in the E 1/2 Section 27, T-17-N, R-19-E, Montgomery County, Alabama, and containing 12.86 acres more or less.

FURTHER, the Affiant Sayeth Not.

Date 3-23-95 [signature]

Franklin Keel
Acting Area Director
Eastern Area Office

Bureau of Indian Affairs

STATE: ALABAMA)

COUNTY: ESCAMBIA)

On this 23rd day of MARch, 1995, before me, the undersigned Notary Public, personally appeared Franklin Keel, known to me to be the Acting Eastern Area Director, Eastern Area Office, Bureau of Indian Affairs, whose name is subscribed to the within instrument and who acknowledged to me that he executed and signed the same.

[signature]
Notary Public

My Commission Expires: My Commission Expires October 17, 1997

100
105
500
1050
13.50

STATE OF ALA.
MONTGOMERY CO.
I CERTIFY THIS INSTRUMENT
WAS FILED ON

1995 APR -7 AM 11:41

[signature]
JUDGE OF PROBATE

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Judge of Probate

Appendix K

Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar, No. 11-cv-00278 (D.D.C. March 13, 2013)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

Plaintiffs,

v.

SALAZAR, *et al.*,

Defendants,

and

COWLITZ INDIAN TRIBE,

Defendant-Intervenor.

Case Nos. 11-cv-00284-BJR and 11-cv-278-BJR

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE, DENYING PLAINTIFFS' MOTION TO SUSPEND THE SCHEDULING ORDER, AND DISMISSING THE CASE

I. INTRODUCTION

Before the Court is Plaintiffs' Clark County and City of Vancouver, Washington, Citizens Against Reservation Shopping, Al Alexanderson, Greg and Susan Gilbert, Dragonslayer Inc., Michel's Development LLP, and the Confederated Tribes of the Grand Ronde Community of Oregon ("Plaintiffs") Motion to Strike Federal Defendants' Supplemental Record of Decision and Federal and Intervenor-Defendants' Reliance Thereon. (Dkt. No. 77).[1] Plaintiffs also move to suspend the scheduling order pending resolution of their motion to strike. (Dkt. No. 78.). Federal Defendants, the United States Department of the Interior ("DOI"), Kenneth L. Salazar, in his official capacity as Secretary of the Interior, the Bureau of Indian Affairs ("BIA"), Donald

[1] Substantially similar motions were filed in the two related cases. For ease, the Court will cite to the docket in *Clark County v. United States Department of Interior*, 11-cv-00278 (BJR).

Laverdure,[2] in his official capacity as Acting Assistant Secretary of the Interior – Indian Affairs, the National Indian Gaming Commission ("NIGC"), and Tracie Stevens, in her official capacity as Chairwoman of the NIGC (collectively "Federal Defendants") oppose the motions. (Dkt. Nos. 79 and 80.). Having reviewed the briefing by the parties together with all other relevant materials, the Court now finds and rules as follows:

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action centers around DOI's December 17, 2010 decision (the "2010 ROD") to acquire land in trust for the benefit of the Cowlitz Indian Tribe ("Cowlitz Tribe") for economic development purposes pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479. 76 Fed. Reg. 377-01 (January 4, 2011). The land at issue is comprised of nine parcels equaling approximately 151.87 acres located in Clark County, Washington ("the Clark County Property") on which the Cowlitz Tribe plans to construct and operate a gaming facility under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. *Id.*

Plaintiffs filed their lawsuits on January 31, 2011 (Case No. 11-cv-00278-RWR), and February 1, 2011 (11-cv-00284-RWR), alleging that the Secretary's decision to acquire the land into trust violates: (1) Sections 5 and 19 of the IRA, 25 U.S.C. §§ 465, 479, because the Cowlitz Tribe was not federally recognized or under federal jurisdiction in 1934; (2) the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et. seq.*; and (3) the IGRA, 25 U.S.C. §§ 2701-2721, because the Clark County Property is not eligible for gaming. The Clark County Plaintiffs filed additional claims against the NIGC, challenging the NIGC's 2005 approval of a gaming ordinance and the 2008 approval of a gaming ordinance amendment for the Cowlitz Tribe and the underlying gaming eligibility determination for the Clark County Property. On July

[2] Mr. Laverdure is substituted for Larry Echo Hawk pursuant to Federal Rule of Civil Procedure 25(d).

13, 2011, the Cowlitz Tribe moved to intervene in this action, which the Court allowed on December 23, 2011. On February 10, 2012, the Court entered a scheduling order adopting the schedule proposed by Plaintiffs, Federal Defendants and Intervenor-Defendants. (Dkt. No. 42.).

Pursuant to the February 10, 2012 scheduling order, the Federal Defendants lodged DOI's administrative record with the Court. (Dkt. No. 43.). On or around March 13, 2012, one of the Clark County Plaintiffs' attorneys contacted counsel for Federal Defendants regarding documents that were missing from the administrative record. (Dkt. No. 53-2 at ¶ 7.). Accordingly to the Federal Defendants, DOI was unable to locate the documents and requested the materials from Plaintiffs' attorney. (*Id.* at ¶ 8-9.). These documents address the merits of the NIGC's gaming determination for the Clark County Property. (*Id.* at ¶¶ 3-5.). The Federal Defendants supplemented the administrative record with these documents, certifying that they were "before the Secretary at the time of his 2010 ROD." (Dkt. No. 48.). The Federal Defendants certified that the administrative record was final and closed. (*Id.*). It is now clear that while Plaintiffs documents were before the Secretary at the time he issued the final decision, they were "overlooked," and were, therefore not considered in 2010 ROD. (Dkt. No. 69 at 3.).

Pursuant to the February 10, 2012 scheduling order as extended on June 15, 2012, Plaintiffs filed their motions for summary judgment and supporting memorandum on June 20, 2012 (Dkt. No. 45). Plaintiffs argued that the 2010 ROD is unauthorized under the IRA, violates the IGRA, and fails to comply with the NEPA. (*Id.*). Plaintiffs claimed that during the underlying administrative proceedings, they provided DOI with expert reports and other factual materials pertaining to the Cowlitz Tribe's alleged historical connection to the Clark County Property. (*Id.* at 39.). They argued that the 2010 ROD does not consider or otherwise address Plaintiffs' materials, nor does it articulate what legal standard the Secretary applied in reaching his decision.

(*Id.*). Therefore, Plaintiffs argued, at a minimum, this case should be remanded because the Secretary failed to provide a reasoned explanation for his decision. (*Id.*).

Plaintiffs assert that once the Federal Defendants reviewed Plaintiffs' summary judgment motions, the Federal Defendants realized that Plaintiffs were correct—the Secretary had not provided a reasoned explanation for his decision. (Dkt. No. 77 at 3.). Thereafter, the Federal Defendants requested that the Court remand the case so that the DOI could "carefully examine the documents submitted by Plaintiffs." (Dkt. No. 48 at 4.). They argued that a remand was necessary so that the agency could "review and take[] final action to deny or affirm the initial reservation gaming determination" … because "[d]epending on the decision reached by DOI on remand, some or all of Plaintiffs' claims…may be rendered moot." *Id.*

Plaintiffs opposed the motion to remand, arguing that the Federal Defendants' claim that the DOI needed to "carefully consider" the material was pretextual and what they really sought was an opportunity to create a post-hoc justification of the 2010 ROD. (Dkt. No. 63 at 2.). They claimed that only a few pages were missing from the administrative record and the information contained on those pages appear in substance in multiple places in the record. (*Id.*). "The Secretary's errors in making the initial reservation determination are many, but losing documents so that complete review was impossible is not one of them. Rather, the Secretary's error was dismissing without addressing the evidence before him." *Id.*

United States District Court Judge Roberts denied the Federal Defendants' motion for voluntary remand, determining that "[n]either a remand nor a stay [] is necessary to enable the federal defendants to review and reconsider the [initial reservation gaming determination]." (Dkt. No. 66 at 3.). However, Judge Roberts also stated that "[p]rinciples of judicial economy counsel in favor of affording the federal defendants a reasonable opportunity to reconsider and

potentially rescind the challenged determination." (*Id.* at 2.). Accordingly, Judge Roberts extended the deadline within which the Federal Defendants had to respond to Plaintiffs' summary judgment motions so that the DOI could review the records. (*Id.* at 2-3.) The Court further held that "[s]hould the federal defendants decide in the interim to rescind or otherwise alter their determination, they shall file promptly a notice of such action." (*Id.* at 3.).

On October 1, 2012, Federal Defendants filed a "Notice of Filing Supplemental ROD." (Dkt. No. 67.). The Notice included a one-page "Memorandum" signed by Michael Black, the Acting Assistant Secretary—Indian Affairs wherein he "adopt[s] the Revised Initial Reservation Opinion [] for the Cowlitz Indian Tribe [] from the Associate Solicitor, Division of Indian Affairs [] dated October 1, 2012." (*Id.* at Ex. 1.). The Memorandum states that the October 1, 2012 Revised Initial Reservation Opinion "replaces and supersedes" the December 14, 2010 Initial Reservation Opinion issued by the Office of the Solicitor in the Division of Indian Affairs. *Id.* It further states that the October 1, 2012 Revised Initial Reservation Opinion "does not alter the Assistant Secretary—Indian Affairs' December 17, 2010 determination to acquire the land in trust or his determination that the Cowlitz Parcel qualifies as the Tribe's initial reservation. The [October 1, 2012 Revised Initial Reservation] Opinion, is, therefore, incorporated into the [2010 ROD]." (*Id.*).

The October 1, 2012 Revised Initial Reservation Opinion that Mr. Black "incorporated" into the 2010 ROD is a 24-page memorandum from the Associate Solicitor, Division of Indian Affairs, to Mr. Black. (Dkt. No. 67 at Ex. 2.). This 24-page memorandum purports to set forth the Secretary's reasons for determining that the Cowlitz Parcel qualifies as the Cowlitz Tribe's initial reservation. It also relies on gaming qualification decision for two other tribes, which were prepared after the 2010 ROD that Plaintiffs challenge in this case. (*Id.*).

Thereafter, the Federal Defendant proceeded to file their summary judgment briefs, addressing the October 1, 2012 Revised Initial Reservation Opinion, rather than the 2010 Initial Reservation Opinion on which the Secretary based the 2010 ROD. (*See e.g.* Dkt. Nos. 71, 72.). Plaintiffs now move to strike the supplemental record decision and to prohibit the Federal Defendant and Intervenor-Defendants' reliance thereon. (Dkt. No. 77.). They also seek to suspend the current scheduling order pending the Court's resolution of the motion to strike. (Dkt. No. 79.). The matter was reassigned to this United States District Court Judge on November 5, 2012. (Dkt. No. 83.). This Court heard oral arguments on the pending motions on March 7, 2012.

III. DISCUSSION

Plaintiffs move to strike the Supplemental Record of Decision ("Supplemental ROD") for the following reasons. First, they claim that the Federal Defendants acted in contravention of Judge Roberts' order. They point out that the Court denied the request for remand and only allowed the Federal Defendants extra time "to reconsider and potentially rescind the challenged determination." (Dkt. No. 77 at 2 quoting Dkt. No. 66 at 2.). However, Plaintiffs argue, the Federal Defendants did not rescind or otherwise alter the challenged decision; instead, they chose to re-write the 2010 Initial Reservation Opinion to strengthen the administrative record on which the 2010 ROD rests. (Dkt. No. 77 at 6 3; TR at 15.). To wit, the Federal Defendants filed the 2012 Revised Initial Reservation Opinion, a "point-by-point" rebuttal to Plaintiffs' summary judgment arguments, and now purport to have "supplemented" the 2010 ROD with it. (TR at 6.). Plaintiffs assert that this legal maneuvering violates Judge Roberts' order.

Next, Plaintiffs argue that the DOI cannot supersede the 2010 ROD with an "entirely new" agency action without first obtaining leave of this Court. (Dkt. No. 82.). Plaintiffs assert that the filing of an appeal of an agency action in district court is an "event of jurisdictional significance."

(*Id.* at 4.). Once a district court assumes jurisdiction over an appeal of a final agency decision, no further agency action is permissible. (*Id.*). In Plaintiffs' view, to hold otherwise would mean that an agency could strip a reviewing court of its jurisdiction at any time by simply re-opening and/or altering its decision post-filing.

Plaintiffs further argue that under the Administrative Procedures Act ("APA"), courts are only allowed to review agency decisions that are final. According to Plaintiffs, the finality requirement preserves the proper role of federal courts under Article III by ensuring that courts do not review tentative agency decision. (*Id.* at 6.). Plaintiffs claim that if an agency was allowed to unilaterally change a decision after a court assumed jurisdiction, then courts would always run the risk of reviewing tentative agency decisions. (*Id.* at 7.). "To be sure, an agency can admit error, rescind its decision, and move to have a case dismissed as moot. But it cannot rewrite a portion of a final decision in the midst of litigation and claim that the new explanation is incorporated into a decision made two years prior, without violating the principles of the doctrines of finality, ripeness, and exhaustion protect." (*Id.*).

Plaintiffs charge that the Federal Defendants' actions in this case epitomizes the very type of post-hoc rationalization that the APA prohibits. (Dkt. No. 77 at 6 citing *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-40 (1981) ("[P]ost hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action")). Plaintiffs argue that the Supplemental ROD is nothing more than a "well-dressed" post-hoc justification for a decision made almost two years ago, and as such, cannot be the bases for the DOI's decision. "[T]he record to be considered by [this Court] 'consists of the administrative record compiled by the agency in advance of litigation, not any record thereafter constructed in the

reviewing court.'" (Dkt. No. 77 at 8 quoting *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987).).

In Plaintiffs' view, the Federal Defendants have two options here. They can either rescind the 2010 ROD, thereby rendering this case moot, or they can defend the 2010 ROD based on the record as it existed at the time the decision was made. What they cannot do, Plaintiffs argue, is "reach a new decision during litigation and pretend it happened two years ago." (Dkt. No. 77 at 3.). Accordingly, Plaintiffs move to strike the Supplemental ROD.

Federal Defendants counter that the DOI has the inherent authority to reconsider its decisions, and that it acted pursuant to this authority when it reconsidered the 2010 ROD in light of documents it had previously overlooked, and when it issued the Supplemental ROD. (Dkt. No. 79 at 4.). They argue that Plaintiffs' contention that the Supplemental ROD is a post-hoc rationalization is off-point because the Supplemental ROD is not an after-the-fact explanation in a judicial proceeding; rather, it is an entirely new agency action. *Id.* at 5-6. Federal Defendants further argue that Plaintiffs seek to strike from the judicial docket the only document that can serve as a basis for their challenges to the agency's reservation determination. *Id.* at 7. What Plaintiffs propose, Federal Defendants argue, would result in having the parties brief, and the Court adjudicate, a portion of the 2010 ROD that no longer has any legal effect. *Id.* "Granting Plaintiffs' their requested relief would [] result in an impractical waste of the parties' and the Court's resources. If the parties were to proceed with litigation over the initial reservation determination in the December 2010 ROD, the remedy would be a remand to the agency for further consideration…[t]he remand has now occurred…" *Id.* at 7-8.

The Court agrees with Plaintiffs that Judge Roberts' order did not give the Federal Defendants carte blanche to modify the 2010 ROD any way they saw fit. Judge Roberts *denied*

the Federal Defendants' motion to remand. (Dkt. No. 66 at 3.). He did, however, recognize that if the agency reviewed the previously "overlooked" documents and decided to reconsider or rescind its decision based on that review, it would be a waste of judicial resources to force the parties to continue in this litigation on the 2010 ROD. Therefore, in the interest of "judicial economy," Judge Roberts afforded the Federal Defendants an opportunity to "reconsider and potentially *rescind* the challenged determination." (*Id.* at 2) (emphasis added). "An extension will conserve judicial resources, as well as those of the parties, *by preventing litigation that may be premature or moot.*" (*Id.*) (emphasis added). The Federal Defendants' contention that Judge Roberts' instruction that they notify the Court if they decide to "rescind or otherwise alter their determination" gave them the freedom to supplement the 2010 ROD takes the language of Judge Roberts' order too far. Reading the order as a whole, it is clear that Judge Roberts contemplated that the Federal Defendants would either rescind the 2010 ROD, thereby rendering this litigation moot, or defend the 2010 ROD on the record as it existed at the time that the decision was made.

Nor can the agency unilaterally decide to change or alter the 2010 ROD. The Federal Defendants argue that it is a "well-established legal principle that '[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.'" (Dkt. No. 69 at 5 quoting *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980).). Federal Defendants cite a number of cases in support of this proposition. (Dkt. No. 79 at 5.). Not one of those cases, however, involved agency reconsideration of a final agency decision while the action was under review by a federal court. *See Trujillo*, 621 F.2d at 1086 (EEOC had authority to rescind initial right-to-sue letter in response to a request for reconsideration before judicial review); *Dun & Bradstreet Corp. v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) (plaintiff filed a takings claim based on Postal

Service's reversal of interim decision prior to judicial review); *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 823 (8th Cir. 2006) (federal agency revised quotas "to correct a major error" prior to judicial proceedings); *Belville Min. Co. v. United States*, 999 F.2d 989, 997 (9th Cir. 1993) (Office of Surface Mining reversed initial determination as to mining rights prompting judicial challenge of reversal). These cases do not stand for the proposition that an agency may unilaterally correct its final decision *after* a case has been filed in district court.

To allow the Federal Defendants to unilaterally change the 2010 ROD would run afoul of the APA's limits on administrative review and undermine this Court's jurisdiction. Under the APA, a district court may not review an agency decision until it is final. *American Petroleum Institute v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012). The APA finality requirement serves a critical purpose. It preserves the proper role of federal courts under Article III by ensuring that courts do not review tentative agency decisions, preventing courts from "'entangling themselves in abstract disagreements over administrative policies, and ...protect[ing] the agencies from judicial interference'" in an ongoing decision-making process. *Id.* at 386; *Panvano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996) ("Parties are generally required to exhaust their administrative remedies, in part because of concerns for separation of powers"). It is for this reason that once a district court assumes jurisdiction over an appeal of a final agency decision, the agency's authority over the decision is divested. *See Doctors Nursing & Rehabiliation Center v. Sebelius*, 613 F.3d 672, 677-78 (7th Cir. 2010) (stating that an agency may not divest a district court of jurisdiction simply by reopening and reconsidering a final agency decision). Accordingly, this Court finds that the Federal Defendants did not have the authority to supplement the 2010 ROD with the 2012 Revised Initial Reservation Decision.

Nor can the Federal Defendants cannot supplement the administrative record with the 2012 Revised Initial Reservation Decision. It is black letter law that the record to be considered by this Court "consists of the administrative record compiled by the agency in *advance of litigation*, not any record thereafter constructed in the reviewing court." *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (emphasis added) (rejecting agency's attempt to submit a litigation affidavit as a post hoc rationalization of the agency's action); *see also, Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (rejecting agency's rationale as post hoc rationalization not included in administrative record); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-40 (1981) ("[P]ost hoc rationalization of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"). Accordingly, the Federal Defendants cannot "incorporate" a 2012 explanation into a 2010 ROD by characterizing it as a "Supplemental Record of Decision."

However, the Court is now in a conundrum. The Court notes that Plaintiffs opposed the Federal Defendants' motion to remand, yet remand is the relief that they sought on the initial reservation determination because the agency had failed to provide a "reasoned explanation for his decision." The Secretary has now provided such a reasoned explanation. Plaintiffs again oppose remand and ask the Court to strike the Supplemental ROD. If the Court were to grant Plaintiffs' request, the parties would be litigating the 2010 Initial Reservation Determination, a determination that has been withdrawn and superceded. The Court will not waste its or the parties' resources on such a fruitless endeavor. *See Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong"). The Court is also cognizant of the fact that the parties have been locked in this battle for nearly eleven years. (TR at 13.). However, the APA

requires that the Federal Defendants conform to its dictates, disallowing amendments to a final decision once a case has been filed in district court. Accordingly, the Court will remand this action to the agency with instructions to rescind the 2010 ROD. Since this is a case where the agency has already reconsidered and revised its final decision and since the parties represent to the Court that the agency is not required to provide public notice under IGRA (which is the only portion of the 2010 ROD being supplemented), The Court will require the agency to issue a new decision of record within sixty (60) days of the date of this order, unless good cause is shown why it cannot do so. *See Fulton v. FPC*, 512 F.2d 947, 955 (D.C. Cir. 1975).

IV. CONCLUSION

For the foregoing reasons, it is HEREBY ordered that:

(1) Plaintiffs' motion to strike the Supplemental ROD is DENIED;

(2) Plaintiffs' motion to suspend the scheduling order pending resolution of the motion to strike is DENIED as moot;

(3) This case is remanded to the DOI;

(4) The agency must issue a new decision of record within sixty (60) days of the date of this order; and

(5) This case is hereby DISMISSED as moot.

Dated this 13th day of March, 2013.

Barbara Jacobs Rothstein
U.S. District Court Judge

Appendix L

Letter from Atty. Gen. Strange to Joe Espy (Oct. 19, 2012)

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
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MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

October 19, 2012

VIA HAND DELIVERY:
Mr. Joseph C. Espy, III
Melton, Espy & Williams
Attorneys at Law
255 Dexter Avenue
Montgomery, Alabama 36104

Dear Joe:

Thank you for meeting with us to discuss the interests of your clients, Milton McGregor and Victoryland, in opening a casino in Macon County and offering a game that is sometimes referred to as "electronic bingo." As of now, I do not know precisely what sorts of gambling devices your clients hope to operate in Macon County, and I do not know the precise business model under which your clients plan to operate. But assuming that they are the same sorts of machines and business models we have seen in the past two years at Greenetrack and other locations in Greene County and at Center Stage in Houston County, I want to make my position clear and let you know of the options I believe your clients have going forward. For these purposes, the Macon County Bingo Amendment is not meaningfully different from the Greene County and Houston County Bingo Amendments. Thus, my position on the legality of your clients' machines and operations, and on what options your clients have, is the same as it has been in those two other counties.

The operations we have seen over the past two years have been illegal for at least three reasons.

First, the machines they have used have been slot machines, as defined in Ala. Code §13A-12-20 (1975). These machines have accepted cash value and then awarded prizes based on a game of chance. The slot-machine statute makes it illegal to possess a slot machine, even when the possessor does not have the "intention that it be used in the advancement of unlawful gambling activity." Ala. Code §13A-12-27 (1975). The Legislature and people of Alabama enacted the "bingo" amendments against the backdrop of this strict-liability slot-machine statute, and they cannot be deemed to have impliedly repealed this code provision as to slot

machines that purport to play "bingo." Therefore, regardless of what game is purportedly being played on these machines, they are illegal under the Alabama Code.

Second and at any rate, even if these machines had not been slot machines, they have not played the game of "bingo" that is made legal by any of the bingo amendments, as explained in *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65 (Ala. 2009). During the games, there have not been numbers announced one by one, and the players have not been required to individually daub matching bingo numbers on a card, one by one. This requirement is critical. Because these machines have not met the definition of "bingo," they have been unlawful gambling devices under Ala. Code §13A-12-20.

Third, the operations in these locations have been illegal because the bingo amendments do not authorize for-profit "bingo" operations. I realize that the Macon County Amendment does have one difference from the other amendments: it says the "nonprofit organization may enter into a contract with any individual, firm, association, or corporation to have the individual or entity operate bingo games or concessions on behalf of the nonprofit organization." But as is the case with the other amendments, the operation of the bingo games itself must be for charitable, educational, or other similar purposes. Making profits for slot-machine companies is not one of those purposes. Accordingly, any purported "bingo" arrangement that is designed to make profits for your clients or others is not authorized under the amendment.

Despite our efforts to enforce the law, some of these operations have sought to reopen, in outright defiance of the law, even after law enforcement has seized their machines and while proceedings to forfeit their machines have been pending in the courts. I want to assure you that we will continue to enforce the law throughout Alabama.

You also are likely aware of the situation with Class II gaming on Indian land. Federal law governs those facilities, and I do not have jurisdiction to enforce either federal or Alabama law against them. That said, I believe that those facilities are in violation of federal law, and have taken every measure at my disposal to encourage the Obama Administration to enforce the law against those facilities. But the Administration has refused to enforce the law in this area. I attach, for your information, three letters I sent the Administration on this issue during the last two years, as well as the Administration's hostile response. I would note that the

Administration does not take the position that "electronic bingo" is legal under Alabama law; its position is that "electronic bingo" is legal on Indian land under federal law regardless of whether it is legal under Alabama law. In any event, your clients should be fully aware that they cannot justify opening operations within state jurisdiction that are illegal under state law, based on the fact that Indian casinos are operating on land over which the State does not have jurisdiction, and where federal law governs.

If your clients' plans are legally problematic in light of what I have stated above, the most prudent course for them, and the best course for Alabama, would be for them to remain closed and to instead use their substantial capital and business acumen to pursue other endeavors that are better for Alabama and its people, including those in Macon County. Build a manufacturing facility. Build a hospital. Those operations are clearly legal and would provide good jobs to Alabama residents. But if your clients are intent upon operating an "electronic bingo" casino no matter what I say, it seems to me that they have two other options, which are very similar to the options we have given operations in other locations in the State.

First, your clients could amicably allow state law enforcement agents to seize some or all of the machines that your clients intend to operate and evidence about how they would be operated. Your clients could then argue their case in court through a forfeiture action, which we would be willing to expedite. To be clear, the State could not agree to allow your clients to open until after the court had issued a final judgment finding the operation to be legal.

Second, your clients could reopen and assume the risk that they are violating the law. Law enforcement action would then follow as appropriate.

For various reasons, the first option is far superior for all parties involved. It is unclear to me why your clients would not readily welcome the possibility of obtaining an up-or-down ruling from a neutral judge, possibly before the end of this year, on the legality of their proposed operations. If you would like to discuss this option further, please contact John Neiman at (334)-353-2187 as soon as possible.

Sincerely,

Luther Strange

Luther Strange
Attorney General

LS:JN:smm
Enclosure

Appendix M

Indian Reorganization Act

Congress approved February 28, 1931, June 9, 1932, and June 13, 1933, are hereby extended one and three years, respectively, from June 13, 1934.

Amendment.

SEC. 2. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 18, 1934.

[CHAPTER 576.]

AN ACT

June 18, 1934.
[S. 3645.]
[Public, No. 383.]

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Indian affairs.
Future allotment in severalty prohibited.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Existing trust periods extended.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*,

Provisos.
Existing valid rights not affected.

Lands in reclamation projects.

Order temporarily withdrawing Papago Reservation lands from mineral entry, etc., revoked.

Resulting damages to be paid tribe; limitation.

Annual rental to be paid.

Applicant for mineral patent must first make deposit of rent.

That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Patentee to pay, to credit of Indians, damages, for loss of improvements.

Refund, if not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Rights of way, etc., not restricted.

Vol. 46, p. 1202

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

No transfers of restricted Indian lands, etc.; exception.

Provisos.
Lands may descend only to Indian tribe or successor corporation.

Descent, etc., according to applicable laws.

Voluntary exchanges for proper consolidations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

Acquisitions, for providing lands for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

Appropriation authorized.

Proviso.
Not to be used outside boundary lines of Navajo reservation.

Ante, p. 960.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Balances available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Title vested in United States in trust. Lands exempt from taxation.

Indian forestry units. Regulations governing.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

New Indian reservations on lands acquired by proclamation.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Proviso. Additions, for exclusive use of Indians.

Holdings for homesteads outside of reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sum for defraying expenses of tribal organization herein created.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Establishment of revolving fund, to make loans for economic development.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Repayments to be credited to revolving fund. Report to Congress.

Vocational and trade school. Annual appropriation for loans, to provide payment for tuition, etc.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Proviso. Indian students in secondary, etc., schools.

Reimbursable.

Standards of health, ability, etc., to be established.

Appointments.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Provisions dealing with Indian corporations, education, etc., applicable to Alaska.

Designated sections inapplicable to various tribes.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of

such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

Protecting treaty rights with Sioux Indians.
Continuation of allowances, etc.
Vol. 23, p. 894; Vol. 29, p. 334; Vol. 25, p. 451.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

No person to receive more than one allowance.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

No Indian claim or suit impaired by this Act.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

Indians residing on same reservation may organize for common welfare.

Effective, when ratified.

Revocation, amendments, etc.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Additional powers vested in tribe.

Secretary to advise tribe of contemplated appropriation estimates.

Charters.
Issue of, to each tribe, upon petition therefor.
Proviso.
Ratification condition precedent to operation.
Powers conferred.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Revocation.

Inapplicable to reservation rejecting proposition.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Term "Indian" defined.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

"Tribe."

"Adult Indians."

Approved, June 18, 1934.

[CHAPTER 577.]

June 18, 1934.
[S. 3742.]
[Public, No. 384.]

AN ACT

Granting the consent of Congress to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a toll bridge across Lake Champlain at or near West Swanton, Vermont.

Lake Champlain. Vermont may bridge, at West Swanton.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby granted to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a bridge and approaches thereto across Lake Champlain, at a point suitable to the interests of navigation, between a point at or near East Alburg, Vermont, and a point at or near West Swanton, Vermont, in accordance with the provisions of an Act entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906, and subject to the conditions and limitations contained in this Act.

Construction.
Vol. 34, p. 84.

Toll rates to be adjusted to provide cost of operation and sinking fund.

SEC. 2. If tolls are charged for the use of such bridge, the rates of tolls may be so adjusted as to provide a fund sufficient to pay (a) the reasonable cost of maintenance, repair, and operation of the said bridge and its approaches, and (b) the amortization within a reasonable time, and not exceeding twenty-five years from the