IN THE SUPREME COURT OF ALABAMA

CASE NO. 1151312

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Casey Marie Wilkes and Alexander Jack Russell,

APPELLANTS,

v.
Wind Creek Casino and Hotel, PCI Gaming and
The Poarch Band of Creek Indians

APPELLEES

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On Appeal from the Circuit Court of Elmore County
CV-2015-901734

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# BRIEF OF THE APPELLEES

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## STATEMENT REGARDING ORAL ARGUMENT

The law regarding tribal sovereign immunity, which was the sole basis of the Circuit Court's decision granting summary judgment in favor of the Appellees, is well settled. Accordingly, oral argument is unlikely to aid this Court in deciding this case.

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## STATEMENT OF JURISDICTION

The trial court's order granting summary judgment was based upon its determination that the sovereign immunity of the Tribal Defendants prevented the trial court from obtaining subject matter jurisdiction. (C. 794-797) Likewise, this Court lacks subject matter jurisdiction over this action due to the Tribal Defendants' tribal sovereign immunity.

## TABLE OF AUTHORITIES

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## STATEMENT OF THE CASE

### I. The Nature of the Case

Ms. Wilkes and Mr. Russell (collectively referred to as Ms. Wilkes) seek money damages against the Wind Creek Casino and Hotel, PCI Gaming, and the Poarch Band of Creek Indians (collectively referred to as Tribal Defendants) for injuries each suffered in an automobile accident caused by Barbara Spraggins, an employee of the Tribal Defendants. The Poarch Band of Creek Indians is a federally recognized Indian tribe and it, along with its commercial arms and enterprises, possess sovereign immunity from the claims of Ms. Wilkes.

Additionally, Ms. Spraggins was acting outside the line and scope of her employment because she had left her employment for personal motives, which placed her in a location unrelated to her employment. Ms. Spraggins left the Wind Creek Casino and Hotel, Wetumpka (Wind Creek) on a work-related errand which took her to a warehouse in Montgomery, Alabama, which is south of Wind Creek. The wreck occurred north of Wind Creek. Ms. Spraggins could not offer any work-related reason for her being north of Wind Creek.

## II. Proceedings Below

The complaint was filed on February 16, 2015. (C. 2) After discovery by all parties, the Tribal Defendants filed motions for summary judgment based upon their sovereign immunity and the contention that they could not be vicariously liable for Ms. Spraggins' negligence because she was not acting within the scope of her employment at the time of the accident. (C. 305, 346) After receiving briefs and hearing oral arguments, the trial court granted the Tribal Defendants summary judgment based upon their sovereign immunity. (C. 794) On August 10, 2016, the summary judgment order was amended to reflect the proper names of the Tribal Defendants, and an order was entered the same date making the judgment a final judgment. (C. 808, 809) A timely appeal was filed.

## STATEMENT OF THE ISSUES

I. Whether the Tribal Defendants possess sovereign immunity?

II. Whether Ms. Spraggins was acting within the line and scope of her employment at the time of the accident?

## STATEMENT OF FACTS

The only facts relevant to the trial court's grant of summary judgment in favor of the Tribal Defendants are that the Poarch Band of Creek Indians is a federally recognized Indian tribe (C. 339, 342) and that Wind Creek Casino and Hotel, Wetumpka, and PCI Gaming Authority are business arms of the Poarch Band. (C. 299, 300). *See also Alabama v. PCI Gaming*, 801 F.3d 1278 (11th Cir. 2015); 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017)[1]

The Tribal Defendants offer the following statement of facts to balance the statement of facts submitted by Wilkes and to support their alternative contention that Spraggins was acting outside the line and scope of her employment when the automobile accident occurred.

Defendant Barbie Spraggins ("Spraggins") started work with Wind Creek on November 4, 2013. (C. 309) Prior to her starting work, she was given a drug and alcohol screen which she passed. (C. 317) Spraggins worked as a facilities administrator and described her day-to-day job

[1] The contents of the Federal Register are judicially noticed by operation of federal law. 44 U.S.C. § 1507.

responsibilities as doing all of the purchasing for anything having to do with maintenance of the Wind Creek facility; making sure that check requests were done for multiple types of bills whether utility bills or invoices from a contractor to clean out the sewer; making sure these check requests were sent to finance; making sure office supplies were ordered and purchases were made for in-house projects; and going to pick up things when they were needed - paint supplies from Sherwin Williams and building supplies from Russell Do-It Center. She assisted the facility director in the general operation of his office. (C. 308,309)

Sometime after Spraggins had completed her three-month probation period as a new employee, she was asked to go to the Human Resources office because a coworker had reported that she smelled of alcohol. Spraggins had not been drinking that day, but it was more than likely that she had been drinking the night before. She was counseled about needing to make sure she watched what she drank and not to drink the night before she comes to work. (C. 313) A few weeks later, Spraggins was reported as smelling of alcohol and a breathalyzer test was conducted. The test was administered after Spraggins had signed a waiver giving them

permission to perform the test. Spraggins did not know the test results but was told to go home that day. She turned in her keys, phone, gaming license badge and left. She had been drinking the night before, but not the day of, the second incident. (C. 315-316)

The breathalyzer test revealed the presence of alcohol and yielded a reading of .07. (C. 335, 336)

Following the second incident, Spraggins thinks she was given a three-day suspension and placed on three-months' probation with the understanding that she could be breathalyzed and drug tested at any given time on any given day. (C. 317) Spraggins was given information about the Employee Assistance Program ("EAP") and was made to contact the EAP administrator, which is a company independent of Wind Creek that is retained to assist employees. (C. 313)

The EAP made Spraggins go to a doctor and referred her to a psychiatrist at Alabama Psychiatric Association in Montgomery, Alabama. (C. 318) Spraggins went to the psychiatrist every other week for the first month or so. Her last visit was in September 2015. Spraggins cancelled her October visit due to a work conflict and never rescheduled it. She visited the psychiatrist for about six

months. (C. 318, 319)

Spraggins usually arrived at work at 8:00 in the morning. (C. 317) On the morning of January 1, 2015, according to what Spraggins has been told, she left Wind Creek to go to the warehouse to pick up lamp shades. (C. 326) Lamp shades were found in the back of the pick-up truck after Spraggins's accident. (C. 326)

The warehouse contains attic stock, which is back stock of items left over from the construction of Wind Creek. As part of her job, Spraggins would keep a little list of things that were needed, and when she had down time, she would run over to the warehouse and pick up several of the items that were on her list. She doesn't recall if someone told her to go pick up the lamp shades or if she did that on her own. (C. 326)

The warehouse is located close to the entrance of Gunter Air Force base, approximately fifteen minutes south of Wind Creek. (C. 327) The closest way to go to the warehouse is to go south on Highway 231. (C. 328)

The accident occurred on Highway 14 on the bridge over Mortar Creek, which is about 15 minutes north of Wind Creek. (C. 300) Spraggins has no explanation for why she was

north of Wind Creek: "I can't figure that out." (C. 328) Spraggins testified: "But, I mean, there's no - - I don't - - I don't know of a reason." (C. 328) Spraggins later told Johnny Steadham, one of her supervisors, that she was not feeling well and had gone by to see her girlfriend. (C. 337)

Spraggins was an employee of Wind Creek Hotel and Casino, Wetumpka and was driving a vehicle owned by the Tribal Defendants when the automobile accident occurred. (C. 300, 301) She was intoxicated at the time of the accident with a blood alcohol content in excess of .20. (C. 301).

Spraggins was terminated within days after the accident and before she was able to return to work. (C. 337)

## STATEMENT OF THE STANDARD OF REVIEW

The Appellants have accurately described the applicable standard of review.

## SUMMARY OF THE ARGUMENT

The Circuit Court correctly granted summary judgment to the Tribal Defendants on the basis of tribal sovereign immunity. Ms. Wilkes' attacks on the Circuit Court's decision are based on the erroneous claim that the United States Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), abrogated the Tribal Defendants' tribal sovereign immunity. Ms. Wilkes grossly misreads the *Carcieri* decision and misunderstands several fundamental principles of federal Indian law. In addition, her argument has been rejected in toto by the Eleventh Circuit Court of Appeals. See *Alabama v. PCI Gaming*, 801 F.3d 1278(11th Cir. 2015) and *Poarch Band of Creek Indians v. Hildreth*, 2016 WL 3668021.

The Tribal Defendants, as a matter of settled federal law, possess sovereign immunity from lawsuits unless that immunity is waived by the tribe or abrogated by Congress. While Ms. Wilkes attempts to call this fact into question in a number of ways, all of her arguments are merit-less. The United States Supreme Court continues to recognize the doctrine of tribal sovereign immunity. The Tribe is a duly and properly federally recognized tribe. The trust status

of the Tribe's lands is neither susceptible to being challenged in this lawsuit nor relevant to the Tribal Defendants' tribal sovereign immunity. These simple, incontrovertible facts refute Ms. Wilkes's arguments in their entirety and call for affirmance of the Circuit Court's decision.

Additionally, the Tribal Defendants are not liable for the negligence or wantonness of Spraggins because she was not within the scope of her employment at the time of the accident. All of the evidence shows that Spraggins left Wind Creek on an errand to go to a warehouse located fifteen minutes south of Wind Creek and that the accident occurred on a bridge located fifteen minutes north of Wind Creek, a couple of hours after Ms. Spraggins left on her errand. Ms. Spraggins did not know why she was on the bridge when the accident happened and could not provide any work-related reason for her being there.

Alabama law dictates that the pertinent question is whether the employee was engaged in an act that she was hired to perform or whether her conduct was impelled by motives that were wholly personal. *Singleton v. Burchfield*, 362 F.Supp.2d 1291 (M.D. Ala. 2005). Ms. Spraggins was not

performing an act she was hired to perform as there was no work-related reason for her being north of Wind Creek.

## ARGUMENT

### I. The Tribal Defendants Have Sovereign Immunity.

As the trial court properly held, the Tribal Defendants are entitled to sovereign immunity which bars this suit. (C. 1307.) Both the existence of tribal sovereign immunity and its applicability to these Tribal Defendants are settled matters of federal law.

#### A. The Poarch Band's Sovereign Immunity Is Settled Federal Law.

Questions of tribal sovereign immunity are questions of federal law. "Only Congress, and not a state legislature, can abrogate tribal immunity, because 'tribal immunity is a matter of federal law and not subject to diminution by the States.'" *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1230 n.5 (11th Cir. 2012) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)).

It is well-settled "that 'as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'"

*Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1203-04 (11th Cir. 2012) (quoting *Kiowa Tribe*, 523 U.S. at 754); See *also Michigan v. Bay Mills Indian Community*, --- U.S. ----, 134 S.Ct. 2024, 2030-31, 188 L.Ed.2d 1071, (2014) ("[W]e have time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization or a waiver." (Internal punctuation and citation omitted)). Following the *Carcieri* decision, the Eleventh Court of Appeals affirmed the Poarch Band's sovereign immunity:

> Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v.Citizen Band Potawatomi Indian Tribe of Okla.*,498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). Indian tribes therefore possess "'the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Seminole Tribe II*, 181 F.3d at 1241 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). A suit against a tribe is "barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit." *Id.* Although the Supreme Court has expressed doubts about "the wisdom of" tribal immunity, the Court nonetheless has recognized that "the doctrine of tribal immunity is settled law and controls" unless and until Congress decides to limit tribal immunity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756-58 (1998); *see also Bay Mills*, 134

> S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.")

*Alabama v. PCI Gaming*, 801 F.3d 1278, 1289 (11th Cir. 2015). Thus, the Poarch Band enjoys sovereign immunity absent an express tribal waiver or abrogation of that immunity. In this case, there has been no abrogation or waiver; indeed, none is even alleged. The Poarch Band is therefore entitled to sovereign immunity, and the trial court's order granting summary judgment in their favor should be affirmed.

### B. Tribal Sovereign Immunity Applies to A Tribe's Commercial Activities and Enterprises.

It is equally well settled that tribal sovereign immunity applies to a tribe's commercial activities and extends to tribal enterprises such as Defendants Wind Creek Casino and Hotel, Wetumpka and PCI Gaming Authority. A host of federal and state courts have so held. *See, e.g., PCI Gaming, supra; Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009); *Miller v. Wright*, 705 F.3d 919, 923-24 (9th Cir. 2013), *cert denied*, 133 S. Ct. 2829 (2013); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) ("When the tribe establishes an entity to conduct certain activities, the

entity is immune if it functions as an arm of the tribe."); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) ("The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity."); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986); *Bassett v. Mashantucket Pequot Museum and Research*, 221 F.Supp.2d 271, 277 (D. Conn. 2002); *Kosceliak v. Stockbridge-Munsee Cmty.*, 811 N.W.2d 451, 456 (Wis. Ct. App. 2012); *see also Kiowa Tribe* 523 U.S. at 754-55 (finding no distinction between governmental and commercial activities of a tribe when deciding whether there is tribal immunity from suit). These decisions all illustrate the broad acceptance and uncontroversial nature of the notion that tribal sovereign immunity extends to tribal economic enterprises such as Defendants PCI Gaming Authority and Wind Creek Casino and Hotel, Wetumpka.

In *PCI Gaming*, the Eleventh Circuit specifically addressed the extension of the Poarch Band's tribal immunity to Defendant PCI Gaming Authority. The Court held that PCI Gaming, an entity of the Tribe which engages in commercial activities, shares in Poarch Band's immunity because it

operates as an enterprise of the Tribe. Wind Creek Casino and Hotel, Wetumpka is indistinguishable from PCI Gaming in this respect, and the trial court's order granting summary judgment in their favor should be affirmed.

### C. Tribal Sovereign Immunity Applies to Incidents Which Occur Off of Tribal Lands.

Finally, it is well settled that tribal sovereign immunity applies regardless of whether the incident at issue occurs on tribal lands. The United States Supreme Court recently reaffirmed this fact in the *Bay Mills* case, which arose out of an Indian tribe's construction of a casino on allegedly non-tribal lands. The State of Michigan specifically asked the Court to revisit its earlier decisions holding that tribal sovereign immunity extends to off-reservation conduct, but the Court declined and instead reaffirmed its prior stance that a tribe's sovereign immunity extends to commercial activities that take place off of tribal lands. *See Bay Mills*, 134 S.Ct. at 2038-39; *see also Kiowa Tribe*, 523 U.S. at 760 (Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off reservation.); *Seneca Telephone Co. v. Miami Tribe of*

*Oklahoma*, 253 P.3d 53, 2011 OK 15 (Okla. 2011)(An Indian Tribe's tribal immunity protects it from claims of negligent excavation work on land held in fee.); *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009)("The Supreme Court, however, has 'sustained tribal immunity from suit without drawing a distinction based on where tribal activities occurred.'")

Because tribal sovereign immunity applies with equal force on and off Indian lands, the location of the subject incident is irrelevant. Tribal sovereign immunity bars all claims for relief against the Tribal Defendants, and the trial court's order granting summary judgment in their favor should be affirmed.

### D. Ms. Wilkes' Arguments Misconstrues Tribal Sovereign Immunity.

Ms. Wilkes makes two equally unavailing arguments against the Tribal Defendants' sovereign immunity. First, she argues that courts increasingly disfavor tribal sovereign immunity, so this Court should decline to recognize it. (See Appellant's Br. 24-27.) This is false. Case law reveals no trend away from the recognition of sovereign immunity, and the United States Supreme Court's

most recent decisions addressing the doctrine unquestionably affirmed its continuing vitality. *See Kiowa Tribe*, 523 U.S. at 1705; *Bay Mills*, 134 S.Ct. at 2036. Second, Ms. Wilkes erroneously argues that the Tribe is not federally recognized, and therefore not entitled to sovereign immunity. (See Appellant's Br. 27- 53.) This contention, in addition to misunderstanding the nature and source of tribal sovereign immunity, is also based on a false and easily refuted premise. Neither line of argument reveals any error in the trial court's reasoning and decision.

**1. Kiowa Tribe, Bay Mills and other case law affirm tribal sovereign immunity.**

Ms. Wilkes claims that "courts increasingly disfavor tribal immunity," implying that the doctrine is eroding. (Appellant's Br. 19.) As support for this bald statement, Ms. Wilkes cites irrelevant United States Supreme Court decisions from 1974 and 1991 and offers a misleading quote from the more recent and controlling *Kiowa Tribe* decision. (*Id.* at 19-21.) But she ignores the actual holding of *Kiowa Tribe*, its affirmation in *Bay Mills*, and a number of very recent Eleventh Circuit precedents. See, e.g., *PCI Gaming*, *supra*, *Poarch Band of Creek Indians v. Hildreth*, 2016 WL

3668021, *Contour Spa*, 692 F.3d at 1203-04; *Furry*, 685 F.3d at 1226.

As she did before the trial court, Ms. Wilkes provides a lengthy block quote from Justice Kennedy that questions whether the doctrine of tribal sovereign immunity should be modified. (See Appellant's Br. at 21 (quoting *Kiowa Tribe*, 523 U.S. at 1704)). But she fails to note the Court's actual holding in that case - that tribal sovereign immunity continues to be the law of the land and will continue to apply unless and until abrogated by Congress. *See Kiowa Tribe*, 523 U.S. at 1705. The Supreme Court expressly held in Kiowa Tribe that "Congress … has always been at liberty to dispense with such tribal immunity or to limit it. It has not yet done so. … [W]e decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits …." *Id.* (internal quotation omitted).

The views expressed in *Kiowa Tribe* were affirmed in *Bay Mills*, when the Supreme Court stated that Indian tribes enjoy the core aspects of sovereignty which include immunity from suit. *Bay Mills*, 134 S.Ct. at 2030. Citing *Kiowa Tribe*, the Supreme Court further stated that it had "time and again" declared the doctrine of tribal immunity to be

"settled law." *Id.* Finally, the Supreme Court specifically affirmed the holding in *Kiowa Tribe* that tribal immunity extended to a tribe's commercial activities occurring off of tribal lands. *Id., at 2038.*

Far from abandoning tribal sovereign immunity, *Bay Mills and Kiowa Tribe* reaffirmed the doctrine's continuing validity and vitality. *See Furry*, 685 F.3 at 1229(quoting *Kiowa Tribe's* affirmation of tribal sovereign immunity). Ms. Wilkes' predictions as to how the Supreme Court may rule on tribal sovereign immunity in the future are not relevant. What is relevant are the unequivocal words on this issue from the United States Supreme Court in its most recent cases: "Tribes enjoy immunity from suits" *Kiowa Tribe*, 523 U.S. at 1705; and "All that we said in *Kiowa* applies today." *Bay Mills*, 134 S.Ct. at 2038.

**2. The Supreme Court's *Carcieri* decision has no bearing on questions of federal recognition or tribal sovereign immunity.**

After a lengthy discussion of her views on the source and nature of tribal immunity and congressional authority over Indian tribes, Ms. Wilkes argues that the Tribal Defendants are not entitled to sovereign immunity because the Tribe is not federally recognized. (Appellant's Br. 29-

48.) To support her erroneous claim, Ms. Wilkes relies on the United States Supreme Court's *Carcieri* decision. But *Carcieri* had absolutely nothing to do with tribal sovereign immunity or the authority of the Secretary of the Interior (the Secretary) to formally recognize Indian tribes such as the Poarch Band. It involved only the Secretary's prospective authority to take land into trust for the benefit of certain Indian tribes under a provision of the Indian Reorganization Act of 1934 (the IRA), 25 U.S.C. § 465, and the proper definition of certain terms as used in that Act. Ms. Wilkes' attack on the Tribe's federal recognition, like her reading of *Carcieri*, is deeply flawed.

The Constitution vests the federal government with exclusive authority over relations with Indian tribes,[2] including tribal recognition. See *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 455 (1995). Congress has

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[2]Although her argument fails regardless for reasons discussed below, it is important to note that Ms. Wilkes incorrectly contends that tribal sovereign immunity derives from and is dependent upon the IRA or any other federal statute. Tribal sovereign immunity arises from tribes' status as former sovereign nations. See, e.g., *Kiowa Tribe*, 523 U.S. at 757 ("As sovereigns or quasi-sovereigns, the Indian Nations enjoyed sovereign immunity 'from judicial attack' absent consent to be sued.").

delegated to the Department of the Interior plenary administrative authority in the context of the federal government's dealings with tribes. *See Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) (quoting 25 U.S.C. § 2). Contrary to Ms. Wilkes' argument, the Secretary's authority over the recognition of Indian tribes is neither derived from nor governed by the IRA. Instead, it is controlled by the Federally Recognized 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 the Federal Acknowledgement Process (FAP) regulations promulgated by the Secretary of the Interior at 25 C.F.R. Part 83, pursuant to 25 U.S.C. § 2.[3] Beginning in 1994, the Recognition Act directed the Secretary to maintain a list of federally recognized tribes, which Congress defined for

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[3]Prior to the promulgation of the FAP regulations in 1978, there was no formal process for the federal recognition of Indian tribes. See, e.g., *Montoya v. United States*, 180 U.S. 261, 266 (1901); *United States v. Wright*, 53 F.2d 300, 307 (4th Cir. 1931); *Stand Up for California! v. United States Dep't of Interior*, 919 F. Supp. 2d 51, 69-70 (D.D.C. 2013). 25 U.S.C. § 2, which provides part of the statutory basis for the Secretary's authority to promulgate the FAP regulations, delegates to the Commissioner of Indian Affairs, under the supervision of the Secretary, "the management of all Indian affairs and all matters arising out of Indian relations." *Id.*

purposes of the Recognition Act as including "any Indian or Alaska Native tribe … that the Secretary of the Interior acknowledges to exist as an Indian tribe." *25 U.S.C. § 479a(2)*. That list's inclusion of the Poarch Band of Creek Indians, *see* 82 Fed. Reg. at 4917, definitively refutes Ms. Wilkes' claim that the Tribe lacks formal federal recognition.

The Recognition Act also defeats Ms. Wilkes' spurious argument that the Tribe's recognition under the FAP regulations is the result of an improper attempt by the Secretary to "usurp Congressional authority to define 'Indian' and 'tribe' …." (Appellant's Br. 35.) Congress, in passing the Recognition Act, explicitly approved the FAP regulations as a valid means of bestowing federal recognition on Indian tribes. *See* Pub. L. 103-454, Title I, § 103 (108 Stat. 4791), codified in historical and statutory notes to 25 U.S.C. § 479a ("The Congress finds that … Indian tribes presently may be recognized by Act of Congress [or] *by the administrative procedures set forth in Part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group*

*Exists as an Indian Tribe*' …." (emphasis added)).[4] Ms. Wilkes makes no effort to address Congress's explicit endorsement of the FAP regulations, nor does she respond to the Recognition Act's express declaration that "a tribe that has been recognized in one of these manners [including pursuant to the FAP regulations] may not be terminated except by an Act of Congress." Pub. L. 103-454, Title I, § 103 (108 Stat. 4791), codified in historical and statutory notes to 25 U.S.C. § 479a. Indeed, she assiduously avoids any citation or discussion of 25 U.S.C. § 479a as she counter factually asserts that there is "no evidence that Congress intended for the Department of the Interior to create a regulatory scheme for the purpose of recognizing … previously-unrecognized tribes." (Appellant's Br. 40.)

Ms. Wilkes's argument against the validity of the Tribe's recognition rests on her misreading of two federal court decisions that had nothing to do with federal

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[4]This explicit congressional endorsement of the FAP regulations refutes Ms. Wilkes' ungrounded assertion that "the legitimacy of the recognition process codified in federal regulations at 25 C.F.R. § 83 is now doubtful …." (Appellant's Br. at 37.)

recognition or tribal sovereign immunity.[5] (See Appellant's Br. 29-48 (discussing *Carcieri*, 555 U.S. 379 and *Big Lagoon v. Rancheria v. State of California*, 741 F.3d 1032 (9th Cir. 2014)).) *Carcieri* addressed the definition of "Indian" and the word "now" in the phrase "now under federal jurisdiction" as those terms were used in the IRA. Ms. Wilkes attempts to transplant the IRA's definition of "tribe," as divined in *Carcieri*, into the Recognition Act, an entirely different piece of federal legislation passed sixty years later to address different issues and, most important, containing its own statutory definition of the term "Indian tribe" that *is different than the definition set forth in the IRA*. *Compare* 25 U.S.C. § 479a(2) (defining "Indian tribe" for purposes of the Recognition Act) *with* 25 U.S.C. § 479 (defining "Indian" and "tribe" for purposes of the IRA).[6] The IRA's definition of "tribe" - and hence the

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[5]The fact that the *Carcieri* decision upon which Ms. Wilkes principally relies has nothing to do with federal recognition is simply and decisively illustrated by the fact that the Narragansett Tribe, which the Supreme Court held was not under federal jurisdiction in 1934, remains on the recently published list of federally recognized tribes. See 82 Fed. Reg. at 4917.

[6]The Recognition Act, which controls the question of federal recognition, defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or

*Carcieri* decision and its analysis of that issue - has no bearing on the meaning of that term for purposes of the Recognition Act. Ms. Wilkes' reliance on *Carcieri* to challenge the validity of the Tribe's federal recognition is therefore misplaced.

Ms. Wilkes's reliance on *Big Lagoon* is even more fraught with problems because the Ninth Circuit Court of Appeals, sitting *en banc*, vacated the panel decision relied upon by Ms. Wilkes and replaced it with an opinion that is on all fours with the Eleventh Circuit's decision in *PCI Gaming*, supra. *See Big Lagoon Rancheria v. State of California*, 789 F.3d 947 (9th Circuit 2014.) In any event, however, *Big Lagoon* has no relevance to this case, because like *Carcieri*, *Big Lagoon* involved the propriety of a land-into-trust decision by the Secretary under the IRA and had nothing to do with tribal sovereign immunity. To the extent that *Big Lagoon* has any relevance to Ms. Wilkes's efforts to question the Poarch Band's federal recognition, it serves only to further discredit her argument.

Accordingly, Ms. Wilkes fails in her effort to portray

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community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 479a(2).

this case as one in which a federal regulation conflicts with a governing statute. (See Appellant's Br. at 49.) To the contrary, this is a case of two discrete federal statutes defining similar terms differently in different contexts, and a litigant attempting to conflate those separate definitions to support her legally untenable position. That Ms. Wilkes's brief omits any mention of the one expressly applicable to the federal recognition of Indian tribes is telling.

The United States, through the Secretary's congressionally approved exercise of his authority, has formally recognized the Poarch Band of Creek Indians as an Indian tribe that is entitled to all concomitant benefits and privileges, including sovereign immunity. Pursuant to federal law, that recognition can only be undone by an act of Congress. *See* Pub. L. 103-454, Title I, § 103 (108 Stat. 4791), codified in historical and statutory notes to 25 U.S.C. § 479a. While neither *Carcieri* nor any other federal case, statute, or regulation casts the slightest doubt on the propriety of the Tribe's recognition, two opinions from the Eleventh Circuit Court of Appeals specifically reject Wilkes' *Carcieri* argument and affirm the recognition of the

Poarch Band. *See Alabama v. PCI Gaming*, 801 F.3d 1278(11th Cir. 2015) and *Poarch Band of Creek Indians v. Hildreth*, 2016 WL 3668021. The trial court's order granting summary judgment in favor of the Tribal Defendants on sovereign immunity grounds should be affirmed.

### E. Ms. Wilkes' Argument that Her Claims Did Not Arise out of Conduct on Indian Lands is Irrelevant.

Ms. Wilkes argues that the Tribal Defendants did not establish that the property where the incident occurred was "Indian Lands," and that the *Carcieri* decision prohibits such determination. (Appellants' Br. 53-59) Obviously, the automobile collision in which Ms. Wilkes was injured and is the basis of her claim did not occur on lands of the Poarch Band and no such contention has been made by the Tribal Defendants. Because the injury to Ms. Wilkes occurred on a public highway off of tribal lands, whether land has been taken into trust by the United States for the benefit of the Poarch Band is immaterial and irrelevant to the sovereign immunity of the Tribal Defendants. The Tribal Defendants have provided numerous cases from the United States Supreme Court and various federal courts that tribal sovereign immunity extends to their conduct occurring off of tribal lands. (Appellees' Br. P. 15)

Ms. Wilkes' final argument is also irrelevant to the consideration of tribal immunity. She concludes her brief by contending that the state courts of Alabama have jurisdiction over her tort claims if the Poarch Band is not cloaked in sovereign immunity, and arguing that the Poarch Band is not so protected because its lands have not been properly taken into trust by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934 (the IRA), 25 U.S.C. § 265. Again, Ms. Wilkes is conflating federal recognition of an Indian Tribe with the benefits conferred on Indian tribes by the IRA. As shown previously in this brief, federal recognition of the Poarch Band is not dependent upon compliance with the IRA.[7] (Appellees' Br. P. 19) Thus, Ms. Wilkes' argument is irrelevant.

### F. Courts have universally have held that the Poach Band is a federally recognized tribe and is entitled to sovereign immunity.

The Poarch Band of Creek Indians is a federally recognized Indian tribe that possesses sovereign immunity from suits such as Ms. Wilkes's. That immunity extends to

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[7]The U.S. District Court for the Southern District of Alabama has recently held that the Poarch Band is a federally recognized Indian Tribe and that it is entitled to the benefits provided by the IRA. A copy of the decision is attached in the Appendix to this brief as Exhibit A.

the Tribe's arms and enterprises, i.e., the other Tribal Defendants. It applies whether or not the alleged conduct occurred on Indian lands.

Attached as Exhibit B in the Appendix is a list of cases in which courts have recognized the Poarch Band of Creek Indians as a federally recognized Indian tribe which possesses sovereign immunity. No court has held otherwise. **The trial court's holding on this issue was correct, and its order should be affirmed on that basis.**

## II. Alternatively, The Tribal Defendants Are Due to Be Dismissed Because Defendant Spraggins Was Not Acting Within the Scope of Her Employment at the Time of the Accident.[8]

Wilkes bases her claim against the Tribal Defendants upon the theory of respondeat superior and the allegation that Spraggins was an employee of the Tribal Defendants

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[8] The Tribal Defendants asserted in the trial court as an alternative ground for summary judgment the fact that Defendant Spraggins was acting outside the scope of her employment at the time of the automobile accident. Because of its determination that it lacked subject matter jurisdiction due to the tribal immunity of the Tribal Defendants, the trial court did not reach this issue. The alternative ground is presented herein due to the off chance that if this Court determines that the Tribal Defendants are not entitled to sovereign immunity in this instance, this Court will nonetheless affirm the trial court's judgment on this alternative ground. *DeFriece v. McCorquodale*, 998 So.2d 465 (2008).

acting within the scope of her employment when she caused the accident. In order to recover under this doctrine, Wilkes must establish two facts: (1) that the status of employer and employee existed at the time of the negligent or wanton act and (2) that the act was done in the scope of the employee's employment. *Wells v. Henderson Land & Lumber Co.*, 200 Ala. 262, 76 So. 28 (1917); *Newsome v. Mead Corp.*, 674 So.2d 581 (Ala.Civ.App. 1995).

While Spraggins was an employee of the Tribal Defendants and was driving a vehicle owned by the Tribal Defendants, she was not acting within the line and scope of her authority at the time of the accident. In the seminal case of *Pryor v. Root*, 674 So.2d 45 (Ala. 1995), the Alabama Supreme Court held that use of a company vehicle created an "administrative presumption" of agency - that the employee was acting within the line and scope of her employment. This "administrative presumption" is a prima facie presumption so that a plaintiff does not have to provide further evidence of agency unless the defendant offers proof that the employee was not acting in the line and scope of his authority. Once the defendant offers such proof, the plaintiff must prove the agency.

The parameters of this doctrine are outlined in *Singleton v. Burchfield*, 362 F.Supp.2d 1291 (M.D. Ala. 2005) as follows:

> "The rule which has been approved for determining whether certain conduct of an employee is within the line and scope of his employment is substantially that if an employee is engaged to perform a certain service, whatever he does to that end, or in furtherance of the employment, is deemed by law to be an act done within the scope of the employment." *Solmica of the Gulf Coast, Inc. v. Braggs*, 285 Ala. 396, 401, 232 So.2d 638 (Ala.1970). Put another way, "the dispositive question is whether the employee was engaged in an act that he was hired to perform or in conduct that conferred a benefit on his employer." *Hulbert v. State Farm Mut.Auto. Ins. Co.*, 723 So.2d 22, 24 (Ala.1998). Conversely, conduct is not within the scope of employment if it is "impelled by motives that are wholly personal." *Solmica*, 285 Ala. at 401, 232 So.2d 638.

Consequently, whether Spraggins was within the scope of her employment at the time of the accident should be determined by whether she was "engaged in an act that she was hired to perform" or whether her conduct was "impelled by motives that are wholly personal." *Singleton, supra.*

The following evidence proves that at the time of the accident Spraggins was impelled by a wholly personal motive as even she could not come up with any reasonable explanation for her being on Alabama Highway 14.

1. On the morning of January 1, 2015 Spraggins left

> Wind Creek to go to the warehouse which is located close to the entrance of Gunter Air Force base, approximately fifteen minutes south of Wind Creek.
>
> 2. The accident happened at Highway 14 on the bridge over Mortar Creek, which is about fifteen minutes north of Wind Creek.
>
> 3. Spraggins has no explanation for why she was north of Wind Creek.
>
> 4. There is no business reason or justification for Spraggins being where she was when the accident happened.
>
> 5. Sometime after the accident Spraggins told Johnny Steadham, one of her supervisors, that she was not feeling well and had gone by to see her girlfriend.

While Spraggins may have begun her trip to perform an act within the scope of her employment, she clearly deviated from that purpose and had been on some errand which was "impelled by motives that are wholly personal."

It is established in Alabama that where an employee abandons her employers' business for personal reasons of her own, the employment is suspended and the employer is not liable for the negligence of the employee during the time of her departure from the employer's business. *Bell v. Martin*, 1 So.2d 906, 241 Ala. 182 (1941). Moreover, the mere fact that she is returning to her employment at the time of the accident does not of itself reinstate the employee in her employer's employment so as to subject the employer to

liability and damages resulting after her departure and before her return is accomplished "as of fact." Id., 907.

In *Bell*, the Alabama Supreme Court held the employee, who was returning to his employment after having abandoned it for a personal errand, had not returned to his employment at the time of the accident and discussed extensively the necessity of an employee returning to her employment before the respondeat superior liability of the employer would become attached. The Court stated:

> The principle has been clearly stated in *Dockweiler v. American Piano Co.*, 94 Misc. 712, 160 N.Y.S. 270, 271; Id., 177 A.D. 912, 163 N.Y.S. 1115, as follows:
>
> "Where there has been a temporary abandonment of an employment, the servant cannot ordinarily be said to have returned to his master's service until he at least reached a point in a zone within which his labors would have been consistent with an act of deviation merely, had the original act been such in its other circumstances as to have been one of deviation, and not one of temporary abandonment."

*Id.*, 909. The Court then quoted from *Southwest Dairy Products Co. v. DeFrates*, 132 Tex. 556, 125 S.W.2d 284, 122 A.L.R. 854:

> "The test of liability is whether he [employee] was engaged in his master's business and not whether he purposed to resume it. It is equally true that Henderson owed the duty to his master of returning the car and resuming his employment and, while returning to the zone of his employment, he was

discharging that duty, but that fact does not fix liability against the master. It was Henderson's own wrong in driving away that created the duty to return, and in returning he was but undoing that wrong.

The return was referable to, and an incident of the departure. He was no more engaged in his master's business while returning to, than while departing from his path of duty. *Fletcher v. Meredith*, 148 Md. 580, 129 A. 795, 45 A.L.R. 474; *Model Laundry v. Collins*, 241 Ky. 191, 43 S.W.2d 693; *Cannon v. Goodyear Tire & Rubber Co.*, 60 Utah, 346, 208 P. 519; *Brinkman v. Zuckerman*, 192 Mich. 624, 159 N.W. 316; *Anderson v. Nagel*, 214 Mo.App. 134, 259 S.W. 858; *Colwell v. Aetna Bottle & Stopper Co.*, 33 R.I. 531, 82 A. 388."

*Id.*, 909-910. Finally, the Court stated:

The recent case of *Parrott et al. v. Kantor et al.*, 216 N.C. 584, 6 S.E.2d 40, 43, discussed cases on the point involved in the case at bar and then follows the rule as set out in the above mentioned cases. The court said: "*Blashfield*, Permanent Edition, in Section 3051, Vol. 5, page 212, speaking with respect to returning from deviation, says: 'The majority rule, and probably the better view, is that the relation of master and servant is not restored until he has returned to the place where the deviation occurred, or to a corresponding place, some place where in the performance of his duty he should be,' citing decisions of courts in many states. In *Humphrey v. Hogan*, 104 S.W.2d 767, the Court of Appeals of Missouri says that the weight of authority is well stated in this section. See also Annotations 22 A.L.R. 1414, 45 A.L.R. 487, 68 A.L.R. 1056, 80 A.L.R. 728.

*Id.*, 910.

In the present case, Spraggins had abandon her

employer's business when, for no explicable reason, she traveled north of Wind Creek while her errand required her to go south from Wind Creek. While she may have been returning to work at the time of the accident, she had yet to accomplish her return to employment. To paraphrase, Spraggins was no more performing the work of Wind Creek while returning to, than while departing from, her duty to pick up the lamp shades.

Because the evidence that Spraggins had departed from her employment is undeniable, the "administrative presumption" is not applicable and does not create a fact question for the jury. See *Bell, supra*; *Tullis v. Blue*, 114 so. 185, 216 Ala. 577 (Ala. 1927); *Durbin v. B.W. Capps & Son, Inc.*, 522 So.2d 766, 768 (Ala. 1988); *Coker v. Penfield Chair Co.*, Inc., 836 So.2d 878(Ala.Civ.App. 2002).

At a minimum, the evidence recited above overcomes the "administrative presumption" that Spraggins was within the scope of her employment and requires the Plaintiffs to come forward with evidence that Spraggins was within the scope of her employment at the time of the accident. *Pryor*, supra. The Tribal Defendants do not believe Wilkes met that burden. Therefore, the Tribal Defendants are entitled to a summary

judgment.

## CONCLUSION

The Poarch Band is a federally recognized Indian tribe, a fact that has been confirmed by numerous courts. Accordingly, the Tribal Defendants possess sovereign immunity that protects them from the claims in this lawsuit. Even if their sovereign immunity were not a bar to the claims asserted against them, the Tribal Defendants would be entitled to summary judgment because Spraggins was acting outside the scope of her employment at the time of the accident. This Court should affirm the summary judgment entered by the trial court.

Dated this the 19th day of May, 2017.

Respectfully submitted,

/s/ Charles A. Dauphin
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing document on the following via email and U.S. mail, postage prepaid, on this the 19th day of May, 2017 to the following counsel:

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**EXHIBIT A**

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

| | | |
|---|---|---|
| **POARCH BAND OF CREEK INDIANS,** | ) | |
| **Plaintiff,** | ) | |
| **vs.** | ) | **CIVIL ACTION NO. 1:15-0277-CG-C** |
| **THAD MOORE, JR., in his official capacity as Tax Assessor of Escambia County, Alabama,** | ) | |
| **Defendant.** | ) | |

**ORDER FOR PERMANENT INJUNCTION AND DECLARATORY JUDGMENT**

This matter is before the Court on Plaintiff's motion for judgment on the pleadings (Doc. 82) and Defendant's response (Doc. 89). Upon consideration of the pleadings and the evidence presented in the record, the Court concludes a permanent injunction and declaratory judgment is due to be entered.

**I. Factual Background**

The facts in this case have been thoroughly documented by this Court and the Eleventh Circuit in its recent decision affirming subject matter jurisdiction and the issuance of the preliminary injunction. (*See* Doc. 36; *Poarch Band of Creek Indians v. Hildreth*, No. 15–13400, 2016 WL 3668021 (11th Cir. July 11, 2016)). Nevertheless, the Court will briefly summarize the

pertinent facts such that the permanent injunction and declaratory judgment are clearly stated.

The Secretary of Indian Affairs first recognized the Poarch Band of Creek Indians ("the Tribe") on June 4, 1984. (Doc. 16, Ex. A). Shortly thereafter, the United States took approximately 229.5 acres of land (the "Trust Land") in Escambia County, Alabama into trust for the exclusive use and benefit of the Tribe. (Doc. 13, Exs. A–J). These lands, taken pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, include permanent improvements, including the structures that house the Tribe's gaming enterprise (collectively, "Trust Property"). (*See generally* Doc. 36, p. 2).

As early as August 18, 1986, the Alabama Attorney General's office informed the Escambia County Tax Assessor (then James Hildreth), the Trust Lands "will be exempt from taxation in the future" and correctly stated "there is no authority for state taxation." (Ala. Atty. Gen. Op. 86–00327 (August 18, 1986); Doc. 1, Ex. B). After this initial assessment of the Tribe's legal standing, Hildreth refrained from assessing taxes on the Trust Land for over twenty-five years.

After the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Escambia County Commission inquired about the status of the Trust Lands. (Doc. 16-3). In June 2012, the Office of the Secretary of the Interior informed the Commission the Trust Lands are held in trust by the U.S. Government and that the Tribe "enjoys all rights and privileges

associated with having its Reservation held in trust by the United States under Federal Law." (Doc. 1, Ex. C).

Approximately eighteen months later, in January 2014, Hildreth initiated an audit of the Tribe on the basis that "certain real and personal property of the Poarch Band of Creek Indians has escaped taxation." (Doc. 1, Ex. D). In a letter to the Tribe, Hildreth stated, "any property which is claimed to be exempt from taxation must also be listed, and the burden is on the taxpayer to clearly establish its right to an exemption." *Id.* In February 2014, the Tribe responded to this request and provided a list of property, exclusive of the Trust property. Hildreth found the property listing to be "incomplete and non-responsive" and indicated his intention to proceed with an audit of "***all*** property of which the Poarch Band is the owner or holder within Escambia County, regardless of whether the Poarch Band considers to be 'Trust Property.'" (Doc. 1, Ex. F) (emphasis in the original).

On April 10, 2014, our sister court in the Middle District of Alabama issued an opinion affirming the Tribe's Trust lands in Escambia County are held in trust by the United States for the benefit of the Tribe. (Doc. 1, p. 6; *see Alabama v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161, 1182, 1184 (M.D. Ala. 2014) (Watkins, C.J.); *aff'd*, *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015)). In April 2014, the Tribe notified Hildreth of this decision via letter. (Doc. 1, Ex. H). After this communication, the Tribe heard nothing from Hildreth for several months.

On February 26, 2015, Hildreth informed the Tribe his office had completed its appraisal of all of its property, including the Trust Lands, and requested a meeting. (Doc. 1, Ex. I). The Tribe met with Hildreth and his legal counsel in April 2015 to discuss the assessment. (Doc. 1, p. 6; Doc. 24, p. 6, ¶ 26). On May 22, 2015, Hildreth's counsel wrote to Lori Stinson, the Attorney General for the Tribe, and stated, "[w]e are hopeful the parties can reach an amicable agreement very soon, but please know that Mr. Hildreth otherwise intends to formalize a tax assessment (including escaped taxes) by mid-June." (Doc. 25, Ex. A). Hildreth's counsel invited the Tribe to meet with Hildreth on May 26, 2015. *Id.* This action followed.

**II. Procedural Background**

On May 26, 2015, the Tribe filed the instant action against Hildreth. (Doc. 1). In the Complaint, the Tribe alleges Hildreth intends to violate federal law by levying taxes on its Trust Lands, which are held in trust by the U.S. Government for the benefit of the Tribe. Until recently (Doc. 89), Hildreth denied these allegations, using the Supreme Court's decision in *Carcieri v. Salazar* as a defense. On July 22, 2015, this Court granted a preliminary injunction ordering that Hildreth, in his official capacity as Tax Assessor for Escambia County, is prohibited from proceeding with or issuing any tax assessment of the Tribe's property. (Doc. 36, p. 18).

The Tribe filed a motion for judgment on the pleadings (Doc. 82) after the U.S. Court of Appeals for the Eleventh Circuit affirmed that this Court

properly exercised subject matter jurisdiction over this civil action and did not abuse its discretion in granting the preliminary injunction. *See Poarch Band of Creek Indians*, 2016 WL 3668021. In response, Defendant Thad Moore, Jr., in his official capacity as the Tax Assessor of Escambia, County, Alabama ("Moore"),[1] withdrew "further opposition to the plaintiff's request for a declaration that the Tribe's land held in trust is exempt from taxation and to plaintiff's request for entry of a permanent injunction."[2] (Doc. 89, p.1). All opposition to the entry of declaratory judgment and permanent injunction thus withdrawn, this Court finds the Tribe's motion for judgment on the pleadings (Doc. 82) to be **MOOT**. An order now follows entering a permanent injunction and declaratory judgment in favor of the Tribe.

**III. Legal Standard**

This Court previously noted the standard governing preliminary injunctive relief. The Court stated,

> In order to succeed on his motion for the entry of a preliminary injunction, the Tribe must establish four prerequisites: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction were not granted, (3) that the threatened

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[1] Moore assumed the office of Tax Assessor during the pendency of this litigation and was substituted as the named defendant in his official capacity. (*See* Doc. 82-1, p. 1).

[2] Moore also cites to the Eleventh Circuit's recent decision in *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015) as the impetus to his withdrawing any and all opposition.

[3] In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), the Supreme Court held that a plaintiff must establish: (1) that he is suffering an irreparable injury; (2) that

Moore also cites to the Eleventh Circuit's recent decision in *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015) as the impetus to his withdrawing any and all opposition.

> injury to the plaintiff outweighs the harm an injunction may cause the defendant, and (4) that granting the injunction would not disserve the public interest. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (internal citation and quotation marks omitted).

(Doc. 36, p. 7). "The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004) (quoting *Siegel v. Lepore*, 234 F.3d 1163, 1213 (11th Cir. 2000) (en banc) (per curium) (Carnes, J., dissenting) (internal marks omitted).[3]

The Declaratory Judgment Act, 28 U.S.C. § 2201, authorizes federal courts, in their discretion, to declare the rights and legal relations of interested parties. *See Pennsylvania Lumbermens Mut. Ins. Co. v. D. R. Horton, Inc.—Birmingham*, No. 15-71-WS-B, 2016 WL 70842, *3 (S.D. Ala. Jan. 5, 2016). Courts exercise case-by-case analysis in deciding whether to declare these rights and considers "practicality and wise judicial administration." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995); *see also Aetna Ins. Co. v. Transamerican Ins. Co.*, 262 F. Supp. 731, 732 (E.D. Tenn. 1967) ("The determinative factor is whether the declaratory action will

[3] In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), the Supreme Court firmly laid out the four elements of a permanent injunction: the plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the pubic interest would not be disserved by a permanent injunction."

probably result in a just and more expeditious and economical determination of the entire controversy."). Issuance of a declaratory judgment necessitates two requirements: (1) to be "within [the Court's] jurisdiction" and (2) to be "a case of actual controversy." *See* 28 U.S.C. § 2201(a); *Accident Ins. Co. v. Greg Kennedy Builder, Inc.*, 159 F. Supp. 3d 1285, 1287 (S.D. Ala. 2016). "To be 'within [the] jurisdiction' of the Court, there must exist an independent found of jurisdiction." *Id.* (quoting *Appling Cnty. v. Mun. Elec. Auth.*, 621 F.2d 1301, 1303 (5th Cir. 1980)). As has been previously ruled, the Court has subject matter jurisdiction in this case. *Poarch Band of Creek Indians*, 2016 WL 3668021 at *3–4. The "actual controversy" requirement mirrors the requirement of Article III, section 2 standing for a "case or controversy." *Accident Ins. Co.*, 159 F. Supp. 3d at 1287. This requirement looks to "'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* (quoting *GTE Directories Publ'g Corp. v. Trimen Am., Inc.*, 67 F.3d 1563, 1567 (11th Cir. 1995) (internal citation omitted)).

## IV. Analysis

### A. Permanent Injunction

Having granted a preliminary injunction (Doc. 36), the Court retreads a familiar analysis in this Order. The Court addresses each element in turn.

#### 1. Success on the Merits

In light of the Eleventh Circuit's decisions in *PCI Gaming Authority* and the appeal of this Court's preliminary injunction order (Doc. 36), the Tribe's success on the merits cannot be doubted. Defendant has judiciously acknowledged this fact by withdrawing his opposition to the entry of a permanent injunction. (Doc. 89, p. 1; *see generally PCI Gaming Authority*, 801 F.3d 1278; *Poarch Band of Creek Indians*, 2016 WL 3668021).

**2. Irreparable Injury**

The Court must determine whether irreparable harm occurs when a county or state official threatens to violate the Tribe's sovereign immunity by assessing and levying taxes on its Trust Property. As the Eleventh Circuit recently reiterated, this action most certainly does. *See PCI Gaming Auth.*, 801 F.3d at 1287. As the Supreme Court has long recognized, the "doctrine of tribal sovereignty" is "a 'deeply rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.'" *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (quoting *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168 (1973)). While Congress may act to limit or otherwise alter a tribe's sovereignty, the Courts may not do so. *See Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2017 (2014). As allowing Moore or his successor to levy tax assessments on the Tribe's lands "would be tantamount to exercising sovereignty over the Tribe," *see* Doc. 36, p. 15, the irreparable injury to the Tribe cannot be contested. As the Tenth Circuit held, "We have repeatedly stated that such an invasion of tribal sovereignty

[by enforcing state law on Indian land] can constitute an irreparable injury." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006). In light of Defendant's withdrawal of his objections, the Court soundly concludes the Tribe would have suffered an irreparable injury and finds it has met its burden for the second element.

**3. Balance of Harms**

As previously discussed in the Preliminary Injunction Order, the balance of the harms weighs heavily in the Tribe's favor. (*See* Doc. 36, pp. 15–17). Balancing the interests of both sides, the Court determines that a continuation of the status quo—that of the Defendant's not collecting any taxes on the Trust Lands, as it has not done so since 1986—best serves the interests of the parties. The Tribe's continued interest in preserving its sovereignty far outweighs Defendant's interest in collecting a tax to which it has no right. *See Wyandotte Nation*, 443 F.3d at 1255. Thus, the Tribe has met its burden.

**4. Public Interest**

Finally, the requested permanent injunction would not be adverse to the public interest. The Tribe has requested application of federal law, and Moore has withdraw any and all objection to the issuance of a permanent injunction. Congress explicitly stated in 25 U.S.C.A. § 465 that trust land held for the benefit of Indian tribes is to be exempt from state and location taxation. It is in public's interest that the State and its officials comply with

federal law. Indeed, "frustration of federal statutes and prerogatives are not in the public interest." *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). Therefore, the Court finds that granting the Tribe's motion for permanent injunction does not violate public interest.

As the Tribe has demonstrated each element, the Court finds a permanent injunction foreclosing Defendant's assessment and levying of taxes upon the Trust land is, in fact, "the order of the day." *Angel Flight of Ga., Inc. v. Angel Flight of Am., Inc.*, 522 F.3d 1200, 1209 (11th Cir. 2008).

**B. Declaratory Judgment**

The Tribe's First Amended Complaint (Doc. 11) seeks a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, which authorizes federal courts to declare the rights and legal relations of interested parties. *See Pennsylvania Lumbermens Mut. Ins. Co. v. D. R. Horton, Inc.—Birmingham*, No. 15-71-WS-B, 2016 WL 70842, *3 (S.D. Ala. Jan. 5, 2016). "The two principal criteria guiding the policy in favor of rendering declaratory judgments are 1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and 2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Otwell v. Ala. Power Co.*, 944 F. Supp. 2d 1134, 1148 (N.D. Ala. 2013). Entry of declaratory judgment, along with the permanent injunction, will inevitably serve a "useful purpose" to settle the Tribe's inherent sovereignty and freedom from local property taxes

and will "afford relief" from any future uncertainty that this issue will be revisited. Were Defendant, or any of his successors, allowed to continue in his assessment and levying of taxes, it will doubtless violate the Tribe's rights as a sovereign nation, and the very activity complained of in this suit is clearly barred by existing federal law. As such, the Court deems it prudent to enter the declaratory judgment, detailed below.

**V. Conclusion**

For the foregoing reasons, the Court finds the Tribe has fulfilled its burden of proof required for a permanent injunction and declaratory judgment and **ORDERS** as follows:

1. The Tribe's motion for judgment on the pleadings (Doc. 82) is **MOOT** due to Moore's withdrawal of any and all objections (Doc. 89).
2. A permanent injunction thus **ISSUES** as follows:
    a. The Court hereby **ORDERS** that Thad Moore, Jr., in his official capacity as the Tax Assessor of Escambia County, is **PERMANENTLY ENJOINED** from issuing any assessment of the Tribe's Trust Lands, including the assessment of taxes, penalties, and related fees.
    b. This injunction **BINDS** Moore and all of his officers, agents, servants, employees, successors, and others in active concert or participation with any of them, who would seek to levy taxes on these Trust Lands, the Trust Property, and any additional

property that may come to be owned by the Tribe or to be held in trust by the U.S. Government for the benefit of the Tribe within the exterior geographic boundaries of Escambia County.

c. The Court retains jurisdiction to enforce this Permanent Injunction.

3. The Court further **DECLARES** the Tribe is exempt from local property taxes pursuant to federal law, including but not limited to 25 U.S.C. § 465, and the recent Eleventh Circuit cases mentioned within this Order. As such, any putative liens against the Tribe's Trust Property arising out of, resulting from, or relating to any local property taxes are void and unenforceable as a matter of law.

4. This Court recognizes and **DECLARES** the assessment and collection of local property taxes on the Tribe's Trust Lands constitutes an impermissible, unlawful interference with the Tribe's inherent sovereignty and right of self-governance.

**DONE** and **ORDERED** this 5th day of December, 2016.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

**EXHIBIT B**

APPENDIX

In the following cases The Poarch Band of Creek Indians, or one of its enterprises, was dismissed based upon the court's determination that the Poarch Band possessed sovereign immunity which barred the suit. There are no cases which have held that the Poarch Band was not a federally recognized tribe or was not possessed of sovereign immunity.

United States Court of Appeals for the Eleventh Circuit

1. *State of Alabama v. PCI Gaming Authority*, 801 F.3d 1278 (11th Cir. 2015)("[t]he Tribe is unquestionably immune from suit")

2. *Poarch Band of Creek Indians v. Hildreth*, 15-13400 (11th Cir. 2016) (The Poarch Band was duly recognized by the Secretary of the Interior as an Indian tribe.)

3. *Williams v. Poarch Band of Creek Indians*, Op. No. 15-13552, October 18, 2016 (11th Cir. 2016) (The Poarch Band is entitled to tribal sovereign immunity against a claim brought pursuant to the ADEA.)

4. *Freemanville Water System, Inc. v. Poarch Band of Creek Indians,* 563 F. 3d 1205(11th Cir. 2009)(The Poarch Band is entitled to sovereign immunity and such immunity extends to activities off of tribal lands.)

United States District Court, Middle District of Alabama

5. *Hardy v. Igt, Inc.*, 2:10-cv-901 WKW, United States District Court, M.D. Alabama, Northern Division, August 15, 2011 (The Poarch Band has sovereign immunity).

6. *Allman v. Creek Casino Wetumpka*, 2011 WL 2313706 (M.D. Ala. May 23, 2011) (Dismissed for lack of subject matter jurisdiction due to sovereign immunity of the Poarch Band.)

7. *Sanderford v. Creek Casino Montgomery*, 2:12-CV-455 WKW, United States District Court, M.D. Alabama, January 10, 2013. (Dismissed due to sovereign immunity of the Poarch Band.)

United States District Court, Southern Division of Alabama

8. *Johnson v. Wind Creek Casino, Hotel*, cv-16-0052-WS United States District Court, S.D. Alabama. (2016) (Tribal sovereign immunity is a jurisdictional issue, and because the Poach Band is covered by such immunity, which has been neither abrogated nor waived, the Court lacks subject matter jurisdiction)

9. *Poarch Band of Creek Indians v. Moore*, CV-00277-CG, United States District Court, S.D. Alabama. (2016) (The Poarch Band is a federally recognized Indian tribe entitled to the benefits of the IRA.)

Escambia County Circuit Court

10. *White v. McGhee*, Escambia County Circuit Court, CV-2009-900054.00 (Motion for Summary Judgment was granted without opinion. Grounds asserted in the motion for summary judgment included the lack of subject matter jurisdiction due to sovereign immunity of the Poarch Band)

11. *Hight v. Wind Creek Casino*, Escambia County Circuit Court, CV-2014-000019.00 (Case was dismissed because of lack of subject matter jurisdiction due to sovereign immunity of the Poarch Band.)

12. *Ward v. Creek Entertainment Center*, Escambia County Circuit Court, CV-2008-900038.00 (Case was dismissed because of lack of subject matter jurisdiction due to sovereign immunity of the Poarch Band.)

13. *Knight v. Escambia County, Alabama, Poarch Band of Creek Indians, et al.*, Escambia County Circuit Court, CV-2009-00005 (The Poarch Band was dismissed due to its sovereign immunity.)

Montgomery County Circuit Court

14. *James v. Tallapoosa Entertainment Center*, Montgomery County Circuit Court, CV-2007-000511 (Case was dismissed because of lack of subject matter jurisdiction due to sovereign immunity of the Poarch Band.)

15. *Spratt v. Tallapoosa Entertainment Center*, Montgomery County Circuit Court, CV-2009-900354.00 (Court granted motion to dismiss which was based upon the sovereign immunity of the Poarch Band.)

16. *Graves v. Poarch Band of Creek Indians,* Montgomery County Circuit Court, CV-2012-901115.00 (Granted motion to dismiss for lack of jurisdiction due to sovereign immunity of the Poarch Band.

Cases on Appeal to the Alabama Supreme Court

17. *Rape v. Poarch Band of Creek Indians*, Supreme Court of Alabama, No. 1111250 (On appeal from the Montgomery County Circuit Court which dismissed the Poarch Band due to its sovereign immunity which prevented the court from obtaining jurisdiction in the case.)

18. *Harrison v. PCI Gaming*, Supreme Court of Alabama, No. 1130168 (On appeal from the Escambia County Circuit Court which dismissed PCI Gaming, an enterprise of the Poarch Band, due to sovereign immunity of the Poarch Band which prevented the court from obtaining jurisdiction of the case.)