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

POARCH BAND OF CREEK INDIANS,	)
Plaintiff,	) **Case No.:** 1:15-cv-00277-CG-C
v.	)
JAMES H. HILDRETH, JR., in his official Capacity as Tax Assessor of Escambia County, Alabama,	) **MOTION TO DISMISS COUNTERCLAIM AND TO STRIKE CERTAIN AFFIRMATIVE DEFENSES**
Defendant.	)

The Poarch Band filed this suit to enjoin Defendant Hildreth from proceeding with his threatened assessment of taxes on lands that are held in trust by the United States for the benefit of the Poarch Band of Creek Indians (Trust Lands) and permanent improvements built on those lands (collectively, Trust Property). In so doing, the Poarch Band asked the Court to apply the plain language of 25 U.S.C. § 465 to settled law and facts.

In response, Hildreth has launched a wide-ranging, scorched earth assault on the Tribe. Far beyond asking the Court to deny the Poarch Band's claims, he asks it to deny the Poarch Band's existence. He further asks the Court to vitiate a number of decades old federal agency decisions, to invalidate the United States' title to the Trust Lands, and to do it all without the United States as a party. This the Court cannot and should not do.

As set forth in detail below, the Court lacks subject matter jurisdiction over Hildreth's counterclaim based on tribal sovereign immunity and his failure to join the United States as a party. The counterclaim is thus subject to dismissal pursuant to Rules 12(b)(1) and 12(b)(7). Additionally, Hildreth's alleged affirmative defenses 2 through 12, inclusive, should be stricken from Hildreth's answer (Doc. 24) on the grounds that they (1) are insufficient as a matter of law and/or (2) are not affirmative defenses at all, but rather mere restatements of Hildreth's impermissible counterclaim.

ARGUMENT AND ANALYSIS

I. Hildreth's counterclaim is barred by tribal sovereign immunity.

As the Supreme Court very recently reaffirmed, Indian tribes possess sovereign immunity from unconsented lawsuits. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014). The Court has "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" of immunity by the tribe. *Id.* at 2030-31 (internal quotation and punctuation omitted). That the Poarch Band, as a federally recognized Indian tribe, possesses sovereign immunity is as settled as the doctrine itself. *See, e.g., Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009) (affirming the district court's dismissal of claims against the Poarch Band on the basis of sovereign immunity); *Alabama v. PCI Gaming*

Auth., 15 F. Supp. 3d 1161, 1172-73 (M.D. Ala. 2014) (appeal pending, 11th Cir. Case No. 14-12004); *Williams v. Poarch Band of Creek Indians*, 2015 WL 4104611 at *5 (S.D. Ala. July 8, 2015).

Nothing about Hildreth's counterclaim brings it outside the scope of the Poarch Band's sovereign immunity. Tribal sovereign immunity bars suits brought by states and their agents. *Bay Mills*, 134 S. Ct. at 2031 ("[T]ribal immunity applies no less to suits brought by States … than to those brought by individuals."). It applies to suits seeking declaratory and injunctive relief as well as those for monetary relief. *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1244-45 (11th Cir. 1999). Of particular relevance here, it applies to counterclaims, including compulsory counterclaims. *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991).

Hildreth presumably will contend that the Poarch Band has waived immunity from his counterclaim. *See* Hildreth's 5th Aff. Def., Doc. 24 at 11. That argument is irreconcilable with *Oklahoma Tax Commission*. There, a tribe sued in federal court to enjoin Oklahoma's assessment of unpaid state taxes on cigarettes sold at the tribe's convenience store. 498 U.S. at 507. The state counterclaimed, arguing that the tribe "waived [its] sovereign immunity by seeking an injunction against the Commission's proposed tax assessment." *Id.* at 509. The Court gave short shrift to the state's argument, simply noting that it had "rejected an identical contention over

a half-century ago" and reaffirming that "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Id.* (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511-512 (1940)). To the extent that Hildreth contends that the Poarch Band waived its sovereign immunity by filing suit, he once again disregards settled federal law.

Absent clear congressional abrogation or express tribal waiver – neither of which is present in this case – tribal sovereign immunity demands that *any* claim against an Indian tribe be dismissed. *See Bay Mills*, 134 S. Ct. at 2031-32; *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130-31 (11th Cir. 1999). The Poarch Band has not waived its immunity from Hildreth's counterclaim, nor has Congress abrogated that immunity. Accordingly, the Court should dismiss Hildreth's counterclaim for lack of subject matter jurisdiction.[1]

[1] To be clear, the Poarch Band in no way agrees with or concedes Hildreth's underlying claim that the Tribe was not under federal jurisdiction in 1934 and is thus ineligible to have the United States take lands into trust for its benefit pursuant to the Indian Reorganization Act of 1934 (IRA) as interpreted in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Hildreth is incorrect on that point. But that is irrelevant, because the issue is not properly before the Court. As explained elsewhere herein and in the Poarch Band's other filings, *see, e.g.*, Doc. 25, the Secretary of the Interior determined decades ago that the Poarch Band is an Indian tribe eligible to have lands taken into trust for its benefit under the IRA, and Hildreth's exclusive means of contesting that determination was through a timely, direct APA challenge.

II. Hildreth's counterclaim should be dismissed on Rule 19 grounds.

In addition to being barred by tribal sovereign immunity, Hildreth's counterclaim should be dismissed for failure to join a necessary party. The counterclaim seeks the reversal of numerous decisions by the Secretary of the Interior (the Secretary) as well as the invalidation of the United States' title to lands that it holds in trust for the benefit of the Poarch Band. *See* Doc. 24 at 22-23. Under Rule 19, the United States is a required party to this counterclaim, and failure to join the United States requires the counterclaim's dismissal.

Under Rule 19(a), joinder of a party is required where (a) the party's absence could prevent a court from providing complete relief among the existing parties or (b) the absent party claims an interest in the litigation and adjudication of the matter in the party's absence could impair its ability to protect that interest or leave it subject to multiple or inconsistent obligations. *See* F. Rule Civ. P. 19(a). The United States is a required and indispensable party in any case challenging its title to lands as a matter of law. *See, e.g., Minnesota v. United States*, 305 U.S. 382, 386-387 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975) ("[T]he United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation."); *see also Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n.4

(9th Cir. 1991). And because it has sovereign immunity from Hildreth's counterclaim, the United States cannot be joined.[2]

When a required party cannot be joined, Rule 19(b) directs courts to consider a nonexclusive list of factors to determine whether, "in equity and good conscience," the case should be dismissed. These factors include: (1) the extent to which a judgment rendered in the missing party's absence might prejudice that party or the existing parties; (2) the extent to which such prejudice could be avoided or limited; (3) whether a judgment rendered in the absence of the missing party would be adequate; and (4) whether the plaintiff would have an adequate remedy if the suit were dismissed for non-joinder. *See* Rule 19(b); *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 865-872 (2008). Where, as here, the missing party is a sovereign that cannot be joined due to sovereign immunity, these factors require dismissal.

The Supreme Court's *Pimentel* decision is instructive. There, the Supreme Court reversed decisions by a district court and the Ninth Circuit that allowed claims implicating the interests of the Republic of the Philippines to proceed in the

[2] The Supreme Court recently described an action challenging the Secretary's decision to take land into trust for an Indian tribe as "a garden-variety APA claim." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, --- U.S. ----, 132 S. Ct. 2199, 2208 (2012). Having failed to bring his "garden-variety APA claim" within the APA's limitations period, Hildreth is now time barred from suing the United States to challenge the Secretary's actions. *See, e.g.*, *Big Lagoon Rancheria v. California*, --- F.3d ---, 2015 WL 2499884 at **4-5 (9th Cir. June 4, 2015) (*en banc*); *Alabama v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161, 1181 (M.D. Ala. 2014); Doc. 25 at 7-8 (citing case law).

Republic's absence. As the Supreme Court explained, the lower courts "failed to give full effect to sovereign immunity when they held that the action could proceed without the Republic …. A case may not proceed when a required-entity sovereign is not amenable to suit." *Pimentel*, 553 U.S. at 865, 867 (citing, *inter alia*, *Minnesota*, 305 U.S. at 386-388). Under *Pimentel*, the inherent injury to an absent sovereign's interests under Rule 19(b)(1) is independently sufficient to require dismissal when, as here, the absent sovereign is immune from suit.

Pimentel also sheds light on the appropriate application of the other Rule 19(b) factors. Applying the second factor, the Court found it impossible to tailor relief among the existing parties in a way that avoided prejudice to the absent sovereign's interests. *See* 553 U.S. at 870. The same is true here, where Hildreth's counterclaim necessarily seeks invalidation of the United States' title to the Poarch Band's Trust Lands. His requested relief cannot be tailored in any way that would not substantially prejudice the United States' interests. Similarly, the third Rule 19(b) factor – adequacy of a judgment in the missing party's absence – favors dismissal because any judgment against the United States in its absence would be non-binding, and thus *per se* inadequate. *See id.* at 870-871 (explaining that a judgment against the Philippines in the Republic's absence would fail to meet Rule 19(b)'s adequacy standard because it would not bind the Republic); *see also Carlson*, 510 F.2d at 1339 ("No decision made in an action in which the United States is not a party can bind

the United States."). Finally, *Pimentel* explains that while dismissal due to non-joinder of a sovereign may leave a party without a remedy, that risk is inherent in the concept of immunity, and the prejudice suffered by a claimant who cannot sue a sovereign is outweighed by the prejudice that the sovereign would suffer if the action proceeded in its absence. *Pimentel*, 553 U.S. at 872.

Under Rule 19, Hildreth's effort to divest the United States of title to property that it has held in trust for decades and overturn long settled federal agency decisions cannot proceed without the United States. Accordingly, since the United States cannot be joined due to sovereign immunity, Rule 19 provides a separate and independent basis for dismissing Hildreth's counterclaim.[3]

III. Hildreth's counterclaim is precluded by *PCI Gaming*.

Even if it were not barred by sovereign immunity and could proceed in the absence of the United States, Hildreth's counterclaim would still be precluded by the recent decision in *Alabama v. PCI Gaming Authority*, 15 F. Supp. 3d 1161, 1181 (M.D. Ala. 2014) (appeal pending, 11th Cir. Case No. 14-12004). In *PCI Gaming*, Middle District Chief Judge Watkins addressed the same issues raised in Hildreth's counterclaim. holding as follows:

[3] Ironically, Hildreth concedes that the United States is a required party, but contends that this requires the dismissal of the Poarch Band's claims rather than his own counterclaim. *See* Doc. 24 at 11. It is well established, however, that an Indian tribe may sue to press its own interests – specifically including enjoining unlawful state taxation – without the United States' involvement. *See, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 761 (1985); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 473-475 (1976).

a. The APA provides the only avenue to contest federal trust takings for the benefit of the Poarch Band. 15 F. Supp. 3d at 1181.

b. Alabama cannot collaterally attack the United States' trust title to the Tribe's Trust Lands. *Id.* at 1183.

c. Alabama cannot untimely attack land into trust decisions years after its legal and administrative remedies have expired. *Id.*

d. *Carcieri* does not "open[] the door" for Alabama to challenge federal decisions to take lands in to trust for the Poarch Band. *Id.* at 1184.

On their face, these holdings by Chief Judge Watkins directly and squarely refute the arguments raised in Hildreth's response.

Hildreth cannot relitigate those issues here. While he was not a named party in *PCI Gaming*, a non-party is bound by a prior judgment when he has a legal relationship with a prior litigant. *See Griswold v. Cnty. of Hillsborough*, 598 F.3d 1289, 1292 (11th Cir. 2010). Here, Hildreth has such a relationship with the State of Alabama. Under Alabama law, a county tax assessor is considered "an administrative officer of the State." *SC Realty, Inc. v. Jefferson Co.*, 638 So. 2d 1343, 1345 (Ala. 1994). He assesses taxes for the benefit of both the county and the state. Ala. Code §§ 40-2-11 & 40-5-44. As such, he is "clothed with powers and duties to be exercised in behalf of the state" and serves as a "representative[] of the state."

McLendon v. Empire Mining Co., 74 So. 937, 937-938 (Ala. 1917); *see also State Tax Comm'n v. Commercial Realty Co.*, 182 So. 31, 35 (Ala. 1938).

Even if Hildreth were not a state actor, counties are precluded from relitigating issues that have already been decided adversely to their state. *See, e.g.*, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah,* --- F.3d ---, 2015 WL 3705904 at **15-16 (10th Cir. June 16, 2015). In *PCI Gaming*, the county's interests were represented by the State of Alabama, which represented all of its citizens, including those residing in Escambia County. *See, e.g.*, *Ute Indian Tribe,* --- F.3d ---, 2015 WL 3705904 at *6. Because Hildreth cannot relitigate questions already decided adversely to the State in *PCI Gaming*, his response falls flat.[4]

The Eleventh Circuit's decision in *Hercules Carriers, Inv. v. Claimant Florida Department of Transportation*, 768 F.3d 1558 (11th Cir. 1985), does not save Hildreth's counterclaim. *Hercules* was a fact specific decision addressing the application of *non-mutual* collateral estoppel to one state agency as a result of an administrative proceeding brought by another state agency that raised "substantively distinct" issues. *See id.* at 1578-80. This case presents very different facts. *PCI*

[4] That *PCI Gaming* is under appeal is irrelevant. *See, e.g.*, *United States v. Abatti*, 463 F. Supp. 596, 599 (S.D. Cal. 1978). "'The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal.'" *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* sec. 4433, at 308 (1981 & Supp. 1987)). *See also Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir.2007) ("[A] final judgment retains its collateral estoppel effect, if any, while pending appeal."); *Lewis v. Exxon Corp.*, 716 F.2d 1398, 1400 (D.C. Cir. 1983) ("A judgment generally has collateral estoppel effect even though it is on appeal.").

Gaming was brought by the State of Alabama, not by a subsidiary agency or another county's tax commissioner. It was brought against the Poarch Band's Tribal Council members in their official capacities and an arm of the Tribe, not some unrelated or tenuously related third party. *See PCI Gaming*, 15 F. Supp. 3d at 1164. And, like this case, it asserted that the State could assert jurisdiction over the Poarch Band's Trust Lands based on the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In short, the State in *PCI Gaming* and Hildreth's counterclaim in this case make the same legal challenge to the same legal rights of the same party.

The Supreme Court explained in *United States v. Mendoza*, the decision on which the Eleventh Circuit relied in deciding *Hercules*, that the "concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable … when the government is litigating the same issue with the same party." *Mendoza*, 464 U.S. 154, 163-164 (1984). Accordingly, the concerns underlying *Mendoza* and, in turn, *Hercules* are not present here. There is no reason why Hildreth should not be bound by the State of Alabama's very recent litigation of *Carcieri*'s effect on the legal status of the Poarch Band's Trust Lands.[5] Indeed, a

[5] *Hercules* also emphasized that the previous action cited as a basis for estopping the government was an administrative proceeding that addressed much narrower factual issues than those raised in the substantive litigation, meaning that there may not have been full and fair opportunity for the government to litigate the issues in question. *See* 768 F.2d at 1181-82. That certainly is not the case here, as the State in *PCI Gaming* relied on the same *Carcieri*-based legal theory that Hildreth now espouses and had a full and fair opportunity to litigate its claims both before a federal district court and the Eleventh Circuit.

contrary holding would produce an absurd result, as it would allow every state official in Alabama to bring serial, *Carcieri*-based challenges to the legal status of the Poarch Band's Trust Lands.

IV. Hildreth's affirmative defenses 2 through 12 should be stricken.

In addition to his impermissible counterclaim, Hildreth has asserted in his Answer a number of legally invalid affirmative defenses that should be stricken. *See* Doc. 24 at 8-15. While motions to strike affirmative defenses are generally disfavored, they should be granted where an alleged affirmative defense "is insufficient as a matter of law." *Resolution Trust Corp. v. Youngblood*, 807 F. Supp. 765, 769 (N.D. Ga. 1992). This standard is satisfied in this case, as a number of Hildreth's purported affirmative defenses seek affirmative relief along the same lines as his counterclaim – and are barred as a matter of law for the same reasons – or rely on the same erroneous legal theory set forth in his response to the Poarch Band's motion for preliminary injunction (Doc. 17).

A. Many of Hildreth's putative affirmative defenses are invalid as a matter of law because they are mere restatements of his impermissible attempt to mount an untimely, collateral attack on settled federal agency decisions.

Affirmative defenses 2, 3, 6, 7, 8, 10, 11, and 12 are entirely dependent upon Hildreth's allegation that the Secretary should not have granted federal recognition

to the Poarch Band or taken land into trust for its benefit.[6] If the Secretary's decisions are recognized and given legal effect, as they must be, then each of these affirmative defenses necessarily fails.

As explained above and in the Poarch Band's reply brief in support of its motion for preliminary injunction (Doc. 25 at 7-8), challenges to federal agency decisions can be litigated only through a timely APA claim against the relevant federal decision maker. Numerous federal appellate decisions have rejected efforts to collaterally or untimely litigate APA claims, specifically including efforts to do so in the guise of affirmative defenses. *See, e.g.*, *Big Lagoon Rancheria v. California*, --- F.3d ---, 2015 WL 2499884 at **4-5 (9th Cir. June 4, 2015) (*en banc*); *Paucar v. Atty. Gen. of the United States*, 545 Fed. Appx. 121, 124-125 (3d Cir. 2013); *United States v. Backlund*, 677 F.3d 930, 943-944 (9th Cir. 2012); *United States v. Lowry*, 512 F.3d 1194, 1202-03 (9th Cir. 2008); *see also Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006) (holding that the six-year statute of limitations applicable to APA actions must be "strictly observed"); *PCI Gaming*, 15 F. Supp. 3d at 1181 ("The State cannot avoid the APA's procedures for reviewing the Secretary's decisions simply by reformulating its argument."). The

[6] Hildreth's ninth affirmative defense suffers from this same infirmity to the extent that it contests the validity of the United States' title to the Trust Lands. However, the Poarch Band reads that defense as conceding the United States' title and contending that the Trust Property is still not exempt from state and local taxation. The plain text of 25 U.S.C. § 465 disposes of that argument.

APA's statute of limitations – and the United States' sovereign immunity – cannot be so easily evaded.

The Ninth Circuit's recent *en banc* decision in *Big Lagoon* is particularly instructive, as it addressed this issue in a very similar factual and legal context. There, a tribe sued a state in federal court alleging that the state had not complied with its federal statutory obligation to negotiate in good faith with the tribe regarding a gaming compact for a casino on the tribe's trust land. The state, just like Hildreth, argued as an affirmative defense that the tribe lacked standing to invoke the statutory obligation because it was not properly federally recognized and its lands were not properly taken into or held in trust by the United States under *Carcieri*. *See Big Lagoon*, --- F.3d at ----, 2015 WL 3499884 at *3.

The Ninth Circuit rejected the state's arguments. It noted that "although the State frames these issues in terms of challenges to standing and asserts them as affirmative defenses … it necessarily argues that the BIA exceeded its authority when it took the eleven-acre parcel into trust." *Id.* at **3-4. The court went on the explain that the "proper vehicle to make such a challenge is a petition for review pursuant to the APA, and that is the typical method employed in prior litigation for challenging entrustment decisions." *Id.* at *4. Finally, the Court emphasized that allowing the state to collaterally attack the agency decisions "would constitute just the sort of end-run [around the APA] that we have previously refused to allow, and

would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id.* at *5; *see also PCI Gaming*, 15 F. Supp. 3d at 1181-82. Accordingly, the *en banc* Ninth Circuit rejected the state's efforts.[7]

The same result follows in this case. The fact that Hildreth couches his arguments as affirmative defenses does not allow him to avoid the fact that federal law bars untimely, non-APA, collateral attacks on federal agency decisions. *See id.*; *see also Resolution Trust*, 807 F. Supp. at 770-771 ("[T]he court lacks jurisdiction to hear these issues, regardless of whether they are couched in terms of counterclaim or affirmative defense."). Hildreth's second, third, sixth, seventh, eighth, tenth, eleventh, and twelfth affirmative defenses, all of which rely on the alleged impropriety or invalidity of the Secretary's decisions to recognize the Poarch Band and accept land into trust for its benefit, are insufficient as a matter of law and should be stricken.[8]

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[7] The Ninth Circuit went on to note that, as here, any attempt by the state to bring a direct APA claim many years after the relevant federal recognition and land entrustment decisions would be time barred. *See Big Lagoon*, --- F.3d at ----, 2015 WL 3499884 at *5.

[8] While Hildreth may contend that he can mount an untimely collateral attack on the Secretary's decisions by alleging that they exceeded the Secretary's authority, that argument is unavailing. Because the Court lacks subject matter jurisdiction to review the Secretary's decisions in a collateral, non-APA proceeding, it necessarily lacks jurisdiction to determine in such a proceeding whether those decisions exceeded the Secretary's authority. *See, e.g.*, *Self v. BellSouth Mobility, Inc.*, 700 F.3d 453, 463-464 (11th Cir. 2012) ("This argument puts the cart before the donkey. … Because the district court lacks jurisdiction to review the FCC's orders at all, it lacks jurisdiction to decide whether the orders are invalid because they are outside the jurisdictional authority of the agency."); *see also Big Lagoon*, --- F.3d at ----, 2015 WL 3499884 at *5 n.5 (declining to apply

B. Several of Hildreth's alleged affirmative defenses suffer from additional legal infirmities and should be stricken.

Hildreth's putative affirmative defenses two, four, five, nine, and ten (Doc. 24 at 9-11 & 13-14) are insufficient as a matter of law for additional reasons. For example, Hildreth's second affirmative defense – that the court lacks subject matter jurisdiction under 28 U.S.C. § 1362 because the Poarch Band is not an Indian tribe – is incorrect as a matter of law and is foreclosed by Eleventh Circuit precedent. *See* 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015) (listing the Poarch Band as a federally recognized Indian tribe); *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1206 (11th Cir. 2009) ("The Poarch Band of Creek Indians is a federally recognized Indian tribe …."); *Williams*, 2015 WL 4104611 at *5 (taking judicial notice that "PBCI is a federally recognized Indian tribe"); Doc. 25 at 10-11; *see also Longo v. Seminole Indian Casino-Immokalee*, --- F. Supp. 3d ----, 2015 WL 2449642 at *3 (M.D. Fla. May 21, 2015) (appeal pending, 11th Cir. Case No. 15-12460) (granting motion to dismiss on the basis of tribal sovereign immunity despite plaintiff's claim that historical evidence showed that the Seminole Tribe was not really an Indian tribe). It should be stricken.

Hildreth's fourth affirmative defense, which asserts that the Poarch Band cannot seek to enjoin his efforts to assess unlawful taxes without joining the United

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the so-called "*ultra vires*" exception to the bar on untimely, collateral attacks on agency action under substantially identical facts).

States as a party, is likewise foreclosed by binding precedent. The United States Supreme Court has repeatedly allowed Indian tribes to bring actions on their own behalf to enjoin unlawful taxation by state or local governments. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 761 (1985); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 473-475 (1976). While the United States is indeed a required party to Hildreth's impermissible counterclaim, its presence is not required for the Poarch Band to seek this Court's protection from local taxation efforts that violate federal law. Hildreth's fourth affirmative defense is insufficient as a matter of law, and should be stricken.

Hildreth's fifth affirmative defense erroneously asserts that the Poarch Band has waived its tribal sovereign immunity. Hildreth asserts no facts supporting this contention, and it is unclear how an alleged waiver of immunity could constitute a defense in any event. Nevertheless, even assuming that this was a legally cognizable defense, it is incorrect for reasons set forth in Part I, *supra*. Hildreth's fifth affirmative defense should be stricken.

Hildreth's ninth affirmative defense contends that that Poarch Band's Trust Property is not exempt from taxation because Alabama has not consented to federal jurisdiction over the Trust Lands or ceded its taxing jurisdiction over them. In support of this affirmative defense, Hildreth relies on an out of context quotation and citation from a case dealing with the application of Art. I, § 8, cl. 17 of the United

States Constitution (the Enclaves Clause). Congress's power to legislate with respect to Indian affairs – including the power to take land into trust for the benefit of Indians – is based upon the Constitution's Indian Commerce and Treaty Clauses, not on the Enclaves Clause. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974) (discussing constitutional sources of "[t]he plenary power of Congress to deal with the special problems of Indians"); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 151-152 (D.D.C. 2012). "The Enclaves Clause requirement of state consent is … irrelevant where the Congressional authority to act stems from some other constitutional source." *City of Roseville*, 219 F. Supp. 2d at 151 (citing *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990)). Simply put, state consent is not required for Congress to exercise its authority to legislate with respect to Indian affairs. Accordingly, Hildreth's ninth affirmative defense is insufficient as a matter of law, and should be stricken.

Hildreth's tenth affirmative defense asserts that his assessment of taxes on the Poarch Band's Trust Property would not be unlawful because it is compelled by Alabama law. Federal law, however, expressly forbids state or local taxation of the Poarch Band's trust property. *See* 25 U.S.C. § 465. "When federal law forbids an action that state law requires, the state law is 'without effect.'" *Mut. Pharm. Co., Inc. v. Bartlett*, 133 S.Ct. 2466, 2476-77 (2013) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also* U.S. Const., Art. VI, cl. 2; *McCulloch v.*

Maryland, 17 U.S. 316, 427 (1819). Hildreth's claim that his state law duties compel and justify his breach of federal law is thus insufficient as a matter of law, and his tenth affirmative defense should be stricken.

CONCLUSION

Hildreth's counterclaim and many of his affirmative defenses present transparent attempts to impermissibly expand this litigation and circumvent the sovereign immunity of the Poarch Band and the United States. His artful pleading cannot expand this Court's jurisdiction. Accordingly, to the extent that Hildreth's counterclaim and his putative affirmative defenses seek affirmative relief against the Poarch Band, seek to invalidate federal agency decisions through an untimely, collateral proceeding, or otherwise rely on legally insufficient arguments, they should be dismissed and stricken, respectively.

Respectfully submitted this 14th day of July, 2015.

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Certificate of Service

I hereby certify that on the 14th day of July, 2015, a true and correct copy of the foregoing was served on all counsel via the Court's electronic case filing system.

/s/ Charles A. Dauphin
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