

## Procedure

### **Assessment Blocked, Appeal Filed In Alabama Tribal Tax Case**

**A** dispute over the taxability of an Indian tribe's land in Alabama hinges largely on a statute of limitations, as the case moves to a federal appeals court. [*Poarch Band of Creek Indians v. Hildreth*, S.D. Ala., No. 1:15-cv-00277, notice of appeal, 7/28/15]

James H. Hildreth Jr., the tax assessor for Escambia County, Ala., filed notice July 28 that he is appealing a preliminary injunction order to the U.S. Court of Appeals for the Eleventh Circuit. Judge Callie Granade issued the injunction on July 22 in the U.S. District Court for the Southern District of Alabama, prohibiting Hildreth from assessing any tax against the property held in U.S. trust on behalf of the Poarch Band of Creek Indians.

In her injunction order, Granade wrote that Hildreth's attempt to tax the property amounts to a challenge of the Poarch Band's status as a federally recognized Indian tribe. This challenge falls outside the six-year statute of limitations set by the federal Administrative Procedure Act because the Department of Interior recognized the Poarch Band in 1984 and then took 229.5 acres of land into trust on the tribe's behalf, she wrote.

Hildreth's attorneys have argued the 2009 U.S. Supreme Court ruling in *Carcieri v. Salazar*, 555 U.S. 379 (2009) calls into question the Poarch Band's right to tax-exempt land because the court interpreted the Indian Reorganization Act as defining Indians as people who were members of an Indian tribe under federal jurisdiction at the time of the act's enactment in 1934.

But Granade wrote the *Carcieri* case differed because it was a timely challenge of the U.S. taking land into trust, having been brought within the six-year window.

"Since *Carcieri*, in cases analogous to this one, courts have found that challenges to the Trust land acquisitions are subject to APA procedures, including the six-year statute of limitations for challenging agency decisions," Granade wrote.

**Tribes Prevailed in Similar Case.** An attorney for the Poarch Band, Mark Reeves of Kilpatrick Townsend & Stockton, agreed the statute of limitations is a crucial factor in the case and rightfully should block Hildreth's attempt to tax the land.

Reeves also is one of the attorneys for the Poarch Band in a similar case pending before the Eleventh Cir-

cuit, in which the State of Alabama is opposing the tribe's right to legally operate casinos in the state (*State of Alabama v. PCI Gaming Authority*, 11<sup>th</sup> Cir., No. 14-12004). The state appealed to the Eleventh Circuit after a judge in the Middle District of Alabama dismissed Alabama's complaint in April 2014.

"We feel like they both got it right and hope we'll get the same from the Eleventh Circuit in both cases," Reeves told Bloomberg BNA on July 29. In both cases, the judges found that a challenge to the Poarch Band's status and rights as a tribe would be subject to the six-year statute of limitations.

"That's a developing, consistent message from the federal courts, and I think our case falls in line with that," Reeves said.

Richard Pomp, a University of Connecticut law professor who has written on taxation of Indian tribes, said the judge in the property tax case might have viewed Hildreth as a local tax assessor looking for an opportunity to take advantage of the tribe's casino profits.

"This is another example of a State's hostility to an Indian Tribe, especially one that is viewed as having a pot of gold from gaming," Pomp told Bloomberg BNA July 28. "The Tribe had strong federal law on its side, which is why an injunction was issued."

**Assessor Disputes Time Limit.** The application in this case of the APA's statute of limitations conflicts with Eleventh Circuit precedent, said Bryan M. Taylor from Bachus, Brom & Taylor, which is representing Hildreth.

Both the Eleventh Circuit and Federal Circuit have previously ruled that challenges to a federal agency's discretionary decisions are time limited, but not challenges to regulations that defy federal statute, Taylor told Bloomberg BNA July 29.

"When the challenge involves an unauthorized exercise of power that is contrary to statute or constitutional authority, the statute of limitations doesn't apply," he said.

Hildreth views the land as taxable regardless of his ability to challenge the Poarch Band's status or the original placement of the land into trust, Taylor said, since trust land becomes taxable whenever it no longer serves its original purpose.

"The only purpose for a trust is to provide land for Indian tribes that were federally recognized before the 1934 act," he said, citing the guidance of the Supreme Court in *Carcieri*. The Poarch Band's own representatives have testified to Congress that the Supreme Court ruling sets up two different classes of Indians, he added.

"We have repeatedly stated that we acknowledge the tribe's federal recognition, but under the guiding Supreme Court ruling, that alone is not what establishes a

tribe's right to a tax exemption under the Indian Reorganization Act," Taylor said.

**Time Limit Hard to Escape.** Similar cases since the *Carcieri* ruling have seen states trying to assert the right to tax Indian lands, said Bruce Ely, an Alabama tax attorney at Bradley Arant Boult Cummings.

"They become statute of limitations cases," Ely told Bloomberg BNA July 28.

"I think the tax assessor has some viable claims, but the statute of limitations may prevent the substantive issues from ever being heard," he predicted.

In both of the cases involving the Poarch Band, the state and local officials are partly motivated by the millions of dollars that the tribe makes from gambling operations, while the state receives no tax revenue, Ely said.

"I expect there will be more litigation to come," he added.

The preliminary injunction order is available at [http://www.bloomberglaw.com/public/document/Poarch\\_Band\\_of\\_Creek\\_Indians\\_v\\_Hildreth\\_Docket\\_No\\_115cv00277\\_SD\\_A](http://www.bloomberglaw.com/public/document/Poarch_Band_of_Creek_Indians_v_Hildreth_Docket_No_115cv00277_SD_A).

The notice of appeal is at [http://www.bloomberglaw.com/public/document/Poarch\\_Band\\_of\\_Creek\\_Indians\\_v\\_Hildreth\\_Docket\\_No\\_115cv00277\\_SD\\_A/1](http://www.bloomberglaw.com/public/document/Poarch_Band_of_Creek_Indians_v_Hildreth_Docket_No_115cv00277_SD_A/1).

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