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## The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters

R. Spencer Clift III

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# THE HISTORICAL DEVELOPMENT OF AMERICAN INDIAN TRIBES; THEIR RECENT DRAMATIC COMMERCIAL ADVANCEMENT; AND A DISCUSSION OF THE ELIGIBILITY OF INDIAN TRIBES UNDER THE BANKRUPTCY CODE AND RELATED MATTERS

R. Spencer Clift, III\*

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### I. Introduction

In times past, American Indian tribes were commonly stereotyped as a collection of rudimentary craftsmen and artisans living on federally established and impoverished reservations that commonly served as mere venues for, among other things, elementary school field trips. Over the past twenty years, American Indian tribes have evolved and progressed from federal welfare beneficiaries into major entrepreneurial entities thriving in a multitude of commercial, profit-driven endeavors. These tribes' "business-like demeanor" is particularly manifested as tribes own and/or operate, for example, smoke shops, fuel stations, convenience stores, casinos, hotels, golf courses, agribusinesses, and banks on more than 300 Indian reservations located throughout the United States.<sup>1</sup>

This dramatic economic proliferation is attributed, in part, to the fact that Indian tribes in America are located on lands providing tribal businesses unique, tax exempt venues due to the inherent status of tribes as sovereigns.<sup>2</sup> For example, the Mississippi Choctaw tribe has partnered with corporations such as American Greeting Cards, AT&T, Caterpillar, Panasonic, Pepsi, Sylvania, Matrix Building Systems, and Ford Motor Company, creating more than 1000 local jobs and generating approximately \$123 million in annual wages.<sup>3</sup> Specifically, the Choctaw Indian tribe, located on approximately 29,500 acres in five counties in central Mississippi, participates in more than fifteen enterprises with revenues exceeding \$200 million per year.<sup>4</sup> The economic development and growth of Indian tribes throughout America have created a budding middle class on Indian reservations leading to, inter alia, the charter of at least ten banks owned and controlled by Native Americans. It is anticipated that such economic growth and development, along with budding political influence, will substantially

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1. Gary S. Pitchlynn, *Secured Transactions and Tribal Sovereign Immunity*, 53 CONSUMER FIN. L.Q. REP. 52, 52 (1999).

2. Jim VandeHei, *Mississippi's Choctaw Find an Unlikely Ally in a GOP Stalwart*, WALL ST. J., July 3, 2000, at A1.

3. *Id.*; *Native Americans Move into the Banking Business as Their Assets Grow*, WALL ST. J., Nov. 30, 2000, at A1; Jim Garber & Megan Knox, *From the Chief's Desk — Chief Phillip Martin, Biography*, CHOCTAW TIMES, Fall 2000, at 6, 7.

4. Garber & Knox, *supra* note 3, at 7.

increase over the next ten years.<sup>5</sup> As a result, Indian tribes persuade many lawmakers to support their programs and agendas.<sup>6</sup>

The recent, dramatic success and incredible growth in the tribal gaming industry in America has led to a boom of capital intensive projects on many tribal lands.<sup>7</sup> Economic prosperity and accelerated expansion are common themes on approximately 198 reservations containing some sort of gaming operation.<sup>8</sup> It is emphasized here that tribes are not immune from economic failure or financial distress (and perhaps even relief under the remedial Bankruptcy Code).<sup>9</sup>

At some point, a tribe engaged in commercial activity will face financial distress and need protection under established and tested insolvency laws. As tribes continue to become commercially attractive to outside partners, investors, and the public, the need exists for tribes to establish "legal certainties" by adopting the necessary and predictable business codes and designating legal fora for resolving commercial and noncommercial disputes.<sup>10</sup> The tribes' sovereign status as independent nations make legal disputes frustrating and intimidating to many nontribal entities, ultimately leading to complex, time-consuming, and expensive jurisdictional disputes.<sup>11</sup> In an effort to exude an amicable commercial disposition, tribes oftentimes will, as a practical matter and business decision, accept limitations or waive sovereign immunity in certain legal fora in order to garner valuable and necessary commercial interaction with the private and public sectors.<sup>12</sup>

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5. *Id.*

6. VandeHei, *supra* note 2.

7. *Id.*; Viveca Novak & Mark Thompson, *The Lost Tribe?*, TIME, Mar. 6, 2000, at 66, 67 (identifying and noting that the largest casino in the U.S. is located in Connecticut and run by an Indian tribe projecting earnings of \$1 million per day even with the addition of another tribal casino in the same state); *see also* William Booth, *Tribes Ride a Casino Dream*, WASH. POST, May 9, 2000, at A1 (identifying plans for over \$400 million in gaming developments in California by Indian tribes); Pat Doyle, *Red Lake Tribe Betting That Water Park, Hotel Will Boost Casino*, STAR TRIB. (Minneapolis), May 12, 2000, at B1 (discussing the commencement of a \$22 million indoor water park adjacent to a casino run by the Red Lake Indian Tribe in Minnesota).

8. *See* Novak & Thompson, *supra* note 7, at 66, 67.

9. *See generally* Pitchlynn, *supra* note 1.

10. *Id.* at 53.

11. *See In re Shape*, 25 B.R. 356 (D. Mont. 1982); *In re Sandmar Corp.*, 12 B.R. 910 (D.N.M. 1981) (providing examples of the jurisdictional barriers manifested in past cases).

12. David B. Jordan, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After Kiowa Tribe v. Manufacturing Technologies Inc.*, 52 OKLA. L. REV. 489, 503 (1999); Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 110

It is specifically noted that clarification of a tribe's status under the Bankruptcy Code (the Code) is required. Intensive commercial activity and economic development engaged in by tribes leads to the conclusion that at some point in the future, a tribe will likely participate in a bankruptcy case as a debtor seeking reorganization under the Code. The eligibility and status of a tribe involved in a case or proceeding under the Code, as either a debtor or creditor, remains in question. Query, shall tribes be eligible entities under the Code in light of the definitions of governmental units, persons, corporations, partnerships, or municipalities under §§ 101 and 109 of the Code?

The primary purpose and intent of this article are to analyze the past treatment of tribes and their existing and potential treatment under the Code. The article also demonstrates that no uniform treatment or definitive classification of a tribe presently exists under the Code. Indeed, uncertainty seemingly exists regarding the status, treatment, and eligibility of tribes as participants in bankruptcy cases and proceedings. While several courts addressed the role of tribes under the Code as a creditor, these courts acknowledged, *inter alia*, the absence of the term "Indian tribe" in the current Code.<sup>13</sup>

In essence, this article provides pertinent information for two distinct audiences: (1) readers who know little or nothing about Native Americans and Indian tribes in the U.S.; and (2) readers with a limited knowledge of the Bankruptcy Code. The ultimate goal of the article is to provide suggestions and answers, or at least more guidance, regarding the treatment, eligibility, applicability, sovereign status, and relief available to tribes under the Code.

Part II of the article studies the semantics, history, evolution, and status of tribes that should be analyzed to more fully appreciate the multifarious transformation and advancement of the American Indian tribe. Part III provides an overview of the Code. Part IV defines and utilizes the definitions in the Code as they relate to the eligibility, participation, treatment, and applicability of the Code to tribes. Part V discusses the history, origin, and ultimate impact sovereign immunity has on the tribal eligibility issue. This Part also addresses the specific issues of sovereign immunity in an effort to assess the eligibility and applicability of tribes as

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(1999-2000).

13. *Sandmar Corp.*, 12 B.R. 910 at 916 (acknowledging the absence of the term "Indian tribe" in the 1978 Code but recognizing the existence of the term "Indian territory" in 11 U.S.C. § 1(24) under the Bankruptcy Act of 1898). However, the court questioned the lack of an explanation regarding the omission of the term in the current Code. *Id.*

participants in cases and proceedings under the Code. Finally, Part VI provides some conclusions.

## *II. The Semantics, Evolution, and Dismemberment of Native American Culture and Resulting Titles*

### *A. From Nations to Tribes*

A study of the historical background and evolution of the status of American Indians and modern organized Indian tribes is addressed before even attempting to classify a formally organized group of Indians into a "qualified entity" eligible for relief under the Code. An examination, understanding, and appreciation of the historical development of American Indian tribes and tribal sovereignty are addressed before the specific issues are further discussed in this article.<sup>14</sup>

First, the development of Indian tribes as America's true first nations is considered and appreciated.<sup>15</sup> Europeans considered groups of Indians, when contemplated as a collective unit, as "nations," "tribes," "bands,"<sup>16</sup> or "remnants of tribes."<sup>17</sup> Without further inquiry or comment, all of these terms are functionally synonymous.<sup>18</sup> An understanding and definition of the descriptive terms defining Indians and Indian tribes must be analyzed before applying them to the various possibilities offered under the Code. In order to more fully appreciate and understand the semantics and relevance of this specific classification, the term describing Indian groups as "nations" is first developed

#### *1. "Indian Nation" Analysis*

The Europeans considered Indian settlements in the Americas as "nations" for several reasons. Under the principles of European legal theory, the doctrine of discovery, and natural law, the early explorers and colonists

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14. John Fredericks, III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347, 409 (1999).

15. *Id.*

16. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 6 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN]; *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975) (utilizing the term "band" as being commonly referred to as part of a divided tribe or portion of a larger entity formally recognized as a tribe).

17. Dan Gunter, *The Technology of Tribalism: The Lemhi Indians, Federal Recognition, and the Creation of Tribal Identity*, 35 IDAHO L. REV. 85, 92 (1998); see also VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 2 (1969).

18. Gunter, *supra* note 17, at 92.

could only acquire previously settled Indian lands through an act of war or by entering into a treaty.<sup>19</sup>

The advantage of recognizing tribal settlements as "nations" is clear: in the event a dispute over land or territory arises, two distinct sovereigns can enter into treaties.<sup>20</sup>

Thus, in order to facilitate settlement and land acquisition through treaties, Europeans settling in North America treated the Indian settlements as sovereign nations.<sup>21</sup> The treaties also served to maintain peace among the sovereigns and symbolized the fact that the early relationship between Native Americans and settlers also borrowed principles from international law.<sup>22</sup>

For example, the English policy of recognizing Indian nations as sovereign nations was manifested in 1763.<sup>23</sup> When King George III issued the Royal Proclamation of 1763, the Crown revealed a "connection" to the "Indian nations" and envisioned its role as a "protector" of Indian rights.<sup>24</sup> The policy implemented by the British indicated that the Indian settlements were viewed as independent nations, especially with respect to Indian lands and their governments as sovereign entities.<sup>25</sup> Additionally, the Treaty of Fort Stanwix of 1768 firmly established the use of international instruments in British Indian policy and reinforced the idea of tribes as sovereign entities.<sup>26</sup>

After the American Revolution, the United States Congress continued Britain's policy by recognizing Indians as sovereign nations under the Articles of Confederation.<sup>27</sup> Indian nations were not considered a "part" of the United States or under its jurisdiction. Instead, the Indian nations were considered "protectorates" under the Articles.<sup>28</sup> Accordingly, domestic

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19. *Id.* at 93.

20. COHEN, *supra* note 16, at 52.

21. Gunter, *supra* note 17, at 93.

22. Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1462 (1991); *see also* 1 INDIAN AFFAIRS: LAWS AND TREATIES 1 (Charles Kappler ed., photo. reprint 1977) (1904); ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, at 103 (1997).

23. *Appeal from the Supreme Court of the United States to the Supreme Court of the American Indian Nations: The Cherokee Nation of Indians, et al. v. Georgia*, 8 KANS. J.L. & PUB. POL'Y 159, 163 (1999) [hereinafter<sup>9</sup> *Cherokee Nation Appeal*].

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 167.

28. *Id.*



disputes between Indians and Americans invoked consideration of the principles and doctrines of international law.<sup>29</sup> Furthermore, Indians and their organized settlements possessed political liberty and property (i.e., land) as sovereigns safeguarded by the same protections afforded to other sovereign entities. Therefore, Indian nations' land and rights could only be taken by the utilization of treaties, trade, or force.<sup>30</sup>

With the ratification of the America Constitution in 1787, Congress and the federal government were empowered to control and regulate commerce with Indians by virtue of the Commerce Clause of the Constitution.<sup>31</sup> The Commerce Clause, or more specifically, the "Indian Commerce Clause," allows Congress to regulate relationships and commerce with Indian tribes in virtually every economic or commercial aspect; however, this "plenary power" possessed by Congress is extremely broad but not absolute, because it is subject to constitutional limitations and judicial review.<sup>32</sup>

Likewise, the treaty power under Article II, Section 2 of the Constitution vests substantial "political power" in the Executive Branch, subject to Senate approval, to negotiate international agreements with sovereign entities (i.e., Indian nations).<sup>33</sup> The treaty-making authority clarifies the role of the federal government as the principal figure regarding Indian affairs.<sup>34</sup> The status of American Indians as nations, or independent nations within the meaning of the Constitution, was fixed and determined by the Supreme Court in a line of cases known as the "Marshall Trilogy."<sup>35</sup>

The Marshall Trilogy consists of three cases: *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*. In *Johnson v. M'Intosh*, the United States Supreme Court articulated the inherent limitations on tribal power as a result of Indian tribes' incorporation into the United States.<sup>36</sup> This case actually clarified the fact that tribes lacked legal

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29. COHEN, *supra* note 16, at 50, 58.

30. *Cherokee Nation Appeal*, *supra* note 23, at 169.

31. U.S. CONST. art. I, § 2, cl. 3 (Indians not taxed); U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. CONST. amend. XIV, § 2 (Indians not taxed).

32. *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) (providing protection for Indian property rights recognized by Congress); *see also* *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).

33. U.S. CONST. art. II, § 2 (denoting the treaty power possessed by the President with the advice and consent of the Senate).

34. COHEN, *supra* note 16, at 207.

35. AM. INDIAN LAWYER TRAINING PROGRAM, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 5 (1988).

36. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *see also* Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183, 1188 (2000).

authority to transfer and alienate their lands or enter into treaties with sovereigns other than the United States.<sup>37</sup> The tribes' status as complete sovereigns was clearly curtailed as manifested by the decision:

They [Indian tribes] were admitted to be the rightful occupants of the soil, with legal as well as just claim to retain possession of it, and to use it according to their own discretion, but their [Indian tribes] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied . . . .<sup>38</sup>

In 1831, the United States Supreme Court again addressed the legal interpretation of tribal status in the federal-tribal relationship in *Cherokee Nation v. Georgia*.<sup>39</sup> In *Cherokee Nation*, the Court diminished the independent status of tribes as nations or separate sovereigns.<sup>40</sup> Chief Justice Marshall considered the fact that because the drafters of the Constitution expressly distinguished "foreign nations," "several states," and "Indian tribes" in Article I, Section 8, Clause 3, in the text of the Constitution, tribes could not be considered "foreign nations" or "states."<sup>41</sup> Ultimately, these points lead to one question: If tribes fail to qualify as a state or a foreign nation, what are they? The treatment of tribes as foreign nations in one case and domestic dependent nations in another presented multiple problems and led to the inconsistent legal treatment of tribes.

Interestingly, Chief Justice Marshall attempted to clarify the status of tribes in relation to the federal government by utilizing parts of the Constitution, treaties, and other international instruments.<sup>42</sup> The Chief Justice applied domestic law (i.e., the Indian Commerce Clause of the Constitution) to resolve an international legal issue involving the status of the relationship of sovereign tribes with the United States.<sup>43</sup> The Chief Justice articulated and applied the term "domestic dependent nations" to tribes, who in his opinion and interpretation of the Constitution, were under the dominion and control of the United States (i.e., congressional control).<sup>44</sup>

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37. Ball, *supra* note 36, at 1188.

38. *Johnson*, 21 U.S. (8 Wheat.) at 574.

39. 30 U.S. (5 Pet.) 1 (1831).

40. O'Brien, *supra* note 22, at 1464.

41. *Id.*; ALFRED KELLY ET AL., *THE AMERICAN CONSTITUTION* 204 (7th ed. 1991).

42. O'Brien, *supra* note 22, at 1499-1500.

43. *Id.*

44. *Id.* It is noted that the relationship between a tribe and the United States is one similar to that of a ward to its guardian, discussed *infra* in relation to the trust relationship.

Further, Chief Justice Marshall boldly declared that the United States had an "unquestionable right" to Indian lands which should be voluntarily ceded to the United States.<sup>45</sup> The Chief Justice's study of the constitutional semantics (i.e., the framer's use of the term "domestic dependent nations"), deliberately chosen by the framers of the Constitution in the Indian Commerce Clause, forever ameliorated the stature of Indian settlements in America as sovereign, independent nations.<sup>46</sup>

One year later, Chief Justice Marshall qualified and substantiated his prior use of the term "domestic dependent nations" in *Worcester v. Georgia*.<sup>47</sup> The Chief Justice held that tribes were still considered "nations" in the sense that a government-to-government relationship exists between the separate tribes and the federal government under the Constitution. Thus, tribes still possessed the right to self-government, subject only to congressional control, free of individual state interference.<sup>48</sup>

Subsequently, tribes were viewed as a "weaker state," yet still an independent entity existing in a trust relationship as a ward under the auspices of the federal government.<sup>49</sup> While the "Marshall Trilogy" provided the legal foundation upon which modern tribal sovereignty is based, the three decisions signaled that the Federal Constitution failed to preserve the deserved status of complete sovereignty for the nation's largest free minority — the American Indian tribes.<sup>50</sup>

## 2. "Indian Tribe" Analysis

Although the Supreme Court conceived and articulated a rationale to curtail the sovereignty of Indian nations, the status of Indians, in the minds of some, was degraded further by the adoption of the term "tribe" when referring to Indians.<sup>51</sup> As one commentator stated — the use of the words "tribe" or "tribal" might inappropriately denote a "less advanced" culture.<sup>52</sup> Nevertheless, the framers of the American Constitution adopted this term leading to its ultimate use in the many statutes and judicial cases concerning Indian settlements.

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45. *Id.*

46. *Id.* at 1500 (asserting that Marshall's assignment of the term "domestic dependent nations" forever "de-internationalized" or "domesticized" tribal status).

47. 31 U.S. (6 Pet.) 515, 557 (1832).

48. Fredericks, *supra* note 14, at 365.

49. *Id.*; COHEN, *supra* note 16, at 234; O'Brien, *supra* note 22, at 1464.

50. Fredericks, *supra* note 14, at 365; KERMIT HALL ET AL., *AMERICAN LEGAL HISTORY* 260 (1996).

51. John Randolph Prince, *Indian Country: A Different Model of Sovereignty*, 33 *GONZ. L. REV.* 103, 104 n.4 (1998).

52. *Id.*

Despite multiple constitutional attacks alleging that the term is discriminatory or an improper racial classification under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court validated the use of the term. The Court affirmed the use of the word determining that the term is a "political classification" rather than a racial one.<sup>53</sup> Today, the term is a universally adopted classification and even a desired status or form of recognition for organized groups of Indians seeking federally created benefits.<sup>54</sup>

In negotiations, the federal government chose to assign the term "tribe" to Indian groups.<sup>55</sup> Perhaps, the federal government, including the courts and Congress, failed to employ a precise or blanket definition of the term in order to arrive at a desired result.<sup>56</sup> It has even been stated that no universal, legal definition of the term exists because no specific, fitting, or all-inclusive standard could be articulated to cover the vast array of Indian groups deserving or seeking recognition.<sup>57</sup>

In any event, the term — Indian tribe — is commonly used in two manners — an ethnological sense and also a legal-political sense.<sup>58</sup> The ethnological sense addresses the origin, characteristics, vernacular, and ancestry of certain Indian tribes. This sense is commonly assessed and analyzed by reference to geographic boundaries and ethnic or personal character traits. The political sense addresses the classification and organization of tribes for political, legislative, or administrative purposes as well as federal assistance and benefits.<sup>59</sup>

The broad and multiple definitions of the term "tribe" allowed the federal government to diminish the rights of Indians and actually deny them particular rights depending on the context and reach of particular statutes utilizing the term.<sup>60</sup> The need for a definition of the term "tribe" originated in order to settle treaty disputes and is presently utilized to determine eligibility for federal support, protection, and assistance.<sup>61</sup> In fact, pursuant to the Code of Federal Regulations, formal acknowledgment of tribal existence by the Bureau of Indian Affairs (BIA) is a prerequisite to the

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53. L.R. Weatherhead, *What Is an "Indian Tribe"? — The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 3 (1980).

54. Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 211 (1991).

55. Gunter, *supra* note 17, at 93.

56. *Id.*

57. COHEN, *supra* note 16, at 3; *see also* Weatherhead, *supra* note 53, at 5.

58. COHEN, *supra* note 16, at 3.

59. *Id.* at 6.

60. *Id.* at 3.

61. *Id.*

protection, services, immunities, privileges, and benefits provided by the federal government by virtue of their status as "tribes."<sup>62</sup>

In recognition of the fact that the definition of the term "tribe" was open for judicial interpretation, the Supreme Court developed a widely used definition of its own in *Montoya v. United States* and reaffirmed in *United States v. Candelaria*.<sup>63</sup> For example, the Court defined a "tribe" as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined territory."<sup>64</sup> Despite the differing definitions attributed to tribes in common law doctrines and judicial case holdings, tribes have gained formal recognition from the legislative and executive branches of the federal government.

## *B. Recognition by the Federal Legislative and Executive Branches*

### *1. Recognition of Indian Tribes by the Legislative Branch*

Article I of the Constitution grants Congress the authority to regulate Indian tribes. The determination that Indians residing together validly constitute a tribe rests with Congress and not the courts.<sup>65</sup> Congress has delegated regulation over tribes — although some consider the duty a nondelegable, constitutionally empowered responsibility — to the executive branch (i.e., the BIA).

The definition previously established in *Montoya v. United States*<sup>66</sup> is presently utilized as part of a multifactor test in determining the legitimacy or the existence of a tribe. In the event the federal government determines that a tribe exists, courts generally accept such recognized status without question.<sup>67</sup> "Arbitrariness" represents the only constitutional barrier that prohibits a blanket definition of an "Indian tribe" from being applied to all federal, Indian legislation.<sup>68</sup> Congress, however, routinely delegates the

62. 5 C.F.R. § 83.2 (2002).

63. *Montoya v. United States*, 180 U.S. 261, 266 (1901); *United States v. Candelaria*, 271 U.S. 432, 442 (1926).

64. *Id.*; see also *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902 (D. Mass. 1977) (noting the power and competence of the court to recognize the actual existence of a tribe even though it is not otherwise formally recognized); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, cert. denied, 444 U.S. 866 (1979) (stating that the phrase "Indian tribe" is to be construed liberally in an Indian tribes favor when ascertaining the existence or qualifications regarding a given tribe's eligibility for federal benefits due to the wide variations and conditions confronting tribes in diverse geographic areas).

65. *United States v. Sandoval*, 231 U.S. 28, 49 (1913); *Candelaria*, 271 U.S. at 439.

66. 180 U.S. 261, 266 (1901).

67. COHEN, *supra* note 16, at 3; see also *United States v. John*, 437 U.S. 634, 650 (1978); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977).

68. *Weatherhead*, *supra* note 53, at 4-8; see *Sandoval*, 231 U.S. at 46 (stating that

defining responsibility to the administrative agencies of the executive branch (i.e., the BIA), unless Congress expressly defines the term in a particular statute.<sup>69</sup> Because Congress can overrule a BIA decision (or for that matter a judicial decision) by legislative act, the power Congress wields over Indian affairs must also be considered.

To further confuse the situation, in the event a petitioning group of Indians are not formally recognized by the BIA as a tribe, they may attain formal recognition by fitting within the expressed criteria or definition in a particular statute. Tribes may exist for one purpose or statute but fail to exist for others.<sup>70</sup> Therefore, tribal status must be considered and analyzed as applied in a particular statute or situation.<sup>71</sup> Prime examples and differentiation in federal statutes are:

*a) Title 20 of the United States Code — Education — American Indian, Alaska Native, and Native Hawaiian Culture and Art Development*

Title 20 U.S.C. § 4402(4) and (5) ("Definitions"):

(4) The term "Indian" means any person who is a member of an Indian tribe.

(5) The term "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in or established pursuant to the Alaska Native Claims Settlement Act), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians . . . .<sup>72</sup>

*b) Title 25 of the United States Code — Indians*

Title 25 U.S.C. § 479 ("Definitions"):

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more

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Congress is not empowered to arbitrarily bring a group of people together by calling them a tribe).

69. Weatherhead, *supra* note 53, at 5.

70. COHEN, *supra* note 16, at 7.

71. *Id.*

72. 20 U.S.C. § 4402(4)-(5) (2000).

Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.<sup>73</sup>

Title 25 U.S.C. § 479a(2): "The term 'Indian Tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."<sup>74</sup>

Title 25 U.S.C. § 472a(e)(1):

(1) The term "tribal organization" means —

(A) the recognized governing body of any Indian tribe, band, nation, pueblo, or other organized community, including a Native Village . . . ; or

(B) in connection with any personnel action referred to in subsection (c)(1) of this section, any legally established organization of Indians which is controlled, sanctioned, or chartered by a governing body referred to in subparagraph (A) of this paragraph . . . .<sup>75</sup>

Title 25 U.S.C. § 450b(d) and (e), the Indian Self-Determination and Education Assistance Act of 1975, provides:

(d) "Indian" means a person who is a member of an Indian tribe;

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians . . . .<sup>76</sup>

Title 25 U.S.C. § 1301(1), from the Indian Civil Rights Act of 1968 ("Constitutional Rights of Indians Generally"): "(1) 'Indian tribe' means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government . . . ."<sup>77</sup>

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73. 25 U.S.C. § 479 (2000).

74. 25 U.S.C. § 479a(2) (2000).

75. 25 U.S.C. § 472a(e)(1) (2000).

76. 25 U.S.C. § 450b(d)-(e) (2000).

77. 25 U.S.C. § 1301(1) (2000).

Title 25 U.S.C. § 1603(d), from the Indian Health Care Act:

"Indian tribe" means any tribe, band, nation, or other organized group or community, including any Alaska Native village . . . as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians . . . .<sup>78</sup>

Title 25 U.S.C. § 1903(8), of the Indian Child Welfare Act: "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native Village . . . ."<sup>79</sup>

Title 25 U.S.C. § 2403(3), of the Alcohol and Substance Abuse Prevention and Treatment Act:

The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians (including any Alaska Native village . . . as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians . . . .<sup>80</sup>

Title 25 U.S.C. § 479, of the Indian Reorganization Act of 1934 (section 19 of the IRA): Congress announced prospectively which Indian groups would be recognized as Indian tribes for purposes of the act by authorizing three types of groups as follows: "A. Members of any recognized Indian tribe now under federal jurisdiction; B. Descendants of members of such recognized Indian tribe, who resided on any reservation on June 1, 1934; C. Person of one half or more Indian Blood."<sup>81</sup>

*c) Title 42 of the United States Code — The Public Health & Welfare*

42 U.S.C. § 9601(36): "The term 'Indian Tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska native village, . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians . . . ."<sup>82</sup>

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78. 25 U.S.C. § 1603(d) (2000).

79. 25 U.S.C. § 1903(8) (2000).

80. 25 U.S.C. § 2403(3) (2000).

81. Weatherhead, *supra* note 53, at 12; see 25 U.S.C. § 479 (2000).

82. 42 U.S.C. § 9601(36) (2000).



42 U.S.C. § 300f(14): "The term 'Indian Tribe' means any Indian tribe having a Federally recognized governing body carrying out substantial governmental duties and powers over any area."<sup>83</sup>

d) 40 C.F.R. § 146.3 — *Public Buildings, Property, and Works*

"*Indian Tribe* means any Indian Tribe having a Federally recognized governing body carrying out substantial governmental duties and powers over a defined area."<sup>84</sup>

In addition to the definitions proscribed in the statutes, a federal acknowledgment or recognition process exists. The process has a distinct history worthy of a substantive discussion concerning its inception and current framework.

2. *Recognition of Indian Tribes by the Executive Branch*

The importance assigned to Indian relations as well as tribal recognition by the federal government is manifested by the fact that four of the first thirteen statutes passed by the first Congress of the United States addressed Indian affairs.<sup>85</sup> In the Act of August 7, 1789, Congress established the Department of War and commissioned this Department to follow the directions of the President in regard to Indian affairs as well as military matters.<sup>86</sup> Subsequently, the BIA was established in 1832 as part of the Department of War; however, in 1849, the primary responsibility for the administration of Indian affairs was transferred to another executive branch department — the Department of the Interior.<sup>87</sup>

Today, the BIA functions as part of the Department of Interior under the executive branch and performs a majority of the federal responsibilities regarding Indian affairs.<sup>88</sup> In particular, the BIA, under the direction of the Interior Department's Assistant Secretary of Indian affairs, is solely responsible for administering the federal acknowledgment process of unrecognized tribes.<sup>89</sup>

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83. 42 U.S.C. § 300f(14) (2000).

84. 40 C.F.R. § 146.3 (2001).

85. COHEN, *supra* note 16, at 108 n.378.

86. *Id.* at 108; Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

87. COHEN, *supra* note 16, at 673.

88. *Id.*; see 25 U.S.C. §§ 1-17 (2000) ("Bureau of Indian Affairs"); see 25 U.S.C. § 1a (2000) (authorizing the Secretary of Interior to expressly delegate powers and duties of Indian affairs to the Commission of Indian Affairs); see William Claiborne, *Tribes and Tribulations: BIA Seeks to Lose a Duty; Indians' Casino Rush Overwhelms Agency's Recognition Staff*, WASH. POST, June 2, 2000, at A31 (noting that the BIA is currently overwhelmed by the massive recognition issues relating to Indians).

89. Paschal, *supra* note 54, at 209.

Despite broad federal authority empowering administrative agencies with the duty of recognizing tribal status, Indian tribes are recognized utilizing a number of methods and diverse criteria. Recognition by treaty,<sup>90</sup> agreement,<sup>91</sup> executive order,<sup>92</sup> legislation, continuous course of dealings with the federal government,<sup>93</sup> or a continuous political relationship with the federal government<sup>94</sup> (i.e., administrative actions such as providing services to tribes through the Department of the Interior/BIA) are all possible ways tribes are recognized.<sup>95</sup> In 1978, the BIA, on its own initiative and not at the behest of the Congress, formally established an administrative program to facilitate the tribal recognition process by providing a systematic and specifically defined process of attaining tribal recognition.<sup>96</sup>

The federal acknowledgment process promulgated by the BIA requires petitioning tribes to satisfy a meticulous seven-part test.<sup>97</sup> The process requires representatives of a tribe to file a detailed petition with the BIA providing evidence that the particular tribe meets each element of a seven-part test establishing each of the following:<sup>98</sup>

(1) "The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900."<sup>99</sup>

(2) "A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until present."<sup>100</sup>

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90. See, e.g., Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually et al., 10 Stat. 1132 (1855) (establishing a reservation); Weatherhead, *supra* note 53, at 8.

91. See, e.g., Act of July 1, 1892, ch. 140, 27 Stat. 62 (ratifying an agreement with the Colville Tribe).

92. See, e.g., Arizona v. California, 373 U.S. 546, 595-98 (1963). In 1919 Congress terminated the practice of creating reservations by executive order. 43 U.S.C. § 150 (2000).

93. See Paschal, *supra* note 54, at 210 (citing an example regarding official recognition of an Indian tribe where a trust relationship existed between the Indian tribe and the federal government consisting of continuous federal contact, negotiations, and exchange of federally conferred benefits); see also COHEN, *supra* note 16, at 6.

94. See, e.g., United States v. Sandoval, 231 U.S. 28, 47 (1913); Weatherhead, *supra* note 53, at 15.

95. Weatherhead, *supra* note 53, at 8. See generally Paschal, *supra* note 54.

96. Gunter, *supra* note 17, at 95.

97. 25 C.F.R. § 83.7(a)-(g) (2000).

98. *Id.*; Paschal, *supra* note 54, at 216.

99. 25 C.F.R. § 83.7(a) (2000).

100. *Id.* § 83.7(b).

(3) "The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present."<sup>101</sup>

(4) "A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures."<sup>102</sup>

(5) "The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."<sup>103</sup>

(6) "The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe."<sup>104</sup>

(7) "Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship."<sup>105</sup>

Once the petition containing proof of the seven necessary elements is filed, the BIA appoints a staff of historians, anthropologists, and genealogists to evaluate the merits of the tribe's petition.<sup>106</sup> The twelve members serving on the BIA's Branch of Acknowledgment and Research staff also verify and research the merits of the petition followed by BIA experts who summarize their reports and issue proposed findings.<sup>107</sup> Finally, after a notice and comment period, the Assistant Secretary of Indian Affairs authorizes and issues a final determination.<sup>108</sup> Of course, the process is lengthy, costly, and dilatory, often costing a petitioning entity as much as \$400,000 to \$1 million and lasting as long as twenty-five years.<sup>109</sup> While the term "Indian tribe" is a clearly desirable designation for organized tribes, its definition is less than clear and subject to substantial administrative costs and financial burdens. Considering such costs, one may question why a tribe seeks federal recognition.

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101. *Id.* § 83.7(c).

102. *Id.* § 83.7(d).

103. *Id.* § 83.7(e).

104. *Id.* § 83.7(f).

105. *Id.* § 83.7(g).

106. Paschal, *supra* note 54, at 216.

107. *Id.* at 217; Claiborne, *supra* note 88, at A31.

108. Paschal, *supra* note 54, at 217.

109. *Id.* at 219; *see* Claiborne, *supra* note 88, at A31 (providing updated numbers and statistics regarding the recognition process).

### C. Why Indian Tribes Seek Federal Recognition

Official federal recognition as a tribe qualifies such entities for a multitude of rights and benefits as expressly stated in 25 C.F.R. § 83.2.<sup>110</sup> Federal assistance and benefits, status as a sovereign entity, tax exemptions, and the establishment of a trust relationship as the beneficiary of a high fiduciary duty, represent the reasons why tribes expend enormous time and resources to attain formal recognition.<sup>111</sup>

Federal recognition automatically qualifies tribes as eligible for multiple forms of federal assistance programs.<sup>112</sup> Services such as financial assistance and social services,<sup>113</sup> loans to tribal members,<sup>114</sup> housing improvement programs,<sup>115</sup> and health services<sup>116</sup> are just a few of the many services and benefits provided to qualified, eligible Indian tribes.<sup>117</sup>

As a sovereign entity, officially recognized tribes are allowed to self govern and enjoy immunity from state taxation and regulations within tribal territory. Recognition as a tribe is also a prerequisite to being exempt from state laws or state constitutional provisions prohibiting casino gambling.<sup>118</sup> In a similar fashion, tribal sovereignty bears significant value in regard to tribal exemptions from state and federal taxes.<sup>119</sup>

For example, tribes expend enormous resources maintaining the state and federal tax exemptions on gaming revenues earned in tribal casinos.<sup>120</sup> Tribes, like the Mississippi Choctaw, also attract corporate giants like Ford Motor Co. and AT&T, who build manufacturing plants within tribal territory in order to reap the lower corporate tax rates on these sovereign, tribal lands.<sup>121</sup> The enormous entrepreneurial and corporate growth, however, are

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110. 25 C.F.R. § 83.2 (2000).

111. Paschal, *supra* note 54, at 209.

112. *Id.* at 213.

113. 25 C.F.R. § 20.100 (2000).

114. 25 C.F.R. § 101 (2000).

115. 25 C.F.R. § 256.1 (2000).

116. 42 C.F.R. § 36.2 (2000).

117. See generally Paschal, *supra* note 54, at 228 nn.39-41; Rebecca Tsosie, *American Indians and The Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 L. & SOC. INQUIRY 359, 362 (1997) (referring to special programs such as the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963; Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450a-450n).

118. Claiborne, *supra* note 88, at A31.

119. VandeHei, *supra* note 2, at A1.

120. *Id.*

121. *Id.*

dependent upon the trust relationship existing between the federal government and tribes.

Currently, some 558 Indian tribes are formally recognized under federal law.<sup>122</sup> As a growing number of tribes participate in substantial commercial activities such as resort management, casino gambling, manufacturing, banking, and agribusinesses, tribes represent a distinct political, commercial, and economic entity.<sup>123</sup> In fact, the commercial success of Indian tribes has led to as many as ten banks established and run by Native Americans. Moreover, the president of the North American Native Bankers Association of Norman, Oklahoma expects Indian tribes to own or control as many as fifty or sixty banks by 2010.<sup>124</sup> These Indian tribes engaging in commercial activities are not immune from economic or financial troubles or downturns.

Close scrutiny of the status of tribes may be required in the event a tribe or tribally owned entity, seeks relief under the Bankruptcy Code as a debtor attempting business reorganization or as a creditor in a case or proceeding under the Code. After an appreciation and brief understanding of the history and status of Indian tribes in American law, an overview of the Bankruptcy Code is helpful before analyzing the subjects concurrently.

### *III. Brief Overview of Bankruptcy Code and Its Accompanying Jurisdictional and Venue Provisions*

In the event an Indian tribe participates as a debtor or creditor in a bankruptcy case or proceeding, the following sections of this article provide some basic principles and explanations regarding the vernacular, jurisdiction, venue, and substantive provisions governing the bankruptcy courts and the applicable rules of procedure in bankruptcy.

#### *A. An Overview of the Purposes and Policies Underlying the Bankruptcy Code*

Like every other citizen in America, individual Indians and Indian tribes have absolute and equal rights under the law. Today, tribes participate in commercially diverse and complex business enterprises. There is a reasonable likelihood that one or more tribes will encounter economic

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122. Claiborne, *supra* note 88, at A31.

123. *Id.* (providing updated numbers and statistics regarding the recognition process); Fredericks, *supra* note 14, at 349; Booth, *supra* note 7, at A1 (reporting that each of the 107 federally recognized tribes in California have the right to open two casinos each and many currently planned include elaborate spas, luxury suites, golf courses, cultural centers, and hiking trails); Doyle, *supra* note 7, at B1.

124. Pamela Sebastian Ridge, *Native Americans Move into the Banking Business as Their Assets Grow*, WALL ST. J., Nov. 30, 2000, at A1.

problems similar to some other commercial enterprises and entities. By understanding the basic purposes and policies underlying the federal bankruptcy laws, tribes can informatively and efficiently participate in the nation's bankruptcy courts.

The United States Supreme Court addressed the purposes of the federal bankruptcy laws on numerous occasions. For example, in *Stellwagen v. Clum*,<sup>125</sup> the Court stated:

The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.<sup>126</sup>

Moreover, the federal bankruptcy laws are full of social and economic concerns that serve the public interest. One purpose, and the general philosophy of the bankruptcy laws, is "to give the [honest but unfortunate] debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."<sup>127</sup> The other, countervailing purpose of the bankruptcy laws is to promote equality of treatment among similarly situated creditors. In essence, the bankruptcy laws displace the various state debt collection processes in favor of a uniform collective process in the federal bankruptcy court.

America's bankruptcy laws are characterized by, inter alia, inherent tension among divergent interests. In a bankruptcy case, there are many competing and countervailing interests to consider including, for example, the interests of a tribe in a given case. It has been said that bankruptcy is a distinct system of jurisprudence — the nature of which is to sort out all of the debtor's legal relationships with others, and to apply the uniform substantive principles and procedural rules of the bankruptcy laws to those

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125. 245 U.S. 605 (1918).

126. *Id.* at 617; see *Neal v. Clark*, 95 U.S. 704, 709 (1877); *Traer v. Clews*, 115 U.S. 528, 541 (1885); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902); *Wetmoer v. Markoe*, 196 U.S. 68, 77 (1904); *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

127. *Lines v. Frederick*, 400 U.S. 18, 19 (1970) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

relationships. The goal being to either financially rehabilitate a distressed debtor or assemble and liquidate a debtor's assets for an equitable distribution to creditors. To accomplish these goals, modifications of pre-bankruptcy debtor-creditor relationships are required. As a result, a claim in bankruptcy may be satisfied in a manner far different from that originally contemplated by the parties.

Accordingly, pre-existing legal relationships can be disturbed from a broad perspective by the bankruptcy laws, subject to many statutory safeguards. A bankruptcy discharge is a privilege and not a constitutional right, and only honest debtors receive bankruptcy discharges.<sup>128</sup> For example, § 727(a) of the Code sets forth the statutory grounds for denial of an individual debtor's general discharge in a chapter 7 liquidation case. Notwithstanding an honest individual debtor's general discharge, as a matter of legislative and social policy, certain debts of individual debtors are not subject to a discharge by virtue of § 523(a) of the Code.<sup>129</sup>

For example, Congress legislated that the following debts are not subject to discharge: taxes, debts obtained by fraud, unscheduled debts, embezzlement, alimony and child support, willful and malicious injury, fines and penalties owed to the government, student loans, previously scheduled debts that were judicially declared nondischargeable, and debts arising from motor vehicle accidents when operating the vehicle while impaired.<sup>130</sup> These exceptions insure that America's bankruptcy laws are utilized for one of its intended purposes — to provide the honest and unfortunate debtor a fresh start.

### *B. An Overview of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure*

From a broad perspective, the Code is intended to fairly and equitably balance the rights of creditors and debtors. The laws of Congress relating to bankruptcy are designed to rehabilitate financially distressed debtors or provide parties with a forum for assembly and liquidation of a debtor's non-exempt assets, if any, for an equitable distribution to creditors under a statutory scheme of distribution. While the Code provides the substantive bankruptcy laws, the Federal Rules of Bankruptcy Procedure provide the procedures to implement such laws.<sup>131</sup>

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128. *United States v. Kras*, 409 U.S. 434 (1973); *Hunt*, 292 U.S. at 244.

129. *See* 11 U.S.C. § 523(a) (2000); 11 U.S.C. § 727(a) (2000) (regarding bankruptcy discharge). Compare with 11 U.S.C. § 1141(d) (2000) (regarding discharges in chapter 11 reorganization cases filed by corporations, partnerships, and individuals).

130. 11 U.S.C. § 523 (2000).

131. Some procedure is legislated in the statutory provisions of the Code. *See also* Hon.

The Code is divided into eight chapters. Chapters 1, 3, and 5 of the Code, with limited exceptions, are the general provisions applicable to all the operative chapters under the Code (i.e., chapters 7, 9, 11, [12],<sup>132</sup> and 13). Chapter 1 of the Code addresses general matters such as definitions, rules of construction, and eligibility to be a debtor under the Code. Chapter 3 outlines the administration of estates, providing guidance concerning use of the debtor's assets and other provisions necessary for the management of the debtor's estate. In the event the requisite number of creditors file an involuntary petition against a debtor under either chapter 7 or 11, chapter 3 (specifically § 303 of the Code) contains statutory provisions regarding involuntary bankruptcy cases.<sup>133</sup> Chapter 3 also addresses matters concerning the automatic stay; the use, sale and lease of property; and executory contracts and unexpired leases. Chapter 5 defines the rights of creditors, debtors, bankruptcy trustees, and the substantive rights of debtors regarding estate property.

All of these sections concurrently govern and guide utilization of the bankruptcy laws. For example, the automatic stay provisions in § 362(a) of the Code automatically apply to any "entity," as defined in § 101, upon the debtor's mere filing of a petition under §§ 301, 302, or 303 of the Code.<sup>134</sup> This example serves as just one instance where the chapters of the Code work concurrently to resolve insolvency disputes and curtail aggressive collection tactics by virtue of one of the Code's equitable powers — the automatic stay.<sup>135</sup>

Chapters 7, 9, 11, [12], and 13, often referred to as the operative chapters, generally apply in their respective chapters with some limited exceptions. Chapter 7 of the Code, styled "Liquidation," is designed for insolvent individuals seeking a fresh financial start as well as corporate or partnership businesses desiring to cease conducting business and liquidate

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David S. Kennedy et al., *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1 (2000).

132. The current status and future of chapter 12 is in doubt. See *infra* note 140 for an explanation of the current status of this chapter of the Code.

133. 11 U.S.C. § 303 (2000).

134. 3 COLLIER ON BANKRUPTCY § 362.03[1] (15th ed. 2002) [hereinafter COLLIER].

135. See H.R. REP. NO. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 6296-97; S. REP. NO. 95-989, at 54-55 (1978), reprinted in 1978 U.S.C.C.A.N. 5840-51 ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.").



in an orderly manner. Petitions under chapter 7 may be filed voluntarily by debtors or involuntarily by creditors.

Insolvent municipalities and other local government units are specially treated under the Code and file petitions under chapter 9.<sup>136</sup> Only voluntary petitions initiate a case under chapter 9; no involuntary petition may be filed. In order to qualify as an eligible municipality, all of the elements in § 109(c) must be met.<sup>137</sup>

Chapter 11 allows a corporation or partnership business, individual proprietor, or consumer debtor an opportunity to reorganize or be liquidated. Upon filing the chapter 11 petition, debtors enjoy a "breathing spell" which allows debtors time to restructure their assets and liabilities in a formally presented reorganization plan. Chapter 11 of the Code provides financially distressed businesses an opportunity to restructure their finances which ordinarily serves the best long-term interest of creditors and shareholders.<sup>138</sup> It is also said that chapter 11 allows businesses time to avoid the auctioneer's hammer by better serving the economy by preserving jobs.<sup>139</sup>

Initially, Congress enacted chapter 12 to meet the special needs of financially distressed "family farmers."<sup>140</sup> Finally, chapter 13 provides financial relief for eligible individuals with regular income desiring to restructure their finances over a period of three to five years. With an understanding of the basic purposes and policies of the Code and its tenets, an explanation of the jurisdictional provisions and court structure is helpful.

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136. See Jack L. Smith, *Chapter 9 Bankruptcy — A Primer for a Developing Remedy*, NORTON BANKR. L. ADVISER, Feb. 1991, at 2; *Avoiding the Hit and Run Chapter 9*, 28 Bankr. Ct. Dec. (LRP), News and Comment, No. 24, at A1 (May 21, 1996).

137. 11 U.S.C. § 109(c) (2000).

138. H.R. REP. NO. 95-595, at 220 (1977), reprinted in 1978 U.S.C.C.A.N. 6179-80 (discussing the purposes of business reorganization).

139. *Id.*

140. See, e.g., 11 U.S.C. § 101(18)-(19) (2000); *id.* § 109(f). Pending bankruptcy legislation — House Bill 333 and Senate Bill 420 — contain provisions making chapter 12 a permanent part of the Bankruptcy Code and retroactively enacted to vitiate the void incurred upon its June 30, 2000, expiration. However, on May 11, 2001, President Bush signed House Bill 256 (Family Farmer Bankruptcy Provisions Extension, Pub. L. No. 107-8, 115 Stat. 10 (2000)) extending the availability of chapter 12 until June 1, 2001. Chapter 12 received yet another temporary six-month extension on December 19, 2002, when President Bush signed House Bill 5472 that re-enacted chapter 12 of the Code from January 1, 2003, until July 1, 2003.

### *C. Bankruptcy Jurisdiction Generally*

Indian tribes, like many others who may be unfamiliar with the current governing jurisdictional provisions and substantive bankruptcy laws and rules, may have questions regarding the jurisdictional provisions governing the federal bankruptcy court. An understanding of the statutory relationship between the United States district court and the United States bankruptcy court and the semantics utilized in the relevant statutes is critical in addressing, for example, the bankruptcy court's source of authority; the role and authority of a bankruptcy judge; the distinction between bankruptcy "cases" and "proceedings"; and the distinction between "core" and "non-core" proceedings under the Code.

#### *1. Jurisdiction Under 28 U.S.C. § 1334(a)-(b)*

Title 28 U.S.C. § 1334 confers original jurisdiction of bankruptcy "cases" and "proceedings" on the United States district courts. The terms bankruptcy "case" and "proceeding" are terms of art and should not be used interchangeably.<sup>141</sup> Title 28 U.S.C. § 1334(a) provides that the United States district courts shall have original and exclusive jurisdiction of all bankruptcy cases filed under chapters 7, 9, 11, [12], and 13 of the Code. Thus, all bankruptcy cases are filed in the federal court system and not in the state court system.

The bankruptcy "case" is broadly described to include all events in the case (from its beginning to its conclusion) or "the whole ball of wax" that is created upon the filing of the bankruptcy "petition" under § 101(42) of the Code.<sup>142</sup> "Proceedings" as contemplated under 28 U.S.C. § 1334(b), are specific "subactions" or specific lawsuits within a bankruptcy "case" and are commenced by the filing of, for example, a complaint, motion, notice, an objection, or an application.<sup>143</sup>

Title 28 U.S.C. § 1334(c) recognizes the permissive and mandatory abstention doctrines which provide that the district court has non-exclusive jurisdiction (i.e., concurrent jurisdiction) over all civil proceedings arising under title 11 or arising in or related to cases under title 11. The effect of the abstention doctrine under § 1334(c) allows the district court (usually the bankruptcy court) to defer to state courts certain proceedings arising

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141. See, e.g., 28 U.S.C. § 1334(a) (2000) ("cases"); *id.* § 1334(b) ("civil proceedings").

142. See, e.g., *In re Blevins Elec., Inc.*, 185 B.R. 250, 253 (Bankr. E.D. Tenn. 1995); *In re 995 Fifth Ave. Assoc., L.P.*, 157 B.R. 942 (S.D.N.Y. 1993) (citing 5 COLLIER, *supra* note 134, § 1109.02).

143. See FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3); 2 COLLIER, *supra* note 134, § 301.03.

under the Code or arising in or related to cases under the Code (i.e., lawsuits that involve strictly state law and state law issues).

*2. Designation of Bankruptcy Courts and Appointment and Reappointment of Bankruptcy Judges Under 28 U.S.C. §§ 151-152*

Title 28 U.S.C. §§ 151 and 152 describe the authority and appointment (and reappointment) process for United States bankruptcy judges in each judicial district. Bankruptcy judges are not empowered or created under Article III of the United States Constitution. The empowerment and authority of a bankruptcy judge to adjudicate cases or proceedings under title 11 of the United States Code must originate from a federal statute.

This authority is derived from 28 U.S.C. § 151, establishing bankruptcy judges as judicial officers of the district court empowered with the authority to preside over most cases, actions, lawsuits, or proceedings that are referred to them by the district court under 28 U.S.C. § 157(a).<sup>144</sup> But, under 28 U.S.C. § 151, bankruptcy judges in each judicial district constitute a unit of the district court to be known as the bankruptcy court for that district and are appointed (and may be reappointed) by the respective United States court of appeals for fourteen-year, fixed terms under 28 U.S.C. § 152(a)(1) removable only for incompetence, misconduct, neglect of duty, or physical or mental disability pursuant to 28 U.S.C. § 152(e).<sup>145</sup>

*3. Reference and Withdrawal of the Reference Under 28 U.S.C. §§ 157(a) and (d)*

Title 28 U.S.C. § 157(a) provides the statutory authority for district court referral of any or all bankruptcy cases and proceedings to the bankruptcy court. Pragmatically, every bankruptcy case or proceeding is automatically referred to the bankruptcy court in the district, as all the district courts have entered broad standing automatic orders of reference. Upon the district court's referral of bankruptcy cases and proceedings to the bankruptcy court under 28 U.S.C. § 157(a), the bankruptcy court, rather than the district court, thereafter exercises original bankruptcy jurisdiction rather than the district court. The district court, for cause shown, may later withdraw, in whole or in part, any case or proceeding and in some limited proceedings must withdraw the reference of a proceeding under 28 U.S.C. § 157(d).

*4. Core and Non-Core Proceedings Under 28 U.S.C. § 157(b)-(c)*

Title 28 U.S.C. § 157(b)-(c) statutorily distinguishes between "core" proceedings on the one hand and "non-core" proceedings on the other. The

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144. 28 U.S.C. § 151 (2000); *see also id.* § 152.

145. *Id.* § 151.

"core" and "non-core" dichotomy may generate possible confusion for those unfamiliar with the bankruptcy jurisdictional provisions. The necessity to prescribe bankruptcy judges' jurisdiction through the use of the core and non-core dichotomy arose after the Supreme Court issued its plurality opinion declaring a portion of the prior bankruptcy jurisdictional scheme unconstitutional.<sup>146</sup>

Congress responded in 1984 and restructured the bankruptcy court's jurisdictional structure by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Amendments).<sup>147</sup> In the 1984 Amendments, Congress created the core and non-core distinction found in 28 U.S.C. §§ 157(b)(1)-(2) and (c)(1)-(2).<sup>148</sup> This distinction is particularly important because it separates the proceedings in which non-Article III, bankruptcy judges may properly exercise powers to hear and determine certain legal disputes. In "core" proceedings, the powers of bankruptcy judges are broad; however, in "non-core" proceedings, absent consent of the parties, the powers are more limited.

Bankruptcy judges under 28 U.S.C. § 157(b)(1) may both hear and determine all cases referred under title 11 and all referred core proceedings arising under title 11, or arising in a case under title 11, and may enter appropriate orders, subject only to traditional appellate review — on a clearly erroneous standard — by the district court or in some judicial districts the Bankruptcy Appellate Panel (sometimes referred to as a BAP).<sup>149</sup> Title 28 U.S.C. § 157(b)(2) contains a non-exclusive laundry list of "core" proceedings that classify the vast majority of the types of proceedings before the bankruptcy courts.<sup>150</sup>

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146. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

147. Pub. L. No. 98-353, § 101, 98 Stat. 333, 333 (codified at 28 U.S.C. § 1334 (2000)).

148. *Id.*

149. *See* 28 U.S.C. § 158(b)(1) (2000) (allowing the judicial council of the circuit to allow all appeals to be heard by a group of bankruptcy judges serving on a bankruptcy appellate panel).

150. *Id.* § 157(b)(2). The statute states:

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

The 1984 jurisdictional amendments do not define or even attempt to list or illustrate "non-core" proceedings under 28 U.S.C. § 157(c). It is said that "non-core" proceedings are related proceedings such as, for example, a lawsuit involving state law and issues commenced or prosecuted by a bankruptcy trustee or chapter 11 debtor-in-possession, which is based on a breach of contract, warranty, or other state law claim.<sup>151</sup> A non-core proceeding may also involve a suit that involves all of the following: (1) a state law cause of action; (2) against a defendant that was not a creditor of the estate (or at least did not assert a claim against the estate); and (3) a nonbankruptcy, congressional statute.

Pursuant to their powers under 28 U.S.C. § 157(b)(3), bankruptcy judges may initially determine whether a given proceeding is core or non-core. It is noted that a bankruptcy judge's determination that a proceeding is core or non-core shall not be made solely on the basis that its resolution may be affected by state law and may be appealed.<sup>152</sup> Determinations regarding whether a matter is core or non-core requires careful consideration of the factors in 28 U.S.C. § 157(b)(2).

Bankruptcy judges issue final orders in "core" proceedings which are subject to appeal to the district court in the judicial district where the bankruptcy judge is serving or, in some districts, a Bankruptcy Appellate Panel.<sup>153</sup> In a "non-core" proceeding, a bankruptcy judge, nonetheless, may hear the proceeding and thereafter submit proposed findings of fact and

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(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

*Id.*

151. *See, e.g., Mohawk Indus., Inc. v. Robinson Indus., Inc.*, 46 B.R. 464 (D. Mass. 1985).

152. 28 U.S.C. § 157(b)(3) (2000).

153. *Id.* § 158(a); *see also id.* § 158(b)(1).

conclusions of law to the federal district court for a de novo review pursuant to 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033. After considering the bankruptcy judge's proposed findings and conclusions of law on a de novo review basis, the district judge enters a final order in a non-core proceeding. By virtue of 28 U.S.C. § 157(c)(2), a bankruptcy judge may enter a final order in a "non-core" proceeding with the consent of all the parties to the non-core proceeding, subject only to the traditional appellate review on a clearly erroneous standard by the district court (or, if appropriate, by a Bankruptcy Appellate Panel).<sup>154</sup>

#### 5. Application of Jurisdictional Provisions to Indian Tribes

Two decisions prior to the 1984 amendments accompanying the Code addressed the question regarding the jurisdiction of bankruptcy cases involving Indian tribes.<sup>155</sup> The current jurisdictional provisions of 28 U.S.C. § 1334 are quite similar to the former bifurcated jurisdictional provisions of the Bankruptcy Act of 1898, despite the 1984 amendments.<sup>156</sup> It appears that the first time a bankruptcy court actually addressed the issue of tribes in a reported case was 1981.<sup>157</sup>

The *Sandmar* court directly addressed whether a bankruptcy court had jurisdiction over a tribe in its capacity as a creditor.<sup>158</sup> Factually, the case involved a tribe that knowingly violated the automatic stay provisions of § 362(a) of the Code and repossessed a leasehold after a non-Indian, tenant-debtor under the Code defaulted on a lease.<sup>159</sup> The court stated that the case was one of first impression for the court while expressly recognizing counsel's inability to cite any cases discussing Indian tribes and bankruptcy.<sup>160</sup> In concluding that the bankruptcy court was the only forum for resolution of the dispute between the tribe and the debtor-citizen under the Code, the court noted the broad jurisdictional grant of bankruptcy courts in 28 U.S.C. § 1471(e) — codified in 28 U.S.C. § 1334(e) — and the authority of Congress to establish uniform laws on the subject of bankruptcies in the Constitution.<sup>161</sup> Furthermore, the court stated that allowing the bankruptcy court to hear and determine the dispute involving

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154. The Supreme Court approved a similar delegation of authority under the Magistrate Judges Act as not violative of Article III in *United States v. Raddatz*, 447 U.S. 667 (1980).

155. *In re Sandmar*, 12 B.R. 910 (D.N.M. 1981); *In re Shape*, 25 B.R. 356 (D. Mont. 1982).

156. See 28 U.S.C. § 1334 (2000); *id.* § 1441.

157. See *Sandmar*, 12 B.R. 910.

158. *Id.* at 912-13.

159. *Id.* at 911-12.

160. *Id.* at 913, 915.

161. See 28 U.S.C. § 1334 (2000); see also U.S. CONST. art. I, § 8, cl. 4.

the debtor and the tribe allowed a specialized tribunal to administer a comprehensive body of uniform federal bankruptcy law and practice without infringing upon the jurisdiction of the tribal courts.<sup>162</sup>

The *Sandmar* court's analysis focused on the jurisdictional grant in 28 U.S.C. § 1471(e), currently 28 U.S.C. § 1334(e), granting the bankruptcy court exclusive jurisdiction over all the property, *wherever located*, of the debtor, as of the commencement of such case.<sup>163</sup> The court refused to accept the argument that each tribe could enact separate bankruptcy laws on reservations, holding that upon violating the automatic stay and pursuing its claim in bankruptcy court, the tribe subjected itself to the court's jurisdiction.<sup>164</sup> The *Sandmar* court's jurisdictional analysis was utilized a year later in a similar case involving a dispute between a tribe and a non-Indian debtor under the Code.

Similarly, the court in *In re Shape* determined that the bankruptcy court had personal and subject matter jurisdiction over tribes and tribal trust lands involved in a bankruptcy case by virtue of 28 U.S.C. § 1471(e).<sup>165</sup> The court relied on the broad statutory grant of jurisdiction conferred upon the bankruptcy court by Congress in 28 U.S.C. § 1471(e) (currently contained in 28 U.S.C. § 1334(e)). As long as the tribe's sovereign immunity did not preclude the bankruptcy court's jurisdiction; the court could decide the case.<sup>166</sup> Quoting and relying on the *Sandmar* case extensively, the *Shape* court held that it had jurisdiction despite the tribes sovereign status for the same reasons.<sup>167</sup> The court additionally noted an "implicit divestiture" of sovereignty surrendered by tribes dating back to the ratification of the Constitution.<sup>168</sup> Recognizing a limitation on tribal sovereignty and utilizing language supporting the bankruptcy court's exercise of jurisdiction, the court quoted from *Sandmar*, stating that "the areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."<sup>169</sup>

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162. *Sandmar*, 12 B.R. at 915.

163. The former jurisdictional grant in 28 U.S.C. § 1471(e) now appears in 28 U.S.C. § 1334(e), granting the district court, who automatically refers the case to the bankruptcy court pursuant to the reference provisions in 28 U.S.C. § 157, jurisdiction over all the debtor's property, wherever located, in a case under this title.

164. *Sandmar*, 12 B.R. at 916.

165. *In re Shape*, 25 B.R. 356 (D. Mont. 1982).

166. *Id.* at 358.

167. *Id.* at 359 (noting that due to the broad scope of 28 U.S.C. § 1471(e), U.S. CONST. art. I, § 8, cl. 4, and the fact that tribes are subject to the automatic stay as both an entity and a governmental unit under § 101 of the Code, the court retained jurisdiction).

168. *Id.*

169. *Id.* (citing *Sandmar*, 12 B.R. at 914); see *United States v. Wheeler*, 435 U.S. 313,

Thus, the court retained jurisdiction over the tribes by relying on the Constitution, and the fact that the parties in interest involved tribal creditors and a nontribal debtor concerning a dispute over property of the bankruptcy estate located in sovereign, tribal territory.<sup>170</sup> The analysis in these decisions, however, has been called into question.

A Ninth Circuit Court of Appeals case, *In re Greene*,<sup>171</sup> expressly rejected the jurisdictional analysis articulated in *Sandmar*.<sup>172</sup> Factually, the case involved a bankruptcy trustee pursuing a preference action on behalf of the bankruptcy estate against a tribal-owned furniture retailer who peaceably repossessed the debtor's furniture prior to bankruptcy. The *Greene* court primarily relied on *United States v. Nordic Village, Inc.*,<sup>173</sup> holding that the bankruptcy court's jurisdiction over property of the estate and jurisdiction to hear adversary proceedings fail to pierce the tribe's immunity from suit.<sup>174</sup> Concluding that jurisdiction and defenses to jurisdiction are wholly distinct issues, the court refused to allow a broad congressional grant of jurisdiction to abrogate all the accompanying defenses thereto.<sup>175</sup>

The expansive view of tribal immunity and its effect on jurisdiction articulated in *Greene* and *Nordic Village* appear to eliminate the precedential effect of *Sandmar* and *Shape*, but the concurring opinion of the *Greene* decision states that the common law sovereignty of Indian tribes is far from absolute.<sup>176</sup> According to the concurring opinion, the extent of tribal sovereign immunity in commercial activities remains an "important, complex, and unresolved question" worthy of debate.<sup>177</sup> Because Congress exercises plenary authority over tribes, tribal sovereign immunity, jurisdiction of the bankruptcy court, and the bankruptcy laws, Congress should clarify the eligibility, jurisdiction, and sovereign status of tribes under the Code to eliminate the split of authority.

Although the sovereign immunity issue remained a major variable in the bankruptcy courts' jurisdictional analysis, the *Sandmar* and *Shape* courts articulated substantive justifications which perhaps can aid other bankruptcy courts in the event jurisdictional issues arise when a tribe finds itself involved in a bankruptcy case as a creditor. It is true that the repeal of 28

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326 (1978).

170. *Wheeler*, 435 U.S. at 329.

171. *In re Greene*, 980 F.2d 590 (9th Cir. 1992), cert. denied, 510 U.S. 1039 (1994).

172. *Id.* at 598.

173. 503 U.S. 30 (1992).

174. *Id.* at 38.

175. *Id.*; *Greene*, 980 F.2d at 598.

176. *Greene*, 980 F.2d at 600.

177. *Id.*



U.S.C. § 1471 compels consideration of the similar provisions in 28 U.S.C. § 1334; nevertheless, the jurisdictional analysis in *Sandmar* and *Shape* is helpful. Although the assumptions the courts made in *Sandmar* and *Shape*, that the particular Indian tribes were "governmental units" and "entities" as defined in § 101 of the Code, remains in question and worthy of further discussion, one must also consider which jurisdiction's substantive property law applies in the event a tribe files for protection under the Code.

6. *Jurisdiction over Property of the Estate Created Under Section 541(a) of the Bankruptcy Code*

Assuming a tribe qualifies for relief under a chapter of the Code, a bankruptcy court must ascertain which property law applies. Although questions concerning whether property is part of the debtor's bankruptcy estate is a question of federal law, state law ordinarily controls what interest a debtor has in the property.<sup>178</sup> Section 541 of the Code governs what is property of the debtor's estate, but state law determines a debtor's interest in the property constituting property of the estate.<sup>179</sup> The question of land title and outright ownership of property, both real and personal, will be substantiated and analyzed.<sup>180</sup> Without a cognizable determination of who

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178. *Butner v. United States*, 440 U.S. 48, 55 (1979).

179. *Id.*

180. 11 U.S.C. § 541(a) (2000). The statute provides as follows:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

controls tribal assets, difficult issues exist. Thus, a study of the ownership of, for example, land and title of tribal land and possessions follows.<sup>181</sup>

In 1831, the landmark case of *Cherokee Nation v. Georgia*<sup>182</sup> established a trust relationship. Many scholars and courts attribute the inception of the trust relationship existing between the United States and Indian tribes to Chief Justice Marshall's statement: "[T]he tribes' relation to the United States resembles that of a ward to his guardian."<sup>183</sup> In application, the trust relationship dates back to the era of Chief Justice Marshall and protects the sovereignty and self government of tribes while keeping the tribe subject to the overriding power of the United States government.<sup>184</sup> Although the creation of the particular relationship was forced upon the various tribes in 1831 and reinforced in 1887 with the enactment of the General Allotment Act, today it inures a benefit to tribes in the guardian/ward relationship with tribes being the designated beneficiaries of the federal government's trustee or guardian responsibility.<sup>185</sup>

The land represents trust property held by the government to protect Indian land ownership.<sup>186</sup> The benefits of the trust relationship are: (1) the prohibition of the sale of Indian lands without federal consent; (2)

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(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

*Id.*

181. See Richard A. Monette, *Governing Private Property in Indian Country; The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 54 (1995) (providing an in depth and thorough discussion of the early Supreme Court analysis on the trust relationship and property right theories); *In re Kedrowski*, 284 B.R. 439 (Bankr. W.D. Wis. 2002) (determining the relevant legal authority to determine property of the estate for a debtor who was a member of an Indian tribe required consideration of federal law, state law, a gaming compact between the tribe and the state, and tribe's gaming ordinance to determine if gaming distributions paid to individual tribal members constitute property of the bankruptcy estate).

182. 30 U.S. (5 Pet.) 1 (1831).

183. *Id.* at 17; Monette, *supra* note 181, at 54; see also Robert Clinton, AMERICAN INDIAN LAW: CASES AND MATERIALS 234 (1991); NICHOLAS J. SPAETH, AMERICAN INDIAN LAW DESKBOOK 9 (1993).

184. Fredericks, *supra* note 14, at 382; see also Monette, *supra* note 181, at 43.

185. AM. INDIAN LAWYER TRAINING PROGRAM, *supra* note 35, at 25.

186. *Id.* at 31. See generally Monette *supra*, note 181, at 43.

eliminating state control or power over recognized tribal territory; (3) government-to-government relationship between tribal governments and the federal government; (4) legal representation in litigation regarding trust property and its management; (5) the right to claim federal lands; and (6) the benefit of holding the federal government to a higher fiduciary duty of loyalty in dealing with trust property.<sup>187</sup> Recently, in *Cobell v. Norton*,<sup>188</sup> the Federal Court of Appeals clearly articulated the fiduciary relationship owed Indian tribes as the highest of moral obligations appropriately judged by the most "exacting fiduciary standards."<sup>189</sup>

In application, the trust relationship plays some role in the event an Indian tribe seeks protection under the Code. In the tribal-trust relationship, the land, natural resources, and personal property are held in trust by the United States.<sup>190</sup> Tribes must obtain express approval from the federal government to sell, convey, or encumber trust property.<sup>191</sup> As stated, tribal properties are held in trust shielded from both voluntary and involuntary alienation under state law.<sup>192</sup> As one expert on the subject also noted, "the tribes' status as *governmental entities* supports" the broad immunity that protects tribes from divestiture of their property.<sup>193</sup> The restraints on alienation (i.e., the inability of tribes to leverage their land base or personal holdings) of tribal property create difficulties for tribes in their efforts to secure developmental capital from the private sector, and unless Congress removes the restraints on alienation or offers financial relief, the restraints may eliminate financing desperately needed during a bankruptcy reorganization.<sup>194</sup>

Similarly, personal property of tribes is held in trust in the United States Treasury, but the funds can only be used to benefit the tribe or its members in whose names the funds are credited.<sup>195</sup> Authorization by treaty or express provision of law represents the only manner that tribal funds can be

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187. AM. INDIAN LAWYER TRAINING PROGRAM, *supra* note 35, at 28; *see also* 25 U.S.C. § 175 (2000); COHEN, *supra* note 16, at 224-25; *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (stating the federal government must abide by the "most exacting fiduciary standards").

188. 240 F.3d 1081, 1099 (D.C. Cir. 2001).

189. *Id.* (citing *Seminole Nation*, 316 U.S. at 287).

190. AM. INDIAN LAWYER TRAINING PROGRAM, *supra* note 35, at 58.

191. *Id.*

192. COHEN, *supra* note 16, at 519-20.

193. *Id.* at 520 (emphasis added).

194. *Id.* at 521 nn.87-89, 94 (citing very few cases and circumstances where Congress or courts have authorized the alienation of Indian tribal lands).

195. *Id.* at 547-48 (noting that tribal funds are property of the tribe as an entity rather than property of each individual member).

appropriated.<sup>196</sup> Perhaps, Congress can authorize the use of such funds in the event a tribe seeks relief under the Code or authorize the right of tribes to encumber property subject to the existing statutory safeguards found under the Code and title 25. It is certain that Congress must clearly and plainly authorize the use of tribal property or enact legislation such as the Indian Financing Act of 1974 that insures, guarantees, and safeguards tribes from financial stress.<sup>197</sup> Because tribes have evolved into sophisticated commercial entities involved in a diverse array of businesses, Congress should allow tribes the right to reorganize under the Code by authorizing the use of tribal assets.

Although tribes do not fully own tribal holdings and land they occupy or possess, outright, the tribes' legal, equitable, and possessory interest in the land would constitute part of the property of the estate under § 541 of the Code in the event a tribe files for protection. Any interest or right to the use of the proceeds of such land must also be approved by a bankruptcy court after the filing of the case.

Federal judges typically apply state law while adjudicating questions involving legal and equitable interests in property.<sup>198</sup> Closely connected to the trust relationship issue, a serious question arises in regard to the controlling law on property interests. The Supreme Court has held that federal courts (e.g., a bankruptcy court), applying state law, decide what constitutes the property of the estate of the debtor under § 541(a).<sup>199</sup> This bankruptcy estate is automatically created upon filing a petition under the Code.<sup>200</sup> The bankruptcy estate, as defined in § 541 of the Code and federal law, is extremely broad.<sup>201</sup> It is ordinarily state law, however, that determines the debtor's property rights and interests in the assets comprising the bankruptcy estate.<sup>202</sup>

It is well settled that the filing of a petition under § 541(a) of the Code creates an estate comprised of "all legal or equitable interests of the debtor

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196. *Id.*

197. *Id.* at 520 n.85 (noting that Indian Financing Act of 1974 established a revolving loan fund as well as a loan guarantee and insurance program for loans procured from the private sector).

198. *Butner v. United States*, 440 U.S. 48, 58 (1979).

199. *Id.* at 54-55; *Segal v. Rochelle*, 382 U.S. 375 (1966); *Lines v. Frederick*, 400 U.S. 18 (1970) (holding that state law did not control whether certain property became property of the estate).

200. 11 U.S.C. § 541(a)(1) (2000).

201. *In re Whiting Pools*, 462 U.S. 198, 204-05 (1983); H.R. REP. NO. 95-595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 6322-23; S. REP. NO. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5868.

202. *Butner*, 440 U.S. at 55.

in property as of the commencement of the case."<sup>203</sup> The interest in the estate property held by the debtor (or commonly referred to as the "debtor in possession" or DIP in a business reorganization), trustee, or the bankruptcy estate at the time of the commencement of the case, is ascertained pursuant to state law; state law does not apply, however, where it would be inconsistent with other sections of the Code (e.g., §§ 363, 506(a), 544, 545, 547, 548, and 552).<sup>204</sup> Query, if a tribe files a voluntary petition under the Code (or an involuntary petition is filed against a tribe), which substantive property law applies? Is it state law or tribal law, absent some application of federal bankruptcy law?<sup>205</sup>

Deeply rooted in this nation's history, tribes are free from state jurisdiction and control.<sup>206</sup> Most tribes occupy sovereign territory where state law does not apply. As Chief Justice Marshall stated in *McClanahan v. State Tax Commission*, "state law could have no role to play within the reservation [of an Indian tribe's] boundaries."<sup>207</sup>

It is suggested that Congress clarify which substantive property law will apply, for example, to mortgages, security interests, and contractual obligations in the event a tribe qualifies as an eligible entity filing for relief under the bankruptcy laws. Perhaps, Congress can clarify and resolve both of these issues before a bankruptcy court is confronted with such a complex problem. With jurisdictional issues addressed in the context of tribes, one also should consider the venue provisions governing bankruptcy cases and proceedings.

#### *D. Venue Provisions Governing Bankruptcy Cases and Proceedings*

Interestingly, the proper venue (i.e., location or forum) for where a tribe may file a bankruptcy case may generate debate. Indian tribes have operated their own court systems for years and also have established their own

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203. 11 U.S.C. § 541(a)(1) (2000).

204. See *id.*; *Barnhill v. Johnson*, 503 U.S. 393, 397 (1992).

205. Compare *In re Kedrowski*, 284 B.R. 439 (Bankr. W.D. Wis. 2002). The court held that distributions to individual tribal members generated from gaming revenues of a tribal casino where the debtor was an enrolled member of an Indian tribe constituted property of the individual's 11 U.S.C. § 541 bankruptcy estate in the context of an individual member of a tribe filing for personal bankruptcy. The court considered federal law, state law, a gaming compact between the tribe and the state, and the tribe's gaming ordinance to determine if the per capita distributions constituted property of the debtor's estate. *Id.*

206. Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 U. KAN. L. REV. 351, 352 (1974) (citing Hon. Thurgood Marshall's observations in *Williams v. Lee*, 411 U.S. 164, 168 (1973)).

207. 411 U.S. 164, 168 (1973).

structure and procedural rules governing the tribunals.<sup>208</sup> In fact, tribes have exclusive jurisdiction over tribal affairs within Indian Country unless the tribe relinquishes such power, or the power is explicitly stricken by statute.<sup>209</sup> Since 1970, tribal courts have increased in number as well as sophistication.<sup>210</sup> In 1978, the Supreme Court stated that "tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."<sup>211</sup>

Article I, Section 8, Clause 4 of the U.S. Constitution seemingly mandates that all bankruptcy cases and proceedings be conducted according to uniform laws established by Congress in the federal court system.<sup>212</sup> Therefore, a tribe involved in a bankruptcy case or proceeding may be compelled to abide by the current venue provisions that govern all cases and proceedings under the Code, absent "proceeding" abstention under 28 U.S.C. § 1334(c) or "case" abstention under 11 U.S.C. § 305(a). Pursuant to 28 U.S.C. § 1334(e), the district court (i.e., the bankruptcy court after the statutory reference under 28 U.S.C. § 157(a)), shall have the exclusive jurisdiction of all of the debtor's property, wherever located, of the debtor as of the commencement of such case, and of the property of the bankruptcy estate.<sup>213</sup> Bankruptcy cases and proceedings involving a tribe seemingly would operate in the same manner as any other bankruptcy case or proceeding in the bankruptcy court. Nevertheless, congressional fine-tuning may be necessary to avoid expensive and time-consuming legal disputes in light of the fact that a majority of tribes are located within sovereign territory and are technically not necessarily "residents" within any federal judicial district.

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208. COHEN, *supra* note 16, at 251, 332.

209. *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978); Fisher v. District Court, 424 U.S. 382 (1976); *see also* Indian Civil Rights Task Force, *supra* note 206, at 351.

210. AM. INDIAN LAWYER TRAINING PROGRAM, *supra* note 35, at 17; *see also* 1 AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 163 (Comm. Print 1977) (stating that of the 287 tribal governments in operation in the United States, 117 had operating tribal courts in 1976).

211. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

212. U.S. CONST, art. I, § 8, cl. 4.

213. *See In re Sandmar Corp.*, 12 B.R. 910, 915 (D.N.M. 1981); *In re Shape*, 25 B.R. 356, 359 (D. Mont. 1982) (utilizing 28 U.S.C. § 1471(e) (repealed), replaced by a similar grant under 28 U.S.C. § 1334(e) allowing a bankruptcy court to dismiss arguments to avoid participating in a case or proceeding in a bankruptcy court based on tribal sovereignty or the powers of tribes to enact their own bankruptcy laws).

### 1. Case Venue Under 28 U.S.C. § 1408

Upon the debtor's seeking relief under the Code, the debtor ordinarily has two choices in regard to venue (i.e., where the bankruptcy case will be filed). Cases can be commenced in the bankruptcy court<sup>214</sup> for the district where the debtor has a domicile, residence, or principal place of business, or principal assets for the 180 days immediately preceding the filing of the case, or the place where the debtor spent most of its time during the 180 days prior to the filing.<sup>215</sup> A case may also be filed in the district in which there is a case pending with a debtor's affiliate.<sup>216</sup>

More specifically, 28 U.S.C. § 1408(1)-(2) provides as follows:

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district —

214. See 1 COLLIER, *supra* note 134, § 4.01[1] (indicating the intent of title 28 U.S.C. § 1334 is that venue be placed in the district courts, rather than the bankruptcy courts, even though almost all of the activity in the case will occur in the latter).

215. 28 U.S.C. § 1408(1) (2000); see, e.g., *In re Frame*, 120 B.R. 718, 771 (Bankr. S.D.N.Y. 1990).

216. 28 U.S.C. § 1408(2) (2000). "Affiliate" is not defined in title 28; however, it is defined in 11 U.S.C. § 101(2) as follows:

"Affiliate" means —

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities —

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debtor, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities —

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

11 U.S.C. § 101(2) (2000).

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.<sup>217</sup>

With respect to venue, no statutory distinction is mentioned or drawn in 28 U.S.C. § 1408(1) among natural persons, partnerships, and corporations.<sup>218</sup> Likewise, the drafters deliberately used the inclusive word "entity" intending to cover all of the terms relating to all participants possibly filing for protection under the Code.<sup>219</sup> Thus, a tribe may qualify as an "entity" for purposes of determining venue in a bankruptcy case, discussed *infra*.

## 2. Proceeding Venue Under 28 U.S.C. § 1409

The proceeding venue provisions under 28 U.S.C. § 1409 attempt to facilitate and promote administrative convenience and fairness in bankruptcy proceedings.<sup>220</sup> Title 28 U.S.C. § 1409 governs venue for most bankruptcy proceedings. A "proceeding" arising under title 11 or arising in or related to a "case" ordinarily may be commenced in the same bankruptcy court in which the main case is pending.<sup>221</sup> That is, as a general rule, venue for all of the proceedings within a case is proper wherever the main bankruptcy case is pending.<sup>222</sup>

More specifically, 28 U.S.C. § 1409:

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a

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217. 28 U.S.C. § 1408(1)-(2) (2000).

218. 1 COLLIER, *supra* note 134, § 4.01[1].

219. *Id.*; H.R. REP. NO. 95-595, at 311 (1977), reprinted in 1978 U.S.C.C.A.N. 6268; S. REP. NO. 95-989, at 24 (1978), reprinted in 1978 U.S.C.C.A.N. 5809.

220. BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL § 605.4 (4th ed. 1996).

221. 28 U.S.C. § 1409(a) (2000).

222. *Id.*



case under title 11 may be commenced in the district court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than \$1,000 or a consumer debt of less than \$5,000 only in the district court for the district in which the defendant resides.

(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

(e) A proceeding arising under title 11 or arising in or related to a case under title 11, based on a claim arising after the commencement of such case from the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the district court for the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim, or in the district court in which such case is pending.<sup>223</sup>

Four exceptions to the general rule require the trustee, or debtor-in-possession, to commence proceedings in the judicial district where the defendant resides (or "under applicable nonbankruptcy venue provisions").<sup>224</sup> By virtue of Federal Rule of Bankruptcy Procedure 9001(10), trustee includes a debtor-in-possession in a chapter 11 case. The

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223. 28 U.S.C. § 1409 (2000).

224. *Id.* § 1409(b)-(e).

first venue exception involves proceedings where the trustee (or debtor-in-possession) seeks to recover either a money judgment of less than \$1000 or property worth less than \$1000 or attempts to enforce a consumer debt of less than \$5000.<sup>225</sup> The second exception allows the trustee or debtor-in-possession to file proceedings where the case is not pending when the trustee acts to recover property as the statutory successor to the debtor or creditors.<sup>226</sup> The third exception allows the trustee (or debtor-in-possession) to pursue postpetition claims, arising under state or foreign law, only in the district where a state or federal court sits where the claim arose.<sup>227</sup> The final exception allows a third party (i.e., a plaintiff-postpetition creditor) to sue the trustee (or debtor-in-possession) either in the district where the case is pending or the state or federal court where the claim arose.<sup>228</sup> Thus, parties in interest who transact business with trustees or debtors-in-possession subsequent to the filing of the petition, may be sued only in the district where the claim arose; however, such parties may file suit against the trustee or debtor-in-possession in the bankruptcy court where the case is pending or an appropriate state or federal court where the claim arose thus eliminating undue costs incurred by small creditors seeking to minimize collection costs.

### 3. Change of Case or Proceeding Venue Under 28 U.S.C. § 1412

The district court can transfer a bankruptcy case or proceeding to a different district "in the interest of justice or for the convenience of the parties" under 28 U.S.C. § 1412.<sup>229</sup> Rule 1014 of the Federal Rules of Bankruptcy Procedure implements 28 U.S.C. § 1412 and governs motions to change the venue of "cases."<sup>230</sup> Rule 7087 of the Federal Rules of Bankruptcy Procedure governs motions to change the venue of "proceedings." The burden of proof must be carried by a preponderance of evidence by the moving party seeking to change such venue.<sup>231</sup>

The traditional factors considered by the bankruptcy court in transferring venue include, inter alia, the location of the debtor's principal place

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225. *Id.* § 1409(b).

226. *Id.* § 1409(c).

227. *Id.* § 1409(d).

228. *Id.* § 1409(e).

229. *Id.* § 1412. The statute provides as follows: "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." *Id.*

230. 1 COLLIER, *supra* note 134, § 4.04[2].

231. *Id.* § 4.04[1] (citing *In re Peachtree Lance Assocs. Ltd.*, 150 F.3d 788 (7th Cir. 1999); *Puerto Rico v. Commonwealth Oil Ref. Co.*, 596 F.2d 1239 (5th Cir.1979); *De Rosa v. C.B.C. Corp.*, 49 B.R. 935 (Bankr. E.D.N.Y. 1985)).

of business; location of the debtor's estate or principal assets; location of the alleged activities, transaction, or misconduct; determination of where the case can be efficiently and economically administered; the necessity and location of any ancillary administration or compulsory service; and multiple other factors the court may consider in a particular case.<sup>232</sup> Importantly, despite allegations of improper venue, some courts have held that they possess the power to transfer, dismiss, or retain a case in order to accommodate the parties in cases involving numerous creditors or assets in several states.<sup>233</sup>

#### *4. Case Dismissal and Change of Case Venue Pursuant to Federal Rule of Bankruptcy Procedure 1014*

Rule 1014(a)(1) of the Federal Rules of Bankruptcy Procedure allows the bankruptcy court to dismiss or transfer a case filed in a proper district on timely motion of a party in interest and after hearing on notice to the petitioner, the U.S. trustee, and other entities as directed by the court.<sup>234</sup> Pursuant to Rule 1014(a)(1), the court has discretion to dismiss the case or transfer a properly filed or venued case to another district in the interest of justice or for the convenience of the parties.

Likewise, Federal Rule of Bankruptcy Procedure 1014(a)(2) governs the venue of cases filed in an improper district.<sup>235</sup> This procedural rule specifically allows courts to dismiss or transfer cases after analysis of the facts for the convenience of the parties or in the interest of justice. Although a majority of cases hold that a bankruptcy court must transfer or dismiss an improperly venued case upon a timely motion, authority exists that allows a bankruptcy court to retain a case filed in an improper venue in the interest of justice or for the convenience of the parties.<sup>236</sup>

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232. 1 COLLIER, *supra* note 134, § 4.04[a][ii].

233. *See, e.g., In re Baltimore Food Sys., Inc.*, 71 B.R. 795 (Bankr. D.S.C. 1983); *In re Am. Window Corp.*, 15 B.R. 803 (Bankr. D. Mass. 1981) (stating that the court can retain a case in an improper venue in the interest of justice).

234. FED. R. BANKR. P. 1014(a) ("Dismissal and transfer of cases"). The Rule states:

(1) Cases filed in proper district. If a petition is filed in a proper district, on timely motion of a party in interest and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

*Id.* It is noted that the transfer of "proceedings" is governed by 28 U.S.C. § 1412 and FED. R. BANKR. P. 7087.

235. FED. R. BANKR. P. 1014(a).

236. *See In re Lazaro*, 128 B.R. 168, 174 (Bankr. W.D. Tex. 1991) (questioning the presumptions expressed in the Advisory Committee note and concluding that the 1984 BAFJA amendments did not strip the bankruptcy court of the authority to retain a case filed

Because venue is a waivable defect, a motion asserting improper case venue must be timely filed by a party in interest.<sup>237</sup> Venue objections are waived if a party in interest fails to file a timely objection. Case dismissal, rather than a change of venue, is considered a harsh remedy and should be made, where possible, without legal prejudice.<sup>238</sup>

Finally, Federal Rule of Bankruptcy Procedure 1014(b) establishes the procedure for determining venue in cases involving a single debtor in different districts. In the event multiple cases are filed in more than one district against a single debtor and its agents, the court where the initial petition was filed must decide the proper forum.<sup>239</sup> Meanwhile, the proceedings on the other petitions in the subsequent cases are stayed until the court where the initial petition was filed determines which venue is proper.<sup>240</sup>

#### *5. Change of Adversary Proceeding Venue Under Federal Rule of Bankruptcy Procedure 7087*

To further complicate matters for a nonbankruptcy practitioner, the transfer or change of venue of "adversary proceedings" is governed by Federal Rule of Bankruptcy Procedure 7087, which also implements 28 U.S.C. § 1412.<sup>241</sup> The entire adversary proceeding, or any part thereof, can be transferred pursuant to 28 U.S.C. § 1412 except as provided in Federal Rule of Bankruptcy Procedure 7019(2).<sup>242</sup> This rule, Rule 7019(2), is also invoked when a joined party properly files a timely motion asserting improper venue; this requires the court to determine

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in the improper venue in the interest of justice and for the convenience of the parties); *see, e.g., In re United States Aviex Co., Inc.*, 96 B.R. 874, 882 (N.D. Ind. 1989); *In re Baltimore Food Sys., Inc.*, 71 B.R. 795, 804 (Bankr. D.S.C. 1986); *In re Leonard*, 55 B.R. 106, 110 (Bankr. D.D.C. 1985); *In re Boeckman*, 54 B.R. 110, 111 (Bankr. D.S.D. 1985); *In re Butcher*, 46 B.R. 109, 112 (Bankr. N.D. Ga. 1985). *But see In re Pick*, 95 B.R. 712, 715-16 (Bankr. D.S.D. 1989); *In re Cunningham*, No. 88-4045, slip op. at 7 (D.S.D. 1988); *In re Townsend*, 84 B.R. 764, 766-67 (Bankr. N.D. Fla. 1988); *In re Greiner*, 45 B.R. 715, 716 (Bankr. D.N.D. 1985) (holding that a bankruptcy court does not have the authority to retain a case filed in an improper venue).

237. *In re Mandalay Shores Coop. Hous. Ass'n Inc.*, 63 B.R. 842 (N.D. Ill. 1986); *In re Smith Jones*, 13 B.R. 804 (Bankr. N.D. Tex. 1981).

238. *See In re Hall, Bayoutree Assocs., Ltd.*, 939 F.2d 802 (9th Cir. 1991).

239. FED. R. BANKR. P. 1014(b).

240. *Id.*

241. FED. R. BANKR. P. 7087. The Rule provides: "On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412, except as provided in Rule 7019(2)." *Id.*

242. *Id.*

whether the whole proceeding or any part thereof should be transferred to another district.<sup>243</sup>

Absent express direction by the court, the procedural rule governing adversary proceedings, Rule 7087, does not expressly apply to "contested matters"<sup>244</sup> under Federal Rule of Bankruptcy Procedure 9014 (i.e., events not illustrated as Part VII adversary proceedings or initiated by filing a complaint).<sup>245</sup> Such contested matters are governed by Rule 9014 unless the court expressly directs that Rule 7087 shall apply. For example, the court may direct that Rule 7087 shall apply to a given contested matter.<sup>246</sup> After attaining general understanding of venue in bankruptcy cases and proceedings, the eligibility of tribes under the current framework of the Bankruptcy Code must be analyzed.

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243. FED. R. BANKR. P. 7019. The Rule provides:

Rule 19 F.R. Civ. P. applies in adversary proceedings, except that (1) if an entity joined as a party raises the defense that the court lacks jurisdiction over the subject matter and the defense is sustained, the court shall dismiss such entity from the adversary proceeding and (2) if an entity joined as a party properly and timely raises the defense of improper venue, the court shall determine, as provided in 28 U.S.C. § 1412 whether that part of the proceeding involving the joined party shall be transferred to another district, or whether the entire adversary proceeding shall be transferred to another district.

*Id.*

244. Examples of "contested matters" are governed by Rule 9014: motion for relief from the automatic stay under section 362(d) of the Code; motion to dismiss the case; trustee's objection to proof of claim; motion to use cash collateral, or an objection to confirmation of a plan.

245. FED. R. BANKR. P. 9014. The Rule provides:

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028- 7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.

*Id.*

246. *Id.* When a court directs that all of the Part VII rules apply to a "contested matter," the court is essentially administering the matter in similar fashion as an "adversary proceeding" which is often described as a complete civil lawsuit within a bankruptcy case requiring adherence to procedural formalities as outlined in the Federal Rules of Bankruptcy Procedure.

#### *IV. Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code*

As many tribes diversify economically, the potential for commercial or financial failure concomitantly increases. Some tribes are now involved in capital intensive projects likely to suffer unforeseen financial distress. The question remains: How will commercially involved tribes be treated in the event they file for protection under the Code?

##### *A. Definitions and Eligibility under 11 U.S.C. §§ 101 and 109*

The Code does not statutorily define a tribe nor does it specifically address whether a tribe is eligible for relief as a petitioner-debtor under the laws of Congress relating to bankruptcy. The Bankruptcy Act of 1898 used the term "Indian territory" in section 1(24); however, Congress failed to include the term in subsequent bankruptcy acts, and no explanation exists regarding the omission of the term in the 1978 version of the Code or its subsequent revisions.<sup>247</sup> Therefore, tribes must be classified within the existing definitions in the Code.

##### *1. Introductory Definitions*

Section 101 of the Code contains statutory definitions. An understanding of these statutorily prescribed and traditional definitions is helpful prior to a discussion of the eligibility of tribes to file petitions under one or more of the operative chapters of the Code, if at all.

##### *a) Person*

Section 101(41) of the Code defines a "person" as an individual, partnership, corporation, and, in some instances, a governmental unit.<sup>248</sup> *Black's Law Dictionary* also defines a person as "a human being" and "an entity . . . recognized by law as having the rights and duties of a human being."<sup>249</sup>

##### *b) Corporation*

The Code broadly defines a "corporation" in § 101(9).<sup>250</sup> *Black's Law*

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247. *In re Sandmar Corp.*, 12 B.R. 910, 913 (Bankr. D.N.M. 1981).

248. 11 U.S.C. 101(41) (2000).

249. BLACK'S LAW DICTIONARY 1162 (7th ed. 1999).

250. 11 U.S.C. § 101(9) (2000). The statute states:

(A) includes —

(i) an association having the power or privilege that a private corporation, but not an individual or a partnership, possesses;

*Dictionary* also defines a corporation as "a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it."<sup>251</sup> *Black's Law Dictionary* additionally provides the following definitions:

*Foreign Corporation*: "A corporation that was organized and chartered under the laws of another state, government, or country."<sup>252</sup>

*De Jure Corporation*: "A corporation formed in accordance with all applicable laws and recognized as a corporation for liability purposes."<sup>253</sup>

*Cooperative Corporation*: "An entity that has a corporate existence, but is primarily organized for the purpose of providing services and profits to its members and not for corporate profit."<sup>254</sup>

*Quasi-Corporation*: "An entity that exercises some of the functions of a corporation but that has not been granted corporate status by statute . . . (such as a county or school district)."<sup>255</sup>

#### c) Family

The Code does not define the word "family." It does, however, define a "family farmer" under § 101(18) of the Code.<sup>256</sup> *Black's Law Dictionary* also defines "family" as "[a] group of persons connected by blood, by affinity, or by law."<sup>257</sup>

#### d) Farmer

Section 101(20) defines "farmer" as a person, except a family farmer, "that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which case under this title concerning such person was

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(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

*Id.*

251. BLACK'S LAW DICTIONARY, *supra* note 249, at 341.

252. *Id.* at 343.

253. *Id.*

254. *Id.* at 342.

255. *Id.* at 344.

256. 11 U.S.C. § 101(18) (2000).

257. BLACK'S LAW DICTIONARY, *supra* note 249, at 620.

commenced from a farming operation owned or operated by such person."<sup>258</sup>

*e) Farming Operation*

Section 101(21) of the Code defines "farming operation" as all activities including "farming, tillage of the soil, dairy farming, ranching, production or raising crops, poultry, or livestock, and production of poultry or livestock products in an un-manufactured state."<sup>259</sup>

*f) Entity*

Section 101(15) of the Code expressly provides that an "'entity' includes [a] person, estate, trust, governmental unit, and United States trustee."<sup>260</sup> The dictionary definition of the word "entity" describes an entity as "[a]n organization (such as a business or governmental unit) that has a legal identity apart from its members."<sup>261</sup>

*g) Governmental Unit*

The Code defines a governmental unit in § 101(27). A governmental unit is expansively defined under the Code to include any state, department, agency, or instrumentality of the United States, or a foreign or domestic government.<sup>262</sup> The dictionary definition of a governmental unit classifies a governmental unit as "a subdivision, agency, department, county, parish, municipality, or other unit of the government of a country or a state."<sup>263</sup>

These definitions are listed because the terms are employed when discussing and analyzing tribes under the Code.

Reported cases exist that classify tribes as "governmental units" and "entities" as defined in chapter 1 of the Code. For example, in *In re Sandmar Corp.* and *In re Shape*, the courts held that the automatic stay applied to tribes as creditors of debtors under the Code because 11 U.S.C. § 362 applies to all "entities."<sup>264</sup> Because the statutory definition of "entity" includes the term "governmental unit," these courts impliedly concluded that tribes are governmental units subject to the automatic stay.<sup>265</sup> Although the court utilized statutorily defined terms listed above

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258. 11 U.S.C. § 101(20) (2000).

259. *Id.* § 101(21).

260. *Id.* § 101(15).

261. BLACK'S LAW DICTIONARY, *supra* note 249, at 553.

262. 11 U.S.C. § 101(27) (2000).

263. BLACK'S LAW DICTIONARY, *supra* note 249, at 704.

264. *In re Sandmar Corp.*, 12 B.R. 910, 915 (Bankr. D.N.M. 1981); *In re Shape*, 25 B.R. 356, 358 (Bankr. D. Mont. 1982).

265. *Id.*



as defined in § 101 of the Code, the court failed to offer any detailed explanation or substantiate how it arrived at a conclusion regarding such a classification of tribes that enjoy the status of sovereign nations.

In 1994, the court in *In re Vianese* concluded that § 106(a) of the Code applies to tribes because they comprise "governmental units" as defined in § 101(27).<sup>266</sup> This court noted that Indian nations are considered "domestic dependent nations" resulting in their inclusion under § 101(27) as "governmental units" because the specific statutory wording, "foreign or domestic government," is utilized in that section of the Code.<sup>267</sup> However, in a recent case, *In re National Cattle Congress*, a bankruptcy court held that tribes fail to fit within the definition of "governmental units" under § 101(27) of the Code despite the inclusion of the term "foreign or domestic government" in the definition of a governmental unit as prescribed in § 101(27) of the Code.<sup>268</sup> The court refused to abrogate a tribe's sovereign immunity under § 106(a) of the Code because the term "Indian tribe" was not expressly included in the definition of a governmental unit under § 101(27).<sup>269</sup>

It is obvious that a split of authority exists among bankruptcy courts treating tribes as "governmental units" under the Code. Perhaps, further examination of the eligibility of tribes is necessary.

## 2. Eligibility Under Section 109 of the Bankruptcy Code

As stated earlier, the Code does not expressly define or even mention the term "Indian tribe." Thus, each operative chapter of the Code (i.e., chapter 7, 9, 11, [12] and 13) is analyzed and addressed separately in order to determine whether an "Indian tribe" constitutes an eligible entity, person, corporation, or governmental unit under a specific chapter under the Code that is eligible for voluntary relief under § 301, or an involuntary petition under § 303.

Section 109 elucidates the express parameters and dollar limitations governing debtor eligibility and specifically eliminates and clarifies eligibility utilizing the definitions stated in § 101 of the Code.<sup>270</sup> The

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266. *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995).

267. *Id.*

268. 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000).

269. *Id.* (holding that tribal sovereignty could not be abrogated unless the statute unequivocally and unambiguously stated that it applied to Indian tribes; therefore, because the statute in question only specifically mentioned "States" and "foreign governments," Indian tribes could not be classified as "governmental units" pursuant to § 101(27)).

270. 11 U.S.C. § 109 (2000); *id.* § 104(b) ("Adjustment of dollar amounts") (allowing for the automatic adjustment of dollar amounts to occur every three years effective on April 1 to reflect the change in the Consumer Price Index rounded to the nearest \$25 amount). For

analysis begins by applying § 109 of the Code, "Who may be a debtor," to each operative chapter under the Code.<sup>271</sup> Each chapter is discussed separately for a clearer understanding regarding the eligibility of tribes as participants under the Code.

*a) Eligibility to Be a Debtor Under Chapter 13*

Chapter 13 of the Code allows an eligible, individual debtor to retain all his assets and typically use post-petition income to satisfy creditors, in part or in full, under a court-confirmed plan supervised by a chapter 13 trustee.<sup>272</sup> The qualifications to file a petition under chapter 13 of the Code require that a debtor be an "individual with regular income" as statutorily defined under § 101(30).<sup>273</sup>

"Individual with regular income" is further defined in § 101(30) of the Code as "an individual whose income is sufficiently stable and regular to enable such individual to make payments under a chapter 13 plan of this title."<sup>274</sup> Although individuals are always "persons" under the Code, all persons are not, ipso facto, individuals eligible for relief under chapter 13 of the Code. Although a corporation and a partnership are "persons" under § 101(41), they both fail to statutorily qualify under the definition of an individual eligible for relief under chapter 13. Any statutory right to file a petition under chapter 13 is eliminated if the debtor is a corporation or partnership.<sup>275</sup> Therefore, tribes fail to meet the initial or threshold statutory requirement outlined in § 109(e) of the Code and are ineligible for relief under chapter 13. Although, as noted, individual members of tribes may be eligible for such relief despite the fact that the Code contains no provisions on the rights of Native Americans to file for bankruptcy.<sup>276</sup>

Of course, an *individual* tribe member may qualify as a "person" and an "individual" eligible for relief under chapter 13 as long as the individual earns regular income as prescribed in § 101(30).<sup>277</sup> Unless specifically

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example, this automatic adjustment occurred April 1, 2001, elevating the noncontingent, liquidated, secured debt limitations for a debtor filing under chapter 13 from \$807,750 to \$871,550.

271. *Id.* § 109.

272. *See id.* § 101(30); *id.* § 109(a).

273. *Id.* § 109(e).

274. *Id.* § 101(30).

275. *See* 1 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 2-2 (1992).

276. 1 DANIEL R. COWANS, BANKRUPTCY LAW & PRACTICE § 3.6, at 242 (7th ed. 1998) (indicating that under the previous Bankruptcy Act, Native Americans could file for voluntary petitions because the right to do so was evidently not disputed); *see also In re Denison*, 38 F.2d 662 (D. Okla. 1930), *appeal dismissed*, 45 F.2d 585 (10th Cir. 1930); *In re Russie*, 96 F. 609 (D. Or. 1899); *In re Colegrove*, 9 B.R. 337 (Bankr. N.D. Cal. 1981).

277. *See* 11 U.S.C. § 101(30) (2000) (defining "individual with regular income" as an

excluded, tribal members, as "persons," are included in "a general statute" such as bankruptcy, federal firearm statutes, and tax statutes.<sup>278</sup> Thus, individual Indian citizens are eligible to file for chapter 13 relief provided they earn regular income. Because tribes are not "individuals," a tribe may not utilize chapter 13. However, tribes may constitute an entity, corporation, or partnership. The entire tribe itself may constitute a governmental unit amenable to chapter 9 of the Code.

*b) Eligibility to Be a Debtor Under Chapter 9*

Chapter 9 of the Code is available to certain "governmental units" seeking an adjustment of debts with creditors.<sup>279</sup> Not all governmental units are eligible for relief under chapter 9, "Adjustment of Debts of a Municipality." Chapter 9 is rarely utilized. In fact, only 198 chapter 9 cases were filed between 1980 and 1996.<sup>280</sup> Chapter 9 of the Code does not contemplate asset liquidation or cessation of business operations — it is reorganization. In order to meet the eligibility requirement under chapter 9 of the Code, an eligible entity must meet all of the statutory requirements enumerated in § 109(c) of the Code.<sup>281</sup> The definition of a "municipality" under the Code

individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker); *id.* § 101(41) (defining a "person"); *In re Colegrove*, 9 B.R. 337 (Bankr. N.D. Cal. 1981).

278. *Aubertin v. Colville Confederated Tribes*, 446 F. Supp. 430, 434 (E.D. Wash. 1978).

279. Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425 (1993) (providing an excellent discussion of the history, development, and current status of municipal bankruptcy and chapter 9 of the Code); *see also* David S. Kupetz, *Municipal Debt Adjustment Under the Bankruptcy Code*, 27 URB. LAW. 531 (1994) (discussing the different treatment of municipalities under the Code as arising, in part, due to the sovereign immunity provision contained in the Tenth Amendment of the U.S. Constitution).

280. NAT'L BANKRUPTCY REVIEW COMM'N, FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS 981 (1997) (ch. 4, "Other Recommendations and Issues"); *see also* ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL ABSTRACTS (1996).

281. 11 U.S.C. § 109(c) (2000). The statute states as follows:

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

- (1) is a municipality;
- (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
- (3) is insolvent;
- (4) desires to effect a plan to adjust such debts; and

requires that an entity be subject to control by a public authority, a political subdivision, public agency, or an instrumentality of a *state*.<sup>282</sup>

Section 101(40) of the Code attempts to clarify the definition of municipality by defining it as a "political subdivision or public agency or instrumentality of a State."<sup>283</sup> A state, itself, is not an eligible entity for relief under chapter 9 of the Code.<sup>284</sup> The "entity" filing the petition under chapter 9 must be a "municipality" and be "specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by *state law*."<sup>285</sup>

By virtue of the Bankruptcy Reform Act of 1994, § 109(c)(2) of the Code now requires that state law must provide express, written authority for a municipality to file a petition under chapter 9.<sup>286</sup> Clearly, this requirement would be contrary to the notion of tribal self-determination and Supreme Court precedent safeguarding the self-governing rights of tribes.<sup>287</sup> A tribe and a state government are distinct, sovereign entities. It is contrary to the principles of sovereignty to require one sovereign to obtain prior permission of another as a precondition for relief under the Code. Thus, the plain

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(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

*Id.*

282. 1 COLLIER, *supra* note 134, § 109.04[3][a]; *see also In re Greene County Hosp.*, 59 B.R. 388, 389 (S.D. Miss. 1986).

283. 11 U.S.C. § 101(40) (2000). *But see In re County of Orange*, 183 B.R. 594, 602 (Bankr. C.D. Cal. 1995) (stating that the definition of political subdivision is unclear and requires analysis of section 81(7) of the Act).

284. 1 COLLIER, *supra* note 134, § 109.04[3][a][i].

285. 11 U.S.C. § 109(c)(1), (2) (2000) (emphasis added).

286. 1 COLLIER, *supra* note 134, § 109.04[3][b]; *see County of Orange*, 183 B.R. at 604 (stating that the authority to file a plan must be exact, plain, and direct with well-defined limits so that nothing is left to inference or implication).

287. *See Indian Civil Rights Task Force*, *supra* note 206, at 382 (citing the following cases that define the governing rights and jurisdictional boundaries of Indian tribes: *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court*, 400 U.S. 423 (1971); and *McClanahan v. Ariz. State Tax Comm.*, 411 U.S. 164 (1973)).

language of § 109(c)(2) precludes a tribe from qualifying as a "municipality" eligible for relief under chapter 9.

Assuming *arguendo* that the factors in § 109(c)(2), as well as the other relevant factors are met, the fact that the word "entity" is utilized in § 109(c) suggests that an analysis of § 101(15) of the Code should be made in order to determine if a tribe is eligible for relief under chapter 9. An "entity," as defined in the Code, "includes a person, estate, trust, governmental unit, and United States trustee."<sup>288</sup> It is noted that as a rule of statutory construction, § 101(15) utilizes the word "includes" which means the terms found in the section are not limiting.<sup>289</sup>

Because the word "entity" is used in § 109(c) and qualifies as an eligible participant for relief under chapter 9 of the Code, the definition of "entity" statutorily prescribed in § 101(15) includes governmental unit; thus, § 101(27) must be analyzed and read concurrently. Section 101(27) of the Code specifically defines a governmental unit as:

United States; State, Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or *domestic government*.<sup>290</sup>

With these principles in mind, one might be tempted to conclude that the use of the word "entity" in § 109(c) broadly includes the term "governmental unit" in a systematic reading of the Code.<sup>291</sup> The threshold analysis begins with the term "entity" as it is written and found in § 109(c). The use of the term "entity" mandates a study of the Code's definition of "entity" under § 101(15) which includes the term "governmental unit." The inclusion of the term "governmental unit" compels a study of the Code's definition of the term "governmental unit" which at first glance might include the description of a domestic government.

This conclusion, however, ignores a fundamental rule regarding statutory construction and analysis. It is well settled that a precisely drawn statute dealing with a specific subject controls over a statute governing a more generalized spectrum.<sup>292</sup> Likewise, a more specific statute takes precedence

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288. *Id.* § 101(15).

289. *Id.* § 102(3) (stating that the words "includes" and "including" are not limiting).

290. *Id.* § 101(27) (emphasis added).

291. *See, e.g., In re Vianese*, 195 B.R. 572 (Bankr. N.D.N.Y. 1995); *In re Nat'l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000); *In re Bison Heating & Equip.*, 177 B.R. 785 (Bankr. W.D.N.Y. 1995).

292. *Lindsey v. Solutions Exch., Inc.*, 178 B.R. 895, 902 (Bankr. N.D. Ga. 1995);

over a more general statute.<sup>293</sup> Because § 109(c) is a specific statute particularly addressing the eligibility of municipalities, the rule of statutory construction eliminates the presumptive conclusion that a tribe qualifies as a municipality despite the skillful application of the multiple definitions and terms in §§ 101 and 109 of the Code. It is certain that tribes are a collective, qualified group, and sovereign entity similar to, perhaps, a corporation or partnership.

*c) Eligibility to Be a Debtor Under Chapter 11*

Chapter 11 of the Code is designed to give financially distressed businesses and individuals an opportunity to reorganize or liquidate.<sup>294</sup> A "person" eligible to be a chapter 7 debtor ordinarily is eligible for relief under chapter 11 with limited exception (e.g., stockbrokers and commodity brokers).<sup>295</sup> The use of the term "person" calls for an analysis of the definition of that word as it is used in § 101(41).

The statutory definition of "person" broadly includes an individual, a partnership, a corporation, and, in some very limited circumstances, a governmental unit.<sup>296</sup> Corporations are commonly defined as persons recognized by law possessing the same "rights and duties of a human being."<sup>297</sup> Additionally, *Black's Law Dictionary* defines a corporation as "[a] group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up . . . [possessing] the legal powers that its constitution gives it."<sup>298</sup>

After considering the multiple definitions of "persons" and "corporations," a tribe most closely resembles a "corporation." Tribes are groups of persons officially organized under tribal constitutions as authorized under the Indian Reorganization Act of 1934. Like corporations, tribes are led by a governing body, a tribal board or council, that performs duties akin to a board of directors of a corporation.<sup>299</sup> Just like private and public corporations, tribes engage in various commercial activities for profit.

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United States v. Louwsma, 970 F.2d 797, 799 (11th Cir. 1992).

293. *In re Patterson*, 107 B.R. 576, 578 (Bankr. S.D. Ohio 1989); *Busic v. United States*, 446 U.S. 398, 406 (1980).

294. COWANS, *supra* note 276, § 3.6.

295. 11 U.S.C. § 109(b), (d) (2000).

296. *Id.* § 101(41).

297. BLACK'S LAW DICTIONARY, *supra* note 249, at 1162.

298. *Id.* at 334.

299. *See, e.g.,* Cow Creek/Umpqua Tribe: Organization Chart, at <http://www.cowcreek.com/govt/x02orgchart.html> (last visited Nov. 14, 2002) (providing analysis into the governmental hierarchy and Organizational Chart of one Indian tribe).

Considering the broad definitions of corporate entities, mentioned and defined earlier, one can logically argue that a tribe is easily classified as a "foreign corporation" organized under the laws of the federal government. Likewise, a tribe may be considered a "cooperative corporation" because it provides services and distributes any corporate profits to its tribal members in a de facto corporation. The analogies seem infinite; however, no authority properly analogizes tribes as a qualified, defined, and eligible entity under the Code.

Similarly, a tribe could be classified as a type of partnership. Under the Uniform Partnership Act, a partnership is "an association of two or more persons who carry on as co-owners [of] a business for profit."<sup>300</sup> Tribes are composed of two or more persons who may engage in commercial activities for profit. In essence, tribes may qualify as de facto partnerships despite the absence of a formal partnership agreement. It is noted that a formal agreement is not necessary to properly form a partnership.<sup>301</sup> The only requirements necessary for a finding that a partnership exists are two or more persons as co-owners engaged in a business for a profit.<sup>302</sup> Therefore, tribes could be viewed as partnerships because they are collective groups of individuals engaged in commercial activities for profit.

Tribes, however, are more than a simple organization of individuals. The United States Supreme Court has indicated that tribes are more than private, voluntary organizations.<sup>303</sup> The Court classifies tribes as sovereign "aggregations" and "a separate people" with the power to regulate and control internal social relations.<sup>304</sup> Query, does this holding negate the ability to classify a tribe as a corporation or partnership under the Code? Perhaps, the need exists for Congress to specifically define and delineate the treatment of a tribe as an eligible, demarcated participant under the Code.

*d) Eligibility to Be a Debtor Under Chapter 7*

Chapter 7 of the Code is entitled "Liquidation." It is sometimes referred to as "straight bankruptcy." A typical chapter 7 case requires a debtor to surrender all non-exempt assets to a bankruptcy trustee who abandons burdensome properties, sells off other properties, and distributes the proceeds under a statutory scheme of distribution.<sup>305</sup>

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300. UNIF. PARTNERSHIP ACT § 6(1) (amended 1997), 6 U.L.A. 393 (2001).

301. REV. UNIF. PARTNERSHIP ACT § 101(7) cmt. (amended 1997), 6 U.L.A. 63 (2001) (stating that a partnership agreement need not be written).

302. UNIF. PARTNERSHIP ACT § 6(1), 6 U.L.A. 393.

303. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

304. *Id.*

305. COWANS, *supra* note 276, § 3.4.

Section 109(b) of the Code governs eligibility for relief under chapter 7. A "person," as defined in § 101(41), is eligible for relief under this chapter with the express exception of, for example, railroads, domestic insurance companies, banks, and savings and loan associations.<sup>306</sup>

Most debtors eligible for relief under chapter 11 also qualify as eligible debtors under chapter 7, and the same analysis addressing eligibility under chapter 11 applies in chapter 7. As noted, individual members of tribes are qualified to file for relief by virtue of the fact that they qualify as a "person" and "individual" under the Code, and assertions of sovereign immunity fail to shield tribal members from suits when acting in an unofficial capacity.<sup>307</sup>

*e) Eligibility to Be a Debtor Under Chapter 12*

Chapter 12 of the Code is entitled "Family Farmer Adjustments" and was legislatively created as part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.<sup>308</sup> This chapter is used exclusively for "family farmers with regular annual income" who have assets and liabilities within a designated statutory amount who file petitions in an attempt to save their family farms.<sup>309</sup> Although chapter 12 was scheduled to "sunset" five years after its enactment in 1986, the chapter of the Code has been extended numerous times thereafter. On May 7, 2002, the President signed into law House Bill 4167 which retroactively extended chapter 12 for eight months, from October 1, 2001, to June 1, 2002. Additionally part of a much larger agricultural measure, the President signed the Farm Security and Rural Investment Act of 2002,<sup>310</sup> which extended chapter 12 for seven more months, from June 1, 2002, through January 1, 2003. Chapter 12 received yet another temporary six-month extension on December 19, 2002, when President Bush signed House Bill 5472 that re-enacted chapter 12 of the Code from January 1, 2003, until July 1, 2003. Legislation aimed to massively overhaul America's bankruptcy laws contains

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306. 11 U.S.C. § 109(b) (2000).

307. *In re Stringer*, 252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (stating tribe members are amenable to suit if the subject of the suit is not related to a tribal officer's performance of official duties); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030 (11th Cir. 1995); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043 (E.D. Wis. 1999); *Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996), *aff'd*, 114 F.3d 15 (2d Cir. 1997); *Skowronski v. Branco*, 1999 WL 61409 (Conn. Super. Ct. Feb. 1, 1999).

308. Pub. L. No. 99-554, tit. III, §302(f), 100 Stat. 3088, 3124; *see* Ronald M. Martin, *Bankruptcy Judges, U.S. Trustees, & Family Farmer Bankruptcy Act of 1986*, 16 COLO. LAW. 221 (1987); *see also* Elizabeth Marston-Moore, *Family Farmer Bankruptcy Act of 1986*, 22 TENN. B.J. 13 (1986).

309. COWANS, *supra* note 276, § 3.4.

310. Pub. L. No. 107-171, 116 Stat. 134.



provisions making chapter 12 permanent.<sup>311</sup>

In the event that Congress keeps breathing new life into chapter 12 or makes it a permanent chapter under the Code, the statutory eligibility requirements, nevertheless, must be met. Section 109(f) of the Code expressly states and establishes bankruptcy eligibility for "family farmers."<sup>312</sup> One should also analyze the definition of a "family farmer with regular annual income" as meaning a family farmer whose annual income is sufficiently stable and regular to enable a family farmer to make payments under a chapter 12 plan.<sup>313</sup> The Code further defines "family farmer" as including individuals, partnerships, or corporations who have less than \$1.5 million in debt of which 80% must arise from a "farming operation."<sup>314</sup> In regard to individual filers, there is an additional requirement that more than 50% of the family farmer's gross income for the year prior to the filing of the petition must be derived from the farming operation.<sup>315</sup>

Corporations and partnerships are eligible under chapter 12 as long as 50% of the corporation's stock or the partnership's equity is held by family members; one of the members are actually conducting the operation; and 80% of the value of the operations' assets are related to the farming operation.<sup>316</sup> The term "farming operation" also has a statutory definition which includes a number of types of agribusiness activities.<sup>317</sup>

Tribes are not expressly defined in the eligibility provisions under chapter 12. Individual members and their business entities may be eligible for chapter 12 by virtue of their status as corporations as long as the equity, asset, and ownership composition requirements are met as prescribed in § 101(18) of the Code.<sup>318</sup> Eligibility for tribal, commercial entities still must meet the family composition requirement.<sup>319</sup> Tribes, in a commercial capacity, are engaged in many agricultural activities throughout the country as manifested by the various agricultural organizations officially aligned with tribes.<sup>320</sup>

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311. Bankruptcy Abuse and Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001); Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001).

312. 11 U.S.C. § 109(f) (2000).

313. *Id.* § 101(19).

314. *Id.* § 101(18), (20).

315. *Id.* § 101(18)(A).

316. *Id.* §§ 101(18)(B)(i)-(iii).

317. *Id.* § 101(21) (stating that "farming operation" includes "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state").

318. *See id.* § 101(18)(B).

319. *Id.*

320. *See, e.g.,* Dan Looker, *A Lesson for Us from the Pawnee and Sioux People*,

The Indian Reorganization Act of 1934 expressly permitted tribes to form business corporations to pursue commercial activities.<sup>321</sup> Tribes, in tribal and corporate capacities, engage in a diverse array of agriculturally related activities ranging from the bottling and distributing of water, timber production, tobacco sales, meat processing and production, and many others. Like other farmers and agricultural entrepreneurs, tribal corporations and other formally established business organizations (i.e., a partnership) are subject to commercial failure necessitating the need for bankruptcy relief.

A tribe, however, fails to expressly fall within the scope of the chapter 12 eligibility provisions. Certain individual tribal members or their established commercial entities clearly qualify for chapter 12 relief, but a tribe does not.

Therefore, the confusion exists and the questions remain. What chapter of the Code offers tribes relief from financial distress? How are tribes defined as eligible participants as debtors and creditors under the Code? Perhaps these questions, as well as others, deserve congressional clarification and statutory refinement.

#### *V. Treatment of Indian Tribes and Sovereign Immunity Under the Bankruptcy Code*

##### *A. The Origins of Indian Tribal Sovereign Immunity*

It is frequently said that tribes occupy a unique relationship and status with the federal government under applicable law.<sup>322</sup> The origins of the sovereign immunity possessed by tribes is subject to debate and is broken into two schools of thought. Some scholars assert that tribes possess inherent sovereign immunity because they are sovereigns predating the Constitution.<sup>323</sup> These scholars consider the tribes, rather than the British

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SUCCESSFUL FARMING, May-June 2000 (noting organizations such as the Farmer's Union tribe, Farm Bureau tribe, and the NFO tribe).

321. COHEN, *supra* note 16, at 149 (noting that the corporate charters were created under presumably federal law and issued by Secretary of Interior; thus, the tribes were not incorporated under the various state legislatures).

322. Letitia Ness, *Recent Developments: The Exhausted Doctrine*, 24 AM. INDIAN L. REV. 487, 489 (1999-2000).

323. *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995); *Am. Indian Agric. Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (quoting Chief Justice Marshall's acknowledgment that tribes' sovereignty, like that of the states, stems from original natural rights of their people); THOMAS PAINE, *THE RIGHTS OF MAN* 81-82 (Knopf 1974) (1791) (emphasizing the fact that people existed in the new world under natural law prior to the formation of any established government; thus, Britain formally negotiated with Indian tribes

and French, as the original title holders of all the land in America.<sup>324</sup>

This theory is supported by the fact that prior to ratification of the American Constitution, states and tribes occupied similar positions as international sovereigns.<sup>325</sup> The source of the immunity enjoyed by each sovereign entity flows from the fact that tribes existed as sovereign entities at one time.<sup>326</sup> Tribes do not derive their original sovereign powers from congressional delegation; rather, tribal sovereignty is inherent, and unless that sovereignty has been withdrawn by statute or treaty, tribes retain sovereign attributes over both their territory and members.<sup>327</sup> Others consider the doctrine of tribal sovereign immunity a judicially created doctrine originating relatively recently in the Supreme Court case *Turner v. United States*.<sup>328</sup>

Regardless of the origin of tribal immunity, sovereign immunity remains a substantial barrier in legal disputes. For example, a tribe or nation is not amenable to suit by a bankruptcy trustee, and a bankruptcy courts' jurisdiction does not operate to defeat a tribes' immune status.<sup>329</sup> Tribal sovereign immunity, however, does not extend to individual tribal members acting in a personal capacity, or tribal members engaging in activities relating to their own self-interest or activities unrelated to official, tribal business.<sup>330</sup>

Although the debate continues to generate intellectual discussion, the Constitution introduced the notion of federalism which allowed these separate and distinct sovereigns to co-exist under a unitary, central

through international treaties).

324. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34-35 (1947).

325. Richard A. Monette, *When Tribes Sue States: How "Federal Indian Law" Offers an Opportunity to Clarify Sovereign Immunity Jurisprudence*, 14 QUINNIPIAC L. REV. 401, 410 (1994) [hereinafter *Sovereign Immunity Jurisprudence*].

326. Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between The United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 646 (1994) [hereinafter *New Federalism*].

327. See Ness, *supra* note 322, at 489 (citing *Kerr McGee Corp. v. Farley*, 915 F. Supp. 273, 277 (D.N.M. 1995)).

328. 248 U.S. 354 (1919) (cited as the first time that sovereign immunity in Indian law was judicially recognized); see also Jordan, *supra* note 12, at 490-91.

329. *In re Stringer*, 252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (citing *In re Greene*, 980 F.2d 590 (9th Cir. 1992), cert. denied, 510 U.S. 1039 (1994)); *In re Nat'l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000); cf. *supra* note 155 (citing *Sandmar and Shape*).

330. *Stringer*, 252 B.R. at 901; *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030 (11th Cir. 1995); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043 (E.D. Wis. 1999); *Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996), *aff'd*, 114 F.3d 15 (2d Cir. 1997); *Skowronski v. Branco*, 1999 WL 61409 (Conn. Super. Ct. Feb. 1, 1999); *In re Kedrowski*, 284 B.R. 439, 451 (Bankr. W.D. Wis. 2002).

government regardless of the origin of such immunity.<sup>331</sup> Although a definition of federalism cannot be specifically articulated into an universally accepted definition, the principles of federalism clarify and substantiate the federal government's treatment of tribes in a similar manner as the states.<sup>332</sup>

*B. The Effect and Impact of Federalist Principles on Sovereign Immunity*

In order to more fully appreciate the necessary and inevitable surrender of sovereign immunity under the Code for both tribes and states, it is helpful to understand the principles of federalism and the history of tribal sovereign immunity.<sup>333</sup> The definition of federalism utilized in this article stands for "any political system where there is a constitutional distribution of powers between provincial governments and a central common authority" (i.e., the U.S. federal system of government).<sup>334</sup> Upon an understanding that some sovereignty is surrendered to the federal government upon entering the union or accepting the benefits of citizenship in the United States, the idea of federalism, as it relates to tribes and states, is revealed. In essence, the acceptance of citizenship and inclusion of tribes and states in the United States demands surrender of complete sovereignty. With the principles of federalism in mind, an appreciation of the timing of such a surrender is informative.

Although some, but not all, of the states became part of the union upon ratification of the Constitution, the indoctrination of tribes remains in question and is less clear.<sup>335</sup> Some refer to Chief Justice Marshall's discussion of the effect of treaties in *Worcester v. Georgia* as the moment tribes became part of the Union.<sup>336</sup> Others consider the point of indoctrination of the tribes as the time when the United States acted unilaterally and made federal citizens out of all tribes' citizens in 1924.<sup>337</sup> Regardless of the specific time tribes surrendered part of their sovereignty, states and tribes represent provincial governments who surrender some autonomy to a larger sovereign or central government.<sup>338</sup> Collectively, the federal government, tribes, and states exist in an intersovereign relationship similar to the type of relationship the early federalists envisioned as

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331. *Sovereign Immunity Jurisprudence*, *supra* note 325, at 410-11.

332. *See generally New Federalism*, *supra* note 326, at 618-19.

333. Fredericks, *supra* note 14, at 409.

334. WALTER HARTWELL BENNETT, *AMERICAN THEORIES OF FEDERALISM* 10 (1964).

335. *Sovereign Immunity Jurisprudence*, *supra* note 325, at 410-11.

336. *Id.*

337. *Id.* (citing Act of June 2, 1924, ch. 233, 43 Stat. 253).

338. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (summarizing the Court's approach to the sovereignty of Indian tribes by stating that a tribe's sovereignty is unique and limited in character, subject to complete defeasance by Congress).

proponents of their vision of the Constitution and ideal form of government.<sup>339</sup>

Although tribes fail to derive sovereign immunity from the Eleventh Amendment as states do, the status of the immunity afforded to states and tribes is essentially the same.<sup>340</sup> Based on Supreme Court precedent affording tribes the same protections as offered to the states under the Eleventh Amendment, this article, like others addressing the issue, analyzes any such waivers identically.<sup>341</sup> The main question is the level of sovereignty retained by states and tribes.

It is clear that, due to the inherent limitations on tribal powers stemming from their inclusion as part of the *republic* of the United States, tribes, like states, are not complete sovereigns or independent nations.<sup>342</sup> The level and description of the sovereignty retained by tribes is important because it eliminates the tribes' exposure or ability to participate in lawsuits.<sup>343</sup> As a participant in the federal system, however, tribes must yield some of their sovereignty and accept Supreme Court decisions in accordance with the Supremacy Clause of the Constitution as being the "[s]upreme [l]aw of the [l]and."<sup>344</sup> The Constitution represents the starting point in the sovereign immunity question as it relates to the federal bankruptcy laws.

Principles of federalism require tribes to surrender some of their inherently possessed sovereignty in order to reap the benefits of citizenship.<sup>345</sup> As the Founders anticipated at the Federal Convention of 1787, one supreme power must be established to resolve inherent conflicts among multiple sovereign entities in a republican form of government.<sup>346</sup> In the event the Constitution granted express and exclusive authority to the federal government, similar authority exercised by the states or tribes would be

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339. *Sovereign Immunity Jurisprudence*, *supra* note 325, at 410-11.

340. Wilson, *supra* note 12, at 123.

341. *Id.* at 124; *see, e.g.*, *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940) (holding that neither the tribe nor its tribal officials could be subjected to nonconsensual suit in any forum); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (stating tribes and tribal officials are immune from suit, unless such immunity is waived by either Congress or the tribe).

342. *See* *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

343. *New Federalism*, *supra* note 326, at 641.

344. Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371, 374 (1991).

345. *Id.*

346. *New Federalism*, *supra* note 326, at 624 (citing NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 29-30 (Adrienne Koch ed., 1966)).

contradictory and repugnant.<sup>347</sup> These principles guide one to the ultimate conclusion that the power over commercial activities, bankruptcy, and tribes belongs to Congress.<sup>348</sup>

### *C. Congressional and Judicial Interpretation Regarding Sovereign Immunity*

The Supreme Court accepted congressional or federal supremacy in commercial areas affecting interstate commerce as manifested in *Pennsylvania v. Union Gas Co.*<sup>349</sup> In this decision, the Court held that Congress can abrogate the sovereign immunity of a state or perhaps, any other domestic sovereign government, when legislating pursuant to the plenary powers granted to it in Article I of the Constitution.<sup>350</sup> Additionally, the Court held that Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce.<sup>351</sup>

In 1996, *Seminole Tribe of Florida v. Florida*<sup>352</sup> overruled *Union Gas* specifically abrogating any congressional authority to waive a state's sovereign immunity pursuant to the Commerce or Indian Commerce clauses.<sup>353</sup> While it is true that *Seminole Tribe*, a nonbankruptcy opinion, stands for the proposition that the Eleventh Amendment protects and solidifies only the states' sovereign immunity against Congress's power to create general legislation such as the Indian Gaming Regulatory Act of 1988 (IGRA), other governmental units remain unaffected by the decision.<sup>354</sup> As stated, tribes constitute sovereign entities. Treaties, and the constitutional provisions addressing tribes, call for treating tribes as states under federal law even though the Eleventh Amendment only applies to states.<sup>355</sup>

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347. THE FEDERALIST NO. 32 (James Madison).

348. See U.S. CONST. art. I, § 8, cls. 3-4 (vesting Congress with the right to regulate commerce and establish uniform laws on the subject of bankruptcies); see also *In re Bliemeister*, 251 B.R. 383 (Bankr. D. Ariz. 2000) (holding that sovereignty is alienated as manifested in Hamilton's *The Federalist* No. 81 and 32, emphasizing the constitutionally granted power of Congress to establish uniform and distinct rules on the subject of bankruptcies, and that the states retained no more sovereign power over bankruptcy law than they did over naturalization); Leonard H. Gerson, *A Bankruptcy Exception to the Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 AM. BANKR. L.J. 1, 11 (2000).

349. 491 U.S. 1 (1989).

350. *Id.* at 15.

351. *Id.*

352. 517 U.S. 44 (1996).

353. *Id.*

354. Nat'l Bankruptcy Review Comm'n, *supra* note 280, at 900; see also Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 201 (1996).

355. *Sovereign Immunity Jurisprudence*, *supra* note 325, at 412-15; see also *New*

Because tribes and states are constitutionally afforded similar rights, it is necessary to consider the possible effect *Seminole Tribe* may have upon a tribe in a bankruptcy case.

In *Seminole Tribe*, the Supreme Court failed to directly address whether the Eleventh Amendment confers immunity on a state from suit in a bankruptcy court; however, no other case has invoked more debate regarding Article I of the Constitution, the Eleventh Amendment, and sovereign immunity.<sup>356</sup> Specifically, Justice Stevens' dissent raised the issue when he characterized the majority opinion as suggesting that "persons harmed by state violations of federal copyright, bankruptcy, and anti-trust laws" may have no remedy as a result of this decision.<sup>357</sup>

Despite the majority's response to Justice Stevens's concern about the enforceability of "the federal bankruptcy laws against the states as exaggerated in substance and form," the reference to bankruptcy cases catapulted the Eleventh Amendment issue into bankruptcy courts throughout the country.<sup>358</sup> Considering the inconsistent and controversial application of *Seminole Tribe*, the sovereign immunity issue must be considered in a factual context to more fully appreciate the dynamics of the sovereign immunity issue and the application of *Seminole Tribe* as applied to tribes in bankruptcy cases.<sup>359</sup>

#### *D. Indian Tribes as Participants Under the Bankruptcy Code and Sovereign Immunity*

As noted, an "Indian tribe" or tribal business has yet to file for bankruptcy protection. In the event a tribe files a bankruptcy petition, eligibility to be a debtor under the Code and waiver of sovereign immunity must be considered. Assuming that a tribe is a qualified entity eligible for relief under the Code, a tribe's voluntary act of filing a petition may be considered a waiver of the tribe's sovereign immunity.

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*Federalism*, *supra* note 326, at 633. *But see* *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895) (addressing the fact that Indian tribes are immune from suit and are placed on the same plane occupied by the states under the Eleventh Amendment to the Constitution).

356. Richard Lieb, *Bankruptcy After Seminole Tribe — New Currents of Legal Thought*, NORTON BANKR. L. ADVISER, Aug. 1998, at 1; *see also* Janet A. Flaccus, *The Eleventh Amendment and Bankruptcy Jurisdiction over States*, 10 J. BANKR. L. & PRAC. 207 (2001).

357. *Seminole Tribe*, 517 U.S. at 77 n.1 (Stevens, J., dissenting).

358. *Id.* at 73 n.16.

359. *See In re York-Hannover Dev., Inc.* 181 B.R. 271 (Bankr. E.D.N.C. 1995); *In re Willis*, 230 B.R. 619 (Bankr. E.D. Okla. 1999); *In re Renstrom*, 215 B.R. 454 (Bankr. N.D. Cal. 1997); *In re Straight*, 248 B.R. 403, 421-30 (B.A.P. 10th Cir. 2000) (dissenting opinion). *Contra, e.g., In re Mitchell*, 222 B.R. 877 (B.A.P. 9th Cir. 1998); *In re Morrell*, 218 B.R. 87 (Bankr. C.D. Cal. 1997); *In re Taylor*, 249 B.R. 571 (Bankr. N.D. Ga. 2000).

Because tribes are generally immune from suit in state or federal court, any waiver of tribal sovereign immunity must be unequivocally expressed and may not be implied.<sup>360</sup> Relying on language in the landmark tribal sovereign immunity case *Turner v. United States*,<sup>361</sup> courts have held that a tribe, without congressional consent, can waive its inherent sovereign immunity.<sup>362</sup> The conclusion that a tribe may waive its sovereign immunity rests on the premise that the initiation of a lawsuit or bankruptcy protection equates to the tribe necessarily consenting to a court's jurisdiction to determine all the claims, except in some instances counterclaims, brought in a given lawsuit.<sup>363</sup>

In *United States v. Oregon*,<sup>364</sup> the Ninth Circuit Court of Appeals concluded that tribes can waive sovereign immunity and consent to suit absent explicit, congressional authority. The Ninth Circuit Court of Appeals, in concurrence with the Tenth, Eighth, and Fifth Circuits and guided by *Turner*, held that tribes may consent to suit without explicit congressional authority.<sup>365</sup> Moreover, the court stated clear policy considerations, such as Indian self-determination and other economic development programs,

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360. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969); *cf. Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) (seeming to allow an implied waiver of the tribe's sovereign immunity). *But see* COHEN, *supra* note 16, at 325 (stating that Indian tribes cannot waive immunity by contract affecting trust property without secretarial or congressional consent).

361. 248 U.S. 354, 359 (1919) (stating that the tribe could not be sued "at least [not] without its consent").

362. *Id.* at 358-59; *see also* Wilson, *supra* note 12, at 111 (stating that *Turner* is integral in understanding the Supreme Court's current attitude toward the doctrine of tribal immunity); *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165, 173 (1977) (stating that neither the Tribe or Congress had waived its immunity or consented to suit); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir.) (en banc), *cert. granted on other issues*, 449 U.S. 820 (1980); *Fontenelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970); *Maryland Cas. Co. v. Citizens Nat'l Bank of W. Hollywood*, 361 F.2d 517, 520-21 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966).

363. COHEN, *supra* note 16, at 325; *see also* *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981). *But see* *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940) (stating the consent does not extend to counterclaims).

364. 657 F.2d 1009, 1013 (9th Cir. 1982); *see also* Ann Donnelly, *Immunity Hurts Tribes and Rest of Us*, COLUMBIAN, Jan. 18, 1998, at B1 (discussing the need for clarification or relinquishment of Indian tribal sovereign immunity in order to assure outside investors that their legal rights will be protected in the event of a dispute).

365. *Merrion*, 617 F.2d at 540; *Fontenelle*, 430 F.2d at 147; *Maryland Cas. Co.*, 361 F.2d at 520-21. *But see* *Heckman v. United States*, 224 U.S. 413 (1912) (holding that Indian tribes must obtain congressional consent prior to waiving sovereign immunity in the event restricted property is subject to taking).



substantiate a tribe's power to consent to suit.<sup>366</sup> A tribe's right of self-determination in the form of economic freedom, commercial self-sufficiency, and financial independence is best served when tribes are able to transact business with non-Indian entities.<sup>367</sup> Waivers of sovereign immunity facilitate such commercial involvement from nontribal entities while concomitantly assuaging fears asserted by attorneys representing nontribal businesses in negotiations with tribes that any judgments for nonpayment may not be enforced due to jurisdictional disputes.<sup>368</sup>

For example, a tribe may own 100% of a commercial business and be judgment proof by virtue of its inherent sovereign immunity; however, a tribe may seek to waive its immunity in order to encourage and facilitate outside investment. Outside investors are encouraged by such waivers because in the event conflicts arise between the parties, costly jurisdictional disputes and posturing are avoided. Another way a tribe can waive its immunity is by initiating a lawsuit and submitting a controversy to a nontribal court.<sup>369</sup>

A tribe filing for protection under the Code closely resembles a tribe's act of filing a lawsuit in a federal district court to resolve, for example, a land ownership dispute. Once the tribe, as plaintiff, files suit in a federal court, the tribe cannot object to the court's jurisdiction because it impliedly consented to the court's retention of jurisdiction by filing suit in that court. By analogy, it is equivalent to the restriction that a plaintiff cannot assert improper venue after voluntarily initiating a lawsuit in that court, or a defendant objecting to a court's jurisdiction after actively participating in a case without raising the issues before the implied waiver. Therefore, a tribe could voluntarily utilize any federal court without jurisdictional impediments.

For example, in *Rupp v. Omaha Indian Tribe*,<sup>370</sup> the court held that a tribe waived its sovereign immunity by filing suit in the district court, requesting equitable relief in that forum.<sup>371</sup> Factually, the tribe brought a quiet title action against two individuals holding legal title to tracts of land; the tribe claimed a presumptive right of possession and title. The court held that upon the initiation of the lawsuit, the tribe "necessarily consents to the

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366. *Oregon*, 657 F.2d at 1014.

367. *Id.*

368. *Jordan*, *supra* note 12, at 506.

369. *Oregon*, 657 F.2d at 1013 (stating that the initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of a particular controversy).

370. 45 F.3d 1241 (8th Cir. 1995).

371. *Id.* at 1245.

court's jurisdiction to determine the claims brought adversely to it."<sup>372</sup> Furthermore, the tribe, as the plaintiff, insisted the district court resolve the dispute in question. Despite the tribe's sovereign status, the tribe agreed that the court possessed jurisdiction, and the tribe ultimately assumed the risk of an adverse determination.<sup>373</sup>

Like *Rupp*, a tribe filing a voluntary petition under the Code submits to the bankruptcy court's jurisdiction. It is noted that implied waivers are prohibited, and the simple filing of the petition may not be sufficient to constitute such a waiver of sovereign immunity.<sup>374</sup> An express, unequivocal, and explicit waiver can be executed upon a tribe's voluntary filing or active, voluntary participation in a case or proceeding under the Code. As stated, the Supreme Court held that this waiver can be accomplished without congressional consent.<sup>375</sup>

The court clarified a tribe's ability to waive sovereign immunity in *Rosebud Sioux Tribe v. VAL-U Construction Co. of South Dakota* and recently confirmed its analysis in a similar case, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.<sup>376</sup> Although the *Rosebud* court recognized the strong policy supporting tribal sovereignty and the prohibition against implied waivers of sovereign immunity, the court refused to allow a tribe to void an arbitration clause based on the tribes' sovereign status.<sup>377</sup> The court, relying on *Rupp*, refused to demand that "magic words" be utilized to waive sovereign immunity.<sup>378</sup> The court ordered the tribe to adhere to a contractual arbitration provision stating that the parties voluntarily entered into the contract, and the agreement should be honored. The court specifically emphasized the definitive need for courts to uphold such provisions despite assertions of sovereign immunity.<sup>379</sup>

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372. *Id.*; COHEN, *supra* note 16, at 324; *see also Oregon*, 657 F.2d at 1014.

373. *Rupp*, 45 F.3d at 1245.

374. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (prohibiting implied waivers).

375. *See, e.g., Oregon*, 657 F.2d at 1013; *Turner v. United States*, 248 U.S. 354, 358 (1919); *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001).

376. *Rosebud Sioux Tribe v. VAL-U Const. Co. of S.D.*, 50 F.3d 560 (8th Cir. 1995); *C & L Enter., Inc.*, 532 U.S. at 411.

377. *Rosebud Sioux Tribe*, 50 F.3d at 563.

378. *Id. But see Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) (holding that Indian tribes enjoy immunity from suits on contracts including contracts covering commercial and governmental activities made on or off the reservation).

379. *Rosebud Sioux Tribe*, 50 F.3d at 562 (citing *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)).

Similarly, bankruptcy cases and proceedings are disputes involving valuable property interests (i.e., the property of the estate under § 541 of the Code). The adversarial nature of these disputes requires the parties to formally submit arguments to the court or some forum for adjudication. Therefore, a tribe's participation in a bankruptcy case is not a foreign or extreme concept. In fact, tribal participation in a bankruptcy case, like other lawsuits involving tribes, is quite feasible despite their status as sovereigns.

Statutorily, a tribes' sovereign immunity is not absolute. It exists only at the sufferance of Congress and is subject to complete defeasance.<sup>380</sup> Because tribal immunity may be abrogated by a congressional act, § 106(a) of the Code comes into play.

*E. 11 U.S.C. § 106, Governmental Units, and the Abrogation of Sovereign Immunity Under the Bankruptcy Code*

Under the Bankruptcy Act of 1994, Congress amended § 106 of the Code clearly demarcating Congress' intent to abrogate sovereign immunity of governmental units.<sup>381</sup> The intention of Congress was to explicitly abrogate sovereign immunity assertions by governmental units and preclude such assertions of sovereign immunity involving all sorts of legal and equitable relief.<sup>382</sup> However, the validity and constitutionality of § 106 is in doubt after *Seminole Tribe of Florida v. Florida*.

*1. 11 U.S.C. § 106(a): An Indian Tribe as a Governmental Unit*

The specific section of the Code, 11 U.S.C. § 106(a), abrogating the sovereign immunity of "governmental units," states as follows:

106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728,

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380. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Montana v. United States*, 450 U.S. 544, 560-63 (1981); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979).

381. H.R. REP. NO. 103-835 (1994), reprinted in 1994 U.S.C.C.A.N. 3340; *In re Vianese*, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995); *In re York-Hannover Dev., Inc.*, 181 B.R. 271, 273 (Bankr. E.D.N.C. 1995); see also *In re Bison Heating & Equip., Inc.*, 177 B.R. 785, 788 (Bankr. W.D.N.Y. 1995) (stating that the Bankruptcy Code has significantly enlarged the statutory waiver of sovereign immunity).

382. 1 COLLIER, *supra* note 134, § 106.01.

744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.<sup>383</sup>

By meticulously listing the sixty enumerated sections and provisions of the Code, the Congress clearly intended to abrogate sovereign immunity in regard to "governmental units." Obviously, the stated assumption that a tribe is a governmental unit is fundamental to the argument that § 106(a) of the Code applies. This assumption is subject to considerable debate.

Interestingly, several courts have determined that Indian tribes are governmental units.<sup>384</sup> These courts identified Indian tribes as governmental units under § 101(27) or § 101(15) as constituting an "entity."<sup>385</sup> In *In re Vianese*, the bankruptcy court held that tribes qualified as governmental units as defined under the Code. In *In re Vianese*, an Indian tribe — the Oneida Indian Nation of New York — operated a casino on the tribe's reservation in Verona, New York. The tribe filed a complaint to determine the dischar-

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383. 11 U.S.C. § 106(a) (2000).

384. *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995) (holding that § 106(a) of the Code, as applied to Indian tribes, includes domestic dependant nations and are governmental units); *In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981) (holding that an Indian tribe is a governmental unit under the § 101 definition).

385. 11 U.S.C. § 101(15) (2000).

geability of a debt under § 523(a)(2) of the Code.<sup>386</sup> The court allowed the imposition of attorney's fees against the tribe despite the tribe's assertion of sovereign immunity.<sup>387</sup>

The court held that § 106(a) abrogated the tribe's sovereign immunity because a tribe is a governmental unit as defined in § 101(27) of the Code.<sup>388</sup> The court determined that tribes are "domestic dependent nations" with the right to internally govern and prescribe laws governing tribal members on their reservations.<sup>389</sup> The court noted that no statute or treaty grants Indian nations the right to litigate bankruptcy issues with non-Indians, nor did the bankruptcy court infringe upon the sovereignty of the tribal tribunals.<sup>390</sup> The court proceeded by relying on *Rupp v. Omaha Indian Tribe*<sup>391</sup> by emphasizing the doctrine of mutuality and stating that a plaintiff who commences an adversary proceeding "necessarily consents to the Court's jurisdiction to determine *related* claims brought adversely against it."<sup>392</sup>

Assuming the tribe failed to waive its sovereign immunity by filing the dischargeability complaint, the court further analyzed sovereign immunity.<sup>393</sup> The court noted that tribal immunity exists only at the sufferance of Congress and is subject to complete defeasance.<sup>394</sup> The court also emphasized that the Bankruptcy Reform Act of 1994 amended § 106 to make it "unmistakably clear" that Congress intended to abrogate sovereign immunity in regard to governmental units.<sup>395</sup> Interestingly, the court summarily concluded that

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386. See *id.* § 523(a)(2)(A)(B),(d); *Vianese*, 195 B.R. at 575 (involving the filing by a tribe of an adversary proceeding to determine the dischargeability of a debt arising out of a bad check written for an extension of credit in order to gamble at the casino, and involves an attempt by the debtor's wife, the co-debtor, to receive attorneys fees under § 523(d) alleging that inclusion of the innocent spouse was unjustified).

387. *Vianese*, 195 B.R. at 576-77.

388. *Id.* at 576.

389. *Id.* at 575.

390. *Id.*

391. 45 F.3d 1241 (8th Cir. 1995).

392. *Vianese*, 195 B.R. at 575 (citing *Rupp*, 45 F.3d at 1245); see also *In re PNP Holdings Corp.*, 184 B.R. 805, 807 (B.A.P. 9th Cir. 1995) (substantiating the view that "[a] creditor cannot reasonably expect to invoke those portions of the bankruptcy code that allow it to recover on its claims and yet [totally] avoid the legal effect of the other sections [of the Code] that do not work in its favor").

393. *Vianese*, 195 B.R. at 575.

394. *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

395. *Id.* (citing *In re York-Hannover Dev., Inc.*, 181 B.R. 271, 273 (Bankr. E.D.N.C. 1995); see also *In re Bison Heating & Equip., Inc.*, 177 B.R. 785, 788 (Bankr. W.D.N.Y. 1995) (stating that the Bankruptcy Code has significantly enlarged the statutory waiver of sovereign immunity).

tribes are "governmental units" as defined in § 101(27) and § 106 expressly abrogates a governmental unit's sovereignty.

The court arrived at this conclusion by assuming that Indian nations are "domestic dependent nations" and automatically comprise or constitute "governmental units" within § 101(27).<sup>396</sup> Despite the fact that the term "domestic dependent nation(s)" is not found in the definition of § 101(27), the court classified tribes as "domestic dependent nations." Similarly, other courts classify tribes as governmental units when addressing the sovereignty issue.

In *In re National Cattle Congress*, the debtor relied on *In re Vianese* and *In re Sandmar* by arguing that § 106(a) unequivocally abrogated the sovereign immunity of tribes asserting that the tribes were "governmental units" as defined in § 101(27).<sup>397</sup> The debtor assumed that the tribe, a creditor in the case, constituted a governmental unit and that § 106 categorically abrogated the tribe's sovereign immunity. However, the court failed to accept the fact that congressional abrogation of tribal sovereign immunity can be implied.<sup>398</sup>

The court expressed the need for specific inclusion or for the statute to expressly mention that the particular statute applied to "Indian tribes" to accomplish an express, unequivocal, congressional abrogation of tribal sovereignty.<sup>399</sup> Perhaps, the court recognized that Congress expressly incorporates and defines tribes when a federal statute applies to tribes as manifested in multiple federal statutes, discussed in *supra* Part II. The court refused to recognize that tribes are subject to suit because the term "Indian tribe" was not specifically included in § 101(27).<sup>400</sup> Therefore, the court held that Congress failed to unequivocally abrogate the tribe's immunity from suit.<sup>401</sup>

If Congress specifically included tribes in the definition of the term "governmental unit,"<sup>402</sup> such inclusion of the term Indian tribe would

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396. *Vianese*, 195 B.R. at 576.

397. *Id.*; *In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D. N.M. 1981); *In re Nat'l Cattle Cong.*, 247 B.R. 259, 266 (Bankr. N.D. Iowa 2000).

398. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

399. *Nat'l Cattle Cong.*, 247 B.R. at 267; *see also Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-58 (2d Cir. 2000) (holding Indian tribe immune from suit under the Copyright Act); *Fla. Paralegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999).

400. *Nat'l Cattle Cong.*, 247 B.R. at 266.

401. *Id.*

402. 11 U.S.C. § 101(27) (2000) (defining "governmental unit" as meaning "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving

recognize the explicit abrogation of sovereign immunity in § 106(a). Such clarification would eliminate the debate as to whether a tribe's sovereign immunity eliminates its ability or eligibility to file for protection under the Code. In the event a tribe was involved in a bankruptcy case or proceeding, and Congress expressly adds Indian tribes within the definition of governmental unit in § 101(27), and the controversy invokes a section listed in § 106(a), a court could find that Congress abrogated a tribe's sovereign immunity.

Of course, the two constitutional requirements allowing abrogation of sovereign immunity must be met. In order for the court to abrogate sovereign immunity, Congress must unequivocally express its intent to abrogate the sovereign's immunity, and Congress must act in accordance with its valid exercise of power.<sup>403</sup> Possibly, these two requirements are met because § 106(a) is an unequivocal act of Congress, and Congress wields the requisite constitutional power under the Indian commerce and bankruptcy clauses in Article I of the Constitution.

It is noted that *Seminole Tribe of Florida v. Florida* only declared § 106(a) unconstitutional as it applied to the states because of the Eleventh Amendment.<sup>404</sup> Thus, Congress can act, pursuant to its specifically enumerated Article I powers (i.e., the Indian commerce and bankruptcy clauses), in regulating and abrogating the sovereignty and rights of tribes.<sup>405</sup> Arguably, tribal immunity may be pierced solely by congressional act.<sup>406</sup>

Additionally, because the Eleventh Amendment does not apply to the federal government, § 106(a) serves as explicit congressional consent to the abrogation of sovereign immunity of *federal* governmental units (i.e., the IRS or other federal government units), and the section contains Congress's explicit and necessary consent to such suits against these federal, governmental units.<sup>407</sup>

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as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government").

403. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

404. 1 COLLIER, *supra* note 134, § 106.02[1].

405. *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also* *Montana v. United States*, 450 U.S. 544 (1981); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979) (stating that Indian tribe's sovereign immunity is not absolute and is subject to the sufferance of, and complete defeasance by, Congress); U.S. CONST. art. I, § 8, cl. 4 (the bankruptcy clause); *id.* art. I, § 8, cl. 3.

406. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Hamilton v. Nakai*, 453 F.2d 152, 158-59 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972).

407. *United States v. Lee*, 106 U.S. 196, 227 (1882); *Thibodaux v. United States*, 201 B.R. 827, 832 (Bankr. N.D. Ala. 1996).

In the event a tribe is classified as a "federal governmental unit," § 106(a) may abrogate a tribe's sovereign immunity. Until the Supreme Court specifically addresses the sovereignty issue in regard to the constitutionality of § 106 of the Code in the context of a given bankruptcy case, courts probably will continue to render creative opinions addressing the issue.<sup>408</sup> Interestingly, § 106(b) provides another mechanism for a governmental unit to waive its sovereign immunity — the filing of a proof of claim.

## 2. 11 U.S.C. § 106(b): The Effect of Filing a Proof of Claim

When a governmental unit files a proof of claim in a bankruptcy case, § 106(b) provides that the governmental unit's sovereign immunity is waived.<sup>409</sup> Despite the controversy regarding the constitutionality of § 106, it generally is held that a state or any sovereign for that matter, voluntarily invokes the jurisdiction of the federal courts upon the filing of a proof of claim.<sup>410</sup>

A proof of claim is the traditional method for collecting a debt in a bankruptcy case.<sup>411</sup> With some exceptions, the filing of a proof of claim is a prerequisite to the allowance of that claim on the assets of the bankruptcy estate.<sup>412</sup> The act of filing a proof of claim ordinarily results in the voluntary submission by creditors to the bankruptcy court's jurisdiction for adjudication of the particular claims.<sup>413</sup> Rule 3002(c) of the Federal Rules

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408. See Kelli B. Dexter, *The Bankruptcy Estate v. The State, Round 11: Recent Developments in Sovereign Immunity*, 10 J. BANKR. L. & PRAC. 41, 56 (2000).

409. 11 U.S.C. § 106(b) (2000); *Gardner v. New Jersey*, 329 U.S. 565 (1947); *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998).

410. Dexter, *supra* note 408, at 56 (citing *In re Rose*, 187 F.3d 926, 928 (8th Cir. 1999)); see *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 n.3 (1999); see also *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999); *In re Burlington Motor Holdings, Inc.*, 242 B.R. 156, 160 (Bankr. D. Del. 1999); *In re Eli Witt Co.*, 243 B.R. 528, 530 (Bankr. M.D. Fla. 1999); *Univ. of Va. v. Robertson*, 243 B.R. 657, 662 (W.D. Va. 2000); *In re Janc*, 251 B.R. 525, 534 (Bankr. W.D. Mo. 2000). *But see In re Straight*, 248 B.R. 403, 414 (B.A.P. 10th Cir. 2000) (refusing to hold that filing a proof of claim equates to a waiver of sovereign immunity because such a holding would run counter to the Supreme Court's insistence on strictly construing waivers of sovereign immunity).

411. *Gardner*, 329 U.S. at 573; see 1 COLLIER, *supra* note 134, § 501.01[1] (clarifying that § 101 of the Code defines "claim" broadly, but § 501 of the Code, "Filing of Proofs of Claims or Interests," clearly denotes that proofs of claims are utilized for prepetition debts).

412. 1 COLLIER, *supra* note 134, § 501[2][a]. Whether a claim is allowed or not is determined according to its own set of variables under § 502 of the Code.

413. See *In re S.G. Phillips Constructors, Inc. v. City of Burlington*, 45 F.3d 702, 705 (2d. Cir. 1995) (discussing that the filing of a proof of claim confers jurisdiction on the bankruptcy court as a core matter under 28 U.S.C. § 157(b)(2)(B)).



of Bankruptcy Procedure governs the filing of a proof of claim in a chapter 7, 12, or 13 case. Rule 3003(c) governs the filing of proofs of claims when the debts are scheduled in a chapter 9 or 11 case as being disputed, contingent, or unliquidated.<sup>414</sup> With a general understanding of proofs of claims in bankruptcy cases, one can appreciate the legislative intent of 11 U.S.C. § 106(b).

The plain language of 11 U.S.C. § 106(b) states as follows:

A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.<sup>415</sup>

The legislative history reveals the intent underlying § 106.<sup>416</sup> In the 1994 amendments to the Code, the goal of the revised version of § 106(b) was to clarify conflicting case law and statutorily declare governmental units subject to counterclaims only in cases where the governmental unit filed a proof of claim.<sup>417</sup> The overhaul of § 106 in 1994 clarified the split of case law regarding the balance between the historic doctrines of sovereign immunity and the rights of governmental units.<sup>418</sup> Despite the 1994 amendments and the legislative history, the scope and effect of filing a proof of claim remain in question as well as the constitutional validity of § 106(b) and constructive waivers.<sup>419</sup>

Although the obvious disagreement regarding the effect of filing a proof of claim exists, bankruptcy courts have held that the mere act of filing a

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414. See FED. R. BANKR. P. 3002(c), 3003(c); see also 11 U.S.C. § 1111(a) (2000).

415. 11 U.S.C. § 106(b) (2000).

416. See 140 CONG. REC. H10,752-66 (daily ed. Oct. 4, 1994) (offering details regarding the debate concerning the Bankruptcy Reform Act of 1994 in the House of Representatives).

417. *Id.* at 10,755.

418. *Bankruptcy Reform: Hearing Before the Subcommittee on Economic and Commercial Law of the Committee on the Judiciary*, 103d Cong. 37-38 (1994) (statement of Rep. Berman, Member, House Comm. on the Judiciary).

419. See, e.g., *In re Rose* 215 B.R. 755 (Bankr. W.D. Mo. 1997) (holding a governmental unit to any unfavorable result upon the filing of a proof of claim); *In re Straight*, 143 F.3d 1387 (10th Cir. 1998) (expansively holding that the filing of a proof of claim by a state agency broadly waives the sovereign's immunity); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (*College Savings Bank I*). In 1999, the Supreme Court answered any further questions regarding governmental unit immunity in *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666, 681 n.3 (1999) (*College Savings Bank II*) (commenting that *Gardner* "stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts").

proof of claim in a bankruptcy case constitutes a waiver of sovereign immunity.<sup>420</sup> In 1947, the Supreme Court, in *Gardner v. New Jersey*, made clear that filing a claim against a debtor in bankruptcy waives the immunity with respect to adjudication of that claim.<sup>421</sup> Bankruptcy courts addressing tribal sovereign immunity, and the effect of a tribe filing a proof of claim, have reached a similar result in cases involving states and sovereign immunity.

In *In re White*, the court held that a tribal agency waived its sovereign immunity by properly filing a proof of claim and objecting to confirmation in a bankruptcy case.<sup>422</sup> Factually, a member of the tribe borrowed money from the tribal credit agency and later filed bankruptcy under chapter 11. The court expressly recognized the sovereign status of the tribal credit agency as a wholly operated unit run by the tribe.<sup>423</sup> The court proceeded by relying on *Gardner v. New Jersey*, stating "that when a sovereign files a claim against a debtor in bankruptcy, the sovereign waives immunity with respect to adjudication of the claim."<sup>424</sup>

In its analysis, the *White* court relied heavily on *Gardner*, emphasizing that the active participation of the tribal credit agency in the bankruptcy case paralleled the actions resulting in a waiver for the State of New Jersey.<sup>425</sup> The court held that the active participation and collection efforts of the tribal agency (a sovereign entity), including actions such as objecting to plan confirmation and filing a proof of claim, resulted in a waiver of any immunity possibly asserted with respect to the adjudication of the claim.<sup>426</sup> Apparently, some courts treat tribes in a fashion similar to states under § 106(b) of the Code especially regarding the effect of filing a proof of claim.

In *In re National Cattle Congress*, a district court reached a similar conclusion despite the creative tactics employed by a tribe.<sup>427</sup> Knowing the established effect of filing a proof of claim and tribal sovereign immunity, the tribe filed a proof of claim attached with a "Waiver Disclaimer" expressly retaining its sovereign immunity from adversary proceedings.<sup>428</sup> The court

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420. *Gardner v. New Jersey*, 329 U.S. 565 (1947); *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998); *In re Rose*, 187 F.3d 926, 929 (8th Cir. 1999); *In re Burke*, 146 F.3d 1313, 1319-20 (11th Cir. 1998), *cert. denied*, 527 U.S. 1043 (1999).

421. *Gardner*, 329 U.S. at 573-74.

422. *In re White*, 139 F.3d at 1271.

423. *Id.*; *see also In re Greene*, 980 F.2d 590, 598 (9th Cir. 1992) (holding that wholly owned commercial businesses enjoy sovereign immunity).

424. *White*, 139 F.3d at 1271 (citing *Gardner*, 329 U.S. at 567).

425. *Id.*

426. *Id.* at 1273.

427. 247 B.R. 259, 268 (N.D. Iowa 2000).

428. *Id.* at 264 (asserting that the waiver disclaimer preserves all rights regarding its

discussed the applicability of the bankruptcy laws on tribes and the effect of the tribe's filing the proof of claim.

The court began its analysis with the determination that the Code, as a general statute having broad application, applies to tribes because Congress did not specifically except tribes from the Code's application.<sup>429</sup> Determining that the Code applied to tribes, the court turned to the jurisdictional issues; specifically, the court addressed whether sovereign immunity applied, barring suits against tribes.

The *National Cattle Congress* court held that the tribe is not subject to suit because the term "Indian tribe" is not specifically included in the § 101(27) definition of "governmental unit."<sup>430</sup> The court stated that an inference that Congress intended to include Indian tribes in the definition is contrary to Supreme Court pronouncements that usurpation of tribal immunity must be unequivocally expressed.<sup>431</sup>

As discussed earlier, the court in *National Cattle Congress* failed to determine that tribes, like states, are subject to the statutory waiver of sovereign immunity under § 106(a).<sup>432</sup> The court thoroughly addressed the effect of a tribe filing a proof of claim with an express reservation of its sovereign status. The court held that the initial filing of the proof of claim with the "Waiver Disclaimer" preserved the tribe's sovereign immunity.<sup>433</sup> The court held, however, that the tribe's action of continuing to maintain a proof of claim in a bankruptcy case contradicts an assertion of sovereign immunity.<sup>434</sup>

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mortgage lien). The court stated:

By filing a proof of claim, the Tribe does not intend to participate in or submit to any plan of reorganization or in any way compromise its secured interest. Nor does the Tribe intend, by this filing, to submit to the jurisdiction of this or any other forum with regard to any adversary proceeding. The Tribe hereby expressly retains its sovereign immunity from adversary proceedings. Claim No. 16, Waiver Disclaimer (filed Mar. 20, 1998)).

*Id.*

429. *Id.* (stating that the Code applies to Indian tribes because its general application does not interfere with any treaty, right to self-governance, or contradict congressional intent); see also *Aubertin v. Colville Confederated Tribes*, 446 F. Supp. 430, 435 (E.D. Wash. 1978) (stating that the Bankruptcy Act is an implied waiver of tribal immunity and that the bankruptcy court has the authority to discharge a debt owed to an Indian tribe).

430. *Nat'l Cattle Cong.*, 247 B.R. at 267; cf., *In re Vianese*, 195 B.R. 575, 576 (Bankr. N.D.N.Y. 1995); *In re Sandmar Corp.*, 12 B.R. 901, 916 (Bankr. D.N.M. 1981).

431. *Nat'l Cattle Cong.*, 247 B.R. at 267.

432. *Id.*

433. *Id.* at 268.

434. *Id.*

Therefore, the court upheld the legislative intent regarding § 106(b) holding that the tribe must either withdraw its proof of claim or retract the "Waiver Disclaimer" from the proof of claim.<sup>435</sup> The court seemed to agree with *Gardner* regarding the effect of filing a proof of claim while concomitantly allowing the tribe to carefully determine whether it desired to waive its immunity by continuing to pursue its proof of claim or retain its sovereign immunity.<sup>436</sup>

Under § 106, tribes, like the federal and state governments, enjoy sovereign immunity.<sup>437</sup> Congress, exercising its plenary authority, may waive the tribes' sovereign immunity as long as the waiver is clearly expressed.<sup>438</sup> Arguably, a tribe may waive its protection as a sovereign and impliedly consent to a court's jurisdiction by instituting an action in a given court or filing a proof of claim in a bankruptcy case.<sup>439</sup>

The confusion surrounding § 106 and sovereign immunity remains a topic of considerable debate in bankruptcy fora with states as well as tribes. Congressional or judicial clarification on the sovereign immunity issue will eliminate confusion for many participants in the bankruptcy system, including state agencies as well as other sovereigns such as tribes. Until further, needed clarification is provided, the sovereignty issue remains another problem in the eligibility and applicability of the federal bankruptcy laws as applied to tribes.

### VI. Conclusions

This article attempts to manifest a real and compelling need for Congress to specifically clarify the status (e.g., eligibility) and related provisions regarding the treatment of tribes who may seek relief under the Bankruptcy Code (and also whether tribes are vulnerable to involuntary bankruptcy

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435. *Id.* at 268-69; *see also* FED. R. BANKR. P. 3006 (allowing a creditor to withdraw a proof of claim as a matter of right unless an objection to the claim is filed, the creditor accepts or rejects the plan, or the creditor participates significantly in the case).

436. *See* *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) (stating that withdrawal of a claim under FED. R. BANKR. P. 3006 renders a claim a legal nullity treating that claim as though it has never been filed).

437. COHEN, *supra* note 16, at 324.

438. *Id.*

439. *Id.* (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979)); *see also* *Big Spring v. Bureau of Indian Affairs*, 767 F.2d 614 (9th Cir. 1985) (standing for the proposition that Indian tribes probably possess the authority to waive sovereign immunity); *In re Davis Chevrolet, Inc.*, 282 B.R. 674 (Bankr. D. Ariz. 2002) (substantiating the theory that an Indian tribe waives its sovereign immunity when it files proofs of claim in a chapter 7 case consistent with the intent and legislative effect of filing a proof of claim as proscribed in § 106(b) of the Code).

petitions). Because tribes today are commercially diverse and enterprising, Congress should recognize the ultimate economic reality of some inevitable business failures of tribes with resulting legal issues under the Code. In order to clarify the eligibility of tribes who may seek bankruptcy protection, Congress should settle the controversy through appropriate legislation or statutory amendment to the Code. Such a clarification to the Code would avoid a potentially lengthy and dilatory controversy as well as promote uniformity in the various bankruptcy courts addressing the eligibility of tribes under the Code. Finally, the suggested legislative solutions would help foster the goal set forth in Federal Rule of Bankruptcy Procedure 1001, "to secure the just, speedy, and inexpensive determination of every case and proceeding."<sup>440</sup>

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440. FED. R. BANKR. P. 1001.