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THE “BETTER READING” OF SECTION 17 OF THE INDIAN REORGANIZATION ACT: A REJECTION OF AUTOMATIC WAIVER OF TRIBAL SOVEREIGN IMMUNITY IN *MEMPHIS BIOFUELS*

Sarah W. Conkright[†]

“Business more than any other occupation is a continual dealing with the future; it is a continual calculation, an instinctive exercise in foresight.”¹ Few contexts require as much foresight as dealings between tribal and nontribal businesses.²

Generally, tribal corporations resemble nontribal corporations with respect to their business sophistication and legal savvy;³ tribal corporations, however, carry an added shield of tribal sovereign immunity.⁴ In the absence of congressional abrogation or tribal waiver, sovereign immunity insulates a tribe from suit.⁵

The historical roots of tribal sovereign immunity stem from numerous court decisions recognizing tribal nations as sovereign powers.⁶ A tribe may choose

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1. THE FORBES BOOK OF BUSINESS QUOTATIONS: 10,000 THOUGHTS ON THE BUSINESS OF LIFE 110 (Ted Goodman ed., Black Dog & Leventhal Publishers 2006) (1997) (quoting Henry R. Luce).

2. For purposes of this article, a “nontribal” corporation includes entities formed pursuant to state corporate statutes, rather than tribal law or federal Indian law.

3. See KAREN J. ATKINSON & KATHLEEN M. NILLES, TRIBAL BUSINESS STRUCTURE HANDBOOK III–12 (2008) (demonstrating how the structure, management, and operation of a section 17 tribal corporation parallels nontribal corporations).

4. See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (noting that tribes retain immunity from contract suits, which include commercial disputes); see also Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 416 (2009) (“Tribal sovereign immunity from suit is broad in scope, applies to tribal commercial activities conducted both on and off the reservation, [and] extends to conduct of tribal entities that operate as extensions of the tribal government . . .”).

5. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 283 (1988).

6. See, e.g., *Turner v. United States*, 248 U.S. 354, 354–55, 357–58 (1919) (describing the Creek Nation as “a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches”); see also COHEN, *supra* note 5, at 122 (emphasizing the inherent power of tribal nations).

to waive its sovereign immunity, but must do so clearly and expressly.⁷ Absent such an explicit waiver, a court will not find that a tribe has abrogated its sovereign immunity.⁸ Thus, if a nontribal corporation enters into a business agreement with a tribal corporation and fails to include express provisions requiring the tribal corporation to waive either partial or full immunity, then the nontribal corporation could find itself without legal recourse in the event of a breach.⁹

In a commercial context, parties seeking judicial recourse in response to a tribal entity's contract breach or tortious act may be barred from pursuing their claim because U.S. courts lack jurisdiction over such disputes as a result of tribal sovereign immunity.¹⁰ Some courts, however, have determined that if a corporate charter or contract contains a "sue and be sued" provision or arbitration clause, then the tribal corporation has expressly waived its immunity.¹¹ Such clauses denote a tribe's conscious effort to expose itself to liability so that it may participate competitively with nontribal corporations in the corporate world.¹²

Because sovereign immunity may create legal barriers for nontribal corporations and place tribal corporations at a disadvantage in business dealings, the argument for an automatic waiver of immunity for incorporated tribes has arisen.¹³ In application, such a rule would allow nontribal corporations to remove all barriers preventing future legal action against tribal corporations, thus enabling nontribal corporations to protect themselves from an unexpected invocation of immunity.¹⁴

7. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

8. *See id.* at 59.

9. *See* Gene Barton, *Waiving Tribal Sovereign Immunity Under Arbitration Agreements* (unpublished manuscript) (on file with the King County Bar Association), available at <http://www.docstoc.com/docs/53184478/Tribal-Sovereign-Immunity-Can-Pose-Business-Barrier> (stressing the importance of sovereign-immunity waiver provisions in contracts with tribal corporations).

10. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 759–60 (1998).

11. *See* *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414 (2001); *Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 901 (N.D. Iowa 1994).

12. Recent Case, *Sovereign Immunity—Indian Tribal Sovereignty—Tribes Not Immune from Suits Arising from Off-Reservation Business Activity—Padilla v. Pueblo of Acoma*, 107 *N.M.* 174, 754 *P.2d* 845 (1988), 102 *HARV. L. REV.* 556, 561 (1988) (explaining how tribes may be motivated to adopt such a clause because sovereign immunity often places tribal corporations at a commercial disadvantage).

13. *See* *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1131 (D. Alaska 1978) (noting that Congress recognized the reluctance of nontribal businesses to contract with tribal corporations due to their sovereign immunity and sought to remedy this disadvantage by authorizing section 17 tribal corporations, which have the ability to waive immunity).

14. *Cf.* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 *B.C. L. REV.* 595, 599–600 (2010) (stating that nontribal entities may be "unpleasantly surprised" to learn that the tribe with whom they are transacting

To promote competition and tribal self-governance, secure Native American rights, and encourage economic development, Congress passed the Indian Reorganization Act (IRA) in 1934.¹⁵ Section 17 of the IRA created a provision for federal tribal incorporation.¹⁶ Congress intended this section to restore economic prosperity to tribes¹⁷ and to encourage tribes to conduct business transactions with nontribal corporations.¹⁸

In *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, the plaintiff argued that incorporation under the IRA should automatically divest a tribal corporation of sovereign immunity.¹⁹ The Sixth Circuit rejected this argument, and despite acknowledging a split in authority on the issue,²⁰ held that incorporation under the statute did not automatically waive a tribal corporation's immunity.²¹

Part I of this Note examines the development of tribal sovereign immunity, including section 17 of the IRA, prior case law, and various instances where courts have found that federally incorporated tribal corporations have waived sovereign immunity. Part II examines in detail *Memphis Biofuels*, and specifically focuses on the Sixth Circuit's rejection of section 17 incorporation as an automatic waiver of immunity. Part III analyzes the court's holding in light of the split in authority to determine whether the *Memphis Biofuels* holding comports with prior jurisprudence. This analysis considers the legislative purpose of the IRA, the underlying principles of sovereignty, and the implications of a contrary holding. Taking these factors into consideration, Part IV concludes that, given the importance of congressional deference, the weakness of contrary case law, and the potential negative impact of a contrary holding, the Sixth Circuit made an appropriate finding.

business possesses immunity from suit, especially when no outward indicators of this immunity existed).

15. See 25 U.S.C. §§ 461–494a (2006); H.R. REP. NO. 73-1804, at 1 (1934).

16. See 25 U.S.C. § 477. Under section 17, tribes may petition the Department of the Interior for a federal charter to create distinct tribal corporations. *Id.*; see also *Parker Drilling Co.*, 451 F. Supp. at 1131 (noting that section 17 of the IRA permits tribes to create a “separate and distinct Indian corporation”).

17. See H.R. REP. NO. 73-1804, at 6.

18. S. REP. NO. 73-1080, at 1 (1934) (stating that one of the purposes of the legislation was to “permit Indian Tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations”).

19. 585 F.3d 917, 920 (6th Cir. 2009). The plaintiff also argued that the tribe had both expressly waived immunity and waived immunity based on equitable doctrines. *Id.* at 921–22. The court rejected both of these arguments. *Id.*

20. *Id.* at 920. The court recognized that the Northern District of Iowa had found that “a Section 17 corporation waives sovereign immunity.” *Id.* (quoting *GNS, Inc. v. Winnebago Tribe of Neb.*, 866 F. Supp. 1185, 1188–89 (N.D. Iowa 1994)). By contrast, the Ninth Circuit had rejected the idea that incorporation leads to an automatic waiver. *Id.* (citing *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002)).

21. *Id.* at 920–21.

I. TRIBAL SOVEREIGN IMMUNITY, THE INDIAN REORGANIZATION ACT, AND SECTION 17 CORPORATIONS

A. Early Characterizations of Tribal Sovereignty

Fundamentally, the powers vested in Indian tribes are the “inherent powers of a limited sovereignty which has never been extinguished.”²² The concept of tribal sovereignty developed during the European conquest of the Western Hemisphere, the founding of the United States, and the subsequent judicial interpretations regarding the powers of Indian tribes.²³

Before the European conquest of the Western Hemisphere, Indian tribes remained completely sovereign—free to govern their own affairs as independent nations.²⁴ The influx of Western settlers gradually eroded this sovereignty as conquering nations asserted superior claims to land titles under the discovery doctrine.²⁵ Additionally, treaties between tribes and the United States ceded tribal lands to Western settlers.²⁶ During the early nineteenth century, removal policies also forced tribes to relocate farther west, allowing white settlers to take over their lands.²⁷ The General Allotment Act of 1887 led to further exploitation by permitting the fragmentation of tribal land as part of an overall assimilation policy.²⁸ Although these policies stripped Indian

22. COHEN, *supra* note 5, at 122.

23. See BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL 6–10 (2003) (providing an overview of tribal sovereign immunity, from the conquest of the Native Americans through the enactment of the Constitution and Justice Marshall’s opinions in the *Cherokee Cases*).

24. *Id.* at 5–6; see WILLIAM C. CANBY JR., AMERICAN INDIAN LAW IN A NUTSHELL 115 (5th ed. 2009) (“When Europeans first established colonies in America, they had little choice but to deal with the Indian tribes as the independent nations that they were.”).

25. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823). Justice Marshall explained the discovery doctrine:

Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them.

Id. at 588.

26. See COHEN, *supra* note 5, at 51–53. Such treaties commonly included boundary provisions that conceded particular tracts of land to the United States, but also guaranteed tribes the right to fish and hunt on the ceded land. CANBY, *supra* note 24, at 115.

27. COHEN, *supra* note 5, at 53–54.

28. See Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107, 130–31 (2008).

tribes of their land and self-governance, tribes still possess limited sovereign powers today.²⁹

The Constitution supports the idea that tribes have inherent sovereign characteristics.³⁰ The Commerce Clause likens the relationship between the federal government and Indian tribes to that of foreign nations and individual states.³¹ Similarly, the President's treaty power contains an implicit understanding that the United States makes treaties with sovereign nations.³² Presumably, then, because the United States has entered into several treaties with Indian tribes,³³ tribes must have retained some elements of inherent sovereignty.³⁴ Moreover, despite a series of cases limiting the power of Indian tribes,³⁵ the Supreme Court has held that Indian tribes are separate and distinct nations with sovereign powers, and are not subject to the laws of state governments.³⁶

29. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

30. WILDENTHAL, *supra* note 23, at 7 (noting that language in the Constitution could be interpreted as an implicit recognition of tribal sovereignty).

31. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress power “[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes”); WILDENTHAL, *supra* note 23, at 7.

32. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”); *Sovereign Immunity: Oversight Hearing to Provide for Indian Legal Reform Before the S. Comm. on Indian Affairs*, 105th Cong. 3 (1998) [hereinafter *Committee Hearing*] (statement of Sen. Daniel K. Inouye, V. Chairman, S. Comm. on Indian Affairs) (“Our Constitution makes clear that treaties are the documents which express the legal relationships between sovereigns . . .”).

33. See CANBY, *supra* note 24, at 115–21 (discussing treaties made between Indians tribes and the United States).

34. See *id.* at 119 (explaining that treaties between the United States and Indian tribes are given the same force of law as treaties between the United States and foreign nations).

35. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that the Cherokee Nation was not fully independent nation, but rather a “domestic dependent nation,” which had a ward and guardian-type relationship with the United States); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 603–05 (1823) (finding that Indians were entitled to possess their land, but could only sell it to the U.S. government because they did not actually hold title to the land they occupied).

36. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556–57 (1832). *But see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 & n.9 (1980) (noting that the Court had “long ago” abandoned *Worcester’s* bright-line prohibition). The *Worcester* Court noted that treaties between the United States and Indian tribes that regulate commerce exhibit the United States’ recognition that tribes are politically independent entities with sole authority over their land. *Worcester*, 31 U.S. (6 Pet.) at 556–57.

B. Tribal Sovereign Immunity as a Shield from Suit

Against the historical backdrop in which the United States viewed Indian tribes as “distinct political communities” and thus sovereign nations,³⁷ the Supreme Court first articulated the concept of tribal immunity in *Turner v. United States*.³⁸ The Court held that the Creek Nation, as a sovereign, had immunity from suit for damages sustained to property the tribe had leased to the plaintiff.³⁹ Secondly, the Court found that absent congressional authorization, the tribe could not be “sued in any court; at least without its consent.”⁴⁰ This secondary holding became the bedrock for future court decisions regarding tribal immunity.⁴¹

In *United States v. United States Fidelity & Guaranty Co.*, the Supreme Court voided a lower court’s decision that granted recovery against a tribe.⁴² Relying on the language in *Turner*, the Court found that tribes were immune from suit, absent congressional authorization.⁴³

Building upon this precedent, the Supreme Court later determined that a tribe does not waive sovereign immunity merely by seeking certain types of relief.⁴⁴ In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the tribe filed a motion for injunctive relief to prevent the state from collecting a sales tax from a tribal store.⁴⁵ The Court held that only Congress maintained the authority to limit tribal immunity and determined that Congress had not done so with regard to the collection of tax assessments.⁴⁶ Thus, in accordance with the holding in *United States Fidelity & Guaranty Co.*, the Court found that the tribe did not waive sovereign immunity simply because it sought injunctive relief.⁴⁷

37. *Id.*

38. *Turner v. United States*, 248 U.S. 354, 358 (1919).

39. *Id.* at 357–58 (recognizing the Creek Nation’s political autonomy and power over its internal matters, but noting that sovereign immunity did not create the primary barrier to the plaintiff’s recovery in this case).

40. *Id.* at 358.

41. See Clay Smith, *Tribal Sovereign Immunity: A Primer*, ADVOCATE, May 2007, at 19–20 (2007) (discussing how tribal sovereign immunity derives from *Turner*’s secondary holding).

42. *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940).

43. *Id.* The Court reiterated that “[c]onsent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void.” *Id.* at 514. *But see* *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171–72 (1977) (explaining that tribal immunity does not insulate *individual* tribal members from legal proceedings in localities where they are subject to personal jurisdiction).

44. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509–10 (1991).

45. *Id.* at 507.

46. *Id.* at 510.

47. *Id.* at 509–10. Despite this finding, the Court ultimately ruled that although the state could not tax cigarettes sold to tribe members, the State could collect taxes from sales to non-tribe members. *Id.* at 512 (“[T]ribal sovereign immunity . . . does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes.”).

Most recently, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* required the Court to determine whether tribes may be sued in state court for off-reservation commercial activities.⁴⁸ Although the Supreme Court described the development of tribal immunity as accidental⁴⁹ and enumerated policy arguments against continued adherence to the doctrine,⁵⁰ the Court decided to maintain deference to Congress.⁵¹ Because Congress had not abrogated immunity and the petitioner had not waived it, the Court found that it lacked authority to revisit the doctrine.⁵²

Turner, Oklahoma Tax Commission, United States Fidelity & Guaranty Co., and *Kiowa* each recognized that the authority to waive tribal immunity lies only with Congress or the tribe itself.⁵³ To abrogate tribal immunity, Congress

48. *Kiowa Tribe of Olka. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

49. *Id.* at 756. Although the Court itself often cited *Turner* as the basis for tribal immunity, the majority declared that *Turner* did not actually establish such a proposition. *Id.* Instead, the *Kiowa* Court asserted that the *Turner* Court had merely assumed immunity without providing a reasoned analysis. *Id.* at 757. However, the *Kiowa* Court did recognize that its later holding in *United States Fidelity & Guaranty Co.* explicitly adopted the propositions made in *Turner*. *Id.*

50. *Id.* at 758. The majority acknowledged that tribal immunity “extends beyond what is needed to safeguard tribal self-governance” to commercial tribal activity. *Id.* The Court noted that this wide scope could present issues for those who contract with a tribe and are unaware of the tribe’s immunity. *Id.*

51. *Id.* at 758–59 (declining to narrow tribal immunity for commercial activities to those activities that occur entirely on reservations).

52. *Id.* at 760; see also Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 680 (2002) (noting that the *Kiowa* Court recognized valid arguments in favor of abrogating tribal immunity but refused to impose limitations despite having done so in other instances); Christopher W. Day, Note, *Kiowa Tribe v. Manufacturing Technologies, Inc.: Doing the Right Thing for All the Wrong Reasons*, 49 CATH. U. L. REV. 279, 327–28 (1999) (observing that the *Kiowa* Court expressed a desire for Congress to narrow tribal immunity). Following the *Kiowa* decision, Senate hearings on the proposed Indian Equal Justice Act revisited the issue of tribal sovereign immunity, and both sides of the issue were debated vigorously. *Compare Committee Hearing, supra* note 32, at 5 (statement of Sen. Slade Gorton) (“This bill asks no more and no less than that Indian tribes be subjected to the same degree of responsibilities as others are.”), *with id.* at 3 (statement of Sen. Daniel K. Inouye, V. Chairman, S. Comm. on Indian Affairs) (“[This bill] would divest the Indian nations of their governmental status and relegate them to the status of individuals or private corporations for the purpose of legal actions in State and Federal Courts.”).

53. See *Kiowa*, 523 U.S. at 754; *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). Congressional consent to sue must be express and unequivocal, and cannot be implied; tribes may waive immunity provided that they adhere to the same requirements. See, e.g., *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) (stating that an affirmative waiver by Congress or the tribe is necessary to abrogate sovereign immunity); 41 AM. JUR. 2D *Indians; Native Americans* § 10 (2005) (noting that a tribe must expressly waive sovereign immunity).

must demonstrate an “unequivocal expression” of legislative intent.⁵⁴ Absent such express language, a court cannot infer waiver.⁵⁵

C. *The Purposes of the Indian Reorganization Act*

Following the forced assimilation and land allotment policies of the nineteenth century,⁵⁶ President Franklin D. Roosevelt sought to improve the relationship between the federal government and Indian tribes.⁵⁷ The IRA, also known as the Wheeler-Howard Act, sought to restore Indian tribes to a position of self-governance,⁵⁸ and is considered the single most important statute affecting Native Americans since its passage over seventy-five years ago.⁵⁹ After revisions and extensive hearings, Congress passed the IRA in 1934 with President Roosevelt’s full endorsement.⁶⁰

Congressional reports and debates detail the legislative intent behind the IRA.⁶¹ For example, the House Committee on Indian Affairs Report described

54. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (“In the absence . . . of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the [statute] are barred by its sovereign immunity from suit.”); *see also* *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (rejecting the district court’s finding that immunity could be waived by implication).

55. *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)) (explaining that Congress’s expansive power to permit waiver constrains a court’s ability to find implicit waivers of immunity).

56. *See* ELMER R. RUSCO, *A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 2* (2000); WILDENTHAL, *supra* note 23, at 52–53. Professor Bryan H. Wildenthal characterizes “the period from about 1870 to 1930 [as] the all-time low point for Native American sovereignty.” WILDENTHAL, *supra* note 23, at 53. During this period, the federal government undertook efforts to assimilate the Indian population as part of a policy designed to terminate the existence of independent tribal governments. *Id.* at 25–26. For example, the Allotment Act of 1887 divided tribal land and allotted plots to individual Indians, while subjecting the rest of the land to non-Indian exploitation, ultimately leading to a significant reduction in tribal lands and resources. *Id.*

57. *See* WILDENTHAL, *supra* note 23, at 30 (noting that the Roosevelt administration “marked an epochal shift in federal Indian policy”).

58. *See* 25 U.S.C. §§ 461–494a (2006); 78 CONG. REC. 11,123 (1934). Tribal self-governance encapsulates the conservation of tribal resources, creation of an independent credit system, procurement of higher education opportunities, and formation of businesses. S. REP. NO. 73-1080, at 1 (1934); *see also* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (detailing the legislative intent underlying the IRA).

59. RUSCO, *supra* note 56, at ix; *see also* 78 CONG. REC. 11,125 (“[T]he IRA is the greatest step forward the [Government] has ever taken with reference to Indians.”). This statement encompasses the related statutes that extend the IRA to other tribes, such as the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. §§ 501–510 (1936).

60. *See* S. REP. NO. 73-1080, at 3–4 (including a letter from President Roosevelt who encouraged the passage the act because it would “allow[] the Indian people to take an active and responsible part in the solution of their own problems”).

61. *See, e.g.*, H.R. REP. NO. 73-1804, at 1 (1934) (indicating that the House Committee on Indian Affairs advocated for the bill because it promoted “local self-government and economic

the Act as a tool to enable effective land use and responsible management of business affairs, as well as a means “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”⁶² IRA proponents viewed the legislation as a way to promote tribal authority over tribal affairs through programs that would allow “increasing numbers of Indians to enter the white world on a footing of equal competition.”⁶³

Section 17 of the IRA permits the Secretary of the Interior to issue a corporate charter to any tribe that petitions for one and whose tribal governing body subsequently ratifies the charter.⁶⁴ Hence, tribal corporations chartered under this statute are known as section 17 corporations.⁶⁵ By authoring this provision, Congress intended to enable economic business development and promote tribal engagement in commercial markets.⁶⁶ Incorporation under the IRA creates a business that is “wholly owned by the . . . tribe, but [that

enterprise,” among other objectives); S. REP. NO. 73-1080, at 3 (explaining that the IRA would improve the overall welfare of Native Americans).

62. H.R. REP. NO. 73-1804, at 6.

Reduced to its simplest terms, the present bill would prevent any further loss of Indian lands, would permit the purchase of additional lands for landless Indians, would set up a modern system of Indian agricultural and industrial credit, would permit Indian tribes or groups to incorporate for business purposes, would give Indian tribes the right to organize tribal councils for the promotion of the common welfare, would establish a special Indian civil service and give to qualified Indians the preference right to appointment in the Indian Service, and would create a loan fund for the vocational and professional training of Indians in order to qualify them for the Indian Service and for other employment.

78 CONG. REC. 11,727.

63. 78 CONG. REC. 11,732. Despite this early optimism, scholars debate whether the IRA has achieved its goal. See RUSCO, *supra* note 56, at ix; WILDENTHAL, *supra* note 23, at 284 (noting that some have criticized the Act as overly intrusive).

64. 25 U.S.C. § 477 (2006). The statute states:

Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore[e] interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Id.

65. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 918 (6th Cir. 2009).

66. 73 CONG. REC. 11,731 (“The enactment of this legislation will permit a continuous and increasing exercise of civic power and cooperative action by the Indian peoples, and it will set the entire Indian population in motion”); see also *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1141 (D. Alaska 1978) (indicating that Congress intended section 17 to place tribal organizations on the same footing as nontribal corporations).

operates as] an entity separate and distinct from the [Indian] Nation.”⁶⁷ Although maintaining tribal immunity has its advantages,⁶⁸ it can put an enterprise at a competitive disadvantage.⁶⁹ Thus, section 17 corporations may choose to waive their immunity so they can remain commercially competitive.⁷⁰

A tribe may also elect to organize under section 16 of the IRA, which creates an organization notably different from section 17 corporations. While section 17 allows incorporation under a federal corporate charter,⁷¹ section 16 permits tribes to organize as federally-recognized tribal governmental entities.⁷² Some courts have found these two entities to be legally distinct,⁷³ which becomes important when examining the tribe’s actions.⁷⁴

D. Judicial Findings of Waiver in Tribal Corporations

1. “Sue and be Sued” Clauses

The distinction between section 16 and section 17 incorporation becomes relevant in the context of “sue and be sued” clauses.⁷⁵ These clauses purport to waive a party’s immunity, thereby making it amenable to suit.⁷⁶ The Supreme Court has held that a “sue and be sued” clause in its “normal connotation

67. *Memphis Biofuels*, 585 F.3d at 918; *see also Parker Drilling*, 451 F. Supp. at 1131 (recognizing section 17 corporations as distinct entities); *Atkinson v. Haldane*, 569 P.2d 151, 174 (Alaska 1977) (referring to section 17 businesses as “distinct legal entities” and noting that “[t]he legislative history of the Indian Reorganization Act also supports a determination of separateness”).

68. *Atkinson*, 569 P.2d at 174 (recognizing that the protection of a tribe’s few and precious resources may necessitate tribal immunity).

69. *Id.* Tribes may consider waiving immunity to prevent broad congressional or judicial waiver, to facilitate business dealings with parties concerned about the lack of judicial recourse, and to conform to general principles of fairness. Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1354–55 (1993).

70. *See Parker Drilling*, 451 F. Supp. at 1131.

71. 25 U.S.C. § 477 (2006).

72. 25 U.S.C. § 476 (providing tribes with the authority to adopt a constitution, bylaws, and hold special elections while retaining their “inherent sovereign power”); *see also Separability of Tribal Organizations*, 65 Interior Dec. 483 (1958) (request for interpretive opinion) (identifying the diverse purposes and functions of sections 16 and 17 of the IRA).

73. *See, e.g., Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 898 (N.D. Iowa 1994); *GNS, Inc. v. Winnebago Tribe of Neb.*, 866 F. Supp. 1185, 1188 (N.D. Iowa 1994).

74. *See Veeder*, 864 F. Supp. at 900; *GNS*, 866 F. Supp. at 1188–89; *see also infra* note 81 and accompanying text (discussing the implications of a tribe contracting in its section 16 capacity versus its section 17 capacity).

75. *See Smith*, *supra* note 41, at 20 (noting that the effectiveness of a “sue and be sued” clause may depend on whether the tribe was acting in its governmental or corporate capacity).

76. *See Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245–46 (1940) (finding that Congress’s inclusion of a “sue and be sued” clause in the formation of a federal agency effectively waived the agency’s sovereign immunity).

embrace[s] all civil process[es] incident to the commencement or continuance of legal proceedings.”⁷⁷ In federal legislation, these clauses effectively waive the federal government’s sovereign immunity.⁷⁸ In terms of tribal immunity, courts also generally recognize that such clauses constitute a waiver.⁷⁹ This is not a blanket rule, however, and certain limitations exist.⁸⁰

If a tribe enters into an agreement in its section 16 governmental capacity, then an express waiver of immunity via a “sue and be sued” clause may not subject the tribe to suit.⁸¹ However, if a plaintiff can establish the presence of a “sue and be sued” clause, and also demonstrate that the tribe was acting in its section 17 corporate capacity, courts will generally hold that the clause constitutes a waiver of immunity.⁸² For instance, in *Parker Drilling Co. v. Metlakatla Indian Community*, the court found that “[b]y granting the power to sue and be sued the [section 17] corporation has attempted to waive generally its sovereign immunity.”⁸³ The court noted that such a general waiver permits courts to entertain breach-of-contract actions as well as tort claims against tribes.⁸⁴

77. *Id.* at 245 (finding that “when Congress launch[e]s a governmental agency into the commercial world and endow[s] it with authority to ‘sue or be sued,’ [it creates an] agency [that] is not less amenable to judicial process than a private enterprise under like circumstances would be”; thus the clause should be construed narrowly unless Congress has plainly stated otherwise).

78. *Id.*

79. *See, e.g.,* *Fontenelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970); *Md. Cas. Co. v. Citizens Nat’l Bank*, 361 F.2d 517, 521 (5th Cir. 1966); *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1136 (D. Alaska 1978).

80. *See supra* note 75.

81. *See Veeder v. Omaha Tribe of Neb.*, 864 F. Supp. 889, 900–01 (N.D. Iowa 1994) (dismissing the case for failure to properly identify the entity being sued, but noting that if the plaintiff had clearly sued the tribe under its section 17 capacity, as opposed to section 16, then the court would have found a waiver of immunity via the “sue and be sued” clause in the tribe’s charter). If a tribe “mixes its use of governmental and corporate powers,” however, the presence of a “sue and be sued” clause may indicate a waiver of sovereign immunity. *Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Cmty.*, 520 N.W.2d 167, 170 (Minn. Ct. App. 1994).

82. *See, e.g., Fontenelle*, 430 F.2d at 147; *Parker Drilling*, 451 F. Supp. at 1136–37; *Brunette v. Dann*, 417 F. Supp. 1382, 1385 (D. Idaho 1976); *Martinez v. S. Ute Tribe*, 374 P.2d 691, 694 (Colo. 1962).

83. 451 F. Supp. at 1137. Notably, “sue and be sued” provisions only expose the tribal corporation’s corporate assets to suit—not the assets of the tribal nation. Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1060–61 (1982) (explaining that, regardless of a tribal corporation’s “sue and be sued” clause, tribal funds and “tribal assets such as land and minerals remain protected”); *see also* ATKINSON & NILLES, *supra* note 3, at III-15 (noting that incorporation under section 17 protects a tribe’s government assets).

84. *Parker Drilling*, 451 F. Supp. at 1137 (citing *Atkinson v. Haldene*, 569 P.2d 151, 172–75 (Alaska 1977)) (recognizing that “[t]he purpose of § 17 was to allow Indians to enter into business transactions on an equal footing” with nontribal corporations, and thus rejecting any limitation to tort liability). The court also noted that “it is unlikely that a prospective customer would feel comfortable entering a business office or using a corporate product if the corporation were immune from tort liability. Only with the potential for imposition of tort liability are Indian corporations truly equal . . .” *Id.*

However, some courts have held that the mere presence of a “sue and be sued” clause does not constitute a blanket waiver of immunity.⁸⁵ In *Maryland Casualty Co. v. Citizens National Bank*, the Fifth Circuit acknowledged that “sue or be sued” clauses could be “expressly qualified” so that the tribe retains immunity for certain causes of action.⁸⁶ This would effectively bar plaintiffs from bringing suits when the cause of action fits into a protected category.⁸⁷ Courts may also require plaintiffs to show that certain procedural conditions have been met before waiver may be effective.⁸⁸ The Fifth Circuit also noted that any ambiguities in a “sue and be sued” clause should be generously construed in the tribe’s favor.⁸⁹

2. Arbitration Agreements

Contractual arbitration agreements between tribal and nontribal corporations may also constitute a waiver of immunity, and thus submit a tribal corporation to judicial process.⁹⁰ Arbitration clauses generally require that parties resolve disputes through arbitration proceedings; federal or state courts will then enforce the resulting awards.⁹¹ Courts addressing this issue have adhered to the guidelines set forth in *Santa Clara Pueblo v. Martinez*, which require a

85. See Kunes, *supra* note 4, at 413–14.

86. *Md. Cas. Co. v. Citizens Nat’l Bank*, 361 F.2d 517, 521 (5th Cir. 1966). The court ruled that the “sue or be sued” clause expressly excluded “the levy of any judgment, lien, or attachment” upon tribal property. *Id.* Additionally, because the court found the garnishment action analogous to attachment, it held that the tribe’s immunity barred suit. *Id.* at 521–22.

87. See *id.* at 521–22.

88. See *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 551–52 (N.M. Ct. App. 2004) (recognizing that section 17 corporations may impose prerequisites that must be fulfilled before a “sue and be sued” clause within the corporate charter becomes effective).

89. *Md. Cas. Co.*, 361 F.2d at 521. This method of construction was developed to protect Indians and to compensate for language and literacy barriers present in early tribal dealings with whites. See CANBY, *supra* note 24, at 122 (noting that the Supreme Court “fashioned rules of construction sympathetic to Indian interests” to help the United States carry out its role as a trustee); COHEN, *supra* note 5, at 37–38 (“A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.”). Courts have continued to utilize this canon of construction. See *Winters v. United States*, 207 U.S. 564, 576 (1908) (extending this rule of interpretation to nontreaty agreements between tribes and the United States); Merritt Schnipper, *Federal Indian Law—Ambiguous Abrogation: The First Circuit Strips Narragansett Indian Tribe of Its Sovereign Immunity*, 31 W. NEW ENG. L. REV. 243, 262–64 (2009) (providing an overview of the development and continued use of the doctrine).

90. See Jeremy Clinefelter, Note, *Just Say the “Magic Words”: Advocating an Arbitration Clause Should Be Held to an Express Waiver Standard for the Doctrine of Indian Sovereign Immunity—C&L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 25 AM. INDIAN L. REV. 315, 337–39 (2001) (arguing that narrowly drawn arbitration clauses that identify the tribe’s waiver, include a forum-selection clause, and submit to adjudication should be regarded as express waivers). Tribes will more likely accept arbitration clauses in contracts with nontribal corporations, rather than express waivers of sovereign immunity. See Barton, *supra* note 9, at 1.

91. Barton, *supra* note 9, at 1. Additionally, arbitration clauses may contain a choice of law provision. See, e.g., *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 415 (2001).

clear and unequivocal expression of intent for an arbitration clause to waive immunity.⁹² Application of this standard, however, caused a split in case law that the Supreme Court ultimately resolved.⁹³

In *Pan American Co. v. Sycuan Band of Mission Indians*, Pan American attempted to sue the tribe, and asserted that the tribe explicitly waived sovereign immunity through an arbitration clause included in the contract because “a submission to arbitration is a submission to judicial jurisdiction . . . as a matter of definition.”⁹⁴ The Ninth Circuit disagreed with this interpretation, finding it contrary to “the strong presumption against tribal waivers of immunity,” and counter to accepted principles of arbitration-contract interpretation.⁹⁵

In contrast, other courts have determined that arbitration clauses waive sovereign immunity.⁹⁶ In *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, the Seventh Circuit upheld a judicially enforceable award against the tribe, reasoning that the tribe had waived immunity through the arbitration clause.⁹⁷ The court found no ambiguity in the contract provisions and rejected any suggestion that an effective execution of waiver required the words “sovereign immunity.”⁹⁸ Similarly, the court in *Native Village of Eyak v. GC Contractors* found that the arbitration clause “would be meaningless if it did not constitute a waiver of whatever immunity [the tribe] possessed.”⁹⁹

92. 436 U.S. 49, 58 (1978).

93. See *C & L Enters.*, 532 U.S. at 417–18.

94. 884 F.2d 416, 419 (9th Cir. 1989) (internal quotation marks omitted), *overruled in part by C & L Enters.*, 532 U.S. at 411. The arbitration clause in the agreement stated that “[i]n the event a dispute arises between its parties . . . either party may seek arbitration of said dispute and both parties do hereby subject themselves to the jurisdiction of the American Arbitration Association and do agree to be bound by and comply with its rules and regulations.” *Id.*

95. *Id.* The plaintiff argued that if the court did not find an implied waiver through the arbitration clause, then it would be left without judicial remedies and the provision would “merely be a trap for the unsuspecting.” *Id.* (internal quotation marks omitted). The court rejected this argument and refused to find an implied waiver of tribal immunity, noting that “[c]onsent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*.” *Id.*

96. See, e.g., *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660–61 (7th Cir. 1996); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 761 (Alaska 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 509 (Ariz. Ct. App. 1985).

97. 86 F.3d at 659. The arbitration clause provided that “claims, disputes, or other matters” between the parties would be “subject to and decided by arbitration” and “specifically enforceable in accordance with applicable law in any court having jurisdiction.” *Id.* (internal quotation marks omitted).

98. *Id.* at 660 (“The arbitration clause could not be much clearer.”). The court analogized to state and federal waivers of immunity, noting that “the Federal Tort Claims Act or Tucker Act . . . do not say they are waiving ‘sovereign immunity’; [but merely] create a right to sue.” *Id.*

99. 658 P.2d at 760–61; see also *Val/Del, Inc.*, 703 P.2d at 508–09 (affirming the court’s reasoning in *Eyak* and noting that before entering into the contract, the tribe remained free from liability; however, the tribe expressly waived its immunity when it agreed to the contract and the arbitration provisions therein).

The Supreme Court granted certiorari in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* to resolve the conflicting decisions.¹⁰⁰ The Court unanimously held that the arbitration clause and choice-of-law provision constituted an express waiver and a commitment to engage in dispute resolution proceedings.¹⁰¹ Adhering to the principles set forth in *Sokaogon*, the Court found that the contract mandated arbitration for dispute resolution, an arbitration decision bound parties, and any ensuing arbitral award could be enforced in any court of law having jurisdiction.¹⁰² Thus, the Court had the “requisite clarity” necessary to abrogate tribal immunity.¹⁰³

3. Automatic Waiver of Tribal Immunity for Section 17 Corporations: Two Approaches

a. Recognition of an Automatic Waiver

Courts have provided relatively limited jurisprudence regarding automatic waiver as a condition for section 17 incorporation.¹⁰⁴ In *Investment Finance Management Co. v. Schmit Industries, Inc.*, the district court simply stated that “[s]ection 17 corporations waive sovereign immunity,” without providing further elaboration.¹⁰⁵ The court in *GNS, Inc. v. Winnebago Tribe of Nebraska*, relied on the *Investment Finance* language, but did not expound on its reasoning, and ultimately decided the case based on section 16 of the IRA, instead of section 17.¹⁰⁶

100. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

101. *Id.* at 422–23 (citing *Val/Del. Inc.*, 703 P.2d at 509).

102. *Id.* at 418–19. The terms of the arbitration clause provided that claims between the parties “shall be decided by arbitration . . . unless the parties mutually agree otherwise The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.” *Id.* at 415 (citation omitted) (internal quotation marks omitted).

103. *Id.* at 418.

104. See generally Ann K. Wooster, *Validity and Construction of Indian Reorganization Act*, 28 A.L.R. FED. 2D 563, 611–13 (2008).

105. No. C86-4234, 1991 WL 635929, at *5 (N.D. Iowa July 3, 1991). Determining that the tribal corporation had entered into the contract in its section 17 corporate capacity, and not its section 16 governmental capacity, the court concluded that it had waived its sovereign immunity. *Id.* Notably, the court separated this finding from any potential waiver discussion concerning the “sue and be sued” clause in the tribe’s corporate charter. *Id.* at *6. The court analyzed these issues as two separate and distinct methods of waiving immunity. *Id.*

106. 866 F. Supp. 1185, 1189 (N.D. Iowa 1994). The court pointed out that the *Investment Finance* opinion actually cited to and relied on *Maryland Casualty Co.* *Id.* While this appears to add additional support, *Maryland Casualty Co.* stands for the proposition that ambiguities in contracts should be construed to favor the tribe; a holding reached after the court’s discussion of automatic waiver under section 17. *Md. Cas. Co. v. Citizens Nat’l Bank*, 361 F.2d 517, 521 (5th Cir. 1966). Ultimately, the apparent holding of *Investment Finance Management* did not become determinative in *GNS* because the *GNS* court found that the tribe entered into the agreement as a

b. Rejection of an Automatic Waiver

Although the line of cases eschewing an automatic waiver provide slightly more developed analysis, the jurisprudence is still limited.¹⁰⁷ For instance, in *Parker Drilling*, the court clarified that when assessing the effect of a “sue and be sued” clause, “the mere fact of corporate activity or existence does not [necessarily] waive . . . sovereign immunity”; although, section 17 does permit waiver by the corporation.¹⁰⁸

The Ninth Circuit similarly rejected the concept of an automatic waiver.¹⁰⁹ However, the Ninth Circuit did recognize the historical significance of waiver and incorporation, and the IRA’s fundamental goals of economic independence and business development.¹¹⁰

II. *MEMPHIS BIOFUELS: A NOVEL ARGUMENT AND A DEFERENTIAL HOLDING*

A. Background Facts in Memphis Biofuels

Memphis Biofuels (Memphis), a biodiesel refining company, primarily does business in Memphis, Tennessee.¹¹¹ Chickasaw Nation Industries, Inc. (Chickasaw) is a federally chartered corporation that incorporated under the Oklahoma Indian Welfare Act,¹¹² which extends the application of the IRA to Oklahoma tribes.¹¹³ Memphis and Chickasaw sought to enter into a contractual relationship whereby Chickasaw would transport soybean oil and diesel to Memphis’s plant for biodiesel refinement.¹¹⁴

As contract negotiations progressed, Memphis—conscious of Chickasaw’s sovereign immunity—sought to protect itself through contractual provisions that expressly waived any claims of sovereign immunity.¹¹⁵ Chickasaw responded by sending Memphis a draft of the contract that had been edited by Chickasaw’s in-house counsel.¹¹⁶ The draft indicated that board approval

section 16 entity, thereby obviating any need for further analysis of automatic waiver. *GNS*, 866 F. Supp. at 1189.

107. See Wooster, *supra* note 104, at 611–13.

108. *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1136–37 (D. Alaska 1978) (emphasis added).

109. *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002).

110. *Id.* at 1098–99. But, the court also made a point of noting that concepts of immunity and incorporation are not inextricably linked, such that one necessitates the other. *Id.* at 1099. Furthermore, the court explained that merely electing to incorporate does not waive sovereign immunity, just as choosing to waive immunity does not create a de facto corporation. *Id.*

111. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 918 (6th Cir. 2009).

112. *Id.*; see 25 U.S.C. §§ 501–510 (2006).

113. *Memphis Biofuels*, 585 F.3d at 918; see *RUSCO*, *supra* note 56, at ix.

114. *Memphis Biofuels*, 585 F.3d at 918.

115. *Id.* (noting that the provisions included a “‘representation and warranty’ that [Chickasaw’s] waiver was valid, enforceable, and effective”).

116. *Id.* at 918.

would be necessary to approve a waiver of sovereign immunity.¹¹⁷ Additionally, Chickasaw's corporate charter contained a limited "sue and be sued clause," which also required board approval.¹¹⁸ Despite the requirements mandated by the charter, Chickasaw entered into the contract without the approval of the waiver provision by the Chickasaw board of directors.¹¹⁹ Chickasaw later renounced the agreement.¹²⁰

When mediation attempts proved unsuccessful,¹²¹ Memphis filed a complaint in the United States District Court for the Western District of Tennessee, seeking a declaratory judgment that would pronounce Chickasaw's sovereign-immunity waiver effective.¹²² Chickasaw responded with a motion to dismiss.¹²³ At trial, the district court found a lack of subject-matter jurisdiction and granted Chickasaw's motion to dismiss, which Memphis subsequently appealed.¹²⁴

B. The Sixth Circuit Rejects the Claim of Automatic Waiver Resulting from Section 17 Incorporation

On appeal to the Sixth Circuit, Memphis raised three arguments to demonstrate that Chickasaw had waived its tribal immunity, thus subjecting itself to the court's jurisdiction.¹²⁵ First, Memphis argued that Chickasaw had expressly waived its tribal sovereign immunity.¹²⁶ Second, it argued that equitable doctrines should apply to waive tribal sovereign immunity.¹²⁷ Finally, Memphis argued that incorporation under section 17 automatically waived tribal sovereign immunity.¹²⁸

117. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, No. 08-2253, slip op. at 4 (W.D. Tenn. Aug. 12, 2008) (discussing two comments provided in the draft that expressly reiterated the need for board approval before the corporation could effectively agree to waive immunity).

118. *Id.* at 17–18.

119. *Memphis Biofuels*, 585 F.3d at 919.

120. *Id.*

121. *Id.* The parties initially entered into mediation proceedings as mandated by the contract, but when it became clear that the parties could not reach a resolution, Memphis filed a request for arbitration. *Id.* Refusing to commence arbitration, Chickasaw filed a suit in the Chickasaw Nation District Court. *Id.* The tribal corporation sought both a declaratory judgment that would find the waiver of immunity invalid because the board had failed to approve the position, as well as an injunction to halt the arbitration proceedings. *Id.*

122. *Id.* Memphis also sought to compel arbitration and to get a temporary restraining order to stop Chickasaw from pursuing its case in the Chickasaw Nation District Court. *Id.*

123. *Id.*

124. *Id.* The court found that due to Chickasaw's sovereign immunity, no diversity jurisdiction existed; moreover, Memphis had failed to raise properly a federal question, which prevented the court from exercising jurisdiction under 28 U.S.C. § 1331. *Id.*

125. *Id.* at 922.

126. *Id.* at 920–21.

127. *Id.* at 922.

128. *Id.* at 920.

1. *Lack of Express Waiver of Tribal Sovereign Immunity*

Memphis first argued that the “sue and be sued” clause contained in Chickasaw’s corporate charter constituted an express waiver.¹²⁹ The court rejected this argument because it determined that Chickasaw’s charter did not contain a broad enough “sue and be sued” clause to waive the corporation’s immunity.¹³⁰ Instead, the clause contained an express limitation to the waiver—the requirement of board approval.¹³¹ Similarly, the “sue and be sued” clause in the Chickasaw-Memphis contract required board approval, which Chickasaw never obtained.¹³² Although the parties had signed a waiver provision, and Memphis believed that Chickasaw had obtained the proper approval, Chickasaw retained immunity.¹³³

2. *No Waiver of Immunity Through Equitable Doctrines*

Second, based on the representations Chickasaw officials made when parties signed the agreement, Memphis argued that equitable doctrines required the court to find a waiver.¹³⁴ The court also rejected this argument, relying on cases holding that “unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity.”¹³⁵

3. *Automatic Waiver of Tribal Immunity: An Issue of First Impression for the Sixth Circuit*

Lastly, and most significantly, Memphis argued that incorporation under section 17 of the IRA created an automatic waiver of sovereign immunity.¹³⁶ This argument provided the Sixth Circuit with its first opportunity to comment on the issue of automatic waiver.¹³⁷ Recognizing the split in authority on this issue,¹³⁸ the court examined the language of section 17, specifically noting the statute’s silence with regard to sovereign immunity.¹³⁹ Deferring to Congress, the Sixth Circuit interpreted the IRA’s silence to indicate an absence of waiver

129. *Id.* at 921.

130. *Id.* at 921–22.

131. *Id.*

132. *Id.* at 922.

133. *Id.* (noting that the tribe’s charter controlled; therefore, immunity could not be waived without the board’s requisite approval).

134. *Id.*

135. *Id.*

136. *Id.* at 920.

137. *Id.*

138. *See supra* Part I.D.3. *Compare* GNS, Inc. v. Winnebago Tribe of Neb., 866 F. Supp. 1185, 1188–89 (N.D. Iowa 1994) (recognizing automatic waiver pursuant to section 17 incorporation), *with* Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1099 (9th Cir. 2002) (opining that a tribe choosing to incorporate does *not* automatically waive its sovereign immunity).

139. *Memphis Biofuels*, 585 F.3d at 920.

of immunity.¹⁴⁰ Furthermore, the court pointed to the well-established rule that waiver must be expressly stated,¹⁴¹ and noted that disparities or ambiguities in contracts must be liberally construed in the tribe's favor.¹⁴²

Taking these findings and considerations into account, the court determined that section 17 incorporation did not automatically waive sovereign immunity.¹⁴³ Instead, the Sixth Circuit found that "the better reading of Section 17 is that it creates 'arms of the tribe' that do not automatically forfeit tribal-sovereign immunity."¹⁴⁴ Thus, the court held that an "incorporated tribe" retains its sovereign immunity unless the contracting parties procured an express waiver provision.¹⁴⁵

III. THE SIXTH CIRCUIT CORRECTLY REJECTED AUTOMATIC WAIVER OF TRIBAL IMMUNITY FOR SECTION 17 CORPORATIONS

The Sixth Circuit's holding in *Memphis Biofuels* properly incorporates the IRA's legislative history, the well-established requirement for express waiver, and the relevant case law on the matter.¹⁴⁶ The holding comports with most jurisprudence on the issue, circumvents the potential negative implications of a contrary finding, adheres to the canons of construction, and avoids a path that courts have repeatedly eschewed.¹⁴⁷

A. Appropriate Consideration of Legislative Intent

Faced with a split in case law regarding automatic waiver of tribal immunity, the Sixth Circuit properly examined the legislative intent behind the IRA and determined that Congress intended for the statute to "encourage non-Indian businesses to engage in commerce with Indian tribes."¹⁴⁸ Although the court's statement may too narrowly characterize the IRA's purpose, which aimed more

140. *Id.* at 920–21. The court emphasized that waiver can only be found where Congress has authorized the action, or where the tribe has abrogated its immunity. *Id.* (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)).

141. *Id.* at 921 (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

142. *Id.* ("[S]tatutes are to be construed liberally in favor of the Indians . . . with ambiguous provisions being interpreted to their benefit." (quoting *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985)) (internal quotation marks omitted)).

143. *Id.* at 921.

144. *Id.* Although *Memphis* argued that Chickasaw was precluded from claiming sovereign immunity because it was not "an arm" of the Chickasaw Nation," the court found this contrary to the language of section 17. *Id.* Additionally, section 17 refers to the corporate entity as an "incorporated tribe," thereby supporting the court's finding that the tribe's sovereign immunity shielded Chickasaw. *Id.*

145. *Id.*

146. *See supra* Part II.B.3.

147. *See infra* Part III.

148. *Memphis Biofuels*, 585 F.3d at 920 (citation omitted); *see also* 73 CONG. REC. at 11,123 (1934).

broadly to return Indian tribes to a position of self-governance,¹⁴⁹ the court nonetheless recognized the IRA's overarching goal of tribal self-determination.¹⁵⁰ Inherently, the IRA seeks to enable each individual tribe to control its internal affairs and limit federal government intrusion.¹⁵¹ Hence, inferring automatic waiver would restrict this self-governing power and impose the will of the government on nonconsenting tribes.¹⁵² Moreover, such an action would violate the IRA's purpose; legislators originally passed the law to prevent this very issue.¹⁵³

B. Statutory Silence and a Deferential Finding in the Absence of a Clear Congressional Mandate

Tribal-sovereign-immunity jurisprudence has consistently recognized that tribes are amenable to suit only when Congress has provided express statutory consent.¹⁵⁴ Accordingly, in *Memphis Biofuels*, when the Sixth Circuit found section 17 silent on the issue of sovereign immunity, it properly construed the silence as Congress's intent to uphold the doctrine.¹⁵⁵ This determination coincided with prior holdings in cases in which parties sought to establish waiver.¹⁵⁶

149. See 73 CONG. REC. at 11,123, 11,125, 11,732; see also RUSCO, *supra* note 56, at 295 (“[T]he IRA embodied the key idea behind the tribal alternative ideology, which was that forced assimilation should be replaced by measures giving Indians the right to make uncoerced choices in these matters.”).

150. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. REP. NO. 73-1804, at 6 (1934) (recognizing that section 17's purpose was to rehabilitate tribal economies, damaged by years of oppression); *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (explaining that the statute meant to promote tribal economic progression and foster business); *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1138 (D. Alaska 1978) (noting that section 17 was created to promote competition between tribal and nontribal companies).

151. See H.R. REP. NO. 73-1804, at 6; S. REP. NO. 73-1080, at 1-2 (1934); 78 CONG. REC. 11,123, 11,125, 11,732; see also RUSCO, *supra* note 56, at 115-16. Senator Wheeler told the Senate that the bill lacked any language permitting the government “to impose its will upon the Indians on any reservation.” 78 CONG. REC. 11,123.

152. See 78 CONG. REC. 11,123 (emphasizing the importance of tribal control over both economic and non-economic affairs). Congress eliminated compulsory provisions from earlier drafts of the bill to ensure that a majority of tribe members, and not the federal government, would be making decisions about the tribe's organization. *Id.*

153. See H.R. REP. NO. 73-1804, at 6.

154. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-78 (8th Cir. 1985); *Md. Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 520 (5th Cir. 1966).

155. See *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920-21 (6th Cir. 2009).

156. See *supra* Part I.B.

The Sixth Circuit rejected Memphis's request to find an implied waiver,¹⁵⁷ which the Supreme Court had similarly declined to do in *Santa Clara Pueblo*.¹⁵⁸ Although the statutory language provided no basis for a waiver, Memphis wanted the court to read beyond the language of the statute by finding that mere incorporation provided such a justification.¹⁵⁹ The court decided that permitting such an inference would require the court to overstep its judicial authority; thus, the Sixth Circuit chose the prudent course and rejected the argument.¹⁶⁰

C. *The Weight of Case Law Points to Rejection of an Automatic Waiver*

Although the Sixth Circuit correctly recognized that some courts have held section 17 incorporation waives immunity,¹⁶¹ this line of jurisprudence is limited and tenuous at best.¹⁶² In recognizing the split on this issue, the court cited to *GNS* for the proposition that section 17 incorporation automatically waives immunity.¹⁶³ An examination of *GNS*, however, illustrates that this was not *GNS*'s holding, but merely dicta by the court.¹⁶⁴ Indeed, the *GNS* court cited to a slip opinion for this proposition; however, neither the *GNS* court, nor the slip opinion explained or supported its reasoning for finding that section 17 incorporation created a waiver of immunity.¹⁶⁵

Furthermore, the Sixth Circuit rejected Memphis's assertion that Chickasaw was not an arm of the tribe as a result of its corporate status.¹⁶⁶ Instead, it classified Chickasaw as an arm of the tribal nation, which did not waive immunity simply by incorporating under section 17.¹⁶⁷ The court's holding

157. *Memphis Biofuels*, 585 F.3d at 921.

158. *Santa Clara Pueblo*, 436 U.S. at 58–59 (internal citations omitted).

159. *See Memphis Biofuels*, 585 F.3d at 920.

160. *Id.* at 921 (“Because the language of Section 17 does not explicitly waive sovereign immunity, we conclude that it should not be interpreted to do so impliedly.”).

161. *Id.* at 920.

162. *See supra* Part I.D.3.a.

163. *Memphis Biofuels*, 585 F.3d at 920 (quoting *GNS, Inc. v. Winnebgo Tribe of Neb.*, 866 F. Supp. 1185, 1189 (N.D. Iowa 1994)).

164. *See GNS*, 866 F. Supp. at 1189. The court held that because the entity at issue acted as a section 16 governmental entity, and not a section 17 corporation, the issue of automatic waiver did not apply. *Id.* Further, finding a lack of unequivocal consent to suit, the court determined that the tribe had retained its full sovereign immunity. *Id.*

165. *Id.* (citing *Inv. Fin. Mgmt. Co. v. Schmit Indus., Inc.*, No. C86-4234, 1991 WL 635929, at *5 (N.D. Iowa July 3, 1991)). The signal directing the reader's attention to *Maryland Casualty Co.* misleads the reader; *Maryland Casualty Co.* only serves as authority for the earlier portion of the same sentence, which acknowledged that contractual ambiguities should be resolved in the tribe's favor. *See supra* note 106.

166. *Memphis Biofuels*, 585 F.3d at 921.

167. *Id.* Courts have held that an “arm of the tribe” is an entity so closely linked to the tribe that its activity is attributed to the tribe. *See, e.g.*, *Allen v. Gold Country Casino*, 464 F. 3d 1044, 1046 (9th Cir. 2006) (postulating that the definition of an arm of the tribe rests upon whether the tribe's activities are “properly deemed to be those of the tribe”); *Gristede's Foods, Inc. v.*

demonstrates that a section 17 corporation retains tribal sovereign immunity because of the close relationship between the tribe and corporation.¹⁶⁸

D. The Unclear Scope of an “Automatic Waiver”

Memphis also argued for an “automatic waiver” of tribal immunity, but did not clarify or define what this would entail.¹⁶⁹ Presumably, such a waiver would create a blanket waiver of immunity for all tribes incorporated under section 17—a statutory interpretation the *Memphis Biofuels* court judged improper.¹⁷⁰ Scholars have criticized a broad waiver as unwise, and have instead advocated a narrow or limited waiver.¹⁷¹ A broad construction would eliminate a tribe’s power to self-govern, thus directly conflicting with the IRA’s goal.¹⁷²

More significantly, the presence of an express-waiver clause, albeit a qualified one, seems to negate the argument for an automatic waiver.¹⁷³ Hence, Memphis’s argument that all section 17 corporations should be vulnerable to suit simply based on the organization method fails to recognize that section 17 corporations often craft nuanced provisions in which they consent to suit themselves.¹⁷⁴ Perhaps where no waiver clause exists,

Unkechuage Nation, 660 F. Supp. 2d 442, 478 (E.D.N.Y. 2009) (explaining that an arm of the tribe operates “as an extension of the tribe’s own economic activity”). As such, it remains fully protected by the tribe’s sovereign immunity. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000). A tribe’s motivation for establishing an organization, be it governmental or commercial, does not affect the organization’s retention of immunity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754–55 (1998); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 657 (Ariz. 1971) (citing *Md. Cas. Co. v. Citizen’s Nat’l Bank*, 361 F.2d 517, 521 (5th Cir. 1966)).

168. See *supra* note 167.

169. *Memphis Biofuels*, 585 F.3d at 920 (failing to elaborate on the parameters of an automatic waiver). Memphis argued that federally chartered corporations should not be entitled to immunity because tribal entities incorporated under tribal or state law do not automatically enjoy such immunity. Reply Brief of Appellant at 8, *Memphis Biofuels*, 585 F.3d 917 (No. 08-6145). Asserting that Chickasaw constituted a separate and distinct entity from the tribal nation, Memphis maintained that Chickasaw was not entitled to the tribe’s immunity. See *id.* at 8–9. Memphis also urged the court to consider federally incorporated tribal corporations’ “creation of [a] statute,” and argued that nothing in section 17 indicated immunity so it could not exist. *Id.*

170. *Memphis Biofuels*, 585 F.3d at 921.

171. See Fogleman, *supra* note 69, at 1370 (arguing that waiver under section 17 would “go farther than required in sacrificing immunity”); see also Kunesh, *supra* note 4, at 407 (discussing express waivers of immunity and noting that the terms of “immunity waivers should be drafted on a case-by-case basis and tailored to the particular transaction”).

172. See *supra* notes 152–53 and accompanying text.

173. See Fogleman, *supra* note 69, at 1361–62 (noting that tribal corporations already have incentives to enact a partial waiver in order to ease the fears of contracting parties and to ensure fairness).

174. See Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check*, 57 FED. LAW. 41, 43 (2010). The author explains:

Memphis's argument would carry more merit,¹⁷⁵ in this case, however, the language of the charter presented a clear obstacle and Memphis's argument appears nothing more than a desperate attempt at recovery.¹⁷⁶

E. A Contrary Holding in Memphis Biofuels Would Discourage Incorporation Under Section 17

The IRA incentivizes tribes to incorporate under section 17 so they may increase their business transactions with nontribal entities.¹⁷⁷ By encouraging tribes to waive aspects of liability instead of claiming complete sovereignty, the statute intended to protect nontribal parties, which would otherwise be dealing with a completely immune tribal party.¹⁷⁸

If the Sixth Circuit had taken a contrary position in *Memphis Biofuels* and found that section 17 incorporation waived full tribal immunity, tribal entities would be discouraged from incorporating under the statute.¹⁷⁹ Tribes might instead choose to incorporate under tribal or state corporate law.¹⁸⁰

Like other governments, tribes waive their sovereign immunity, and they do so with increasing frequency. Although no overarching statute imposes the requirement, many tribal leaders and advisers have concluded that tribes are effectively barred from entering into large construction contracts or from financing agreements, for example, without immunity waivers that allow an aggrieved party access to a court or arbitration. *The size, scope, and application of the waiver; the forum permitted to adjudicate a dispute; and the substantive law governing the matter—all of these are subject to negotiation between the parties.* For tort matters, nothing prevents an injured party from petitioning a tribe for a limited waiver after the fact in order to allow the party some avenue of recourse—similar to the writ of petition under English law.

Id. In *Memphis Biofuels*, Memphis imposed its own waiver provision, which, although accepted by Chickasaw, explicitly required the Chickasaw's board approval. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 918–19 (6th Cir. 2009). The board never granted approval, however, so the waiver never became effective. *Id.* at 922.

175. *But see* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) (holding that even when a statute does not address waiver, tribal immunity is nonetheless maintained); *Parker Drilling, Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1136 (D. Alaska 1978) (finding that mere corporate existence did not waive sovereign immunity).

176. *See Memphis Biofuels*, 585 F.3d at 922. The court rejected Memphis's assertion that an express waiver existed because the Chickasaw board of directors had not approved the waiver provision as required by the contract, and because the corporate charter's "sue and be sued" clause only applied to approved legal action. *Id.*

177. *See* Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41, 49 (2001).

178. *See id.*

179. *See infra* notes 181–87 and accompanying text.

180. *See* Gregory J. Wong, *Intent Matters: Assessing Sovereign Immunity for Tribal Entities*, 82 WASH. L. REV. 205, 219 (2007) ("Tribes have the power to incorporate their agencies and corporations under federal, state, or tribal law.").

Under state law, however, tribes do not maintain their immunity.¹⁸¹ So, theoretically, if sovereign immunity would be waived regardless of the tribe's incorporation method, a tribe might actively attempt to make itself vulnerable to suit in state court to demonstrate its intent to fulfill its contract and hopefully attract more business.¹⁸² Tribes could additionally choose to incorporate under tribal law in an effort to maintain immunity.¹⁸³ Although not guaranteed,¹⁸⁴ many corporations organized under tribal law retain their immunity if they establish an interconnected relationship with the tribe.¹⁸⁵ Because of the flexible structure, tribally incorporated businesses can create their own rules, and establish limited waivers to protect assets from suit while remaining commercially competitive.¹⁸⁶

The distinguishing aspect between the various methods of incorporation is that section 17 alone allows corporations to automatically retain tribal sovereign immunity.¹⁸⁷ If the Sixth Circuit had held that section 17 does *not* actually provide this shield of immunity, tribal corporations would lack incentive to incorporate under the statute.

181. See Bernardi-Boyle, *supra* note 177, at 58 (explaining that because state corporate laws subject a corporation to suit in the state of incorporation, for-profit tribal corporations organized under state law waive their sovereign immunity); Heidi McNeil Staudenmaier & Metchi Palaniappan, *The Intersection of Corporate America and Indian Country: Negotiating Successful Business Alliances*, 22 T.M. COOLEY L. REV. 569, 598 (2005); see also, ATKINSON & NILLES, *supra* note 3, at IV-4 (“[O]rganization under state law may be fatal to a finding of entity-level sovereign immunity.”).

182. See Bernardi-Boyle, *supra* note 177, at 42.

183. See ATKINSON & NILLES, *supra* note 3, at III-1 to III-9 (providing an overview of the tribal incorporation process). Incorporation under tribal law is generally easier than incorporation under section 17. *Id.* at III-1.

184. *Id.* at III-4.

185. *Id.* (explaining that courts conduct a fact-specific inquiry to determine if corporations organized pursuant to tribal law retain sovereign immunity). Courts generally consider whether a close link exists between the tribe and tribal corporation with regard to structure and various characteristics, and whether federal policies of tribal self-determination are promoted by cloaking the tribal corporation with the tribe's immunity. *Id.*

186. See Kunesh, *supra* note 4, at 408–14 (discussing the various ways to waive sovereign immunity under tribal law). When surveyed, one tribal leader stated, “the best way to convince the outside world that the tribe will be held accountable is to publicize the fact that the tribe regulates itself. Investors will not fear tribal immunity if they believe that the tribal courts themselves will fairly adjudicate potential claims” Bernardi-Boyle, *supra* note 177, at 60–61.

187. See Smith, *supra* note 41, at 20–21 (“[W]hile section 17 corporations retain their tribal status—and, accordingly, sovereign immunity in the absence of a ‘sue and be sued’ waiver—the other species of corporations are not imbued automatically with such status.”).

F. Broader Questions Properly Left for Another Day

Surely, valid concerns about maintaining tribal sovereign immunity exist.¹⁸⁸ Concurring in *Oklahoma Tax Commission*, Justice John Paul Stevens described tribal immunity as founded upon an “anachronistic fiction.”¹⁸⁹ Similarly, the majority in *Kiowa* acknowledged “reasons to doubt the wisdom of perpetuating the doctrine,”¹⁹⁰ and provided policy arguments suggesting that tribal immunity has been extended beyond its original purpose of protecting tribal self-governance from state encroachment.¹⁹¹ Additionally, in *C & L Enterprises*, the Supreme Court pointed to “real world objectives,” suggesting that more than just an examination of the waiver’s explicitness should be considered.¹⁹²

The Sixth Circuit recognized the potential judicial movement toward a less stringent waiver standard,¹⁹³ but properly “defer[red] to the role of Congress,”¹⁹⁴ instead of making any far-reaching changes to the doctrine.

IV. CONCLUSION

The Sixth Circuit’s refusal to recognize incorporation under section 17 of the IRA as an automatic waiver of a tribe’s sovereign immunity was an

188. See Florey, *supra* note 14, at 640–44 (detailing the undesirable effects of sovereign immunity, emphasizing the lack of incentive for tribes to avoid negligent behavior, and discussing the injustice of tort victims who can not obtain a complete remedy).

189. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991) (Stevens, J., concurring). Although Justice Stevens recognized the entrenched view supporting tribal immunity, he believed that all governments should be liable for their illegal actions. *Id.*

190. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). The Court declared that the independence and mobility of society diminishes the need to protect “nascent tribal governments from encroachments by States.” *Id.*

191. *Id.* The *Kiowa* court also expressed concern that immunity could harm people, such as tort victims, who become involuntarily involved with tribal corporations. *Id.*; see also Recent Case, *supra* note 12, at 561 (stating that the IRA may fail to provide full remedies to injured parties, and suggesting that legislative action should be taken to require tribal corporations to retain a certain amount of assets or business liability insurance to ensure future plaintiffs are protected).

192. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 422 (2001). Similarly, in a Seventh Circuit case, Judge Richard A. Posner questioned the requisite explicitness of waiver. *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659–60 (7th Cir. 1996). He asserted that the purpose of a clear waiver statement led him to “doubt whether there really is a requirement that a tribe’s waiver of its sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions.” *Id.* Posner also argued that an arbitration clause could constitute implicit waiver only if the words “sovereign immunity” were needed to make the waiver explicit. *Id.* at 660. He noted, however, that using these specific words had never been required. *Id.*

193. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009).

194. *Id.* (quoting *Kiowa*, 523 U.S. at 758).

appropriate holding in several respects.¹⁹⁵ Congress' silence regarding automatic waiver in section 17 provides a strong indication of its intent to preserve tribal sovereign immunity. If the Sixth Circuit had found that automatic waiver existed despite congressional silence, it would have embraced an implied waiver—a result that courts have repeatedly rejected.¹⁹⁶ More importantly, such a holding would allow the judiciary to intrude on the legislature's territory.¹⁹⁷ Authority rejecting an automatic waiver far outweighs the relatively weak jurisprudence supporting such a waiver.¹⁹⁸ The negative implications of a contrary finding would not only nullify more than seventy years of case law, but would also undermine the purpose of the IRA.¹⁹⁹ Although valid reasons to abandon or limit sovereign immunity may exist, any effort to do so is best left to Congress, and not the judiciary.²⁰⁰

195. *See supra* Part III.

196. *See supra* notes 158–60 and accompanying text.

197. *See supra* note 53 and accompanying text.

198. *See supra* Part I.D.3.

199. *See supra* Part III.

200. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (stating that although it had concerns in upholding tribal sovereign immunity, the Court would “defer to the role Congress may wish to exercise in this important judgment”).

