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Forcing the Tribe to Bet on the House: The Limited Options and Risks to the Tribe when Indian Gaming Operations Seek Bankruptcy Relief

Stephen A. Hoover

COMMENTS

FORCING THE TRIBE TO BET ON THE HOUSE THE LIMITED OPTIONS AND RISKS TO THE TRIBE WHEN INDIAN GAMING OPERATIONS SEEK BANKRUPTCY RELIEF

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INTRODUCTION

"[Indian tribes'] relation[s] to the United States resembles that of a ward to his guardian."[1] The United States has needed to integrate sovereign Indian nations into the American system of jurisprudence since its inception.[2] Although their status has changed from nation to tribes,[3] existing as "dependent domestic nations,"[4] the recent history of Indian tribes is that of a resurgence of tribal sovereignty borne on the back of Indian gaming.[5] Since 1988, when the Congress passed the Indian Gaming Regulatory Act ("IGRA"), tribes have been building casinos, which allow tribal governments to provide for their people.[6] Indian gaming operations ("IGOs"), once thought to be immune from economic downturns, have also felt the effects of the economic collapse of 2008.[7] In August 2012, the tribe operating the Foxwoods Casino[8] restructured over a billion dollars in debt in an

1. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

2. U.S. CONST. art. I, § 8, cl. 3.

3. R. Spencer Clift III, *The Historical Development of American Indian: Their Recent Dramatic Commercial Advancement; And a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 186 (2002).

4. *Cherokee Nation*, 30 U.S. at 17.

5. William N. Evans & Julie H. Topoleski, *The Social and Economic Impact of Native American Casinos*, 1 (2002) *available at* http://www.nber.org/papers/w9198.

6. Evans, *supra* note 5, at 1-2.

7. *See* Voluntary Petition at 16, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. July 2, 2012), ECF No. 1; Emir Aly Crowne, et al., *Not Out of the (Fox) Woods Yet: Indian Gaming and the Bankruptcy Code*, UNIV. NEV. L.V. GAMING L.J. 25, 25-26, June 13, 2011; *Karen Pearlman, La Posta casino closes down*, SAN DIEGO UNION-TRIBUNE (Oct. 24, 2012, 5:08 PM), http://www.utsandiego.com/news/2012/oct/24/la-posta-casino-closes-down/ (reporting the closure of the La Posta casino by the La Posta Band of Mission Indians).

8. Foxwoods casino, owned by the Mashantucket Western Pequót Tribal Nation, is one of the largest casinos in the world. Crowne, *supra* note 7, at 25.

attempt to remain profitable.[9] In July of 2012, the Santa Ysabel Resort and Casino, an operation of the Iipay Nation of Santa Ysabel, filed for bankruptcy relief.[10] The Santa Ysabel Resort and Casino's case was dismissed the following September for failure to prove that they are an entity eligible to file for relief under the Bankruptcy Code.[11]

IGOs are federal government creations for the benefit of Indian tribes that also provide substantial benefits to surrounding communities. IGOs raise the local population level, increase employment, and cause a decline in mortality in the surrounding area.[12] IGOs exist and have multiplied throughout the nation because of Congressional action.[13] Therefore, the federal government should provide a path for IGOs to avail themselves of bankruptcy relief when needed.

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9. Crowne, *supra* note 7, at 25.

10. The Iipay Nation was unable to manage the debt service incurred by building their casino, most of which was owed to the Yavapai-Apache Nation ("YAN"). Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof at 3-4, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. July 3, 2012), ECF No. 11 [hereinafter *Omnibus Statements*]. At the time of filing for bankruptcy relief, the YAN had received a judgment in the Yavapai-Apache Nation Tribal Court, which they subsequently had recognized in California. *Id.* at 4. The YAN's lien attached to all personal property of the Iipay Nation, including that at the casino. *Id.* The reason the lien did not attach to the real property of the Iipay Nation is that Federal law prevents unapproved alienation of real property held by, or for, the tribe. 25 U.S.C. § 81 (2006). Enforcement of the lien would liquidate all personal property of the tribe in addition to causing the unemployment of the casino employees and others in the surrounding community. *Omnibus Statement*, at 4. The purpose of allowing businesses to reorganize in bankruptcy is "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 528 (1984).

11. *See* Order to Dismiss at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Sept. 11, 2012), ECF No. 98.

12. Evans, *supra* note 5, at 43.

13. "Large-scale gaming sponsored by tribal governments is a relatively new phenomenon. Starting in the late 1970s, as reservations were allowed to take more control over their economic development, a number of tribes began to invest in gaming operation." Evans, *supra* note 5, at 3. The Court decisions preceding the passage of the IGRA, and the IGRA itself, allowed the increase in IGOs in the United States. *See* Evans, *supra* note 5, at 13; 25 U.S.C. §§ 2701-2721 (2006).

Part I examines the history and evolution of Indian law in American jurisprudence, and includes a brief discussion of the development of bankruptcy law. Part II analyzes the requirements of eligibility under the Bankruptcy Code and the business structures available to IGOs. Part III depicts the effects of harmonizing irreconcilable statutes within the Bankruptcy Code and the IGRA. Part IV recommends changes to current statutes to resolve the obligation of the federal government by offering a fresh start to IGOs while protecting the rights of creditors.

I. TRIBAL SOVEREIGNTY, GAMING, AND THE BANKRUPTCY CODE

A. A History of Indian Sovereignty and Gaming Law

Indian tribes are recognized as America's first nations.[14] This prior nationhood is the basis for the United States' acknowledgement of Indian tribes as sovereign entities.[15] Tribal sovereignty is not derived from the Constitution, the foundation of U.S. sovereignty,[16] because the Indians were sovereign peoples prior to the enactment of the Constitution.[17] The U.S. recognizes the continuing right of tribes to govern themselves.[18] King George's 1763 proclamation that he was the protector of the Indian nations set the basis for tribal sovereignty in both the colonies and the later U.S.[19] This prior right of sovereignty was recognized by the fledgling United States in the Constitution.[20] The Indian Commerce Clause solidifies the direct relationship between Indian nations and the Federal government and recognizes their sovereignty as derived from a source other than the

14. Clift, *supra* note 3, at 182.

15. Sarah W. Conkright, *The "Better Reading" of Section 17 of the Indian Reorganization Act: A Rejection of Automatic Waiver of Tribal Sovereign Immunity in* Memphis Biofuels, 60 CATH. U. L. REV. 1175, 1178-79 (2011).

16. Richard G. McCracken, *San Manuel Indian Bingo and Casino: Centrally Located in the Broad Perspective of Indian Law*, 21 LAB. LAW. 157, 161 (2005).

17. Clift, *supra* note 3, at 183.

18. *Id.*

19. The recognition of nationhood by European powers allowed colonial powers to gain territory from the peoples inhabiting North America through treaty and acts of war. *See* Clift, *supra* note 3, at 183.

20. *See* U.S. CONST. art. I, § 8, cl. 3.

Constitution.[21] Less than fifty years later, the Supreme Court examined the unique relationship between sovereigns shared by the Indian nations and the U.S. government in the Marshall Trilogy cases.[22] In the Marshall Trilogy, Chief Justice Marshall delineated the limits of tribal sovereignty in recognition of the Indian nations being enveloped by the growing United States.[23] In the first case of the series, *Johnson v. M'Intosh*, the Court recognized that Indian nations do not have a right to enter into treaties with other sovereigns, and lack the ability to alienate their land without federal approval.[24] In *Cherokee Nation v. Georgia*, Chief Justice Marshall defined the Indian nations as "domestic dependent nations."[25] This phrase shaped how tribes are treated in modern American jurisprudence.[26] Finally, in *Worcester v. Georgia*, the Supreme Court recognized Indian nations' rights to self-govern, free of the States, but subject to Congressional control.[27] The recognition of tribal sovereignty, however, did not prevent the implementation of policies to force assimilation of the Indian population and the deterioration of tribal lands through allotment.[28]

American Indian policy continued to change with the Indian Reorganization Act of 1934 ("IRA").[29] This policy shift restored tribal self-governance and provided new means for economic development.[30] Two key provisions in the IRA allowed a shift from a policy of assimilation of individual Indians into American society to

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21. *See* U.S. CONST. art. I, § 8, cl. 3; Corina Rocha Pandeli, *When the Chips Are Down: Do Indian Tribes with Insolvent Gaming Operations have the Ability to File for Bankruptcy Under the Federal Bankruptcy Code?*, UNIV. NEV. L.V. GAMING L.J. 225, 257-58, Jan. 10, 2012.

22. *See* Worcester v. Georgia, 31 U.S. 515 (1832) ; Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823) ; Clift, *supra* note 3, at 184.

23. Clift, *supra* note 3, at 184-85.

24. *Johnson*, 21 U.S. at 604-05; Clift, *supra* note 3, at 184-85.

25. *Cherokee Nation*, 30 U.S. at 17; Clift, *supra* note 3, at 185.

26. *See* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1059 (9th Cir. 2004).

27. *Worcester*, 31 U.S. at 561; Clift, *supra* note 3, at 186.

28. Conkright, *supra* note 15, at 1182.

29. *Id.*

30. *Id.* at 1182-83.

the integration of tribes as a whole into the American fabric.[31] The first provision gives tribes the ability, under Section 16 of the IRA, to organize a federally recognized tribal government.[32] The second provision allows tribes to create an incorporated entity for economic purposes, thereby separating the tribe's governmental and economic functions.[33] This corporate entity is called a Section Seventeen corporation.[34] A Section 17 corporation is distinct from the tribe as a governing body, yet wholly owned by the tribe.[35] The IRA allows a Section Seventeen corporation to waive sovereign immunity to allow business partners access to judicial recourse, the lack of which was thought to shy potential business partners away from contracting with Indian tribes and their businesses.[36] These provisions allowed the IRA to reset the course of American Indian policy.

The issues of sovereignty, self-governance, and economic development framed the evolution of Indian gaming, which led to the Supreme Court decision in *California v. Cabazon Band of Mission Indians*.[37] In this case, California sought to use Public Law 280[38] to regulate bingo games held on reservation lands.[39] Public Law 280 allowed a small group of States to exert criminal jurisdiction and limited civil jurisdiction over Indian reservations within their boundaries.[40] California argued that Public Law 280 enabled California to regulate gaming on reservations,[41] and that the gaming activities of the two tribes in this case had to conform to California's governing statute.[42] The Supreme Court determined that the States'

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31. *Id.*
32. *Id.* at 1184.
33. *Id.*
34. *Id.* at 1183.
35. *Id.* at 1183-84.
36. *Id.* at 1184.
37. *See* Pandeli, *supra* note 21, at 260.
38. Public Law 280 gave jurisdiction to some states over tribal lands to prevent lawlessness *In re*servations. Pandeli, *supra* note 21, at 260-61; Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 11662, 28 U.S.C. § 1360 (1982 & Supp. III)).
39. Pandeli, *supra* note 21, at 260.
40. *Id.* at 260-61.
41. *Id.* at at 260.
42. California law at that time restricted gaming operations to volunteers of

civil jurisdiction is limited to "private civil litigation."[43] To restrict Indian gaming activities on tribal lands, the States had to criminalize all gaming activities in the state, including lotteries and charitable gaming.[44] Only the treatment of gaming in its entirety as a criminal activity would grant California jurisdiction over gaming on tribal lands through Public Law 280.[45] No longer constrained by the threat of state regulation, many Indian tribes began to open casinos.[46] Consequently, pressure built from gaming interests to enact federal legislation to limit these IGOs.[47]

Congress subsequently passed the IGRA in 1988 as a comprehensive framework to regulate IGOs.[48] Congress gave three purposes for this new legislation.[49] First, the basic goal of Federal Indian policy is to promote tribal economic development, economic self-sufficiency, and strong tribal governments.[50] The second goal is to create a statutory basis for regulating IGOs to shield the industry from crime and corruption.[51] The third goal is to establish a Federal regulatory authority to oversee and protect tribal revenue derived from IGOs.[52] To guarantee that the tribes would get the benefit of the IGOs, Congress mandated that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."[53] The National Indian Gaming Commission ("NIGC") guarantees that the tribes retain control over the IGOs by requiring approval by the Chairman of the NIGC of all management contracts.[54]

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designated charities. Pandeli, *supra* note 21, at 260.

43. Pandeli, *supra* note 21, at 261.

44. Evans, *supra* note 5, at 3.

45. *Id.*

46. *See Id.* at 1.

47. *Id.* at 6.

48. Wells Fargo Bank N.A. v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 694 (7th Cir. 2011) (noting the legislative purpose gave context in a question of statutory construction).

49. 25 U.S.C. § 2702 (2006).

50. 25 U.S.C. § 2702(1) (2006).

51. 25 U.S.C. § 2702(2) (2006).

52. 25 U.S.C. § 2702(3) (2006).

53. 25 U.S.C. § 2710(b)(2)(A) (2006).

54. 25 U.S.C. § 2711(b) (2006).

Since implementation of the IGRA, the NIGC has had broad discretion in some courts to construe agreements as management contracts.[55] In *Wells Fargo Bank N.A. v. Lake of the Torches Economic Development Corp.*, the Ninth Circuit Court of Appeals took notice of the lack of Congressional intent to limit the Commission's authority in regulating Indian gaming.[56] There, the Court held that the trust indenture used to finance the gaming operation was an unapproved management contract and thus void.[57] The Court reached this conclusion based on three points.[58] First, the NIGC's consistent view is that the IGRA requires them to use careful scrutiny over "a variety of arrangements that result in the ongoing control of gaming operations by non-tribe entities."[59] Second, Congress intended to give the NIGC the ability to define those limits required by their mandate because of Congress's inability to determine every instance where scrutiny would be needed.[60] Lastly, the IGRA fulfilled Congress's obligation to act as guardians of Indian tribes and reconciled many interests into a comprehensive legislative framework.[61] Imbuing the NIGC with broad powers to construe agreements as management contracts[62] was for the protection of Indian tribes from outside threats.[63] The relationship between the federal government and Indian tribes is still as guardian to ward, as Marshall suggested 189 years ago.[64]

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55. Wells Fargo Bank N.A. v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 695-96 (7th Cir. 2011).

56. *Id.* at 695.

57. *Id.* at 699, 702.

58. *Id.* at 696-700.

59. *Id.* at 696.

60. *Id.* at 697.

61. *Id.* at 699-700.

62. *Id.* at 695.

63. *Id.* at 686.

64. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Crowne, *supra* note 7, at 27; Pandeli, *supra* note 21, at 258.

B. Bankruptcy Relief in the United States

Bankruptcy legislation in the United States is the way "to grant a fresh start to the honest but unfortunate debtor."[65] Although the legislative power to enact national bankruptcy laws is enshrined in the Constitution, it was not until 1800 that Congress enacted the first federal bankruptcy legislation.[66] It was only effective for several years, and the relief was only available to merchants, traders, bankers, and factors.[67] The lack of relief through bankruptcy lasted thirty-eight years before Congress passed the Bankruptcy Act of 1841.[68] This short-lived foray into bankruptcy lasted barely a year but allowed for the first voluntary petitions and no longer restricted the relief to those in commerce.[69] The next effort in 1867, lasting only eleven years, handled the post-Civil War economy and allowed filings by corporations.[70]

The Bankruptcy Act of 1898 was the first implementation of a permanent system to provide bankruptcy relief within the United States.[71] With a major amendment in 1938, the 1898 legislation was the precursor to our modern bankruptcy system.[72] Eligible debtors' ability to liquidate or reorganize has been consistently available for over 114 years, more than half the life of the United States.[73] The Bankruptcy Code, implemented in 1978, is the current iteration of U.S. bankruptcy legislation.[74] Congress enacted this legislation after a commission was created to study how best to handle the United

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65. 1 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1.01[1] (16th ed. 2011) (quoting Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902)).

66. 1 COLLIER, *supra* note 65, ¶ 20.01[2][a].

67. *Id.*

68. *Id.* ¶ 20.01[2][b].

69. *Id.*

70. *See id.* ¶ 20.01[2][c].

71. *Id.* ¶ 20.01[2][d].

72. *Id.* ¶ 20.02.

73. Bankruptcy relief was unavailable at four periods in the history of the U.S. No federal bankruptcy legislation was in effect from 1789 to 1800, 1803 to 1841, 1843 to 1867, and 1878 to 1898, for a total of 93 years without bankruptcy relief. *See* 1 COLLIER, *supra* note 65, ¶ 20.01.

74. *Id.*

States' need for bankruptcy relief.[75] A 1986 amendment to the Bankruptcy Code expanded the United States trustee system and made it permanent.[76] A 2005 amendment enacted changes to the Bankruptcy Code to curb abuse by debtors with consumer debt.[77]

The modern Bankruptcy Code has nine chapters that govern the bankruptcy process and the relief available to debtors.[78] The debtor's characteristics determine the method of relief available.[79] The Federal Rules of Bankruptcy Procedure governs this process.[80] The Bankruptcy Code began with only odd chapters to allow for later expansion.[81] Chapter 12 is currently the only even-numbered chapter.[82] The first three Chapters, Chapters 1, 3, and 5, detail provisions that apply in bankruptcy proceedings.[83] Chapter 7, or Liquidation, governs the sale of a debtor's assets to repay creditors.[84] Chapter 9 governs the voluntary petition of a municipality.[85] Chapter 11 governs Reorganization, under which a person or business restructures their debt in an attempt to stay in business.[86] Chapter 12 governs the process reserved for family farmers and fishermen.[87] Chapter 13 governs reorganization of the debt of an individual with steady income.[88] Finally, Chapter 15 governs cross-border insolvency

75. *Id.* ¶ 20.02[1][a].
76. *Id.* ¶ 20.04[2].
77. *Id.* ¶ 20.04[5].
78. Title 11 governing bankruptcy relief contains nine chapters labeled "General Provisions," "Case Administration," "Creditors, the Debtor, and the Estate," "Liquidation," "Adjustment of Debts of a Municipality," "Reorganization," "Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income," Adjustment of Debts of an Individual with Regular Income," and "Ancillary and Other Cross-Border Cases." *See* 11 U.S.C. § 101, 301, 501, 701, 901, 1101, 1201, 1301, 1501 (2006).
79. 1 COLLIER, *supra* note 65, ¶ 1.01[2].
80. *Id.* ¶ 1.01[2][b].
81. *Id.* ¶ 1.01[2].
82. *Id.*
83. *Id.* ¶ 1.01[2][a].
84. *Id.* ¶ 1.07[1][a].
85. *Id.* ¶ 1.07[2].
86. *Id.* ¶ 1.07[3].
87. *Id.* ¶ 1.07[4].
88. *Id.* ¶ 1.07[5].

proceedings, recognizing the insolvency proceedings of a foreign jurisdiction.[89]

Filing a petition for bankruptcy relief creates an estate, which includes all of the debtor's interest.[90] An automatic stay bars actions to recover debts owed or actions affecting property owned or possessed by the estate.[91] Creditors then file claims stating a right to payment against the estate.[92] Each creditor's claim is ranked with priority given to some creditors over others.[93] If the claim is established by the filing of a "proof of claim," the claim against the estate will be allowed.[94] In an estate liquidation, satisfaction of claims by distribution of the estate's assets will discharge the debt.[95] When an entity other than an individual reorganizes, confirmation of a plan to repay creditors will discharge all debts.[96] Bankruptcy offers a pathway to relief from debt, but is only available to those who fall into the well-defined categories of eligible entities.

II. THE CONSTRAINTS ON ELIGIBILITY FOR INDIAN GAMING OPERATIONS SEEKING BANKRUPTCY RELIEF

A. Eligibility in a Case under The Bankruptcy Code

Eligibility of a debtor, as defined in the categories of section 109, is the threshold issue of any bankruptcy case and must be addressed before any other aspect.[97] It is the sole and exclusive responsibility of the bankruptcy court to determine eligibility for bankruptcy relief.[98]

89. *Id.* ¶ 1.07[6].

90. *Id.* ¶ 1.03[1].

91. 11 U.S.C. § 362 (2006); 1 COLLIER, *supra* note 65, ¶ 1.05[1].

92. 1 COLLIER, *supra* note 65, ¶ 1.03[2].

93. Claims are unsecured unless secured by a lien against property. 1 COLLIER, *supra* note 65, ¶ 1.03[2][a],[c]. The Bankruptcy Code prioritizes unsecured claims and includes definitions for included unmatured and contingent claims. 1 COLLIER, *supra* note 65, ¶ 1.03[2][a]-[d].

94. 1 COLLIER, *supra* note 65, ¶ 1.03[3].

95. *See* 1 COLLIER, *supra* note 65, ¶¶ 1.03[4] & 1.02[1].

96. 1 COLLIER, *supra* note 65, ¶ 1.07[3][e].

97. *In re* First Assured Warranty Corporation, 383 B.R. 502, 518 (Bankr. D. Co. 2008); 11 U.S.C. § 109 (2006).

98. *Id.*

The court may dismiss the case for "cause" if the debtor is ineligible to file for bankruptcy relief.[99] For example, the Santa Ysabel Resort and Casino's petition was dismissed in 2012 for not satisfying its burden of proof to show that it was eligible to file as an unincorporated company.[100] The Iipay Nation of Santa Ysabel, located in northeast San Diego County, planned the construction of the casino and resort upon tribal lands.[101] The Iipay Nation constructed the casino and opened in 2007 without a hotel or resort to accompany the gaming facility.[102] Unable to keep up with the service debt incurred, the Santa Ysabel Resort and Casino filed for bankruptcy as an unincorporated company on July 2, 2012.[103] Three motions to dismiss were filed, each on a different basis for the debtor's ineligibility.[104] The Court found that the debtor failed to prove it was persons united for carrying on a business enterprise jointly as an unincorporated company.[105]

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99. *See In re* Borges, 440 B.R. 551, 562 (Bankr. D. N.M. 2010); *In re* Seaman, 340 B.R. 698, 708 (Bankr. E.D. N.Y. 2006).

100. *See* Order to Dismiss at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Sept. 11, 2012), ECF No. 98.

101. *Omnibus Statement*, *supra* note 10, at 2.

102. *Id.* at 2-3.

103. *See* Voluntary Petition at 16, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. July 2, 2012), ECF No. 1.

104. Memorandum of Points and Authorities in Support of Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority at 7, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Aug. 2, 2012), ECF No. 57; Acting United States Trustee's Motion to Dismiss Case at 1-2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Aug. 7, 2012), ECF No. 65; County of San Diego's Motion to Dismiss Debtor's Bankruptcy Case; Memorandum of Points and Authorities in Support Thereof at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Aug. 7, 2012), ECF No. 66.

105. *See* Order to Dismiss at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Sept. 11, 2012), ECF No. 98 (where the court relied on the Second Circuit's definition in *In re* Tidewater Coal Exchange, 280 F. 638, 643 (2nd Cir. 1922), *cert. denied* 259 U.S. 584, of an unincorporated company being "an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors, and which is neither a corporation, nor a partnership, nor a joint-stock company.").

Only entities defined under section 109 of the Bankruptcy Code are eligible to file for bankruptcy relief.[106] Similarly, the IGRA's restrictions mandate that the tribe hold the sole proprietary interest in any gaming operation.[107] Under both sets of statutory constraints, only a small list of entities can be both eligible for bankruptcy relief while following the IGRA's constraints. Under section 109 describing eligibility to be a debtor, bankruptcy relief is available to only a "person" or a "municipality."[108] The Bankruptcy Code defines a "person" as including an "individual, partnership, and corporation, but does not include governmental unit . . . ."[109] Section 101 of the Bankruptcy Code contains a lengthy list of definitions of terminology used in the Bankruptcy Code, but does not include a definition for "individual," or "partnership," and states:

> The term "corporation"—
> (A) includes—
> association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;
> partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;
> joint-stock company;
> unincorporated company or association; or
> business trust; but
> (B) does not include limited partnership.[110]

These eight entities are the possible debtors eligible to file under The Bankruptcy Code: a municipality, individual, partnership, association like a private corporation, partnership association, join-stock company, unincorporated company, and business trust. The IGRA's "sole proprietary interest" restriction, however, eliminates some of these arrangements from owning an IGO.

106. 11 U.S.C. § 109 (2006).
107. 25 U.S.C. § 2710 (2006).
108. 11 U.S.C. § 109.
109. 11 U.S.C. § 101(41) (2006).
110. 11 U.S.C. § 101(9).

B. The Indian Gaming Regulatory Act's Restrictions on Proprietary Interest in an Indian Gaming Operation and Their Effect on an IGO's Bankruptcy Eligibility

In trying to fit IGOs within entities eligible for protection under the Bankruptcy Code's framework, the most readily eliminated structure is the municipality. The Bankruptcy Code defines a municipality as a "political subdivision or public agency or instrumentality of a State."[111] The Marshall Trilogy clearly recognizes that a tribe is not in fact part of a State.[112] Because a tribe is not part of a State, whether a tribe operates a casino directly, or through a municipality that they create, the entity is ineligible to file for bankruptcy relief as a municipality as defined in the Bankruptcy Code.

The definition of a "person" leads to the explicit exclusion of a "governmental unit."[113] The Ninth Circuit, in *Krystal Energy Co. v. Navajo Nation*, analyzes whether Congress abrogated tribal sovereign immunity through section 106 of the Bankruptcy Code by including Indian tribes in the definition of "governmental units."[114] The basis for this determination is the interpretation of the definition of governmental unit in section 101(27):

> The term "governmental unit" means 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*.[115]

The Ninth Circuit reasoned that the Bankruptcy Code's exclusion of "governmental unit" applies to Indian tribes because it includes Marshall's definition of Indian tribes as "domestic dependent

111. 11 U.S.C. § 101(40).

112. Worcester v. Georgia, 31 U.S. 515, 561 (1832).

113. 11 U.S.C. § 101(41).

114. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056-59 (9th Cir. 2004).

115. 11 U.S.C. § 101(27) (2006) (emphasis added).

nations."[116] Courts in other circuits disagree with this construction.[117] Until the split is resolved, this decision will bar any tribe operating an IGO from filing as a person for bankruptcy in the Ninth Circuit. The later discussion in Section D of tribes operating an IGO directly, and their eligibility to file under a potential category by holding title through multiple tribal entities, will also exclude IGOs in the Ninth Circuit.[118]

To file as a "person," an IGO must be either an "individual," a "partnership," or a "corporation."[119] Black's Law Dictionary defines an Indian tribe as "[a] group, band, nation, or other organized group of indigenous American people . . . ."[120] An individual is a being "[e]xisting as an indivisible entity" or "[o]f or relating to a single person or thing, as opposed to a group."[121] A conglomeration of people is not an individual, so a tribe, or an arm of the tribe, running an IGO, would not be an individual. The provision requiring sole proprietary interest in the IGRA prevents a tribe from vesting ownership in a single individual to qualify for bankruptcy relief.[122] As a tribe is not an individual, it must be determined if a tribe is eligible under another statutory category.

A partnership is a "voluntary association of two or more persons who jointly own and carry on a business for profit."[123] The IGRA's proprietary interest requirement blocks the ownership of an IGO by the tribe and another party.[124] In addition, characterizing a tribe as a

116. *Krystal Energy*, 357 F.3d at 1057, 1059 (citing Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831)).

117. *See In re* Whitaker, 474 B.R. 687, 693 (B.A.P. 8th Cir. 2012); *In re* Mayes, 294 B.R. 145, 148 n.10 (B.A.P. 10th Cir. 2003) (noting that the inference that the definition included Indian tribes as domestic dependent nations did not meet the requirement for abrogation of tribal sovereignty to be explicit).

118. *See* discussion *infra* Part II.D.

119. 11 U.S.C. § 101(41) (2006).

120. BLACK'S LAW DICTIONARY 841 (9th ed. 2009).

121. *Id.* at 843 (9th ed. 2009).

122. The sole proprietary interest provision prevents any entity holding title other than the tribe, as such, a single individual tribe member is not the entire tribe, and such a transfer would be void *ab initio*. 25 U.S.C § 2710 (2006).

123. *Id.* at 1230 (9th ed. 2009).

124. *But see In re* Cabazon Indian Casino, where a tribe, prior to the IGRA was able to file for bankruptcy relief as a partnership. *In re* Cabazon Indian Casino, 35 B.R. 124, 126 (B.A.P. 9th Cir. 1983).

partnership ignores the fact that tribes are something more than a group out for profit.[125] As the tribe itself is not a partnership, and the IGRA restricts an IGO from being owned in such a manner,[126] an IGO would not be able to file as a partnership.

This leaves bankruptcy relief open to an IGO only if it can prove that it is a "corporation" as defined within the Bankruptcy Code.[127] Although some argue that Indian tribes themselves are analogous to corporations, to date, no authority has held that they are eligible as a "corporation" for bankruptcy relief.[128] Congress explicitly provides, however, a means for an Indian tribe to have a corporate body in Section Seventeen of the IRA.[129] Section Seventeen corporations are distinct legal entities and wholly owned by the tribe.[130] A Section Seventeen corporation is one avenue to explicit inclusion as a corporation, but may also create issues for entities seeking bankruptcy relief.[131] Subsequent analysis focuses on entities that a tribe may create, separate from the tribe itself, to control gaming operations, and to avoid being construed as ineligible for lack of statutory inclusion.[132]

In order to find other eligible entities by which an IGO may qualify as a debtor under the Bankruptcy Code, the five entities described in section 101(9), defining a "corporation," should be examined in light of the IGRA's proprietary interest mandate. For the sake of organization, they are discussed in the reverse order as they appear in the statute; business trust, unincorporated company, joint-stock company, partnership association, and private corporation.

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125. Clift, *supra* note 3, at 230.

126. 25 U.S.C. § 2710 (2006).

127. *See* 11 U.S.C. § 101(9) (2006).

128. *See* Clift *supra* note 3, at 230.

129. 25 U.S.C. § 477 (2006).

130. Conkright, *supra* note 15, at 1183-84.

131. The Sixth Circuit Court of Appeals in *Memphis Biofuels v. Chickasaw Nation Indus.* questioned whether a Section 17 corporation, as an arm of the tribe, may also be ineligible to file for bankruptcy relief. Alexander Hogan, *Article: Protecting Native American Communities by Preserving Sovereign Immunity and Determining the Place of Tribal Businesses in the Federal Bankruptcy Code*, 43 COLUM. HUM. RTS. L. REV. 569, 593 (2012) (citing Memphis Biofuels v. Chickasaw Nation Indus., 585 F.3d 917, 920 (6th Cir. 2009)).

132. *See* discussion *infra* Part II.C-E.

C. Limited Corporate Eligibility

A business trust, or a Massachusetts trust, is a scheme wherein its members receive certificates of beneficial interest in the estate's property and the trustees hold ownership of the property in trust to the certificate holders.[133] Originally, the business trust was created as a means to achieve limited liability while avoiding restrictions on corporations owning real estate.[134] In *Hecht v. Malley*, the U.S. Supreme Court defines a business trust as "an arrangement whereby property is conveyed to trustees . . . to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees . . . ."[135] An IGO, as a business trust, would be an arrangement where the property consisting of the IGO is conveyed to trustees holding legal title, for the benefit of the tribe as holder of transferable certificates issued by those trustees. The requirement to convey the property to trustees means that ownership of the gaming operation must be at one time held by an entity or entities other than the tribe.[136] As this would violate the IGRA's requirements,[137] an IGO cannot be owned by means of a business trust.

An unincorporated company, as defined by the Second Circuit in *In re Tidewater Coal Exchange*, is "an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors, and which is neither a corporation, nor a partnership, nor a joint-stock company."[138] Although consisting of individuals there for their own gain through employer/employee relationships, tribally owned gaming operations are not individuals in a common pursuit.[139] Employees are

133. BLACK'S LAW DICTIONARY 1655 (9th ed. 2009).

134. *Id.*

135. Hecht v. Malley, 265 U.S. 144, 146 (1924).

136. The section on Joint Ventures of Companies Wholly Owned by the Tribe will deal with situations in which entities owned by the tribe may in fact transfer ownership of the IGO. *See* discussion *infra* Part II.D.

137. 25 U.S.C. § 2710 (2006).

138. *In re* Tidewater Coal Exchange, 280 F. 638, 643 (2nd Cir. 1922), *cert. denied* 259 U.S. 584.

139. Employees of an IGO consent to act for the IGO, subject to the IGO's control, and so are the agents of the IGO. Steinbrugge v. Haddock, 281 F.2d 871,

there under the tribe's management, and not under a control agreed to by them as a member.[140] This is unlike *Tidewater*, wherein an exchange was created as a clearinghouse for coal to release coal cars for other use.[141] There, the individuals were in the transshipping coal business and consequently were all actors towards a common pursuit.[142] In contrast, an IGO is not a group of individuals acting towards a common pursuit under a control agreed to by all members, as determined in the bankruptcy filing of the Santa Ysabel Resort and Casino.[143] Therefore, it would not qualify as an unincorporated company as defined within the Bankruptcy Code.[144]

A joint-stock company is an "unincorporated association of individuals possessing common capital, the capital being contributed by the members and divided into shares, of which each member possesses a number of shares proportionate to the member's investment."[145] Joint-stock companies are generally treated at common law as partnerships but with aspects of a corporation, one of which is that the owner divides the interests into shares transferable.[146] This means that members in a joint-stock company do not choose their associates.[147] An IGO may be owned through the ownership of stock by the Indian tribe.[148] A joint-stock company, however, is a partnership of individuals who own stock, and the tribe would otherwise be the sole owner.[149] A partnership, by definition is an

873 (10th Cir. 1960).

140. *See Tidewater*, at 643.

141. *Id.* at 643.

142. *Id.* at 641.

143. *See* Order to Dismiss at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Sept. 11, 2012), ECF No. 98.

144. *See* Order on Motions to Dismiss at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Sept. 11, 2012), ECF No. 98.

145. BLACK'S LAW DICTIONARY 319 (9th ed. 2009).

146. 48A C.J.S. *Joint Stock Companies* § 1 (2012).

147. 46 AM. JUR. 2D *Joint-Stock Companies* § 4 (2013).

148. Here stock represents the "proportional part of a corporation's capital represented by the number of equal unit (or shares) owned, and granting the holder the right to participate in the company's general management and to share in its net profits or earnings." BLACK'S LAW DICTIONARY 1551 (9th ed. 2009).

149. As a partnership constitutes two or more persons, an entity cannot be a partner to itself. *See id.* at 1230.

"association of two or more."[150] An Indian tribe cannot be a partner to itself.[151] As such, a joint-stock company would not be able to own an IGO.

A partnership association is a statutory creation in a few jurisdictions, where a partnership is only liable for the capital invested in the partnership, much like a corporation.[152] As discussed above in considering a joint-stock company, a partnership requires two or more entities, and a tribe cannot be a partner to itself.[153] Therefore, similar to a joint-stock company, an IGO may not claim to be a partnership association.

Lastly, a private corporation is one "founded by and composed of private individuals principally for a nonpublic purpose."[154] In other words, an "association with the powers or privilege that a private corporation . . . possesses," but not the powers or privilege of an individual or partnership is eligible to file for bankruptcy as a "corporation."[155] This encompasses an incorporated entity having a distinct legal existence from its shareholders,[156] entities acting in a like manner, such as municipal corporations,[157] fraternal organizations organized under their own bylaws,[158] and liquidating trusts.[159] Therefore, an entity created by a tribe, and empowered as a private corporation, is eligible to file as a debtor under the Bankruptcy Code.[160] As an association does not require multiple parties to take part in ownership, it may be owned in its entirety by a single entity, the tribe.[161] Therefore, an IGO may be owned through an association with powers of a private corporation without violating the IGRA.

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150. *Id.*
151. *See id.*
152. *Id.* at 1231.
153. *Id.* at 1230.
154. *Id.* at 393.
155. 11 U.S.C. § 101(9)(A)(i) (2006).
156. BLACK'S LAW DICTIONARY 391 (9th ed. 2009).
157. City of Lincoln, Neb. v. Ricketts, 297 U.S. 373, 377 (1936).
158. *In re* Carthage Lodge, 230 F. 694, 702 (N.D. N.Y. 1916).
159. *In re* Cooper Properties Liquidating Trust, Inc., 61 B.R. 531, 536 (Bankr. W.D. Tenn. 1986).
160. *See* 11 U.S.C. § 101(9) (2006).
161. *See* 18 C.J.S. *Corporations* § 21 (2012).

D. The Potential Eligibility of Intra-Tribal Joint Ventures

The elimination of a business trust, unincorporated company, joint-stock company, or partnership association are, however, subject to an exception if they are the product of joint ventures of entities wholly owned by the tribe.[162] An IGO, under those circumstances, could be one of these constructs and eligible as a "corporation," while adhering to the provisions of the IGRA.[163] One tribally owned entity may own the operation, and entrust it to another to form a business trust.[164] The two may act in concert to pursue a casino business and act as an unincorporated company.[165] The two entities may join as partners in such a way as to allow the formation of a joint-stock company or partnership association.[166] If these entities are owned entirely by the tribe and the ownership is not transferable outside the tribe, the NIGC may not see a violation of the IGRA.[167] To that point, the later discussion of how an IGO would go through the bankruptcy process should also pertain to these business structures, but for the purpose of this Comment, they will not be discussed in any depth.

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162. The entire proprietary interest in the IGO is held by entities wholly owned by the tribe, who would hold interest of all assets and liabilities of any joint venture.

163. Each constituent entity would need to maintain its separate identity from the tribe so as not to allow a court to pierce the corporate veil. *See* 18 C.J.S. *Corporations* § 23 (2012).

164. For example, a Tribal Gaming Authority (TGA) formed to create an IGO for a tribe. The TGA may create the IGO, and then entrust it to a Tribal Development Corporation (TDC) with the TGA receiving certificates of beneficial interest in the IGO, thus creating a business trust. *See* BLACK'S LAW DICTIONARY 1655 (9th ed. 2009).

165. The same TGA may act in concert with the TDC and a Tribal Employment Agency (TEA) to each pursue the common goal of creation and operation of the IGO under agreed upon controls, satisfying the requirements to be an unincorporated company. *See In re* Tidewater Coal Exch., 280 F. 638, 643 (2nd Cir. 1922), *cert. denied* 259 U.S. 584.

166. The TGA and TDC may form a joint-stock company, or partnership association if the jurisdiction allowed, in which they have stock transferable to other wholly owned tribal entities, such as the TEA, thus creating a joint stock company or partnership association. *See* BLACK'S LAW DICTIONARY 319 (9th ed. 2009); BLACK'S LAW DICTIONARY 1231 (9th ed. 2009).

167. *See* 25 U.S.C. § 2710(b)(2)(A) (2006).

E. Corporate Structures Available to Indian Gaming Operations

Indian tribes have three options in creating IGOs falling under the Bankruptcy Code's definition of a "corporation."[168] First, as sovereign governing bodies, Indian tribes may enact their own laws governing corporation creation and charter their own tribal corporations.[169] Second, they may charter a corporation under the laws of a State.[170] Third, the tribes may create a Federally chartered Section Seventeen corporation.[171] Because an IGO can begin with the tribal government creating an instrumentality of the tribe, these more formal business organizations' usefulness to tribes must be examined against the utility of tribal instrumentalities to determine if the ability to file for bankruptcy relief is worth the additional steps and effort.[172] In comparison, tribal instrumentalities and corporations chartered under federal, tribal, and state law, are examined based on four criteria: ease of creation, tribal control, effect on sovereign immunity, and tax implications.[173]

Federally chartered corporations created under Section Seventeen of the IRA are formed by submitting a petition to the Secretary of the Interior or passage of a tribal resolution requesting the issuance of a charter.[174] After approval, the tribe drafts a charter, obtains the approval of the tribe, files with the Bureau of Indian Affairs and, if approved by the Bureau, ratifies the charter.[175] Once created, the

168. Corporations are creations recognized by law, and so there are counterparts in each sovereign entity, which is related to the Indian tribe and able to enact pertinent laws (the Federal government, State, and tribe). *See* 18 C.J.S. *Corporations* § 1.

169. KAREN J. ATKINSON & KATHLEEN NILLES, TRIBAL BUSINESS STRUCTURE HANDBOOK, at III-1 (The Office of the Assistant Secretary – Indian Affairs, 2008 ed.).

170. *Id.* at IV-1.

171. *Id.* at III-10 to -11.

172. Instrumentalities of the tribe are the tribe acting on its own, by its own inherent sovereignty. It is thus the first available option to any tribe wishing to create an IGO. *See id.* at II-1.

173. These categories look to the initial steps in creating an IGO, the operation of the IGO by the tribe, and the tribe's ability to protect the revenues derived from the IGO for the benefit of the tribe. *See Id.* at I-3 to I-4.

174. *Id.* at III-10 to -11.

175. *Id.*

Section Seventeen corporation is managed by a board of directors and a manager or CEO runs the day-to-day operations.[176] Generally, Section Seventeen corporations are viewed as alter egos of the tribe and therefore share the tribe's sovereign immunity, subject to waiver.[177] However, some courts have found that the "sue and be sued" clauses in Section Seventeen charters create an automatic waiver of sovereign immunity.[178] The IRS considers Section Seventeen corporations as alter egos of the tribe and therefore not subject to income tax.[179]

Tribal corporations are chartered through tribal laws governing corporation creation.[180] They are created by the issuance of a certificate of incorporation by a tribal equivalent to the Secretary of State.[181] In a tribally owned and chartered corporation, the tribe's legislative body normally approves the articles of incorporation.[182] The corporate structure requires a board of directors and day-to-day manager.[183] The board generally has some independence from the tribal government.[184] Under special circumstances, corporations created under a tribal charter may be protected by the tribe's sovereign immunity.[185] The courts weigh the links between the tribe and the corporation and the purposes for which the corporation is founded to determine the tribally chartered corporation's immunity.[186] Meanwhile, the IRS has not decided whether corporations chartered under tribal law and tribally owned are subject to federal income

176. *Id.* at III-12.

177. *Id.*

178. Contracts involving Section Seventeen corporation's may include "sue and be sued" clauses that some courts have interpreted as not automatically waiving the tribe's sovereign immunity, but to allow a suit to be brought against the tribe allowing the tribe to decide if it wishes at that time to waive sovereign immunity. *See* Conkright, *supra* note 15, at 1188.

179. ATKINSON, *supra* note 169, at III-15.

180. *Id.* at III-1.

181. *Id.* at III-2 to -3.

182. *Id.* at III-3.

183. *Id.*

184. *Id.*

185. *Id.* at III-4.

186. *Id.* at III-4.

tax.[187] Some States do not exempt tribally chartered corporations from state taxes.[188]

States offer ways for a tribe to charter a corporation, each with variations according to the corporate law of the jurisdiction.[189] A board and manager control the corporation, but the issues of sovereign immunity and tax exemption are much different in an entity created through a state.[190] A state chartered corporation is most likely subject to state regulation when operating outside tribal territory, although not likely regulated in activities occurring on tribal lands.[191] A tribe incorporating their gaming operation under state laws may find that state courts will not recognize the entity as sharing the tribe's sovereign immunity due to its creation under state jurisdiction.[192] All corporations chartered under state law, and not otherwise under an exempt category, are subject to both Federal and State corporate income tax.[193]

F. The Costs of Incorporation

Incorporating allows for bankruptcy relief, but comes at the cost of increased difficulty of creation, less tribal control, a negative effect on sovereign immunity, and negative tax implications when compared to an IGO run as an unincorporated instrumentality of the tribe. "Unincorporated instrumentalities of a tribal government are formed under tribal law for commercial purposes and share the same legal characteristics of the tribal government because they are not separate

187. In IRS Ruling 94-16, and its clarification by the Joint Committee on Taxation, the IRS has not addressed the tax liability of a corporation that is chartered under tribal corporations law and where the sole proprietary interest is held by the tribe. JOINT COMMITTEE ON TAXATION, JCX-40-12.2. OVERVIEW OF FEDERAL TAX PROVISIONS AND ANALYSIS OF SELECTED ISSUES RELATING TO NATIVE AMERICAN TRIBES AND THEIR MEMBERS SCHEDULED FOR A PUBLIC HEARING BEFORE THE SENATE COMMITTEE ON FINANCE ON MAY 15, 2012 (2012) ; Rev. Rul. 94-16, 1994-1 C.B. 19 at 1-2.

188. ATKINSON, *supra* note 169, at III-7.

189. *Id.* at IV-1.

190. *Id.*

191. *Id.* at IV-3.

192. *Id.* at IV-4.

193. *Id.* at IV-5.

legal entities."[194] Tribal governments use instrumentalities to run their gaming operations as arms of the tribe.[195] However, there are some clear reasons why a tribe may not wish to gain the advantage of access to bankruptcy relief through formal incorporation.[196]

The creation of an arm of the tribe takes an act of the tribal government.[197] Each of the corporate structures requires filing articles of incorporation with the appropriate entity.[198] In terms of formalities, the most cumbersome process by far is the federally chartered Section Seventeen corporation, while the easiest corporate structure is the state corporation, as there would be no need for prior enactment of corporate law statutes by the tribe.[199] If the tribe already has enacted laws governing the creation of corporations, then the tribal corporation may be as easy to create as a tribal instrumentality.[200] The easiest entity for a tribe to create would be an arm of the tribe as it only takes a single act of the tribal government.

Tribal control over an IGO operated by an instrumentality is near total as it is an arm of the tribe. Some researchers call the use of instrumentalities to perform functions for the tribe the "Council-Run Model."[201] The tribal government is in control of the gaming operation directly or indirectly through a manager.[202] The Section Seventeen corporation is the economic presence of the tribe and so expected to be controlled by the tribal government.[203] Tribal and state chartered corporations have a measure of independence from the tribal government.[204] A Section Seventeen corporation alone will give the

194. *Id.* at II-1.

195. Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718, 725 (9th Cir. 2008); Allen v. Gold Country Casino, 464 F.3d 1044, 1046-47 (9th Cir. 2006).

196. The importance of bankruptcy relief is only an advantage to an IGO seeking relief from debt. Ease of initial operations and control of an IGO are concerns from the first day of operation and liability, whether to tax or suit, are constant issues facing any IGO.

197. ATKINSON, *supra* note 169, at II-1.

198. *See id.* at VI-1 to -2.

199. *See id.* at VI-1.

200. *See id.* at VI-1 to -2.

201. *Id.* at II-2.

202. *Id.*

203. *Id.* at III-12.

204. *See id.* at III-3, IV-3.

tribal government a degree of control close to the control over an instrumentality.[205] The tribal control over an IGO run through an arm of the tribe is greater than they would have over an IGO run by a corporate entity.

In acting through an instrumentality, the tribe actually retains all property involved in the IGO and the gaming operation is protected by the tribe's sovereign immunity.[206] Federally chartered corporations will share in the tribe's sovereign immunity.[207] Tribally chartered corporations will share according to the closeness of operation and purpose with the tribe.[208] State chartered corporations may not be able to claim the tribe's immunity at all.[209] Here, a Section Seventeen corporation is equal to an instrumentality in maintaining immunity to suit.[210]

The Internal Revenue Service has determined in multiple rulings that tribes are not subject to income tax law and that instrumentalities, existing within the tribe, are likewise not taxable entities.[211] Section Seventeen corporations are treated the same as tribal instrumentalities by the IRS, while state corporations are subject to taxation.[212] The status of tribally chartered corporations is undetermined by the IRS and opens a tribe up to potential tax liability.[213] The tax consequence of incorporating under state or tribal law is to risk liability on future earnings.

No incorporated entity is created as readily as a tribal instrumentality.[214] However, a Section Seventeen corporation, based on the comparisons above, appears to allow the tribe to control the IGO, maintain sovereign immunity, and minimize tax liability. Incorporated entities are more difficult to create than an arm of the

205. *Id.* at VI-2.

206. *See* Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718, 725-26 (9th Cir. 2008); Allen v. Gold Country Casino, 464 F.3d 1044, 1046-47 (9th Cir. 2006); ATKINSON, *supra* note 169, at II-3.

207. ATKINSON, *supra* note 169, at VI-2 to -3.

208. *Id.* at VI-3.

209. *Id.*

210. *Id.*

211. *Id.* at II-5.

212. *Id.* at VI-3 to -4.

213. *See* Rev. Rul. 94-16 *supra* note 187; *Id.* at VI-4.

214. ATKINSON, *supra* note 169, at VI-1.

tribe, reduce the tribal government's control of an IGO when compared to an arm of the tribe, take away the tribe's sovereign immunity shared by an arm of the tribe, and open up the tribe to tax liability not risked by an arm of the tribe. The tribe must exert itself more, risk loss of control, sovereign immunity, and tax protection in exchange for the possibility of future debt relief.

III. THE DISHARMONY OF THE BANKRUPTCY CODE AND THE INDIAN GAMING REGULATORY ACT

Courts have a duty to harmonize and reconcile statutes into a cohesive body of law.[215] When the entire provision of a statute cannot be given effect because of an irreconcilable conflict with another statute, a construction is sought to effectuate the purpose, which the legislature intended.[216] The last statute enacted, as the most recent expression of legislative intent, often prevails when two statutes conflict.[217] Moreover, when there is a conflict between two statutes, the more specific statute controls.[218]

If an IGO is created in a form eligible to file for bankruptcy, the court will have to follow the cannons of statutory interpretation and attempt to harmonize the Bankruptcy Code with IGRA.[219] The key foci of any interpretation would be Congress' desire to enact protections to creditors and debtors while simultaneously upholding the federal obligation to act as guardians of the Indian nations.[220] That obligation, discharged through IGRA, is to protect Indian tribes' sovereignty by promoting their proprietary interest in IGOs and the regulatory authority of NIGC.[221] The Bankruptcy Reform Act of 1978

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215. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

216. 73 AM. JUR. 2D *Statutes* § 160 (2012); 82 C.J.S. *Statutes* § 481 (2012).

217. *See Food and Drug Admin.*, 529 U.S. at 133 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

218. Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961).

219. *See Food and Drug Admin.*, 529 U.S. at 133.

220. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); 1 COLLIER, *supra* note 65, ¶ 1.01[1].

221. 25 U.S.C. § 2702(1) (2006).

is a general statute pertaining to all debtors, including IGOs.[222] IGRA, however, is a statute of specific application enacted to promote and regulate IGOs.[223] As IGRA is of specific application and enacted after the Bankruptcy Reform Act, any irreconcilable conflicts should be resolved with IGRA prevailing.[224] Any conflicts that cannot be harmonized between IGRA and the Bankruptcy Code, as it existed prior to 1988, should be construed in IGRA's favor.[225]

An analysis into the journey of an IGO as a debtor is inherently specific to the Chapter under which it filed.[226] An IGO can seek bankruptcy relief through either liquidation or reorganization of the business.[227] Chapter 7's liquidation process leads to the sale of all assets necessary to pay off creditors, with any remaining value reverting to the possession of the debtor.[228] Under Chapter 11 reorganization, the gaming operation continues to run, with a plan to repay creditors from the business operation.[229] Progression through either process relies on courts construing the creation of the bankruptcy estate as in line with IGRA's proprietary interest requirement.[230]

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222. *See In re* Cabazon Indian Casino, 35 B.R. 124, 126 (B.A.P. 9th Cir. 1983) (noting a card-room operating on an Indian reservation, and owned by a tribe and another in a partnership, filed for bankruptcy).

223. 25 U.S.C. § 2702 (2006).

224. This follows the same logic used by the Ninth Circuit in Krystal Energy. There, the Bankruptcy Code, in defining "governmental unit" to include "domestic government," was interpreted as taking into account the Supreme Court's prior definition of Indian tribes as "domestic nations." *See* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1059 (9th Cir. 2004).

225. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005's specific application to abuses of the bankruptcy process should apply to abuses of the bankruptcy system by IGOs as the most recent and specific showing of legislative intent. *See* Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

226. 1 COLLIER, *supra* note 65, ¶ 1.01[2].

227. An IGO will qualify as a business and may seek bankruptcy relief through either liquidation of the business assets or reorganization of debts and payment through operation of the business. *See Id.* ¶ 1.01.

228. *Id.* ¶ 1.07[1][a] & 1.03[4].

229. *See id.* ¶ 1.07[3].

230. *See* 25 U.S.C. § 2710(b)(2)(A) (2006); 1 COLLIER, *supra* note 65, ¶

A. Chapter 7—Liquidation: The House Goes Bust

In a Chapter 7 liquidation of the estate, the United States trustee appoints an interim trustee.[231] The interim trustee may then be replaced by one elected by creditors at a creditor meeting.[232] The trustee's duty is to liquidate the assets of the estate.[233] If the court finds it is in the best interest of the estate, the court may authorize the trustee to operate the business owned by the debtor.[234] An IGO, however, upon liquidation and appointment of a trustee, cannot have the trustee operate the business because doing so seems to violate IGRA.[235] In this scenario, the trustee would have a fiduciary duty to the creditors and the estate, but that duty violates IGRA's requirement that the Indian tribe retain "sole proprietary interest and responsibility."[236] Likewise, a trustee's operation of the IGO can be construed as a management contract that would require the approval of the NIGC Chairman.[237] Thus, upon appointment of a trustee, the gaming activity must cease.[238] The sale of the IGO's assets by the trustee would not violate IGRA's proprietary interest requirement or be direct participation in the management of the gaming activity of the

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1.03[1].

231. 11 U.S.C. § 701 (2006).

232. 11 U.S.C. §§ 701-02 (2006).

233. 11 U.S.C. § 704 (2006).

234. 11 U.S.C. § 721 (2006).

235. "[T]he Indian tribe will have the sole proprietary interest and *responsibility* for the conduct of any gaming activity" 25 U.S.C. § 2710(b)(2)(A) (2006) (emphasis added).

236. 25 U.S.C. § 2710(b)(2)(A) (2006).

237. The Ninth Circuit's concern in *Lake of the Torches* was over "participation of *any* party in the actual management of a tribal gaming facility. . ." Wells Fargo Bank Nat'l Ass'n. v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 697 (7th Cir. 2011) (emphasis in the original). The broad standard, including an indenture wherein the bank was able to change the management of the gaming operation, would seem to encompass the appointment of a trustee to oversee the estate. As such, any appointment of a trustee in a case under Chapter 11 involving an IGO would need approval of the Chairman of the Commission or be void. *See* 25 U.S.C. § 2705 (2006) ("The Chairman ... shall have power ... to – (4) approve management contracts for class II gaming and class III gaming ...").

238. Continued operation of the IGO under a trustee, and not the tribe, would violate section 2710. 25 U.S.C. § 2710(b)(2)(A) (2006).

tribe.[239] Without a management scheme over an active IGO, there is no requirement for the appointment of a trustee to be approved by the Chairman of the NIGC.[240]

B. Chapter 11—Reorganization: Another Toss of the Dice

The debtor, here an IGO, becomes the debtor in possession upon filing for relief under Chapter 11.[241] The debtor in possession, with the powers and duties of a trustee, is under a fiduciary obligation to preserve the assets of the estate in the creditors' best interests.[242] This shift in obligations, just as in the appointment of a trustee to oversee a Chapter 7 case, may be construed as violating IGRA's "proprietary interest and responsibility" requirement in section 2710.[243] Although the proprietary interest does not change, the new duty of the debtor in possession to preserve the assets for the benefit of creditors and the subsequent change in responsibilities conflicts with IGRA.[244] Although this change in obligation can be overlooked when considering a debtor in possession, as the responsibility shifts in the same entity, the appointment of a trustee is another matter.[245] Upon appointment of a trustee, the debtor is no longer responsible for the IGO, violating section 2710.[246] If a court deems it necessary to appoint a trustee because the debtor in possession is violating a fiduciary duty, the court must convert the case to Chapter 7 liquidation or dismiss the case, as continued operation of the business must end.[247] If a trustee is appointed in a Chapter 11 reorganization, the

239. The sale of the assets of the estate, reducing the estate to money to pay creditors, would not impose a fiduciary duty on the trustee in violation of the IGRA's "proprietary interest and responsibility" mandate. *See id.*

240. *See* 25 U.S.C. § 2705(a) (2006).

241. *See* 11 U.S.C. §§ 1101(1), 1107(a) (2006).

242. *See* 11 U.S.C. § 1107(a) (2006); 8B C.J.S. *Bankruptcy* § 841 (2012).

243. 25 U.S.C. § 2710(b)(2)(A) (2006).

244. *See* 11 U.S.C. § 1107(a) (2006); 25 U.S.C. § 2710(b)(2)(A) (2006).

245. The debtor in possession must act with the fiduciary duty a trustee owes toward the estate. 11 U.S.C. § 1107(a) (2006). Although duty owed has changed, the debtor in possession still has responsibility over the estate. A trustee, however, would violate the IGRA's mandate that the tribe have responsibility over the IGO. *See* 25 U.S.C. § 2710(b)(2)(A) (2006).

246. 25 U.S.C. § 2710(b)(2)(A) (2006).

247. 11 U.S.C. § 1112(b)(1) (2006 & Supp. 2011)).

trustee has actual control over the gaming operations management, and can be construed as a management contract subject to the NIGC Chairman's approval.[248] Without NIGC approval, any such arrangement is void *ab initio*, void before it is ever begun.[249]

Unlike in a Chapter 7 case, the appointment of a creditor committee under Chapter 11 can be seen as a management contract.[250] Creditor committees appointed under Chapter 7 do not have the ability to be reimbursed for professional services by the estate of the debtor, while Chapter 11 creditor committees do and may fall under the regulatory authority of NIGC.[251] Leading up to the Ninth Circuit decision in *Lake of the Torches*, the District Court interpreted the appointment of a receiver as a management contract, as it would draw resources away from the gaming operations.[252] The Ninth Circuit noted the District Court's interpretation but decided to leave the issue to future litigation.[253] A court following the District Court's logic in *Lake of the Torches* would construe the exertion of managerial control over monies of the estate as constituting a management contract.[254] It is clear that a management contract requires the NIGC Chairman's approval.[255]

Similarly, the filing of a Chapter 11 reorganization plan by any party other than the debtor, as it designates the IGO's business practices for the term of the plan,[256] may also be construed as a management contract subject to the approval of the NIGC

248. Wells Fargo Bank Nat'l. Ass'n. v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 697-99 (7th Cir. 2011).

249. *See* 25 U.S.C. § 2705(a) (2006); *Lake of the Torches*, 658 F.3d at 699.

250. In Chapter Seven, a creditor committee may not use the assets of the estate to conduct its business and so does not draw resources away from the IGO, which could be construed as a management contract. *See Lake of the Torches*, 658 F.3d at 691, 702 n.14; 1 COLLIER, *supra* note 62, ¶ 1.07[1][c].

251. *See Lake of the Torches*, 658 F.3d at 691, 702 n.14.

252. *Id.* at 686, 691, 702 n.14.

253. *Id.* at 691, 702 n.14.

254. The control of monies of the estate by the committee of creditor, and the subsequent drawing away of financial resources from the IGO's activities, may be construed as the management of an IGO requiring the approval of the NIGC Chairman. *See* 25 U.S.C. § 2705(a) (2006); *Lake of the Torches*, 658 F.3d at 699, 702 n. 14.

255. 25 U.S.C. § 2705(a) (2006).

256. 1 COLLIER, *supra* note 65, ¶ 1.07[3][d]

Chairman.[257] Plans created by other parties in interest constitute participation by those parties in the actual management of the IGO, [258] subjecting the plan to NIGC's authority.[259] Interestingly, any plan that includes a provision for a debt-for-equity swap runs afoul of IGRA's proprietary interest requirement, and is void.[260]

The absolute priority rule also conflicts with IGRA's requirements.[261] The absolute priority rule is used in plans being approved over creditor objections and demands that the debtor pay each senior class of creditors in full before any lesser class, with equity holders constituting the last class.[262] IGOs cannot be held by any other entity, so equity will be maintained even when faced with senior classes of creditors that are not being repaid in full.[263] In such a "cramdown" situation,[264] the tribe retains all equity while classes of senior creditors are left out.[265] This is similar to the protections afforded to Indian lands.[266] Encumbrance of Indian lands for a period of seven years or more is not allowed without approval of the Secretary of the Interior.[267] Here, the federal government, while protecting Indian tribal sovereignty and the ability to be self-sufficient, is restricting the alienation of the IGO, just as it does their land.[268]

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257. *See Lake of the Torches*, 658 F.3d at 697, 702 n.14.

258. Creation of a plan for confirmation may be construed as participation in the management of the debtor. *See* 1 COLLIER, *supra* note 65, ¶ 1.07[3][d][i]-[iii].

259. 11 U.S.C. § 2705 (2006).

260. Shmuel Vasser & Janet Bollinger, *Casino Creditors, Heads Up: American Tribes May Be Ineligible for Bankruptcy*, N.Y. L.J., Dec. 13, 2010 at 3.

261. *See* 11 U.S.C. § 1129(b) (2006); 25 U.S.C. § 2710(b)(2)(A) (2006); Vasser, *supra* note 260, at 3.

262. Vasser, *supra* note 260, at 3.

263. *Id.*

264. "Court confirmation of a Chapter 11 bankruptcy plan despite the opposition of certain creditors. Under the Bankruptcy Code, a court may confirm a plan — even if it has not been accepted by all classes of creditors — if the plan (1) has been accepted by at least one impaired class, (2) does not discriminate unfairly, and (3) is fair and equitable." BLACK'S LAW DICTIONARY 423 (9th ed. 2009).

265. *Id.*

266. *See* 25 U.S.C. § 81 (2006).

267. *Id.*

268. *See id.*

The disharmony between IGRA and the Bankruptcy Code creates unexpected outcomes in the bankruptcy process. In seeking to fulfill Congressional intent through use of the cannons of statutory construction, the bankruptcy courts may find IGRA's restrictions negate otherwise mandatory requirements and foreclose options to both the court and the IGO debtor.

IV. A LEGISLATIVE PRESCRIPTION TO RESOLVE THE STATUTORY CONFLICTS AND GRANT ELIGIBILITY

A resolution to this problem must comport with the federal government's role as guardian of Indian tribes.[269] Although an explicit inclusion of IGOs in the list of eligible entities opens the door for misuse as a back door for tribes seeking bankruptcy relief, it is no greater risk than any other enterprise currently offered access, and Congress should undertake granting eligibility as a federal obligation.[270] Congress must craft a solution that lights a path through the bankruptcy process, resolves the existing statutory conflicts, and avoids creating new conflicts. By providing a pathway to relief from overly burdensome debt, Congress would create a means for efficient liquidation[271] or save a productive business.[272] Doing so is in the best interest of creditors and those dependent upon the enterprise.[273] The solution must address the eligibility of IGOs, the appointment of trustees, and the appointment of creditor committees.[274]

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269. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

270. "[A] principal goal of Federal Indian policy is to promote tribal economic development[.]" 25 U.S.C. § 2701(4) (2006).

271. 1 COLLIER, *supra* note 65, ¶ 1.07[1][a].

272. *Id.* ¶ 1.07[3].

273. "The Supreme Court has identified two of the basic purposes of Chapter 11 as (1) 'preserving going concerns' and (2) 'maximizing property available to satisfy creditors." *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 119 (3rd Cir. 2004), *cert. denied*, 545 U.S. 1110 (2005).

274. Granting eligibility of IGOs addresses the threshold issue of whether an IGO may seek bankruptcy relief, while legislation upon the appointment of trustees, and creditor committees would clarify the irreconcilable statutes that would affect any IGO entering the bankruptcy process.

A. Congress Should Add Indian Gaming Operations to the List of Entities Eligible to File for Bankruptcy

Eligibility of an IGO is readily solved by an amendment to section 101(9) of the Bankruptcy Code defining a "corporation."[275] Congress can amend the Bankruptcy Code to include a new section, 101(9)(A)(vi), adding into the statutory definition:

> (vi) any operation –
> by an Indian tribe;
> upon Indian lands;
> undertaking class I gaming, class II gaming, or class III gaming;
> as defined in 25 U.S.C. § 2703; but
> In addition to an amendment to section 101(9)(A)(v) as appropriate, section 541(b)(9) should be added to the Bankruptcy Code stating:
> (9) interest in land held by an operation as defined in section 101(9)(A)(vi) that is on an Indian reservation or held in trust by the United Stated for a recognized Indian tribe.

These amendments to the Bankruptcy Code would explicitly allow IGOs to seek bankruptcy relief, while not threatening lands already protected from alienation.[276] Upon the IGO filing a petition for relief, an estate is created,[277] the debtor or trustee takes up duties as a fiduciary,[278] the jurisdiction of the United States District Court is invoked,[279] and the automatic stay goes into effect.[280] The amendment to section 541(b), governing what property is not to be included in the estate of a debtor,[281] would prevent distribution of protected lands as part of a debtor IGO's estate.[282]

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275. *See* 11 U.S.C. § 101(9) (2006).
276. 25 U.S.C. § 81 (2006).
277. 11 U.S.C. § 541(a) (2006).
278. *See* 11 U.S.C. §§ 701, 1101(1), 1107(a) (2006).
279. 28 U.S.C. §§ 157(a) , 1334 (2006).
280. 11 U.S.C. § 362 (2006).
281. 11 U.S.C. § 541(b) (2006).
282. As the amendment would be the most recent action showing legislative intent, in addition to being about a specific subject, the granting of eligibility would take precedence over the requirement of approval of the Secretary of the Interior

Bankruptcy relief to IGO protects the tribe, dependent surrounding communities, financial markets, and creditors by avoiding the economic uncertainty of a sovereign entity defaulting and seeking to restructure its debts outside of bankruptcy proceedings under the threat of sovereign immunity.[283] The IGO's financial information is made available upon filing of the bankruptcy petition.[284] That information transparently describes the bankruptcy estate, including all property interests owned by the IGO.[285] The debtor in possession or trustee is under a fiduciary duty to the creditors to maximize and preserve the value of the estate.[286] The jurisdiction of the District Court over the proceedings,[287] in addition to the activation of the automatic stay[288] bring the debtor IGO and all creditors into a single forum and centralized process to manage the assets of the debtor.[289]

Any threat of abuse of the bankruptcy process by a tribe attempting to shield assets or discharge debts other than those of the IGOs, would face either the U.S. trustee or the bankruptcy administrators, the authorities overseeing the bankruptcy process.[290] The U.S. trustee and bankruptcy administrators, for cause, may seek to dismiss or convert the case,[291] or may seek to appoint a trustee to oversee reorganization.[292] The court itself may act *sua sponte* to prevent abuse.[293] In a case, such as the filing by the Santa Ysabel Resort and Casino, where an issue arose as to who held the debt, the

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before Indian lands may be encumbered for over seven years. *See* 25 U.S.C. § 81 (2006); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1960).

283. *See* Crowne, *supra* note 7, at 25.

284. Debtors must file a list of creditors, a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs. 11 U.S.C. § 521(a) (2006).

285. *See* 11 U.S.C. § 541(a) (2006).

286. 11 U.S.C. §§ 704(a), 1107(a) (2006).

287. *See* 28 U.S.C. §§ 157(a), 1334(a) (2006).

288. 11 U.S.C. § 362 (2006).

289. *See* 1 COLLIER, *supra* note 65, ¶ 1.01[1].

290. *See Id.* ¶ 6.01; 8A C.J.S. *Bankruptcy* § 38 (2012).

291. 11 U.S.C. § 707(a) (2006).

292. 11 U.S.C. § 1104(a) (2006).

293. 11 U.S.C. § 105(a) (2006).

casino or the Iipay Nation,[294] the creditors would have the burden of proving the property is within the estate.[295] Access to bankruptcy relief benefits the tribe, creditors, and communities relying on IGOs with little risk that an IGO debtor would be able to abuse the bankruptcy process.

B. Congress Should Expand the National Indian Gaming Commission's Role to Facilitate the Appointment of Trustees

NIGC was created to oversee IGOs.[296] It currently provides oversight of 421 gaming establishments,[297] and is in a unique position to aid IGO debtors through the bankruptcy process.[298] The investigative and regulatory powers of NIGC make it an entity specifically qualified to designate a pool of trustees available for appointment by the U.S. Trustee to oversee the reorganization of an IGO.[299] The statute governing the duties of the NIGC, section 2706 of Title 25, should be amended to include:

> (e) Selection of trustees
> The Commission shall select trustees available for appointment by the United States trustee who may manage an estate including a

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294. Memorandum of Points and Authorities in Support of Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority at 7, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Aug. 2, 2012), ECF No. 57; Acting United States Trustee's Motion to Dismiss Case at 1-2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Aug. 7, 2012), ECF No. 65; County of San Diego's Motion to Dismiss Debtor's Bankruptcy Case; Memorandum of Points and Authorities in Support Thereof at 2, *In re* Santa Ysabel Resort and Casino, No. 12-09415-PB11 (Bankr. S.D. Cal. Aug. 7, 2012), ECF No. 66.

295. *See In re* Altman, 230 B.R. 6, 11 (1999) ("The burden of proof as to what is property of the estate generally rests with the creditor.").

296. 25 U.S.C. § 2702 (2006).

297. NATIONAL INDIAN GAMING COMMISSION, STRATEGIC PLAN: 2014-2018 OF THE NATIONAL INDIAN GAMING COMMISSION, at 2 (September 2012), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/GPRA/NIGCStrategicPlan 20142018.pdf.

298. "[T]he establishment of a National Indian Gaming Commission [is] necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3) (2006).

299. *See* 25 U.S.C. § 2706(b) (2006).

> class I, class II, or class III gaming operation. The Commission must conduct background investigations upon all potential selections for trustee. The appointment of a selected trustee by the United States trustee does not violate any statutory requirement of section 2710(b)(2)(A). The appointment by the United States trustee must be approved by the Chairman of the Commission.

A complimentary amendment to section 321 of the Bankruptcy Code may read:

> (3) selected by the National Indian Gaming Commission to act as a trustee in the filing of a case under this title of a class I, class II, or class III gaming operation, upon approval of the Chairman of the Commission.

Adding the first provision will provide a pool of trustees investigated by NIGC and to which the management of an IGO may be entrusted, if required.[300] The second provision amending the Bankruptcy Code would allow the court to order the appointment of a trustee upon approval of the Chairman of NIGC.[301] The complimentary revisions solve the current statutory conflict and allow an IGO to operate during liquidation and upon the appointment of a trustee to oversee reorganization.[302] The appointment of a trustee in either case benefits both creditors and the community.[303] Creditors

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300. Powers of the NIGC are described in section 2706 of Title 25, while the appointment of trustees by the U.S. Trustee is covered by section 321 of Title 11. *See* 11 U.S.C. § 321 (2006); 25 U.S.C. § 2706 (2006).

301. 11 U.S.C. § 1104 (2006).

302. The proposed amendment would be the last showing of Congressional intent, and therefore controlling over the statutory requirement in section 2710 requiring "sole proprietary interest and responsibility" that precludes the appointment of a trustee over an operating IGO. *See* 11 U.S.C. § 321 (2006); 25 U.S.C. § 2710 (2006); Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

303. The community benefits from reorganization because the reason behind allowing reorganization is "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 528 (1984), The appointment of a trustee in a reorganization benefits creditors as a trustee may be approved by the court for "cause" which "generally means that there is a real need for removal of current management of the debtor because of fraud, dishonesty, incompetence or the like." 1 COLLIER, *supra* note 65, ¶ 1.07[3][a].

will benefit at least as much as they would from an immediate liquidation.[304] The benefit to society is most significant in the case of a reorganizing IGO, which will continue to pay employees[305] and continue to fund health care, education, childcare, and emergency services in the surrounding communities.[306]

C. Congress Should Require the National Indian Gaming Commission Chairman to Approve the Appointment of Creditor Committees

Congress has empowered and obligated NIGC to protect IGOs by approving all management contracts.[307] Use of estate assets to fund a committee of creditors may be a management contract requiring the approval of the NIGC Chairman.[308] Congress intended to protect IGOs from "organized crime and other corrupting influences" by requiring approval of all management contracts.[309] Consequently, this goal must be sustained when the IGO's assets are under the influence of a committee of creditors. As such, the NIGC Chairman should approve any appointment of a creditor committee under section 1102 of the Bankruptcy Code.[310] This prescriptive amendment will change section 1102 to include:

> (c) A committee of creditors in a case in which the debtor is an Indian gaming operation as defined in 101(9)(A)(vi) shall be appointed subject to the approval of the Chairman of the National Indian Gaming Commission.

The committee of creditors' use of estate assets and ability to participate in plans for reorganization allow it to manage assets of the

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304. *See* 1 COLLIER, *supra* note 65, ¶ 1.07[1] ("[M]any of the rights in the reorganization and rehabilitation chapters require creditors to be no worse than they would have been treated had the debtor filed under chapter 7").

305. *See N.L.R.B.*, 465 U.S. at 528; Evans, *supra* note 5, at 14-17.

306. Hogan, *supra* note 131, at 569.

307. 25 U.S.C. § 2702(2) (2006).

308. *See* 25 U.S.C. § 2705(a) (2006); Wells Fargo Bank Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 702 n.14 (7th Cir. 2011).

309. 25 U.S.C. § 2702(2) (2006).

310. *See* 25 U.S.C. § 2705(a) (2006); *Lake of the Torches*, 658 F.3d at 702 n.14.

IGO's estate.[311] The explicit inclusion of this activity resolves any issue as to whether NIGC's approval of such control should be required and protects IGOs from the same bad influences contemplated in IGRA.[312] If the Chairman of NIGC does not approve the appointment, the committee of creditors will fail *ab initio* just as an unapproved management contract.[313] If the Chairman prevents the appointment, and the court feels this would cause an abuse of the process, the case may be dismissed, converted to liquidation, or the plan will not be confirmed.[314] Approval of a committee of creditors by the Chairman of NIGC allows the reorganization process to be carried out while upholding the federal government's obligations to tribes running an IGO.[315]

By addressing these three key issues through amendments to the appropriate statutes, Congress upholds the obligation and duty to Indian tribes in its role as the domestically dominant nation.[316] Bankruptcy relief will be available to IGOs, trustees will be appointed from a pool appropriate to the needs of tribes, and the rights of creditors will be protected.[317] Congress enacted the IGRA to benefit the Indian tribes' ability to self-govern and promote tribal welfare, and it should go further to "grant a fresh start to the honest but unfortunate" IGO.[318]

CONCLUSION

As Justice Marshall established almost two centuries ago, the federal government is obligated to act as a guardian to Indian tribes. This duty has been expressed most recently by Congressional support for tribal sovereignty. Congress has given the means by which to

311. *See* 11 U.S.C. §§ 503(b)(3)(D), 1103 (2006).

312. *See* 25 U.S.C. § 2702(2) (2006); *Lake of the Torches*, 658 F.3d at 702 n.14.

313. *See Lake of the Torches*, 658 F.3d at 699.

314. *See* 11 U.S.C. §§ 105(a), 707, 1129 (2006).

315. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

316. Marshall's definition of Indian nations as "domestic dependent nations" implies that the U.S., as the enveloping nation, must therefore be domestically dominant. *See id.* at 17.

317. *See* discussion *supra* Part IV.A-C.

318. *See* 1 COLLIER, *supra* note 65, ¶ 1.01.

achieve greater powers of self-governance and the means to provide for the welfare of the tribe in addition to creating jobs for tribe members. IGOs are those means, but they do not have access to bankruptcy relief from their debts.

The only avenue currently available to an IGO for bankruptcy relief would be through incorporation of an entity that would jeopardize their sovereignty and expose them to tax liabilities. That path offers relief, but only at the risk of the tribe's wealth.

Congress must amend IGRA and the Bankruptcy Code to grant their charges the ability to find relief from debts that become too burdensome in the honest course of business. Anything less would sacrifice the benefits IGOs give to the tribes and tribe members.

Today, Indian tribes are forced to choose between bankruptcy's relief from debt or retaining their sovereignty. Forcing them to choose is inconsistent with the goals of supporting sovereignty, promoting tribal welfare, and safeguarding IGO revenues for the benefit of the tribe. Congress should not force tribes to choose between access to the means of prosperity and the tools used to safeguard that very prosperity. The Federal government should protect tribal revenues by providing their ward with access to the bankruptcy process.

*Stephan A. Hoover**

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