When the Chips are Down: Do Indian Tribes with Insolvent Gaming Operations Have the Ability to File for Bankruptcy Under the Federal Bankruptcy Code?

*Corina Rocha Pandeli**

Introduction

Indian gaming has become increasingly popular in the United States, with casino and resort facilities on federally recognized Indian land rivaling the likes of Las Vegas and Atlantic City casinos. Since the passage of the Indian Gaming Regulatory Act of 1988 ("IGRA"), gaming activities on Indian reservations across the country have skyrocketed, providing a substantive source of revenue to once economically downtrodden tribes. The IGRA places Indian tribes involved in gaming operations in a unique position because it affords them federal protection and oversight with respect to gaming operations, whereas state law regulates private gaming operations. In a relatively short amount of time, Indian gaming has become extremely lucrative for many Native American tribes, and tribes without gaming activities have scrambled to reap these benefits by developing and expanding casinos on their own reservations.

Like non-Indian casino business ventures, casinos on Indian reservations were thought to be, for the most part, recession proof.[1] However, the current recession in America, which some have coined the Great Recession,[2] has proven otherwise. Casinos all over the country are feeling the consequences of high unemployment rates and tighter budgets,[3] including casinos on Indian res-

* Law Clerk, U.S. Bankruptcy Court, District of Nevada. J.D., 2010, University of Nevada, Las Vegas – William S. Boyd School of Law. A special thanks to my family and friends for their encouragement and support, the Honorable Bruce A. Markell, for his suggestions and guidance, the *UNLV Gaming Law Journal* for their patience and hard work, and my husband, Josué – for everything.

[1] *See, e.g.*, Thomas R. Mirkovich & Allison A. Cowgill, Casino Gaming in the United States: A Research Guide 39 (1997) (casino gaming is generally considered recession proof).

[2] *See* Catherine Rampell, *'Great Recession': A Brief Etymology*, The N.Y. Times (Mar. 11, 2009), http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology (providing a brief synopsis on the origin of the term widely used to describe the current economic depression in the United States).

[3] *See generally* Adam Nagourney, *Las Vegas Faces Its Deepest Slide Since the 1940s*, The N.Y. Times (Oct. 2, 2010), http://www.nytimes.com/2010/10/03/us/03vegas.html?scp=1&sq=casino%20recession&st=cse (noting that the current decline in gaming revenue in Las Vegas, Nevada is consistent with decreases in consumer spending during an economic reces-

ervations.[4] As one Indian casino teetered on the edge of insolvency,[5] an important question arises for Indian tribes engaged in gaming operations: can Indian tribes – a group recognized as sovereign nations within the United States – seek bankruptcy relief under the United States Bankruptcy Code?

This Note will first give an overview of Indian sovereignty and its relationship to the federal government of the United States. Part II will examine the Indian Gaming Regulation Act, which provides Indian tribes great latitude in developing gaming activities on their reservations. Part III will examine the historical development of bankruptcy in the United States and how the Bankruptcy Code in its current form has come to be developed. Finally, Part IV will analyze the possibilities of an Indian tribe filing for bankruptcy under the Bankruptcy Code. This Note concludes that because the Bankruptcy Code does not currently provide a basis for Indian tribes to file bankruptcy, either in terms of eligibility or type of bankruptcy relief, it is unlikely that tribes may file for bankruptcy under current federal law.

I. INDIAN SOVEREIGNTY IN THE UNITED STATES: IS IT OBSOLETE?

Native American[6] law is a complex blend of American history, treaties with Native American tribal nations, federal law, and principals of international law.[7] This Note neither intends nor purports to fully address the complex relationship between Indian tribes and the United States government. Instead, it

---

sion, as "Americans [typically] cut back on recreational travel and gambling during a recession.").

[4] Stephen Singer, *In a First for Indian Casinos, Revenue has Fallen*, BLOOMBERG (Mar. 2, 2011 2:12 PM), http://www.businessweek.com/ap/financialnews/D9LN9DC80.htm. *See also* Hugo Martín, *California's Indian Casinos Slowly Recovering from Recession*, L.A. TIMES (Mar. 3, 2011), http://www.latimes.com/business/la-fi-0303-indian-gambling-20110303,0,4141377.story.

[5] In 2009, Foxwoods Resort Casino, a hotel-casino resort owned by the Mashantucket Western Pequot Tribal Nation in Mashantucket, Connecticut, began seeking to restructure its debts with creditors outside of bankruptcy, after running into significant financial trouble following in the wake of the "Great Recession." *See* Beth Jinks & Jonathan Keehner, *Foxwoods Casino Owner Mashantucket Tribe Seeks Debt Restructure*, BLOOMBERG (Aug. 26, 2009, 6:08 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDLZ5Ygh2R7o; Kathryn Rand, *Slipping into Bankruptcy? Foxwoods Struggles With Debt as Gaming Revenue Slumps*, INDIAN GAMING NOW (Sept. 3, 2009), http://indiangamingnow.com/blog/slipping-bankruptcy-foxwoods-struggles-debt-gaming-revenue-slumps. A year later, Foxwoods continued to work on restructuring its debt outside of the federal bankruptcy system. *See* Brian Hallenbeck, *Mashantuckets introduce Scott Butera, new Foxwoods CEO*, THEDAY.COM (Nov. 11, 2010, 12:00 AM), http://www.theday.com/article/20101111/BIZ02/101119931/1047 (stating that as of November 2010, the tribe "has been in debt-restructuring talks with lenders for more than a year.").

[6] This Note uses the terms "Indian" and "Native American" interchangeably when referring to the indigenous people that Christopher Columbus encountered when he landed in present day America. *See* Christina Berry, *What's in a Name? Indians and Political Correctness*, ALL THINGS CHEROKEE, http://www.allthingscherokee.com/articles_culture_events_070101.html (last visited Jan. 4, 2011) (noting that, although there appears to be some confusion and/or debate in terms of what term is culturally correct, generally speaking, it is preferable to refer to Indians/Native Americas according to their respective tribe).

[7] R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes*

provides a cursory overview of this relationship as a backdrop to the question of whether tribal nations may file for bankruptcy relief under federal law.

The United States has historically struggled to legally define its relationship with Native American tribal nations.[8] This struggle initially arose in the judicial context as courts attempted to define the legal status of tribal nations within the United States. The United States Constitution addresses tribal nations in a manner that acknowledges these nations as distinct and separate political entities.[9] Specifically, the Commerce Clause grants Congress the right to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"[10]

Early Supreme Court cases took the basis for Indian sovereignty provided for in the U.S. Constitution and defined the legal parameters of such sovereignty, establishing that Native American tribes were "domestic dependent nations" of the United States.[11] Three cases in particular – *Johnson v. M'Intosh, Cherokee Nation v. Georgia,* and *Worcester v. Georgia,* colloquially referred to as the "Marshall Trilogy" – established the early and primary "legal foundation for federal Indian policy."[12] This Trilogy established the legal basis for the federal government's taking of Native American land via application of the European-based "doctrine of discovery."[13] This doctrine advanced the theory that a discovering nation, such as the United States, "inherited the sole right of acquiring soil from the natives."[14] The Supreme Court determined that, while the federal government rightfully acquired title to Indian lands simply because of its status as the discovering nation, Indian tribes maintained the "right to use and possess [these] lands subject to conquest or purchase by the government."[15] To this day, application of this policy, based on the doctrine of discovery, continues to be good law; courts continue to consider this doctrine in cases involving Indian tribes.[16]

Under the Bankruptcy Code and Related Matters, 27 AM. INDIAN L. REV.177, 184 (2002-2003) (citations omitted).

[8] *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (providing an early examination of the unique relationship between the United States and Indian tribes); *see also* U.S. v. Kagama, 118 U.S. 375, 381 (1886) (noting that "[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one, and of a complex character.").

[9] U.S. CONST. art. I, § 8, cl. 3 (commonly referred to as the Indian Commerce Clause).

[10] *Id.*

[11] *Cherokee Nation*, 30 U.S. at 17.

[12] Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130, 155 (2010) (citations omitted) (the "Marshall Trilogy" is in reference to Chief Justice John Marshall, who wrote the opinions for the court majority in the three seminal cases).

[13] *Id.* (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584-87 (1823)).

[14] *Id.* (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (internal citation omitted)).

[15] *Id.* at 155-56. (citing Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985)).

[16] *Id.* at 156 (citing Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295, 299 (2005); Del. Nation v. Pennsylvania, 446 F.3d 410, 415-16 (3d Cir. 2006); Seneca Nation of Indians v. New York, 382 F.3d 245, 260-72 (2d. Cir. 2004); W. Mohegan Tribe v. Orange Cnty., 395 F.3d 18, 22-23 (2d. Cir. 2004)).

In *Cherokee Nation*, Chief Justice Marshall noted that, although Indian tribes did not qualify as "foreign state[s] in the sense of the constitution,"[17] Indian tribes were in fact a state of some type:

> The numerous treaties made with [Indian tribes] by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.[18]

Justice Marshall analogized the relationship between Indian tribes and the federal government as something akin to that of a "ward to his guardian."[19] Thus, although recognizing that Indian tribes encompassed a separate and distinctive body of people within the United States, tribes did not constitute a foreign government. Instead, the federal government assumed a patriarchal role over Indian tribes because these tribes looked to the United States for protection and care.[20] Applying this line of reasoning, Justice Marshall determined that the tribes' unique situation constituted "domestic dependent nations," falling within the purview of the federal government's protection, but more importantly, its power and authority.[21]

In *Worcester v. Georgia*, the court addressed a state's ability to regulate Indian tribes within its boundaries.[22] In the opinion, Justice Marshall continued to expound on the concept of "domestic dependent nations" with respect to Indian tribes. In examining the issue of whether states had the ability to exert any authority over Indian tribes, the court noted that "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"[23] Thus, once again, the Supreme Court recognized that Indian tribes were a separate and distinct group within the United States, akin to separate nations with the ability to self-govern in some respects, but without the full recognition of a foreign nation. In doing so, *Worcester* further established the "domestic dependant nations" policy by holding that the federal government, and not the states, had the sole power to regulate Indian tribes.[24]

Consequently, as the United States developed as a country, the Supreme Court established the legal framework and policy as to Indian sovereignty by recognizing that such sovereignty existed, but simultaneously limiting it to that of "domestic dependent nations" of the federal government. Indian tribes became legally recognized as a separate and distinct group with the ability to self-govern to a certain extent, but nonetheless became subordinates to the United States government. Thus, the "domestic dependant nations" policy

---

[17] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).
[18] *Id.* at 16.
[19] *Id.* at 17.
[20] *Id.*
[21] *Id.*
[22] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
[23] *See id.* at 559.
[24] *Id.* at 595-96.

established in the Marshall Trilogy provided a lasting legacy that not only promulgated the legal framework for Indian sovereignty, but deeply influenced the federal government's approach and interaction with Indian tribes.

Currently, the argument can and is often made that through case law, the Supreme Court has chipped away at the sovereign status of Indian tribes.[25] Relatively recent Supreme Court cases seem to be at odds with defining the legal boundaries of Indian sovereignty with respect to tribes' authority over non-members on tribal lands. For example, Indian tribes do not possess criminal jurisdiction over non-tribal members, even when non-tribal members commit crimes on Indian reservations and against members of the tribe.[26] Nor do Indian tribes necessarily have civil jurisdiction over non-tribal members on Indian land.[27] In *Montana v. United States*, the Supreme Court observed that expanding Indian sovereignty "beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes[.]"[28] This statement seemingly encapsulates the contemporary policy of limiting Indian sovereignty to the extent necessary to keep in accord with the government's "domestic dependant nations" policy with respect to Indian tribes. Thus, the Court's relatively recent decisions on Native American issues reflect conflicting and perhaps shifting paradigms on Indian policy.

Despite this tension in the law, Indian tribes continue to possess various forms of meaningful sovereignty.[29] Epitomizing the most common perception of Indian sovereignty, tribes possess the right to self-governance; that is, tribal governments can establish their own constitutions and pass laws with respect to its members and lands.[30] Moreover, in accord with sovereign status, Indian tribes continue to enjoy the protection of sovereign immunity in the legal system.[31] This means that tribes may not be sued in federal court without the tribe's express and unequivocal consent or Congressional abrogation.[32] Although certainly imperfect, Indian tribes today continue to enjoy a unique and relatively sovereign relationship with the federal government.

---

[25] *See, e.g.*, Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 597 (2010) (citations omitted); Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 398 (2009) [hereinafter Kunesh] (citations omitted).

[26] Fromherz, *supra* note 12, at 159 (citing Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978); *see also* Nevada v. Hicks, 533 U.S. 353, 358 (2001)).

[27] *See* Montana v. United States, 450 U.S. 544, 566 (1981) ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

[28] *See id.* at 564.

[29] Fromherz, *supra* note 12, at 165.

[30] Kunesh, *supra* note 25, at 401 (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

[31] Fromherz, *supra* note 12, at 166 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

[32] *Id.* (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

II. The Indian Gaming Regulatory Act: An Arguable Vehicle to Indian Economic Development and Self-Sufficiency

Indian gaming gained a foothold in American culture with Congress' passage of the Indian Gaming Regulatory Act of 1988.[33] Congress primarily passed this law in response to *California v. Cabazon Band of Mission Indians*, a Supreme Court case involving gaming operations on Indian reservations.[34] In *Cabazon*, two tribes – the Cabazon and Morongo Bands of Mission Indians – conducted bingo games on their respective reservations.[35] These games were open to the public and predominantly patronized by non-tribal members traveling onto the reservations.[36] In its opinion, the Court noted that these games provided both tribes considerable benefits, including increased employment opportunities for tribal members and a substantive source of revenue.[37]

Despite these appreciable benefits to the tribes, California sought to regulate the games under California law.[38] Specifically, the state sought to regulate the gaming activities under a state law that solely permitted games to be operated by members of designated charitable organizations on a volunteer basis.[39] This state law also precluded operators from earning any revenue from gaming activities.[40] Under this construct, the tribes would have been precluded from employing members to operate the games and from obtaining any profits from its gaming activities; instead, the tribes would have been required to place profits into a special account that in turn could only be used for charitable purposes as designated by the state of California.[41]

The Court noted that its decisions have "consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'"[42] but qualified that such sovereignty was subordinate only to the federal government and not to states.[43] Notwithstanding this limitation, states could apply their laws to Indian tribes, but only when expressly provided by Congress.[44] Under this principle, California argued that Congress had done so in passing Public Law 280.[45] Public Law 280 provided a handful of states

---

[33] Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (1988).

[34] Kathryn R.L. Rand, *Caught In The Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 Marq. L. Rev. 971, 976 (2007) (citation omitted).

[35] 480 U.S. 202, 204-05 (2006) (citations omitted). The Cabazon band also conducted poker and other card games at a card club on its reservation. *Id.* at 205.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See id.* at 209.

[42] *Id.* at 207 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

[43] *Id.* (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980)).

[44] *Id.*

[45] *Id.* (citing Pub. L. 280, 67 Stat. 588 (1953), codified as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 & Supp. III). The State also argued that Congress had explicitly consented that states to apply law on tribes in the Organized Crime Control Act, 84 Stat. 937 (1970) (codified as amended at 18 U.S.C. § 1955 (2006)).

(including California) *limited* civil and *broad* criminal jurisdiction over portions of Indian reservations.[46] However, the Court clarified that this law was meant to be a means for states to "combat[ ] lawlessness on reservations,"[47] not provide a basis for "total assimilation of Indian tribes into mainstream American society."[48] Therefore, although Public Law 280 gave a few states some jurisdictional authority over tribal lands, the Court effectively narrowed any perceived jurisdictional gap with respect to civil matters on Indian reservations to "private civil litigation [involving reservation Indians] in state court."[49] Because this jurisdictional gap was limited to preclude civil (and regulatory) authority, the court determined that Public Law 280 did not provide California the statutory basis to intercede and regulate the tribes' gaming activities.[50] In this respect, states were effectively barred from regulating Indian gaming operations.

Responding to *Cabazon* and the small but growing number of tribes engaging in gaming operations "without clear standards or regulations,"[51] Congress passed the Indian Gaming Regulatory Act in 1988.[52] The IGRA was the culmination of several years of legislative discussion with respect to Indian gaming, and when ultimately passed, provided the first regulatory scheme for Indian gaming in the United States. The initial legislation was introduced in the Senate on February 19, 1987,[53] just six days before the Supreme Court decided *Cabazon*,[54] reflecting the increasing need at that time to address the growing issues with Indian gaming.

The purpose behind the IGRA was not only to establish a statutory scheme for self-regulation, but also to prevent "organized crime or criminal elements in

---

[46] *Cabazon*, 480 U.S. at 207-08 (citations omitted). The Court noted that "Indian Country" was defined by 18 U.S.C. § 1151, and included "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." *Id.* at 207 n.5 (quoting DeCoteau v. District County Court, 420 U.S. 425, 427, n.2 (1975)).

[47] *Id.* at 208 (citing Bryan v. Itasca County, 426 U.S. 373, 379-80 (1976)).

[48] *Id.* (citing Bryan v. Itasca County, 426 U.S. 373, 387 (1976)).

[49] *Id.*

[50] *Id.* at 209-10. Here, the Court found that California did not "prohibit all forms of gambling[,]" but in fact "daily encourage[d] its citizens to participate" in the state lottery, itself "state-run gambling." *Id.* at 210. In reaching its holding, the Court noted the "distinction between state 'criminal/prohibitory' laws and state 'civil/regulatory' laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209.

[51] Sean Brewer, Note, *Analysis of the Indian Gaming Regulatory Act in Light of Current Tenth Amendment Jurisprudence*, 26 RUTGERS L.J. 469-470 (1995) (citations omitted) (internal quotation marks omitted).

[52] Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721 (1988)).

[53] Bill Summary & Status, 100th Cong. (1987 – 1988), S.555 Cosponsors, U.S. Library of Cong. THOMAS Cong. bill history, http://thomas.loc.gov/cgi-bin/bdquery/z?d100:SN00555:@@@P (last visited on Jan. 9, 2011). The bill was introduced by Senators Dan K. Inouye of Hawaii, Thomas A. Daschle of South Dakota, Daniel J. Evans of Washington, and Larry Pressler of South Dakota. *Id.*

[54] *Cabazon* was decided on February 25, 1987. *Cabazon*, 480 U.S. at 202.

Indian gaming activities."[55] In its Senate Report, the Select Committee on Indian Affairs (the "Committee") noted that the Justice Department initially opposed the creation of a federal regulatory agency to regulate gaming activities on Indian reservations, arguing that such regulation could be enforced by individual states.[56] In response, the Committee pointed out that state regulation of Indian gaming would contravene well-established principles of Indian sovereignty.[57] The Senate Report also expressed the Justice Department's objections over giving Indian tribes the power of self-regulatory authority over their gaming activities, without restraints or limitations that could potentially run afoul of individual state laws with respect to gaming.[58] Notwithstanding these concerns, Congress passed the IGRA, affirming that gaming provided Indian tribes a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments."[59]

The IGRA's statutory framework provides for three classification levels of Indian gaming,[60] with each class subject to different regulations and oversight. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."[61] Put another way, a gaming activity falls under Class I if the tribe conducts the activity—such as rodeos, horse races, or games with prizes—in conjunction with traditional Indian ceremonies or celebrations, such as pow-wows or feasts. These types of gaming activities are exclusively managed and regulated by the respective Indian tribe engaged in such gaming operations,[62] thus removed from external tribe regulation,[63] something that is optimal to tribes striving for tribal self-determination.

Class II gaming encompasses card games and bingo-like games such as "pull-tabs, lotto, punch boards, tip jars, [and] instant bingo,"[64] but expressly precludes "baccarat, chemin de fer, or blackjack[.]"[65] Gaming within this classification is still within the tribe's purview; however, the National Indian Gaming Commission provides some oversight.[66]

Class III gaming is somewhat of a "catch-all" provision, covering any gaming activity not specifically addressed in Class I or II gaming.[67] This category of gaming is generally comprised of the more lucrative types of gaming activities such as slot machines, banking card games,[68] and animal racing.[69]

---

[55] S. REP. NO. 100-446, at 5 (1988); *but see*, Additional Views of Mr. McCain, noting that in fifteen years of Indian gaming there was not one clear case of crime on Indian reservations. *Id.* at 33.
[56] *Id.* at 5.
[57] *Id.*
[58] *Id.* at 23.
[59] 25 U.S.C. § 2702(1) (2006).
[60] *Id.* § 2703.
[61] *Id.* § 2703(6).
[62] *Id.* § 2710(a)(1).
[63] S. REP. NO. 100-446, at 11.
[64] 25 U.S.C. § 2703(7)(a)(i)(III) (2006).
[65] *Id.* § 2703(7)(b)(i).
[66] S. REP. NO. 100-446, at 7.
[67] 25 U.S.C. § 2703(8) (2006).
[68] Banking card games are games where players play against each other and/or the house.

Under the IGRA, Class III gaming is solely authorized on Indian land to the extent that the respective state does not prohibit such types of gaming.[70]

The IGRA also compels states to negotiate with Indian tribes when a tribe applies for Class III gaming. In order to obtain authorization for Class III gaming, the tribe must enter into a compact (or agreement) with the state in which the reservation is located regarding the tribe's possible gaming operations.[71] The state must negotiate the compact with the tribe in good faith.[72] This compact may address a variety of different topics, such as choice of law between state or tribal law,[73] allocation of criminal and civil jurisdiction between the state and tribe necessary to enforce such laws and regulations,[74] or remedies for breach of contract.[75] The IGRA is particularly useful to Indian tribes seeking to engage in Class III gaming because tribes may sue a state in federal court if the state refuses to negotiate with the tribe or participates in bad faith.[76] These provisions reinforce a tribe's probability of entering into a tribal-state compact, and by extension, authorization to conduct Class III gaming on its land.

The IGRA also established the National Indian Gaming Commission ("NIGC").[77] The NIGC has expansive regulatory authority over Indian gaming activities on reservations.[78] This includes, but is not limited to: monitoring Class II gaming conducted on Indian land;[79] inspecting and examining Indian reservations where Class II gaming is conducted;[80] conducting background investigations;[81] having access to, inspecting, and examining papers, books, and records with respect to Class II gaming;[82] entering into contracts with the federal government as necessary to perform NIGC duties;[83] holding hearings and taking testimony as necessary;[84] and promulgating regulations and guidelines to uphold IGRA provisions.[85] As previously stated, the NIGC exclusively oversees Class II gaming on Indian reservations.[86] In this respect, the NIGC serves as the internal regulatory authority for tribes engaged in Class II gaming. The NIGC's requirement that two of its three members be members of a federally recognized Indian tribe emphasizes the concept of self-regulation.[87]

---

[69] S. REP. NO. 100-446, at 7.
[70] 25 U.S.C. § 2710(d)(1)(B) (2006).
[71] *See id.* § 2710(d)(1)(C).
[72] *Id.* § 2710(d)(3)(A).
[73] *Id.* § 2710(d)(3)(C)(i).
[74] *Id.* § 2710(d)(3)(C)(ii).
[75] *Id.* § 2710(d)(3)(C)(v).
[76] *Id.* § 2710(7)(A)(i).
[77] *Id.* § 2704(a).
[78] S. REP. NO. 100-446, at 7 (1988).
[79] 25 U.S.C. § 2706(b)(1) (2006).
[80] *Id.* § 2706(b)(2).
[81] *Id.* § 2706(b)(3).
[82] *Id.* § 2706(b)(4).
[83] *Id.* § 2706(b)(7).
[84] *Id.* § 2706(b)(8).
[85] *Id.* § 2706(b)(10).
[86] *Id.* §§ 2706(b)(1), 2710(a)(2).
[87] 25 U.S.C § 2704(b)(3) (2006). The current acting Chairwoman is Tracie Stevens, a member of the Tulalip Tribes of Washington. *See Commissioners,* NAT'L INDIAN GAMING COMM'N, http://www.nigc.gov/About_Us/Commissioners.aspx (last visited Jan. 7, 2011).

Consequently, pursuant to the provisions of the IGRA, states are presented with formidable challenges in opposing an Indian tribe's desire to conduct gaming operations on its reservation. Under the IGRA, a state has no authority over Class I or Class II gaming activities on Indian reservations;[88] tribes may freely engage in those types of gaming activities without state regulation. Moreover, even in compact discussions with an Indian tribe in regards to Class III gaming, the state carries the burden to prove that it engaged in good faith negotiations.[89] Because of this wide latitude to tribes, the IGRA has proved to be a very valuable tool for Indian tribes seeking economic independence and viability with respect to Indian gaming.

III. ENTER THE BANKRUPTCY CODE: DO INSOLVENT INDIAN TRIBES HAVE A PLACE IN THE CODE TO OBTAIN RELIEF?

Determining whether casinos owned and operated by Indian tribes may file for bankruptcy protection under federal law is like trying to fit a square peg in a round hole. At first blush, the two subjects – an Indian casino owned and operated by an Indian tribe and the United States Bankruptcy Code – seem incongruous to one another because it is unclear whether an Indian tribe has the ability to file for bankruptcy under federal law, given its status as a sovereign nation within the United States.

A. From Past to Present: A (Relatively) Brief History of U.S. Bankruptcy

Bankruptcy seemingly pervades American businesses and individual consumerism. In 2010, there were over a million and a half bankruptcy filings (business and non-business) in the United States.[90] Although bankruptcy may continue to be heavily stigmatized in other countries,[91] in the United States the ability to file for bankruptcy provides the financially distressed a metaphorical lifesaver from drowning in the sea of insolvency.

The concept of bankruptcy is firmly rooted in the Constitution, which states that Congress shall establish "[l]aws on the subject of Bankruptcies throughout the United States."[92] In spite of this, Congress did not pass a federal bankruptcy statute until 1800, and even then, the law was temporary and was primarily passed to address an economic depression pervading the country at the time.[93] In fact, the 1800 Act turned out to be short-lived; Congress

---

[88] *See* 25 U.S.C. § 2710(a)(1), (a)(2) (2006).

[89] *Id.* § 2710(d)(3)(A).

[90] *U.S. Bankruptcy Filings 1980-2010,* AM. BANKR. INST., http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=63164&TEMPLATE=/CM/ContentDisplay.cfm (last visited Feb. 21, 2011).

[91] *See* Erin K. Healy, Note, *All's Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts*, 12 AM. BANKR. INST. L. REV. 535, 542 (2004), noting that "[w]hile a bankruptcy filing in other countries continues to carry significant stigma, U.S. companies and individuals are not subjected to the same shame merely as a result of filing a petition for bankruptcy."

[92] U.S. CONST. art. I, § 8, cl. 4.

[93] David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy*

repealed it after only three years.[94] This first bankruptcy law also did not afford bankruptcy relief to all Americans – it essentially addressed commercial debts involving "traders, merchants, underwriters, and brokers," and was strictly involuntary,[95] meaning that creditors initiated bankruptcy against the debtor on its behalf.

The next two federal bankruptcy statutes passed by Congress suffered similarly short-lived fates. Congress passed the next federal bankruptcy law in 1841, and although it too was short-lived in duration, it provided some important advances in American bankruptcy.[96] The 1841 Act began to "de-criminalize" bankruptcy by abolishing debtor's prisons, expanded the availability of bankruptcy protections from just traders, merchants, underwriters, and brokers to all types of debtors, and for the first time, allowed debtors to voluntarily seek bankruptcy relief.[97] Nonetheless, Congress repealed the law in 1843 after just eighteen months in response to political pressure.[98]

Facing a severe economic depression following the end of the American Civil War and a changing financial landscape, Congress once again passed another federal bankruptcy statute in 1867.[99] At that time, a national American economy had begun to slowly emerge,[100] and with it, a need to address debt collection on a national level rather than state-by-state regulation. The 1867 Act officially charged federal district courts as courts of bankruptcy and established "registers in bankruptcy"—administrative positions created to assist the district courts with bankruptcy proceedings.[101] In 1874, Congress undertook amendments to the 1867 Act, and importantly, established the basic precursor of reorganization laws.[102] For the first time, the debtor retained his property and proposed a plan to repay his creditors for less than the whole amount owed on his debts.[103] If the debtor obtained the requisite approval from the majority of his creditors, he received a discharge of his debts, which also bound all of the debtor's named creditors.[104] Despite these advances in bankruptcy law, in 1878, Congress once again repealed the federal bankruptcy law due to allegations of excessive fees and abusive conduct by creditors.[105]

Court and its Judicial Officers, 9 J. BANKR. L. & PRAC. 165, 170-171 (2000) [hereinafter Kennedy]. The law had a five-year maximum time cap.

[94] *Id.* at 171 (citing CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 21 (1935)).

[95] *Id.*

[96] *Id.* at 171-172.

[97] *Id.* (citing Arnold M. Quittner, *Overview: History of the Bankruptcy Code and Prior Bankruptcy Laws*, 585 PLI/Comm. 7 (1991)).

[98] *Id.* (citing Arnold M. Quittner, *Overview: History of the Bankruptcy Code and Prior Bankruptcy Laws*, 585 PLI/Comm. 7 (1991)).

[99] *Id.* at 172.

[100] *Id.*

[101] *Id.* (citing Charles J. Tabb, *The History of The Bankruptcy Laws in The United States*, 3 AM. BANKR. INST. L. REV. 5 (1995)).

[102] *Id.* at 173 (citing Charles J. Tabb, *The History of The Bankruptcy Laws in The United States*, 3 AM. BANKR. INST. L. REV. 20 (1995)).

[103] *Id.*

[104] *Id.* (citing Charles J. Tabb, *The History of The Bankruptcy Laws in The United States*, 3 AM. BANKR. INST. L. REV. 21 (1995)).

[105] *Id.* at 173-174.

Amid a changing economic national landscape that moved away from agriculture and towards industrialization, Congress enacted the Bankruptcy Act of 1898.[106] This law established the basic framework for the current bankruptcy system by affording bankruptcy relief to individuals and businesses and expanding the role of "bankruptcy referees."[107] The antecedents of current bankruptcy judges, referees were charged with the administrative oversight of bankruptcy cases.[108] Under the 1898 Act, referees acted with authority to "adjudicate debtors as bankrupts, dismiss cases, examine witnesses, declare dividends, examine schedules and order amendments thereof, give notice of certain proceedings to creditors, and generally to attend to the detail of administration[.]"[109] Unlike the position of registers under the 1867 Act, the positions of referees remained in place for the next eighty years, until Congress' next major overhaul of bankruptcy law in 1978. Although there were movements to repeal the 1898 Act, in contrast to previous bankruptcy acts, such efforts proved to be unsuccessful.[110] Rather than completely repeal the 1898 Act, Congress instead chose to amend the law over the years. For example, in 1938 Congress passed the Chandler Act, legislation which substantively revamped, but did not expressly repeal, the 1898 Act.[111] Notably, the Chandler Act established the current structure of "chapters" in bankruptcy,[112] creating sections within the bankruptcy statute to separate the different types of bankruptcy.

As the twentieth century progressed and the number of consumer bankruptcies rose, Congress began facing mounting pressure to amend the bankruptcy laws again. Despite periodic Congressional amendments to the 1898 Act, the bankruptcy law in place in the mid-twentieth century was outdated, and bankruptcy referees were ill-equipped to administratively handle the rising number of cases.[113] In response, Congress commissioned studies and conducted hearings on bankruptcy reform, and created the Commission on the Bankruptcy Laws of the United States in 1970.[114] Separately, bankruptcy referees banded together and lobbied Congress to amend the bankruptcy laws.[115]

After several years of studies and recommendations, political wrangling, and numerous legislative hearings and revisions, the ninety-fifth Congress passed the Bankruptcy Reform Act of 1978.[116] Completely replacing the 1898

---

106 *Id.* at 174-175.
107 *Id.* at 175.
108 *Id.* at 176.
109 *Id.*
110 The Hon. Marcia S. Krieger, *"The Bankruptcy Court is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275, 291 (1999) (citations omitted).
111 *Id.* at 291-92 (citing Ch. 575, 52 Stat. 840 (1938) (repealed 1978)).
112 Kennedy, *supra* note 93, at 176.
113 *Id.* at 177.
114 *Id.*
115 *See* The Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978; Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 14 (2007).
116 The Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978; Part Five*: *Inside the White House*, 82 AM. BANKR. L.J. 175,

Bankruptcy Act, the Bankruptcy Reform Act of 1978 provided a much needed and meaningful overhaul of federal bankruptcy law in the United States. This legislation established Title 11 of the United States Code and the Bankruptcy Code in its current form (hereinafter referred to as the "Code"). The new and improved Code provided for separate bankruptcy courts; that is, courts that are units of federal district courts, but not adjuncts to district courts as once contemplated.[117] Even more importantly, under the new Code, bankruptcy courts were given broad jurisdiction over "all civil proceedings arising under Title 11 or arising under or related to cases under Title 11."[118] The Bankruptcy Reform Act of 1978 also gave bankruptcy courts original, but not exclusive, jurisdiction over proceedings arising under the Code.[119]

This expanse of jurisdiction to bankruptcy courts was relatively short-lived; just four years later, the Supreme Court struck down this expanded jurisdiction in the seminal bankruptcy case, *Northern Pipeline Const. Co. v. Marathon Pipe Line Co*.[120] The Court determined that the legislative grant of jurisdiction to bankruptcy courts in the Code was unconstitutional on the grounds that it conferred the jurisdictional authority of an Article III court to non-Article III judges.[121] This issue was subsequently resolved when Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984,[122] which amended the Code and Title 28, among other things, with respect to jurisdiction of the bankruptcy courts.

Under the amended structure, which remains the current system, district courts possess original jurisdiction over bankruptcy cases,[123] but essentially share jurisdiction of bankruptcy proceedings with bankruptcy courts.[124] Under this construct, in most jurisdictions there is a global or standing "reference" by the district court to the bankruptcy court with respect to bankruptcy proceedings.[125] Accordingly, bankruptcy proceedings are, as a matter of course, heard by the bankruptcy court. However, the district court may withdraw the reference from the bankruptcy court as to a bankruptcy proceeding at any time "for cause shown."[126]

---

193 (2008). The Bankruptcy Reform Act of 1978 is enacted at Pub. L. No. 95-598, 92 Stat. 2549 (1978).

117 *See* The Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978; Part Three: On the Hill*, 81 AM. BANKR. L.J. 341, 364 (2007).

118 Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 649 (2008) (citing Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, sec. 241(a), § 1471(b)-(c), 92 Stat. 2549, 2668).

119 Kennedy, *supra* note 93, at 178 (citing 28 U.S.C. § 1471(a), (b), and (c)).

120 458 U.S. 50 (1982).

121 *Id.* at 87.

122 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 333 (1984).

123 28 U.S.C. § 1334(a) (2006).

124 *Id.* § 1334(a)-(b)(providing in relevant part that ". . .district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.").

125 *See id.* § 157(a).

126 *Id.* § 157(d). Moreover, in certain situations, the district court must withdraw the reference. See *id.* (providing that "[t]he district court shall, on timely motion of a party, so with-

The 1984 Amendment also established a non-exclusive list of "core proceedings" in 28 U.S.C. § 157.[127] Pursuant to this statute, bankruptcy courts may enter orders and judgments in core proceedings arising under or arising in a case under the Code.[128] If the matter is deemed to be a "non-core" proceeding, the bankruptcy court has less power to enter orders and judgments; instead, the bankruptcy court makes proposed findings of fact and conclusions of law, which the court submits to district court for a final order.[129]

As its history would dictate, the Code did not remain static for long. Congress recently amended the Code when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[130] This law, or BAPCPA as it is commonly referred to, has provided the most significant amendments to bankruptcy law since the Code was enacted in 1978.[131] Similar to previous movements for bankruptcy reform, BAPCPA was the culmination of several years of legislative discussion and hearings.[132] One of Congress's primary purposes in enacting BAPCPA was to curb the perceived notion of abusive Chapter 7 consumer filings.[133] Accordingly, one of the most significant changes implemented by BAPCPA was the "means test" imposed on consumer debtors seeking to file for bankruptcy relief under Chapter 7.[134] This test begins by examining whether individuals seeking to file for bankruptcy under chapter 7 fall below the median income for households in the state in which they reside. If the individual falls below the state median income, he or she is eligible to file for Chapter 7 and does not need to complete the means test.[135] However, if the individual's income is above the state median income, the individual must meet the means test to be eligible for Chapter 7; otherwise, the filing is considered presumptively abusive.[136] Thus, the means test pushes debtors into reorganization chapters such as Chapter 13 (or sometimes, Chapter 11). The means test is calculated using a formula that takes into account the individual's monthly disposable income less certain expenses.[137] As illustrated by the means test, BAPCPA imposed stringent requirements on consumers looking to file bankruptcy.

Despite the evolution of federal bankruptcy law in the past century, there is no mention of how or if these laws pertain to Native Americans in the con-

---

draw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.").

[127] *Id.* § 157(b)(2)(A)-(P).

[128] *Id.*

[129] *Id.* § 157(c)(1).

[130] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 23 (2005).

[131] Bruce M. Price and Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 136 (2007) [hereinafter Price].

[132] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 487 (2005).

[133] Price, *supra* note 132, at 165 (citing Pub. L. No. 109-8, 119 Stat. 23 (2005)).

[134] *Id.* at 166 (citations omitted).

[135] *See* 11 U.S.C. § 707(b)(7)(A)-(B) (2006).

[136] *See id.* § 707(b)(2) (i).

[137] *See id.* § 707(b)(2)(A)(ii)-(iv).

text of tribal insolvency. Although the 1898 Bankruptcy Act referred to the "term 'Indian territory' in section 1(24)[,] [ ] Congress failed to include the term in subsequent bankruptcy acts, and no explanation exists regarding this omission of the term in the 1978 version of the Code or its subsequent revisions."[138] Moreover, Congress has had ample opportunity to address tribal eligibility under the Code. Following its passage of the IGRA in 1988, Congress has had at least seventeen years preceding BAPCPA to address the issue. Notwithstanding this opportunity, the Code remains silent on the issue of Indian tribes and bankruptcy eligibility. This may be partly attributable to the fact that until the Great Recession,[139] tribal gaming operations had financially thrived, and consequently, there had been no real need for tribes to seek bankruptcy relief. Although there is some case authority that addresses bankruptcy jurisdiction over Native Americans and tribes,[140] these cases primarily address situations where Native Americans are creditors rather than debtors.

B. Are Tribes Eligible to File as Debtors Under the Code?

For purposes of discussing an Indian tribe's eligibility to file for bankruptcy, this section addresses debtor eligibility in the context of the tribe as the filing entity (and not its gaming operations/casino filing as a separate business entity, such as a limited liability company).[141] Section 109[142] of the Code provides the starting statutory basis for debtor eligibility, delineating a list of acceptable types of debtors and corresponding bankruptcy chapters available to that type of debtor.[143] For example, this section specifies that a Chapter 7 debtor may not be a railroad, bank (foreign or domestic), or insurance company (foreign or domestic).[144] At the outset, Section 109 provides that only a person

---

[138] Clift, *supra* note 7, at 221 (citing *In re* Sandmar Corp., 12 B.R. 910, 913 (Bankr. D.N.M. 1981)).

[139] *See* Rampell*, supra* note 2.

[140] *See In re* Sandmar, 12 B.R. 910 (Bankr. D.N.M. 1981); *In re Shape*, 25 B.R. 356 (Bankr. D. Mont. 1982).

[141] There has been at least one case in which an Indian tribe's business entity, but not the tribe itself, filed for bankruptcy protection. In 2008, Greektown Casino, L.L.C., doing business as the Greektown Casino in Detroit, Michigan, filed for Chapter 11 bankruptcy along with related business entities in the U.S. Bankruptcy Court, Eastern District of Michigan, Southern Division. Kewadin Greektown Casino, L.L.C., one of the related business entities, is owned by an entity (the Kewadin Casinos Gaming Authority) that is in turn owned by the Sault Ste. Marie Tribe of Chippewa Indians. *See* First Day Motion For Entry Of An Order Directing Joint Administration Of The Debtors' Chapter 11 Cases, at 2-5, *In re* Greektown Holdings, LLC, No. 08-53104 (Bankr. E.D. Mich. May 30, 2008). The case is being jointly administered with Greektown Casino, L.L.C. ("Greektown Casino") Case No. 08-53106; Kewadin Greektown Casino, L.L.C. ("Kewadin") Case No. 08-53105; Monroe Partners, L.L.C. ("Monroe") Case No. 08-53107; Greektown Holdings II, Inc. ("Holdings II") Case No. 08 53108; Contract Builders Corporation ("Builders") Case No. 08- 53110; Realty Equity Company, Inc. ("Realty") Case No. 08-53112; and Trappers GC Partner, L.L.C. ("Trappers") Case No. 08-53111. First Day Order For Joint Administration at 2-3, *In re* Greektown Holdings, L.L.C., No. 08-53104 (Bankr. E.D. Mich. June 13, 2008).

[142] All references to "Section" herein will be to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, unless otherwise indicated.

[143] 11 U.S.C. § 109 (2006).

[144] *Id.* § 109(b)(1)-(3).

or municipality may be a debtor under the Code.[145] In turn, Section 101 provides a laundry list of definitions for terms found throughout the Code, although this list is by no means exhaustive.[146] Thus, the Code defines "person" as an "individual, partnership, [or] corporation," excluding certain governmental units.[147] The Code defines "municipality" as a "political subdivision or public agency or instrumentality of a State."[148] This is congruent with the Code's definition of a debtor under Section 101, which provides that the term "debtor" refers to a person or municipality.[149] Therefore, the next relevant inquiry is whether an Indian tribe constitutes a person or municipality for the purposes of filing bankruptcy under the Code.

To qualify as a municipality for the purposes of eligibility, a tribe must be a political subdivision, public agency, or instrumentality of a State. The Code's definition of a State does not expressly articulate that it is in reference to a state of the United States, but simply that it "includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title."[150] Chapter 9 of the Code refers to the specific chapter solely available to municipalities seeking bankruptcy relief. Although not explicitly stated, it is reasonable to infer that the Code's definition of a State refers to a state of the United States.

The Code also does not define the term "instrumentality," although one bankruptcy court has recently conducted an in-depth analysis on this term for the purposes of determining a municipality under the Code.[151] In *In re Las Vegas Monorail Company*, the debtor owned and operated a monorail train along the Strip, the hotel-casino corridor along Las Vegas Boulevard in Las Vegas, Nevada.[152] Pursuant to a somewhat convoluted financing arrangement, the debtor ultimately received loans in the form of municipal bonds to finance construction of the train.[153] Upon the debtor's filing of its bankruptcy, one of its creditors sought to dismiss the debtor's chapter 11 case, arguing that the debtor was a municipality and thus, ineligible to file for bankruptcy under Chapter 11.[154]

After reviewing the legislative history and relevant case law, the bankruptcy court determined that there were three distinct yet interrelated characteristics to consider in determining whether an entity was an instrumentality for the purposes of chapter 9: (i) whether the entity engaged in governmental functions, such as sovereign immunity, the ability to tax, or the ability to take land under eminent domain; (ii) whether the entity had a public purpose, and if so, how much control the state exerted over the entity; and (iii) whether the state itself treated the entity as an instrumentality of the state.[155] Under this context,

---

145 *Id.* § 109(a).
146 *Id.* § 101.
147 *Id.* § 101(41).
148 *Id.* § 101(40).
149 *Id.* § 101(13).
150 *Id.* § 101(52).
151 *See In re* Las Vegas Monorail Co., 429 B.R. 770 (Bankr. D. Nev. 2010).
152 *Id.* at 773.
153 *Id.*
154 *Id.* at 774.
155 *Id.* at 788 (citations omitted).

the court found that the debtor did not exercise any traditional governmental functions,[156] the state of Nevada exercised little to no control over the debtor's daily operations,[157] and the state did not treat the debtor as an instrumentality under Nevada law.[158]

Under the *Las Vegas Monorail* analysis, a strong argument can be made that an Indian tribe is an instrumentality of the federal government. However, reverting back to the definition provided by the Code, to constitute as an instrumentality for the purposes of eligibility as a municipality, the qualifying factor is being a "political subdivision or public agency or instrumentality of a *State*."[159] Even if a tribe is considered an instrumentality of the federal government, tribes are not instrumentalities of states, as conceptually expounded by the Marshall Trilogy and subsequent case law.[160] Similarly, Indian tribes do not qualify as political subdivisions of a state because a tribe is not a city under a state;[161] nor does a tribe constitute a public agency of a state because a tribe is not an entity that provides services to the public on behalf of the state. Under this analysis, an Indian tribe does not constitute a municipality under the Code because it is not a subdivision or instrumentality of a state government. Accordingly, the only other viable option for an Indian tribe to qualify as a debtor is to meet the requirements of a "person" under the Code.

As previously stated, for the purposes of qualifying as a debtor, the Code defines a "person" as an individual, partnership, or corporation, with the exclusion of certain governmental units. The Code does not expressly define the terms "individual" or "partnership."[162] However, it is inferred that the term "individual" literally means a human being, particularly in the context of other definitions describing this term under Section 101. For example, the Historical and Statutory Notes to Section 101 state that the term "Individual with Regular Income" refers to "individuals on welfare, social security, fixed pension incomes, or who live on investment incomes, [who] will be able to work out repayment plans with their creditors rather than being forced into straight bankruptcy."[163] This supports the inference that an "individual" is a human being because entities cannot receive welfare, social security, or income from pensions. Applying this logic to an Indian tribe, it is unlikely that a tribe would be eligible as an individual as contemplated under the Code because a tribe is not a human being.[164]

Similarly, although undefined by the Code, the term "partnership" is liberally referenced in the definitions of assorted business terms in Section 101. There exists various types of legal partnerships; however, Black's Law Diction-

---

156 *Id.* at 795-96 (citations omitted).
157 *Id.* at 797.
158 *Id.* at 800.
159 11 U.S.C. § 101(40) (2006) (emphasis added), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557 (2010).
160 *See* Fromherz, *supra* note 12, at 155-58, 170, 179 (citations omitted).
161 *See In re* Las Vegas Monorail Co., 429 B.R. at 775 (determining that the debtor was not a political subdivision, such as a county or city).
162 *See* 11 U.S.C. § 101 (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557 (2010).
163 *Id.*
164 *See id.*

ary defines "partnership" as a "voluntary association of two or more persons who jointly own and carry on a business for profit."[165] Under this context, it is unlikely that a tribe would be eligible as a partnership since the term inherently infers a plural number of partners, whereas an Indian tribe itself is a single entity. In addition, although a tribe is comprised of more than one member, it is not fundamentally a group of people fiscally invested in a business. This notion is supported by the IGRA, which currently requires that the federal government individually recognize tribes[166] and each tribe independently apply for authorization to engage in Class III gaming operations.[167] Thus, an Indian tribe would likely not qualify to be a debtor as a partnership.

Unlike the terms "individual" and "partnership," the Code actually provides a definition of "corporation." The Code broadly defines this as including associations, joint stock companies, unincorporated companies or associations, or business trusts, but excludes limited partnerships.[168] To qualify as a debtor under the corporation definition, an association must have the same "power or privilege" of a private corporation.[169] Thus, generally speaking, the central inquiry in determining whether an entity is a corporation for the purposes of debtor eligibility is whether the entity conducting business activity legally obtains some degree of protection from liability.[170] In this context, it seems unlikely that an Indian tribe would fit the description of a corporation as defined by the Code. Although both the Code and the Historical and Statutory Notes to Section 101 indicate that entities need not be incorporated under state law to qualify as a corporation,[171] an Indian tribe itself is not an entity formed to conduct or engage in business activities with some degree of limited liability. Tribes may, of course, form corporations or limited liability companies to separately run their gaming businesses; however, the tribe itself does not constitute a corporation as defined by the Code.

Last, with few exceptions, the Code expressly excludes a "governmental unit" from its definition of "person."[172] A governmental unit does not qualify as a "person" for the purposes of being eligible to be a debtor under the Code.[173] Instead, the governmental unit must qualify as a municipality to qualify as a debtor. The Code provides a broad definition of a governmental unit, including the United States and its political subdivisions, such as states, commonwealths, districts, territories, departments, agencies or any instrumentali-

165 BLACK'S LAW DICTIONARY 1230 (9th ed. 2009).
166 *See generally* 25 U.S.C. § 2703(5) (2006).
167 *See Id.* § 2710(d)(1) (listing the requirements necessary for an Indian tribe to gain authorization to conduct Class III gaming on its reservation).
168 11 U.S.C. § 101(9) (2006).
169 *Id.* § 101(9)(A)(i).
170 *See* 2 COLLIER ON BANKRUPTCY ¶ 101.09 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (noting that "[t]he degree of protection from liability will determine whether the entity is a corporation under the definition in section 101. If the protection is more like that given to corporate shareholders, the entity is more likely to be found to meet the Codes definition of 'corporation.' If the protection is more limited, the entity is likely to be found to be a partnership under section 101.").
171 11 U.S.C. § 101(9), HISTORICAL AND STATUTORY NOTES, Revision Notes and Legislative Reports, 1978 Acts.
172 11 U.S.C. § 101(41) (2006).
173 *Id.* § 101(9).

ties.[174] But the definition also provides a catch-all, encompassing any "other foreign or domestic government."[175] At least one article has recently opined that an Indian tribe may be excluded from filing for bankruptcy on the basis that tribes are governmental units.[176] Case authority addressing Indian sovereign immunity and waiver of this immunity has generally concluded that tribes are governmental units as contemplated under Section 101 of the Code.[177] For example, in *Krystal Energy Co. v. Navajo Nation*, the Ninth Circuit held that Congress abrogated the sovereign immunity of tribes under Section 106[178] of the Code,[179] and thus, the debtor could institute an adversary proceeding under its bankruptcy case against an Indian tribe.[180] The court expressly determined that Indian tribes were domestic governments of the United States.[181] Based on this determination, the court concluded that the tribes' immunity was abrogated under Section 106 because Congress provided for abrogation from immunity with respect to foreign and domestic governments under Section 106.[182] However, courts have typically made these types of decisions within the context of waiver and sovereign immunity pursuant to Section 106, and not explicitly on the question of whether a tribe is precluded from eligibility as a debtor under the Code because it is a domestic government.[183] Thus, because the Code does not expressly include an Indian tribe in its definition of a governmental unit, and case law has not expressly held that tribes are domestic governments for the specific purpose of debtor eligibility, it remains unclear whether an Indian tribe is in fact precluded from qualifying as debtor under this basis.

C. If Tribes are Eligible to file as Debtors Under the Code, Under What Chapter Can They File?

Thus far, the analysis of an Indian tribe's eligibility to file for bankruptcy under Section 109 of the Code seemingly indicates that tribes are ineligible to file as debtors – that is, an Indian tribe does not qualify to be a debtor either as a person or municipality, and in fact may be precluded from filing altogether because it meets the definition of a governmental unit. However, assuming *arguendo* that a tribe in fact met the eligibility requirements to file for bankruptcy, the next step would be determining the *type* of bankruptcy the tribe could seek relief under. The Code provides for six different types of bankruptcy relief depending on the nature of debtor and debt involved. While some

---

[174] *Id.* § 101(27).
[175] *Id.*
[176] Steven T. Waterman, *Tribal Troubles—Without Bankruptcy Relief*, AM. BANKR. INST. J., Dec.2009-Jan. 2010, at 44, 87.
[177] *Id.* (citing Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004)).
[178] 11 U.S.C. § 106(a) abrogates sovereign immunity of governmental units with respect to various subsections of the Code. *See generally* 11 U.S.C. § 106(a) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557 (2010).
[179] *Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055, 1061 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).
[180] *See id.* at 1056.
[181] *Id.* at 1058.
[182] *Id.* at 1059.
[183] Waterman, *supra* note 176, at 87.

chapters of bankruptcy under the Code are broadly applicable to debtors and widely used by both consumers and businesses, other chapters of bankruptcy are very specific to the type of debtor and debt involved, and therefore, not as frequently filed. Filings may also be driven by regional jurisdiction. For example, a Chapter 12 filing, which exclusively deals with family farmers and fishermen, may not be prevalent in the state of Nevada, but may be commonly filed in the Midwest region. Because some chapters of bankruptcy are by definition inapplicable to an Indian tribe, this section will not address a tribe's ability of filing for bankruptcy under Chapters 9,[184] 12,[185] 13,[186] or 15.[187] Instead, this section will briefly examine the common chapters of bankruptcy relief – Chapters 7 and 11– and address the possibility of an Indian tribe filing for bankruptcy relief under those respective chapters.[188]

1. Chapter 7 – Liquidation

Chapter 7 is the chapter under the Code that primarily governs the liquidation of a debtor's assets.[189] Broadly speaking, in chapter 7, an appointed trus-

[184] Chapter 9, titled "Adjustment of Debts of a Municipality," applies to municipalities seeking relief under bankruptcy. Under this chapter, a municipality is essentially permitted to reorganize its debts. *See generally* 11 U.S.C. §§ 901 (2005) - 946 (2006). As previously discussed, an Indian tribe likely does not qualify as a municipality because it is not a political subdivision, public agency, or instrumentality of a state. Thus, by definition this chapter is not available to an Indian tribe as a basis for filing bankruptcy.

[185] Chapter 12, titled "Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income," is applicable only to two types of debtors: a family farmer with a regular annual income or a family fisherman with regular annual income. *See generally* 11 U.S.C. §§ 1201-1231 (2006). Family farmers and family fisherman are defined in 11 U.S.C § 101(18), (19), (19A) and (19B), respectively. An Indian tribe as an entity does not meet the definition of either of these types of debtors. Thus, by definition this chapter is not available to an Indian tribe as a basis for filing bankruptcy.

[186] Chapter 13, titled "Adjustment of Debts of an Individual with Regular Income," is applicable only to individual debtors. *See generally* 11 U.S.C. §§ 1301-1330 (2006). As previously discussed, although the Code does not expressly define the term "individual," it is appropriate to infer the common language meaning of the term, thereby referring to a human being. To that end, non-human entities such as corporations and partnerships are precluded from filing for bankruptcy under this chapter. Thus, because an Indian tribe is also a non-human entity, by definition this chapter is not available to an Indian tribe as a basis for filing bankruptcy.

[187] Chapter 15, titled "Ancillary and Other Cross-Border Cases," is a relatively new chapter of bankruptcy, officially added to the Code via BAPCPA in 2005 (although it had a predecessor under Section 304 of the Code in 1978). This chapter addresses "cross-border" bankruptcy proceedings, that is, bankruptcy proceedings commenced in other countries or involving foreign proceedings. This chapter essentially requires some sort of foreign insolvency proceeding or foreign country seeking the assistance of the United States in a foreign proceeding. *See generally* 11 U.S.C. §§ 1501-1532 (2006). Because an Indian tribe's bankruptcy would not, by definition, constitute a foreign proceeding, this chapter is not available to an Indian tribe as a basis for filing bankruptcy.

[188] It should be noted that the Code is expansive. The case law addressing just one subsection in the Code can be complex and lengthy. Similarly, law review articles may be devoted to one subsection, or even a paragraph, of the Code. Therefore, this section is not intended to provide a substantive analysis of these chapters, but instead give an overview with pertinent application to Indian tribes.

[189] 6 COLLIER ON BANKRUPTCY ¶ 700.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (however, liquidation of the debtor's assets may also occur under some of the

tee typically collects the debtor's assets, if any, and liquidates the debtor's assets by sale. After payment of legal and administrative expenses, the trustee distributes any proceeds from this sale to the debtor's creditors in order of priority. Individuals and businesses may file for bankruptcy under this chapter, although there are some significant differences in treatment with respect to both types of debtors. For example, only individual debtors may obtain a discharge from bankruptcy under chapter 7.[190] That is to say, if an individual debtor completes the requirements under chapter 7 and the individual debtor obtains a discharge from the bankruptcy court, notwithstanding any other issues barring discharge or re-affirmation of debts, the debtor's liability on pre-bankruptcy debts is extinguished.

On the other hand, a business is ineligible to receive a discharge under chapter 7 because under a chapter 7 filing, a business ceases to exist.[191] Although a business may file for bankruptcy under chapter 7 and have the appointed trustee liquidate its assets for the benefit of the creditor, the business does not receive a "fresh start" like an individual debtor; instead, the chapter 7 bankruptcy generally results in the wind-up of the business. Moreover, only if the debtor is an individual may the debtor claim exemptions to property. Exempt property is not subject to liquidation,[192] and therefore, the debtor is generally able to retain exempt property. Although the Code provides a list of exemptions available to debtors, states are given the ability to "opt-out" and establish their own exemption laws. Thus, debtors may be statutorily required to claim their exemptions under state law.

If an Indian tribe were to file for bankruptcy under chapter 7, an appointed trustee would generally liquidate the tribe's assets, including real property. Although a tribe does not constitute an individual, and thus does not have the ability to claim exemptions to property, the tribe possesses special status by the federal government with respect to its land. Consequently, it is unclear whether a third party, such as an appointed trustee, would have the ability to alienate Indian land through liquidation without Congressional approval. Congress has historically enacted laws and treaties imposing various restrictions on the alienation of Indian lands.[193] As it currently stands, 25 U.S.C. § 177 precludes the conveyance of Indian lands without Congressional approval.[194] Practically

other bankruptcy chapters, pursuant to 11 U.S.C. §§ 1123(b)(5), 1222(b)(8), and 1322 (2006)).

[190] 11 U.S.C. § 727(a)(1) (2006).

[191] *Id.*

[192] Exempt property, however, is still subject to foreclosure by a creditor who is secured by a lien against the property. The amount of exemption varies state-by-state.

[193] Act of May 28, 1830, ch. 148, 4 Stat. 411, 411 (1830) (essentially codifying the doctrine of discovery, requiring the authorization of the federal government to alienate Indian land). *See also* Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985) (citations omitted); Indian Reorganization Act, ch. 576, § 5, 48 Stat. 984, 985 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1934)) (providing that the Secretary of the Department of the Interior may place land into trusts on behalf of Indian tribes, which entails tribes to special status on the land, such as exemption from the imposition of state property taxes).

[194] 25 U.S.C. § 177 (2006). This statute codifies the Indian Nonintercourse Act, titled "An Act to regulate Trade and Intercourse with the Indian Tribes," which was first passed by Congress in 1790, 1st Cong., Ch. 33, 1 Stat. 137 (1790). However, the first Act expired after two years, which Congress remedied by passing the second Act in 1793. 2d Cong., Ch. 19, 1

speaking, there appears to be some ambiguity as to whether this statute applies with equal force to land held by tribes in fee simple absolute title, as opposed to land held in trust by the Secretary of the Department of the Interior, and thus protected by the federal government.[195]

Assuming that land held by Indian tribes in fee simple absolute is *de facto* exempt from Congressional approval to sell, the chapter 7 trustee would need to determine whether the land was under federal protection or held in fee simple absolute. If the trustee determined that the land was in fact federally protected and therefore restricted, the trustee would then need to obtain approval from the federal government to liquidate the land. This in turn would create extraordinary legal and administrative hurdles for the trustee and, by extension, the bankruptcy court, far beyond that of a typical chapter 7 bankruptcy case. Thus, it is not clear whether this would be something that the trustee and bankruptcy court could, or would, prefer to do.

In addition, from a strategic and policy standpoint, it is not likely that an Indian tribe would want to liquidate its real property. Aside from its gaming operations on Indian land, reservations provide tribes a physical space for its members to live and for the tribe to conduct its governmental functions. This would also be counter-intuitive to the Indian Reorganization Act, which reflected Congress's desire to return land to Indian tribes and remedy some of the effects of the allotment process.[196] Taking these issues into consideration, a chapter 7 liquidation of an Indian tribe's assets, particularly its real property, would be legally challenging, impractical and against federal policy with respect to Indian tribes.

2. Chapter 11 – Reorganization

Chapter 11 provides a vehicle for a debtor to restructure its debts with creditors through reorganization, rather than straight liquidation of its assets. One of the primary goals of reorganization is for the debtor to become financially stable and viable after emerging from bankruptcy. Although businesses primarily use chapter 11, individuals may file under this chapter as well. Generally speaking, in a voluntary bankruptcy case under chapter 11,[197] the debtor

---

Stat. 329 (1793). The second Act added some additional provisions with respect to negotiating Indian land. *Id.* at 330-331 § 8; *see also* Oneida Indian Nation of N.Y. State v. Oneida County, 414 U.S. 661 n. 4 (1974). Congress continued to pass subsequent Nonintercourse Acts to address term expiration periods. *See* 1796 Act, 4th Cong. Ch. 30, 1 Stat. 469 (1796); 1799 Act, 5th Cong. Ch. 46, 1 Stat. 743 (1799); 1802 Act, 7th Cong. Ch. 13, 2 Stat. 139 (1802), until passing the final Act of 1834, 23d Cong. Ch. 161, 4 Stat. 729 (1834), now codified at 25 U.S.C. § 177.

[195] *See* Brian Pierson, *Resolving a Perilous Uncertainty: The Right of Tribes to Convey Fee Simple Lands*, FED. LAW., Mar.-Apr. 2010, at 49, 49-50 (citations omitted); c*f.* Cass Cnty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110-15 (1998) (holding that when Congress has made land on Indian reservations freely alienable, the land is subject to state and local taxation, even if the land is re-purchased by an Indian tribe).

[196] 25 U.S.C. § 461 (2006).

[197] A debtor may also be unwillingly forced into bankruptcy by creditors who have filed an involuntary petition and meet certain statutory requirements; this option is available under chapters 7, 11 or 15 (as added by BAPCPA). *See id.* §§ 303, 1511 (2006). By default under the Code, involuntary petitions are not permitted under Chapters 9, 12, or 13.

submits a proposed reorganization plan to the bankruptcy court;[198] this plan proposes the debtor's treatment of claims and interests in and against the debtor, typically held by creditors and equity holders. The debtor's plan may propose to impair a claim or interest, that is, modify the claim or interest of those holding claims against the debtor, which may result in the debtor's repayment of a debt less than the original amount of debt owed or a change of the payment due date.[199]

To be confirmed by the bankruptcy court, the debtor's proposed treatment of claims must meet certain statutory requirements under the Code.[200] Depending on the treatment under the plan, creditors decide whether or not to accept the proposed plan. If one or more creditors choose to reject the plan, the debtor may still be able to confirm the plan via nonconsensual cram down against the creditor.[201] However, the debtor must meet certain statutory requirements to cram down a plan under chapter 11.[202]

Bankruptcy under chapter 11 is an attractive option for insolvent businesses; the debtor is usually able to continue operating as a business during the pendency of the bankruptcy and typically remains in control of the business as the debtor-in-possession ("DIP").[203] This role is akin to being the trustee in bankruptcy, and in fact, the DIP enjoys the same rights and duties that the trustee normally holds.[204] Of course, this is a condensed version of chapter 11. In reality, there are many more variables and considerations involving the typical chapter 11 business case, such as the court's determination of whether the business is worth more as a going concern rather than being liquidated; DIP financing; issues pertaining to creditors' committees; cash collateral motions; motions to dismiss or convert the bankruptcy case; valuation of debtor's property; adversary proceedings filed under the bankruptcy case (and the separate proceedings that an adversary proceeding entails); the debtor's disclosure statement and proposed plan for reorganization; creditors' objections to the plan; and so on and so forth. Once the bankruptcy court confirms the plan however, the plan becomes binding on all the parties involved in the process.[205]

Given the usual result of bankruptcy under chapters 7 and 11, it is more likely that an Indian tribe with gaming operations in financial distress would seek bankruptcy relief under chapter 11. Gaming has provided tribes with a means of economic development and self-sufficiency. Therefore, an Indian tribe would most likely seek to retain its casino and gaming operations and attempt to restructure its debt, rather than liquidating its assets as a means of maintaining this significant source of revenue for the tribe. As previously discussed, liquidation under chapter 7 may not be a viable option, given the restrictions imposed on alienation of Indian land by the federal government.

---

[198] This is the debtor's exclusive right for the first 120 days of the bankruptcy, pursuant to 11 U.S.C. § 1121(b) (2006).
[199] 11 U.S.C. § 1123(b)(1) (2006).
[200] *Id.* §§ 1123(a)(1), 1129(a).
[201] *Id.* § 1129(b).
[202] *Id.* § 1129(b)(2).
[203] Unless upon motion, the bankruptcy court decides that there is cause to appoint a trustee pursuant to 11 U.S.C. § 1104(a).
[204] 11 U.S.C. § 1107(a) (2006).
[205] *Id.* § 1141(a) (2005).

Moreover, because an Indian tribe does not constitute an individual under the Code, the tribe would likely file as a business under chapter 11. Doing so would allow the tribe to remain in control of its business, and by extension, its gaming operations as the DIP. By filing under chapter 11 and successfully confirming a plan, a tribe in financial distress could restructure its debts and thus benefit from the equitable provisions provided by the Code to most other individuals and entities.

Notwithstanding the potential benefits available to an Indian tribe seeking to restructure its debts under Chapter 11, a tribe's filing under this chapter is also not without caveats. For example, under a typical Chapter 11 business case, the proposed plan of the business may call for a "debt-for-equity" swap. Under this scheme, the creditor—usually a secured creditor or debenture holder—"swaps" their claim of debt against the debtor for a commensurate stake of equity in the reorganized debtor.[206] This proves to be beneficial for both the debtor and creditor. The debtor is able to emerge from bankruptcy substantially free from the burden of the creditor's claim and obtains a "delevered" balance sheet, thus making it more feasible for the debtor to obtain financing, become financially stable, and perhaps even profitable.[207] The creditor receives its payment through the acquisition of the debtor, and for a creditor looking to obtain a distressed business, acquires the business through a less risky fashion than by sale either under the Code or Article 9 of the Uniform Commercial Code.[208]

Unfortunately, this scheme is problematic, and likely inapplicable, to Indian tribes filing under Chapter 11. An important provision of the IGRA provides that Indian tribes conducting Class II gaming operations on its reservation retain sole proprietary interest in those gaming operations.[209] In order to do so, the NIGC reviews and approves contracts that a tribe seeks to enter into with a tribal non-member with respect to the tribe's gaming operations.[210] If the NIGC determines that a potential contract is in fact a "management contract," that is, a contract that amounts to the outside management of tribal gaming operations, the NIGC may deny the contract and render it invalid.[211] This action renders the contract invalid as a matter of law. The NIGC has defined a management contract as a "contract or agreement [that] provides for the management of all or part of the gaming operation."[212]

The important point under the IGRA is that the tribe must retain the sole propriety interests in its gaming operations. Thus, a tribe's proposal for a debt-for-equity swap would be invalid under the IGRA as it would give a creditor rights, and thus control, in the tribe's gaming operations. Moreover, if an

---

[206] Leonard P. Goldberger, *Debt-For-Equity Moves Down the Food Chain*, AM. BANKR. INST. J., Oct. 2010, at 30, 30.
[207] *Id.*
[208] *Id.*
[209] 25 U.S.C. § 2710(b)(2)(A) (2006).
[210] *See generally id.* § 2711 (1988).
[211] *See id.* § 2711(e)(1)(A).
[212] NAT'L INDIAN GAMING COMM'N, BULL. NO. 94-5, APPROVED MANAGEMENT CONTRACTS V. CONSULTING AGREEMENTS (UNAPPROVED MANAGEMENT CONTRACTS ARE VOID), (1994), http://www.nigc.gov/Reading_Room/Bulletins/Bulletin_No._1994-5.aspx (citing 25 C.F.R. § 502.15).

Indian tribe's reorganization plan called for a debt-for-equity swap, the creditor would gain an equity interest in the reorganized debtor—the Indian tribe. This would result in a creditor becoming an equity holder in an Indian tribe, which among other things, expressly contravenes and violates the sovereign status of Indian tribes in the United States. Therefore, this reorganization tool would not be available to Indian tribes filing under Chapter 11.

CONCLUSION

Since Congress' enactment of the Indian Gaming Regulatory Act in 1988, Indian tribes have developed and expanded significant gaming operations, including major casino facilities, on federally recognized Indian lands across the United States. These gaming operations have in turn provided Indian tribes a considerable source of revenue and a meaningful avenue for Indian self-determination and economic viability.

As a result of the Great Recession, businesses across a variety of industries have been hit hard by high unemployment rates and a considerable decrease in consumer spending. This includes the once-thought "recession proof" casino gaming industry. The Great Recession has hit the casino gaming industry particularly hard as Americans tighten their belts, so to speak, and have been less likely to patronize and freely spend disposable income at casinos. Casinos, whether on Indian land or not, have experienced this substantial decrease in spending. Some casinos, barely able to meet financial obligations incurred before the recession set in, struggle with significant debt and teeter on the edge of insolvency while gaming revenue continues to decline.

Though financially distressed non-Indian casinos have bankruptcy available as a means of addressing insolvency, bankruptcy is not an option available to casinos owned and operated by Indian tribes. This is largely because of the sovereign status of Indian tribes and the unique "domestic dependent nations" policy of the federal government toward Indian tribes. Before the current recession, tribal eligibility under federal bankruptcy law was not a pressing issue because Indian gaming, a fairly recent phenomenon, was highly lucrative for tribes and historically not subject to recessionary declines in consumerism.

The Bankruptcy Code does not explicitly provide a form of relief for Indian tribes as debtors. If a tribe seeks to file for bankruptcy, it will either need to find a way to argue that the tribe meets the definition of a debtor, or Congress will need to address this issue by amending the Code to provide for Indian tribes. However, there are major challenges with both these avenues. Even if a tribe successfully filed for bankruptcy, it is not clear that it would be able to take full advantage of all the provisions under the Code available to other types of debtors, which in turn may hinder a tribe's ability to successfully emerge from bankruptcy. Moreover, given the complexity of the special relationship between Indian tribes and the federal government, it is not clear that Congress would be able to easily amend the Code to provide tribes a source of relief under federal bankruptcy laws. In short, whether an Indian tribe may file for bankruptcy relief under federal bankruptcy law is unclear – there is no eas-

ily ascertainable or straightforward answer and the issue may take some time to fully address. Until then, Indian tribes will likely need to find creative ways to address insolvency outside the Bankruptcy Code.