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## Code to Code

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### Rolling the Dice on Debtor Eligibility Native American Tribes and the Bankruptcy Code



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Native American<sup>2</sup> law is a complex blend of American history, federal law, treaties with Native American tribes and certain principles of international law.<sup>3</sup> In turn, Native American tribes are a unique form of government in the U.S.: They enjoy local self-governance by applying tribal law on many issues, but are subject to federal law on certain issues where Congress has applied federal or state law to them.<sup>4</sup> Since the passage of the Indian Gaming Regulatory Act of 1988 (IGRA),<sup>5</sup> gaming activities on Native American reservations have skyrocketed, and tribes have established hundreds of casinos and resorts on tribal lands,<sup>6</sup> which have grown into large and complex commercial enterprises capable of entering into contracts and loan documents with non-tribal lenders.

Due both to an economic recession and increased competition in the gaming sphere, Native American businesses, and thereby the tribes, have suffered significant unanticipated competition and financial distress. As tribes look to a variety of options to address financial distress, an emerging question is whether such tribes are eligible to be debtors under the Bankruptcy Code. Relief under the Bankruptcy Code is particularly important for tribal casinos because tribal insolvency law cannot effectuate a restructuring of a tribe's financial obligations, as

tribal law only applies to members of the tribe and cannot bind dissenting non-tribal lenders.

This article will analyze whether Native American tribes are eligible to file for bankruptcy under the Bankruptcy Code and finds that since the Code does not provide a basis for tribes to file, it is unlikely that they can. However, there is a potential legal argument that Native American tribes might be able to use in reorganizing their businesses under the Code.

#### Eligibility of Native American Tribes to File for Bankruptcy

Section 109 of the Bankruptcy Code governs who may be a debtor and provides, in pertinent part, that "only a person ... or a municipality ... may be a debtor under this title." (Municipalities may only be debtors under chapter 9.) In turn, § 101(41) defines a "person" as including "individual, partnership, and corporation, but does not include governmental unit."<sup>7</sup> "Governmental unit" is defined in § 101(27) as "United States; State; Commonwealth; District; Territory; foreign state; department, agency or instrumentality of [each of the foregoing]; or other foreign or domestic government." Given the self-governance rights afforded to tribes, various courts have held that tribes qualify as a domestic government unit for other purposes under the Bankruptcy Code, such as the waiver of sovereign immunity pursuant to § 106.<sup>8</sup>

Accordingly, as "governmental units," tribes do not qualify as debtors under either chapters 7 or 11 of the Bankruptcy Code, which require that a debtor be

1 The views expressed herein are merely the views of the authors and do not represent the views of their firm.

2 This article uses the terms "Native American," "Indian" and "tribes" interchangeably.

3 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 under the Bankruptcy Code and Related Matters," 27 *Am. Indian L. Rev.* 177, 184 (2002-03) (citations omitted).

4 See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government," but noting that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.") (citations omitted).

5 25 U.S.C. § 2701, *et seq.* The IGRA authorizes and regulates tribal gaming activities on tribal lands in states that do not prohibit such gaming activities, and appointed the National Indian Gaming Commission (NIGC) to oversee such tribal gaming activities.

6 The NIGC reports that there were approximately 450 tribal gaming operations as of the end of 2013. See NIGC Tribal Gaming Revenues 2009-13, available at [www.nigc.gov/LinkClick.aspx?fileticket=\\_15QAX4uZYA%3d&tabid=67](http://www.nigc.gov/LinkClick.aspx?fileticket=_15QAX4uZYA%3d&tabid=67) (last visited April 29, 2015).

7 Section 101(41) also provides that a governmental unit can qualify as a person in certain respects, which is not relevant for this article.

8 See, e.g., *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004) ("[T]he category 'Indian Tribes' is simply a specific member of the group of domestic governments."); *In re Platinum Oil Props. LLC*, 465 B.R. 621, 643 (Bankr. D.N.M. 2011) ("The language 'or other foreign or domestic government' found in 11 U.S.C. § 101(27) includes Indian tribes..."); *Russell v. Fort McDowell Yavapai Nation (In re Russell)*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003) (holding that "other foreign or domestic governments in § 101(27) unequivocally, and without implication, includes Indian tribes as 'governmental units'"); *In re Davis Chevrolet Inc.*, 282 B.R. 674, 683 n.5 (Bankr. D. Ariz. 2002) (ruling that phrase "other domestic government" is broad enough to encompass Indian tribes.).

a “person.” In order to be a chapter 9 debtor, a debtor need not be a “person,” but must instead be a “municipality,” which is defined as “political subdivision or public agency or instrumentality of a State.” Although tribes are domestic governments, they are regulated by federal law — not state law — and are not in any way governed by the states or subject to their authority (except inasmuch as federal law requires the application of state law). Accordingly, a tribe does not qualify as a “municipality” and is therefore not eligible for chapter 9 relief.

## An Alternative Argument for Tribes to File for Bankruptcy

Despite the fact that the tribes themselves are almost certainly not eligible debtors under the Bankruptcy Code, there is one potential alternative argument that Native American tribes may be able to use to reorganize tribal-owned businesses such as casinos. Many casinos are not directly owned by the Native American tribes but by tribally chartered corporations (which, in turn, are wholly owned by their respective Indian tribes). In some cases, the various loan documents for the tribal casino might list the tribal corporation itself as the obligor, rather than the tribe. In such instances, the prospective debtor may be the tribal corporation, which could constitute as an eligible debtor if it qualifies as a “corporation” under the Bankruptcy Code. Specifically, pursuant to § 101(9) of the Bankruptcy Code, the definition of a “corporation” includes an “association having a power of privilege that a private corporation, but not an individual or a partnership, possesses” and “unincorporated company or association.”

This argument has been made at least twice before in bankruptcy courts. First, in *Sa’ Nyu Wa Inc.*, a “tribally chartered corporation” wholly owned by a tribe filed for bankruptcy in Arizona in 2013.<sup>9</sup> The debtor explained in its first-day filings that it was “a tribal corporation that is separate from the Nation and from other corporations or instrumentalities of the Nation,” with its own board of directors.<sup>10</sup> The bankruptcy filing was precipitated by an arbitration award of \$28 million entered against the debtor as a result of a dispute over a development agreement. The debtor noted that the party under the development agreement was the debtor tribal corporation itself, that the tribe was not party to the agreement in any way, and that the arbitration award was collectible only from the debtor corporation and not the tribe. The debtor argued that it was a separate entity from the tribe, which was eligible for relief under chapter 11. While several contemporaneous articles questioned whether the debtor was an eligible filer,<sup>11</sup> no parties-in-interest challenged the debtor’s eligibility; the case proceeded normally before the debtor and developer settled their dispute and consensually dismissed the case.

Next, in *Santa Ysabel Resort and Casino*, a casino that was owned and operated by the Iipay Nation filed for bankruptcy.<sup>12</sup> The debtor’s first-day filings argued that the debtor that owned the casino was a separate legal entity from the

tribe and was therefore not a governmental unit. The debtor argued that it was an “unincorporated company” under § 101(9)(A)(iv) and therefore eligible to file. Three parties in interest filed motions to dismiss because the debtor was ineligible, including another Native American tribe (the debtor’s largest creditor) and the U.S. Trustee.<sup>13</sup> The objecting parties argued that the debtor casino was not an “unincorporated company” because it was merely an arm of the tribe itself and there was no legal distinction between the tribe and the casino entity; specifically, the loan documents provided that the tribe was the obligor that owned and operated the casino and did not make such a distinction between the tribe and the casino entity. The bankruptcy court granted the motions to dismiss by summary order without writing an opinion.<sup>14</sup>

Unfortunately, there are no binding judicial opinions on whether a tribal corporation separate and distinct from the tribe is an eligible debtor. However, if there are facts suggesting that a tribe and a tribally chartered corporation are held out as legally separate entities, and the tribal corporation is the actual obligor on the loan(s), it would seem arguable that tribal casinos might be eligible to file for bankruptcy.<sup>15</sup>

## Confusion and Uncertainty Ensues

Since Congress’s enactment of the IGRA, Native American tribes have developed and expanded significant gaming operations, including major casinos and resorts. These gaming operations have provided Native American tribes with significant revenue and economic viability. Given the recent financial distress being suffered by Native American tribes (in connection with their tribal casinos), the issue of whether a Native American tribe is eligible to be a debtor under the Bankruptcy Code will need to be addressed by the bankruptcy courts or Congress.

As a result of the complexity of the intersection of Native American and federal law, it is not clear whether Congress would be able to easily amend the Bankruptcy Code to provide Native American tribes with a source of relief under federal bankruptcy laws. In deciding what relief to allow tribes under the Code, Congress will have to consider a number of alternatives: whether to amend the definition of “person” or “governmental unit” to make it clear that tribes are eligible debtors, or create a new subchapter under chapters 7, 9 and/or 11 to allow Native American tribes to file for bankruptcy. Until then, confusion and uncertainty will ensue while Native American tribes continue to try to find creative ways to address their financial distress. **abi**

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9 See *Sa’ Nyu Wa Inc.*, Case No. 13-2972 (Bankr. D. Ariz. 2013). The debtor owned and operated the Grand Canyon Skywalk, a tourist attraction in Arizona.

10 See *Sa’ Nyu Wa Inc.*, Case No. 13-2972 (BMW) (Bankr. D. Ariz. March 4, 2013) [Docket No. 10].

11 See Christine L. Swasnick, et al., “Are Tribal Corps. Eligible for Bankruptcy Protection?,” *Law360* (March 13, 2013), available at [www.law360.com/articles/423192/are-tribal-corps-eligible-for-bankruptcy-protection-](http://www.law360.com/articles/423192/are-tribal-corps-eligible-for-bankruptcy-protection-) (last visited April 29, 2015); Sheppard Mullin, “Tribal Corporate Bankruptcy Petition Raises Issues of First Impression for Bankruptcy Court,” *Finance and Bankruptcy Law Blog* (March 7, 2013), available at [www.bankruptcylawblog.com/tribal-corporate-bankruptcy-petition-raises-issues-of-first-impression-for-bankruptcy-court.html](http://www.bankruptcylawblog.com/tribal-corporate-bankruptcy-petition-raises-issues-of-first-impression-for-bankruptcy-court.html) (last visited April 29, 2015).

12 *Santa Ysabel Resort and Casino*, Case No. 12-9415 (Bankr. S.D. Cal. 2012).

13 *Id.* [Docket Nos. 57, 65 and 66].

14 See *Santa Ysabel Resort and Casino*, Case No. 12-9415 (Bankr. S.D. Cal. Sept. 11, 2012) [Docket No. 98].

15 In addition, Native American tribes may utilize this argument during negotiations with lenders. Tribes can maintain that they are actually able to file for bankruptcy with the hopes of negotiating “in the shadow of bankruptcy.” This argument will likely be a temporary (and risky) one, as at some point, a tribal corporation will indeed file for bankruptcy, and a bankruptcy court will either confirm or reject the tribal corporation’s eligibility. The outcome will have major consequences to Native American tribes seeking to restructure their debts with lenders because the tribes’ negotiation position will be either significantly emboldened or weakened depending on how the applicable bankruptcy court rules.