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**IN THE
HO-CHUNK NATION TRIAL COURT**

**Ho-Chunk Nation Department of Housing
and Scholze Ace Home Center, Inc.,**
Plaintiffs,

v.

Edward Perry d/b/a Perry Construction,
Defendant.

Case No.: **CV 00-92**

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**ORDER
(Retention of Judgment)**

INTRODUCTION

The Court must determine whether the federal Bankruptcy Code waives the Ho-Chunk Nation's sovereign immunity from suit. An affirmative finding would result in vacating a decision granting the Ho-Chunk Nation monetary damages against an enrolled tribal member. For the reasons stated below, the Court finds no such waiver of immunity.

PROCEDURAL HISTORY

The Court recounts the procedural history of the instant case in significant detail in its *Order (Default Judgment)*, CV 00-92 (HCN Tr. Ct., Dec. 26, 2000). For purposes of this decision, the Court notes it received a May 3, 2001 correspondence from Attorney Craig V. Kitchen and an attached copy of *In Re: Edward Perry and Wendy Perry, Voluntary Petition,*

1 Case No.: 01-20601-7 (Bankr. W.D. Wis., Feb. 8, 2001), advising it of the operation of the
2 Federal Bankruptcy Code, 11 U.S.C. § 362. In response, the Court entered its May 22, 2001
3 *Order (Requiring Briefs)*. Consequently, Attorney Kitchen informed the Court through a June 8,
4 2001 letter that he did not intend to represent the defendant within this jurisdiction. The plaintiff,
5 Ho-Chunk Nation Department of Housing [hereinafter Housing Dept.], by and through Ho-
6 Chunk Nation Department of Justice [hereinafter DOJ] Attorney Elaine H. Smith, filed a *Motion*
7 *to Extend Due Date* accompanied by a *Motion for Expedited Consideration* on June 21, 2001.
8 The Court granted the foregoing *Motion* through telephonic correspondence, extending the
9 deadline for submitting legal briefs until June 29, 2001. On June 29, 2001, the plaintiff filed the
10 *Plaintiff's Memorandum of Law* with several attachments including a copy of *In Re: Edward*
11 *Perry and Wendy Perry, Discharge of Debtor*, Case No.: 01-20601-7 (Bankr. W.D. Wis., May
12 24, 2001).
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17 **APPLICABLE LAW**

18 19 **CONSTITUTION OF THE HO-CHUNK NATION**

20 **Article I – Territory and Jurisdiction**

21 **Sec. 1 Territory.**

22
23 The territory of the Ho-Chunk Nation shall include all lands held by the Nation or the
24 People, or by the United States for the benefit of the Nation or the People, and any additional
25 lands acquired by the Nation or by the United States for the benefit of the Nation or the People,
26 including but not limited to air, water, surface, subsurface, natural resources and any interest
therein, notwithstanding the issuance of any patent or right-of-way in fee or otherwise, by the
governments of the United States or the Ho-Chunk Nation, existing or in the future.

27 **Sec. 2 Jurisdiction.**

28

1 The jurisdiction of the Ho-Chunk Nation shall extend to all territory set forth in Section 1
2 of this Article and to any and all persons or activities therein, based upon the inherent
3 sovereignty of the Nation and the People or upon Federal law.

4 Article III – Organization of the Government

5 Sec. 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by
6 virtue of self-government and democracy.

7 Sec. 4 Supremacy Clause.

8 This Constitution shall be the supreme law over all territory and persons within the
9 jurisdiction of the Ho-Chunk Nation.

10 Article IV – General Council

11 Sec. 2 Delegation of Authority.

12 The General Council hereby authorizes the legislative branch to make laws and
13 appropriate funds in accordance with Article V. The General Council hereby authorizes the
14 executive branch to enforce the laws and administer funds in accordance with Article VI. The
15 General Council hereby authorizes the judicial branch to interpret and apply the laws and
16 Constitution of the Nation in accordance with Article VII.

16 Article V – Legislature

17 Sec. 1 Composition of the Legislature.

18 (a) Legislative powers shall be vested in the Legislature.

19 Sec. 2 Powers of the Legislature. The Legislature shall have the power:

20 (a) To make laws, including codes, ordinances, resolutions, and statutes;

21 (b) To establish Executive Departments, and to delegate legislative powers to the
22 Executive branch to be administered by such Departments, in accordance with the law; any
23 Department established by the Legislature shall be administered by the Executive; the
24 Legislature reserves the power to review any action taken by virtue of such delegated power;

25 (i) To negotiate and enter treaties, compacts, contracts, and agreements with other
26 governments, organizations, or individuals;

27 (l) To enact laws to manage, lease, permit, or otherwise deal with the Nation's lands,
28 interests in lands or other assets;

1 (s) To promote public health, education, charity, and such other services as may
2 contribute to the social advancement of the members of the Ho-Chunk Nation;

3 Article VI – Executive

4 Sec. 1. Composition of the Executive.

5 (a) The Executive power of the Ho-Chunk Nation shall be vested in the President of
6 the Ho-Chunk Nation.

7 Section 2. Powers of the President. The President shall have the power:

8 (a) To execute and administer the laws of the Ho-Chunk Nation;

9 (k) To represent the Ho-Chunk Nation on all matters that concern its interests and
10 welfare;

11 (l) To execute, administer, and enforce the laws of the Ho-Chunk Nation necessary
12 to exercise all powers delegated by the General Council and the Legislature, including but not
13 limited to the foregoing list of powers.

14 Article VII – Judiciary

15 Sec. 4 Powers of the Judiciary.

16 The judicial power of the Ho-Chunk Nation shall be vested in the Judiciary. The
17 Judiciary shall have the power to interpret and apply the Constitution and laws of the Ho-Chunk
18 Nation.

19 Sec. 5 Jurisdiction of the Judiciary.

20 (a) The Trial Court shall have original jurisdiction over all cases and controversies,
21 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
22 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
23 officials and employees, shall be a party. Any such case or controversy arising within the
24 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
25 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
26 the Nation’s sovereign immunity.

25 Sec. 6 Powers of the Trial Court.

26 (a) The Trial Court shall have the power to make findings of fact and conclusions of
27 law. The Trial Court shall have the power to issue all remedies in law and in equity including
28 injunctive and declaratory relief and all writs including attachment and mandamus.

28 Article XII – Sovereign Immunity

1
2 Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit
3 except to the extent that the Legislature expressly waives its sovereign immunity, and officials or
4 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be
5 immune from suit.

6 HO-CHUNK NATION JUDICIARY ACT OF 1995

7 Sec. 2 Jurisdiction.

8 The Ho-Chunk Nation Judiciary shall exercise jurisdiction over all matters within the power and
9 authority of the Ho-Chunk Nation including controversies arising out of the Constitution of the
10 Ho-Chunk Nation; laws, statutes, ordinances, resolutions and codes enacted by the Legislature;
11 and such other matters arising under enactments of the Legislature or the customs and traditions
12 of the Ho-Chunk Nation. This jurisdiction extends over the Nation and its territory, persons who
13 enter its territory, its members, and persons who interact with the Nation or its members
14 wherever found.

15 CLAIMS AGAINST PER CAPITA ORDINANCE

16 Sec. 103. Permitted Claims Against Per Capita Shares.

17 The following claims shall be recognized and enforced by the Nation against a Per Capita
18 Share at the time of Payment of the Per Capita Distribution of which it is a part, and prior to the
19 distribution of such Per Capita Share to a Tribal Member:

- 20 (a) Any debt or monetary obligation then due and owing by the Tribal Member to the
21 Nation, whether by acceleration or otherwise, which (i) has been established by a
22 judgement of the Trial Court permitting recovery from such Tribal Member's Per Capita
23 Share, or (ii) is stated in writing signed by the Tribal Member and which the Tribal
24 Member has agreed in writing may be recovered from his Per Capita Share upon
25 delinquency, default or other event;

26 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

27 Rule 5. Notice of Service of Process.

28 (B) *Summons.* The *Summons* is the official notice to the party informing him/her that he/she is
29 identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar
30 days (*See, HCN. R. Civ. P. 6*) and that a *Default Judgement* may be entered against them if they
31 do not file an *Answer* in the limited time. It shall also include the name and location of the
32 Court, the case number, and the names of the parties. The *Summons* shall be issued by the Clerk
33 of Court and shall be served with a copy of the filed complaint attached.

34 (C) *Methods of Service of Process.*

- 35 (1) Personal Service. The required papers are delivered to the party in person by the
36 bailiff, or when authorized by the Court, a law enforcement officer from any jurisdiction,

1 or any other person not a party to the action who is eighteen (18) years of age or older.
2 Personal service is required for the initiation of actions in the following:

3 (a) Relief requested is over \$5,000.00, excluding the enforcement of foreign child
4 support orders; or

5 Rule 17. Computation of Time.

6 When counting days to meet time limits under these rules, the day identified as the starting day is
7 not counted in the time limit. For example, if a *Complaint* is filed on the first day of a month and
8 the *Answer* is due in twenty (20) calendar days, then the date the *Answer* is due will be the
9 twenty-first day of the month. If the time limit identified in these rules is less than seven (7)
10 calendar days, then Saturdays, Sundays, and legal holidays are not counted in the time limit.
11 Legal Holidays are defined as those recognized by the Ho-Chunk Nation. If a time limit falls on
a weekend or legal holiday, then the time limit falls on the next working day. Computation of
time originates with the actual Court filing date or Court file stamped date of the document and
not the date the notice or the document is received by the party.

12 Rule 24. Substituting, Intervening and Joining Parties.

13 If a party becomes incompetent or transfers his/her interest or separates from some official
14 capacity, another party may be substituted as justice requires. A party with an interest in an
15 action may intervene and be treated in all respects as a named party to the action. To the greatest
16 extent possible, all persons with an interest will be joined in an action if relief cannot be
17 accorded among the current parties without that person, or the absent person's ability to protect
18 their interests is impeded unless they are a party. Failure to join a party over whom the Court has
no jurisdiction will not require dismissal of an action unless it would be impossible to reach a
just result without the absent party. The Court will determine only the rights or liabilities of
those who are a party to the action.

19 Rule 54. Default Judgement.

20 A *Default Judgement* may be entered against a party who fails to answer if the party was
21 personally served in accordance with Rule 5(C)(1)(a) or 5(C)(1)(b) or obtained judicial
22 authorization to pursue other means of service such as publication or if a party fails to appear at a
23 hearing, conference or trial for which he/she was given proper notice. A *Default Judgement*
24 shall not award relief different in kind from, or exceed the amount stated in the request for relief.
A *Default Judgement* may be set aside by the Court only upon a timely showing of good cause.

25 Rule 58. Amendment to or Relief from Judgement or Order.

26 (A) Relief from Judgement. A *Motion to Amend* or for relief from judgement, including a request
27 for a new trial shall be made within ten (10) calendar days of the filing of judgement. The
28 *Motion* must be based on an error or irregularity which prevented a party from receiving a fair
trial or a substantial legal error which affected the outcome of the action.

1 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
2 later than ten (10) calendar days after entry of judgement, the Court may amend its findings or
3 conclusions or make additional findings or conclusions, amending the judgement accordingly.
4 The motion may be made with a motion for a new trial. If the Court amends the judgement, the
5 time for initiating an appeal commences upon entry of the amended judgement. If the Court
6 denies a motion filed under this rule, the time for initiating an appeal from the judgement
7 commences when the Court denies the motion on the record or when an order denying the
8 motion is entered, whichever occurs first. If within thirty (30) days after the entry of judgement,
9 the Court does not decide a motion under this Rule or the judge does not sign an order denying
10 the motion, the motion is considered denied. The time for initiating an appeal from judgement
11 commences in accordance with the Rules of Appellate Procedure.

12 (C) Erratum Order or Reissuance of Judgement. Clerical errors in a court record, including the
13 *Judgement* or *Order*, may be corrected by the Court at any time.

14 (D) Grounds for Relief. The Court may grant relief from judgements or orders on motion of a
15 party made within a reasonable time for the following reasons: (1) newly discovered evidence
16 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
17 misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
18 requesting party was not personally served in accordance with Rule 5(c)(1)(a) or (b); did not
19 have proper service and did not appear in the action; or (4) the judgement has been satisfied,
20 released, discharged or is without effect due to a judgement earlier in time.

21 Rule 61. Appeals.

22 Any *final Judgement* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation
23 Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
24 *Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent
25 actions of a *final Judgement* or Trial Court *Order* must follow the HCN *Rules of Appellate*
26 *Procedure*.

27 **RELEVANT LAW**

28 UNITED STATES CODE – CHAPTER 11

Sec. 101. Definitions.

In this title –

(15) “entity” includes person, estate, trust, governmental unit, and United States trustee;

1 (23) “foreign proceeding” means proceeding, whether judicial or administrative
2 and whether or not under bankruptcy law, in a foreign country in which the debtor’s
3 domicile, residence, principal place of business, or principal assets were located at the
4 commencement of such proceeding, for the purpose of liquidating an estate, adjusting
debts by composition, extension, or discharge, or effecting a reorganization;

5 (27) “governmental unit” means United States; State; Commonwealth; District;
6 Territory; municipality; foreign state; department, agency, or instrumentality of the
7 United States (but not a United States trustee while serving as a trustee in a case under
8 this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign
9 state; or other foreign or domestic government;

10 (40) “municipality” means political subdivision or public instrumentality of a
11 State;

12 (52) “State” includes the District of Columbia and Puerto Rico, except for the
13 purpose of defining who may be a debtor under chapter 9 of this title;

14 (55) “United States”, when used in a geographical sense, includes all locations
15 where the judicial jurisdiction of the United States extends, including territories and
16 possessions of the United States;

17 **Sec. 106. Waiver of Sovereign Immunity.**

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

21 (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503,
22 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552,
23 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142,
24 1143, 1146, 1201, 1203, 1205, 1227, 1231, 1301, 1303, 1305 and 1327 of this title.

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

27 (b) A governmental unit that has filed a proof of claim in the case is deemed to have
28 waived sovereign immunity with respect to a claim against such governmental unit that is
property of the estate and that arose out of the same transaction or occurrence out of which the
claim of such governmental unit arose.

Sec. 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301,
302, or 303 of this title, or an application filed under section 5 (a)(3) of the Securities Investor
Protection Act of 1970, operates as a stay, applicable to all entities, of –

1
2 (1) the enforcement, against the debtor or against the property of the estate, of a
3 judgment obtained before the commencement of the case under this title;

4
5 **FINDINGS OF FACT**

6
7 The Court derives the following *Findings of Fact* by virtue of the defendant's default
8 judgment. The Court earlier pronounced that "[i]n the event that the defendant fails to answer
9 the complaint, the Court presumes the defendant's tacit agreement with the factual allegations
10 contained or incorporated into the complaint. Consequently, '[w]hen a default judgment is
11 entered, facts alleged in the complaint may not be contested.'" *Dolores Greendeer v. Randall*
12 *Mann*, CV 00-50 (HCN Tr. Ct., July 2, 2001) at 12 (*quoting Black v. Lane*, 22 F.3d 1395, 1399
13 (7th Cir. 1994)).

14
15 1. The plaintiff, Housing Dept., is a wholly owned and operated entity of the Ho-Chunk
16 Nation, a federally recognized Indian Tribe, and is located on trust lands of the Ho-Chunk Nation
17 in Tomah, WI.

18
19 2. The defendant, Edward Perry, is an enrolled member of the Ho-Chunk Nation, Tribal ID
20 No. 439A003567.

21
22 3. On November 13, 2000, the Housing Dept. filed the *Notice and Motion to Intervene* and
23 *Intervenor's Complaint*.¹

24
25 4. On November 20, 2000, Bailiff/Process Server Willa RedCloud personally served the
26 *Intervenor's Complaint* along with a *Summons* upon the defendant, Edward Perry, in accordance

27
28

¹ The Housing Dept. intervened in the case at the November 6, 2000 *Fact-Finding Hearing* as permitted by *HCN R. Civ. P. 24* which states in part: "A party with an interest in an action may intervene and be treated in all respects as a named party to the action."

1 with *HCN R. Civ. P. 5 (C)(1)(a)*. The *Summons* informed the defendant that “[f]ailure to file a
2 timely *Answer* in the time allowed ***can result in a default judgment being entered against you.***”
3
4 *Summons*, CV 00-92 (HCN Tr. Ct., Nov. 20, 2000) (emphasis in original); *see also HCN R. Civ.*
5 *P. 5 (B)*.

6 5. The defendant failed to file an *Answer* “on or before the twentieth (20) (*sic*) day from the
7 date th[e] *Summons* [was] issued,” rendering the defendant in default. *Summons*; *see also HCN*
8 *R. Civ. P. 54*. The final date to file an *Answer* was December 11, 2000 since the twentieth (20th)
9 day fell on a Sunday. *See HCN R. Civ. P. 17*.

10
11 6. On December 26, 2000, the Court entered the *Default Judgment* against the defendant,
12 and the defendant did not attempt to make a timely showing of good cause for failure to file an
13 *Answer*, *HCN R. Civ. P. 54*; did not file a timely post judgment motion, *HCN R. Civ. P. 60*; and
14 did not seek to appeal the final judgment, *HCN R. Civ. P. 61*.

15
16 7. On June 21, 1999, the defendant/contractor entered into a contract with the Housing
17 Dept. for the purpose of building a residence for a tribal member/buyer, Pamela Decorah
18 Scheurich, Tribal ID No. 439A000619, in conjunction with the Ho-Chunk Nation Windfall
19 Homes Updating Project. *Intervenor’s Complaint* at 1, Exhibit 1: *Proposal for Contract*. The
20 defendant/contractor agreed to construct a residence for Mrs. Scheurich on trust land of the Ho-
21 Chunk Nation located at W8859 Decorah Road, Black River Falls, WI. *Id.*

22
23 8. The contract included the signatures of the defendant/contractor, member/buyer and the
24 former President of the Ho-Chunk Nation, Jacob H. LoneTree. The Ho-Chunk Nation
25 Legislature [hereinafter HCN Legislature] expressly delegated the ability to enter into contracts
26 to the President through HO-CHUNK NATION LEGISLATURE RESOLUTION 7/15/97-C. *See*
27
28

1 CONSTITUTION OF THE HO-CHUNK NATION [hereinafter HCN CONSTITUTION], ART. V § 2
2 (a)(b)(i) and ART. VI § 2 (a)(k)(l).

3
4 9. The HCN Legislature adopted the *Ho-Chunk Nation Windfall Homes Updating &*
5 *Housing Benefit Coordination Policy* [hereinafter *Windfall Homes Policy*] in order to continually
6 ensure adequate housing for tribal members. *Windfall Homes Policy*, Revised and Restated as of
7 August 13, 1997; *see also* HCN CONSTITUTION, ART. V § 2 (l)(s).

8
9 10. The defendant/contractor “consent[ed] and agree[d] that the Trial Court of the Ho-Chunk
10 Nation shall have exclusive jurisdiction over any and all disputes” arising under the contract, and
11 that “the rights and obligations of the parties . . . shall be construed in accordance with and shall
12 be governed by the laws of the Ho-Chunk Nation” *Intervenor’s Complaint* at 2, Exhibit 1:
13 *Proposal for Contract* at 7, 8.

14
15 11. The defendant/contractor agreed that “out of each payment to Contractor[, the
16 Contractor shall] pay all amounts owed to all subcontractors on the Home” *Intervenor’s*
17 *Complaint* at 2, Exhibit 1: *Proposal for Contract* at 6.

18
19 12. The defendant/contractor agreed that “the Contractor shall pay as liquidated damages to
20 the credit of Buyer the amount of \$50.00 for each day after the Completion Date it takes to
21 actually complete and deliver the Home in conformity with” the contract. *Id.*

22
23 13. The defendant failed to pay the plaintiff/subcontractor, Scholze Ace Home Center, Inc.
24 [hereinafter Scholze], for supplied project material in the amount of \$32,627.85. *Intervenor’s*
25 *Complaint* at 3, Exhibit 4: *Scholze Statement*. After partial satisfaction through the retained
26 final payment under the contract, the plaintiff, Housing Dept., fully satisfied the defendant’s
27 remaining debt to Scholze in the amount of \$26,974.19. *Intervenor’s Complaint* at 3-4.
28

1 14. The defendant owes liquidated damages in the amount of \$3,950.00, representing the
2 accumulation of \$50.00 per day charges from the extended completion date of May 14, 2000
3 until the posting of the August 1, 2000 *Notice of Termination of Contract* (seventy-nine days).
4
5 *Intervenor's Complaint* at 2-3, Exhibit 2: *Ho-Chunk Nation Community Housing Change Order*
6 and Exhibit 3: *Notice of Termination of Contract*.

7 15. The terms of the December 26, 2000 *Default Judgment* require “the Ho-Chunk Nation
8 Department of Treasury to withhold one hundred percent (100%) of the defendant’s future per
9 capita distributions until this debt of \$30,924.19 is paid in full. Such payments shall be directed
10 to the Ho-Chunk Nation Department of Housing” *Default Judgment* at 6-7 (footnote
11 omitted). The Court properly entered such order in accordance with the CLAIMS AGAINST PER
12 CAPITA ORDINANCE § 103.
13

14 16. On or about February 1, 2001, the Ho-Chunk Nation Department of Treasury [hereinafter
15 Treasury Department] withheld the defendant’s per capita share in the amount of \$1,837.60, and
16 directed this sum to the Housing Dept. *Plaintiff's Memorandum of Law*, CV 00-92 (June 29,
17 2001) at 2.
18

19 17. On February 8, 2001, the defendant filed a *Voluntary Petition* in the federal Bankruptcy
20 Court for the Western District of Wisconsin. The Court became aware of this filing on May 3,
21 2001 through the correspondence submitted by Attorney Craig V. Kitchen.
22

23 18. On or about May 1, 2001, the Treasury Department withheld the defendant’s per capita
24 share in the amount of \$1,829.75, but did not disburse this amount to the Housing Dept. The
25 Treasury Department continues to hold the May 2001 per capita share. *Id.*
26

27 19. On May 24, 2001, the Bankruptcy Court entered its judgment entitled *Discharge of*
28 *Debtor*. *Plaintiff's Memorandum of Law*, Exhibit F.

1 20. The Housing Dept. has filed no *Proof of Claim* in relation to the debt at issue in the
2 present case before the Bankruptcy Court. *Plaintiff's Memorandum of Law* at 5; *see also* 11
3 U.S.C. § 106 (b).
4

5 6 DECISION

7
8 The Court shall attempt to canvass all relevant federal cases concerning the issue at hand.
9 Principally, the Court shall discuss the limited number of occasions in which federally
10 recognized Indian tribes have participated in federal bankruptcy courts or within other federal
11 courts relating to the Bankruptcy Code. The Court shall then offer its interpretation of certain
12 Bankruptcy Code provisions implicated in this case in light of federal case precedent.
13

14 **I. Did the Bankruptcy Code apply to federally recognized Indian**
15 **Tribes prior to the adoption of the 1994 amendments,**
16 **specifically revised 11 U.S.C. § 106, and, if so, did the**
17 **Bankruptcy Code successfully waive tribal sovereign immunity**
from suit?

18 The Ninth Circuit Court of Appeals analyzed whether the Bankruptcy Code applied to a
19 wholly owned and operated tribal enterprise (a furniture store) which conducted business on the
20 reservation with non-Indian buyers, plaintiffs Richard D. and Donna J. Greene d/b/a Custom
21 Carpets. *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *cert. denied* 510 U.S. 1039 (1994). The
22 plaintiffs purchased furniture from the defendant, Mt. Adams Furniture, and subsequently filed
23 for relief under Chapter 7 prior to payment. *Id.* at 592. This action motivated the defendant to
24 peacefully repossess the furniture off-reservation, and later claim sovereign immunity from suit
25 when the bankruptcy trustee attempted to regain the furniture. *Id.*
26
27
28

1 The Ninth Circuit analyzed the earlier version of 11 U.S.C. § 106 to arrive at its
2 decision. *Id.* at 597-98.² The Ninth Circuit assumed that the term “governmental unit”
3 encompassed Indian Tribes for the sake of its analysis, but made no such holding. *Id.* at 597.
4 Regardless, while it did hold that the Bankruptcy Code applied to the situation, the Ninth Circuit
5 found that 11 U.S.C. § 106 did not contain an express waiver of immunity. *Id.* at 598. The
6 Tribe, the Yakima Indian Nation, had not filed a *Proof of Claim* in the underlying proceeding,
7 and, therefore, the *Greene* Court declared § 106 (a) and (b) inapplicable and § 106 (c) incapable
8 of justifying an award of money damages against the Nation. *Id.* at 597-98. As the basis for
9 such holding, the Ninth Circuit placed great reliance upon a then recent pronouncement of the
10 United States Supreme Court [hereinafter U.S. Supreme Court] that “[t]he fact that Congress
11 grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses*
12
13
14

15 ² The bankruptcy trustee urged the appellate court to discern a waiver from the following provisions of the
16 Bankruptcy Code:

17 Sec. 106. Waiver of sovereign immunity.

18 (a) A governmental unit is deemed to have waived sovereign immunity with
19 respect to any claim against such governmental unit that is property of the estate and that
20 arose out of the same transaction or occurrence out of which such governmental unit’s
21 claim arose.

22 (b) There shall be offset against an allowed claim or interest of a governmental
23 unit that is property of the estate.

24 (c) Except as provided in subsections (a) and (b) of this section and
25 notwithstanding any assertion of sovereign immunity –

26 (1) a provision of this title that contains “creditor”, “entity”, or
27 “governmental unit” applies to governmental units; and

28 (2) a determination by the court of an issue arising under such a
provision binds governmental units.

29 Sec. 101. Definitions.

30 (24) “governmental unit” means United States, State; Commonwealth; District;
Territory; municipality; foreign state; department, agency or instrumentality of the United
States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state;
or other foreign or domestic government.

1 to that claim. The issues are wholly distinct.” *Id.* at 598 (quoting *United States v. Nordic*
2 *Village, Inc.*, 503 U.S. 30, 37 (1992) (emphasis in original)); *see also Kiowa Tribe of Okla. v.*
3 *Mfg. Tech., Inc.*, 523 U.S. 751, 755 (1998). Accordingly, the failure of Congress to expressly
4 waive the Yakima Indian Nation’s defense of sovereign immunity barred the plaintiff’s request
5 for relief.

7 The *Greene* decision effectively overruled the holding in an earlier case arising out of the
8 State of Washington. *See Aubertin v. Colville Confederated Tribes*, 446 F. Supp. 430 (E.D.
9 Wash. 1978). In *Aubertin*, an enrolled member of the Colville Confederated Tribes disputed the
10 continued withholding of his tribal per capita payments after obtaining a discharge in
11 bankruptcy. *Id.* at 431-32. The Tribe began withholding Aubertin’s per capita pursuant to his
12 loan agreement with the Tribe wherein he consented to such withholding in the event of default
13 on the loan. *Id.*

15 The District Court assumed jurisdiction of the matter as contemplated by the Indian Civil
16 Rights Act. *Id.* at 432-33. The District Court deemed that it could entertain an alleged due
17 process violation by recognizing that “[a]lthough the Indian Civil Rights Act by its terms does
18 not expressly limit tribal sovereign immunity, the courts have held that the Act does so *by*
19 *necessary implication.*” *Id.* at 432 (emphasis added) (citing *Martinez v. Santa Clara Pueblo*, 540
20 F.2d 1039, 1042 (10th Cir. 1976)). Obviously, the U.S. Supreme Court later overturned this
21 incorrect assumption, declaring that “[i]t is settled that a waiver of sovereign immunity ‘cannot
22 be implied but *must be unequivocally expressed.*’”³ *Santa Clara Pueblo v. Martinez*, 436 U.S.
23 49, 58 (1978) (emphasis added) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

28 ³ For this reason, the brief analysis provided in a case dealing with the Hoopa Valley Indian Tribe proves immaterial since the petitioner brought the action under the Indian Civil Rights Act. *In re Colegrove*, 9 B.R. 337, 339 (Bankr.

1 The District Court proceeded to adjudge the applicability of the Bankruptcy Code, noting
2 the inherent uniformity of the law⁴ and the presumption that “a general statute in terms applying
3 to all persons includes Indians and their property interests” *Id.* at 433-34 (quoting *Fed.*
4 *Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)). Without further
5 substantive analysis, the *Aubertin* Court “conclude[d] that the Bankruptcy Act is an implied
6 waiver of tribal immunity and that the bankruptcy court has the authority to discharge plaintiff’s
7 debt to the Colville Confederated Tribes.” *Id.* at 435. The apparent flaw with the holding
8 derives from the failure to inquire into whether applicability, by itself, results in an automatic
9 loss of sovereign defenses. *See Greene*, 980 F.2d at 598.

12 Only a few bankruptcy courts addressed the relevant issues prior to the adoption of the
13 1994 amendments. Notably, the United States Bankruptcy Court for the District of New Mexico
14 confronted a situation where a New Mexico corporation, Sandmar Corporation, leasing property
15 on the Navajo reservation from the Navajo Nation, filed a Chapter 11 bankruptcy with the effect
16 of staying the debt owed to the Tribe by virtue of the lease. *In re Sandmar Corp.*, 12 B.R. 910
17 (Bankr. D.N.M. 1981). The Navajo Nation reacted by repossessing the property despite full
18 knowledge of the Bankruptcy Court entering the automatic stay. *Id.* at 912.

21 After determining that *Choteau v. Burnet, Comm’r of Internal Revenue*, 283 U.S. 691
22 (1931) did not apply “since an individual member of the tribe, and not the tribe itself, was
23 making a claim for immunity from the statute,” *id.* at 913, the Bankruptcy Court turned to the
24 above-noted premise articulated in the *Tuscarora* decision. *Id.* However, the *Sandmar* Court
25 recognized that “in neither of the cited cases was the question of a tribe’s immunity from suit at
26

28 N.D.Cal. 1981).

⁴ “The Congress shall have Power To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. 1, § 1 (8)(4).

1 issue.” *Id.* The Bankruptcy Court then began to examine whether there existed any inherent
2 limitations to the sovereign immunity of the Navajo Nation. *Id.*

3
4 The *Sandmar* Court keenly focused on the fact that the debtor was non-Indian, thereby
5 rendering the dispute an external matter in light of its commercial character. *Id.* at 914. Given
6 these facts, the Court found persuasive U.S. Supreme Court case law emphasizing the dependent
7 status of Indian Tribes. *Id.* Moreover, the Bankruptcy Court accentuated the point that the
8 Navajo Nation possessed no body of bankruptcy law, and consequently, correctly or incorrectly,
9 surmised that “the Tribal courts have no legal basis for resolving th[e] dispute.” *Id.* at 915.

10
11 The *Sandmar* Court partly justified the above-conclusion through recognition that the
12 Bankruptcy Code represented a uniform law: “Title 11 of the United States Code embodies the
13 totality of the law on the subject of bankruptcy throughout the United States.” *Id.* By
14 establishing the uniformity of the Bankruptcy Code against a background of dependency, an
15 implied waiver of sovereign immunity was born. The Ninth Circuit Court of Appeals, however,
16 later severely criticized the absolutist position taken in *Sandmar*, deeming the contention that
17 sovereign immunity ceases to exist due to the argued exclusivity of jurisdiction in federal
18 bankruptcy courts as having no merit.⁵ *Greene*, 980 F.2d at 598.

19
20 The identical criticism applies to a case that arose in the United States Bankruptcy Court
21 for the District of Montana. *In re Shape*, 25 B.R. 356 (Bankr. D.Mont. 1982). The dispute
22 involved contested property rights to individually allotted trust lands located on the Fort Belknap
23 Indian Reservation. Specifically, the defendants, some of whom were tribal members, wished to
24 ascertain whether leases containing options to purchase obtained from the plaintiffs, tribal
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26

27
28 ⁵ The *Sandmar* Court additionally concluded that the Navajo Nation effectively waived its sovereign immunity from
suit since it filed a *Proof of Claim* in the bankruptcy proceeding, but did not definitively hold that the Tribe
constituted a “governmental unit” as understood within the Bankruptcy Code. *Sandmar*, 12 B.R. at 915-16.

1 members residing on individual allotments, properly conveyed any interest or equity to the
2 defendants. *Id.* at 357. The *Shape* Court initially set out to determine whether “tribal sovereign
3 immunity preclude[s its] jurisdiction over such property, if otherwise in the purview of the
4 Bankruptcy Code,” *id.* at 358, but offered no explanation why such an inquiry was necessary
5 given that the Tribe did not appear as a defendant (granted permission to file an *amicus curiae*
6 brief) nor was any relief sought against the Tribe. *Id.* at 357-58. Nonetheless, the Bankruptcy
7 Court continued by adopting the flawed reasoning of *Sandmar* in wholesale fashion,
8 transforming its opinion into an exercise of extensive and indiscriminate quotation. *Id.* at 358-
9 59. In the end, the *Shape* Court unsurprisingly found that the plaintiffs had no legal authority to
10 convey property interests in lands held in trust by the United States. *Id.* at 359-60; *see Johnson*
11 *v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

14 One other court broached the subject prior to the passage of the 1994 amendments, but
15 did not reach the issue of sovereign immunity. *In re Adams*, 133 B.R. 191 (Bankr. W.D.Mich.
16 1991). The plaintiff, Lewis Adams, removed an employment dispute from the Grand Traverse
17 Band Tribal Court despite agreeing in a contract with the Indian Tribe that its courts would retain
18 exclusive jurisdiction over all employment grievances. *Id.* at 192. The United States
19 Bankruptcy Court for the Western District of Michigan remanded the case to the Tribal Court on
20 the basis that the employment dispute was only tangentially related to his bankruptcy and in
21 furtherance of “strong comity considerations.” *Id.* at 196-97. The Bankruptcy Court did note its
22 agreement with the *Sandmar* decision, holding “that the Bankruptcy Court is *empowered to hear*
23 *matters, despite the existence of a tribal court, that are within its jurisdiction as provided for by*
24 *Congress and the Constitution.” Id.* at 194 (emphasis added). Again, the *Adams* Court entered
25 its decision prior to the opinion of the Ninth Circuit in *Greene*, yet the Bankruptcy Court did not
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27
28

1 explicitly recognize its ability to exercise jurisdiction over an Indian Tribe as synonymous with
2 an evisceration of tribal sovereign immunity from suit.

3 In relation to the Bankruptcy Code, the *Greene* decision represents the most fully
4 reasoned opinion on the subject of tribal sovereign immunity prior to the 1994 amendments.
5 While presuming the applicability of the Bankruptcy Code to tribes, the Ninth Circuit drew
6 proper attention to the analytical defect in *Sandmar* and its progeny. The focus now shifts to
7 whether Congress took the opportunity to unequivocally express a waiver of tribal sovereign
8 immunity from suit in light of its presumed knowledge of the preceding case law, including the
9 opinion appealed in *Greene* to the U.S. Supreme Court.
10
11

12 **II. Did Congress unequivocally express a waiver of tribal**
13 **sovereign immunity from suit by means of the 1994**
14 **amendments to the Bankruptcy Code, specifically revised 11**
15 **U.S.C. § 106?**

16 Two decisions involving tribal creditors did not address the existence of a valid
17 congressional waiver within their respective holdings due to the tribal entities voluntarily
18 availing themselves of the protections afforded by the bankruptcy courts. *In re White*, 139 F.3d
19 1268 (9th Cir. 1998); *In re Vianese*, 195 B.R. 572 (Bankr. N.D.N.Y. 1995). In *White*, Colville
20 Tribal Credit, wholly owned and operated by the Confederated Tribes of the Colville
21 Reservation, loaned tribal member, Melvin J. White, \$340,000.00 contingent on retaining a
22 security interest in Mr. White's tribal trust fund as an assurance against default. *White*, 139 F.3d
23 at 1269-70. Mr. White subsequently filed for Chapter 11 bankruptcy (later converted into
24 Chapter 7), and Colville Tribal Credit actively participated in the Bankruptcy Court for the
25 purpose of preserving its financial interest. *Id.* at 1270. The Ninth Circuit Court of Appeals held
26 that the Tribe, as a sovereign nation, waived its immunity from suit as related to the adjudication
27 of the claim it filed against Mr. White in bankruptcy. *Id.* at 1271 (*citing Gardner v. New Jersey*,
28

1 329 U.S. 565 (1947)). In a footnote, the Court indicated the following: “White did not appeal
2 the district court’s alternative holding that § 106 of the Bankruptcy Code did not abrogate tribal
3 immunity. Therefore, that issue is not before us and we express no view on whether an Indian
4 Tribe is a ‘governmental unit’ for purposes of § 106(a) or (b).” *White*, 139 F.3d at 1273, n.1.

6 Likewise, in *Vianese*, the plaintiff, Turning Stone Casino, wholly owned and operated by
7 the Oneida Indian Nation of New York, filed a complaint in the United States Bankruptcy Court
8 for the Northern District of New York against non-Indian debtors, Joseph L. and Constance A.
9 Vianese, who filed Chapter 7 bankruptcy sometime after the husband bounced a personal check
10 at the Casino in the amount of \$16,500.00. *Vianese*, 195 B.R. at 574. The Bankruptcy Court
11 found a waiver of tribal sovereign immunity by the same rationale as employed in *White*. *Id.* at
12 575. However, the *Vianese* Court continued in *dicta* to assert that “[o]n October 22, 1994, the
13 Bankruptcy Reform Act of 1994 (“Bankruptcy Reform Act”) amended Code § 106 to make it
14 ‘unmistakably clear’ that Congress intended to abrogate sovereign immunity to the extent set
15 forth in that section of the Code.” *Id.* (citing *In re York-Hannover Dev., Inc.*, 181 B.R. 271, 273
16 (Bankr. E.D.N.C. 1995)). The Court then interpreted the reference to “other domestic
17 government” within the definition of “governmental unit” as capable of incorporating Indian
18 Tribes since identified as “domestic dependent nations” by the U.S. Supreme Court. *Id.* at 575-
19 76 (citing 11 U.S.C. § 101 (27); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*,
20 498 U.S. 505, 508 (1991)). Therefore, the *Vianese* Court deduced that 11 U.S.C. § 106 (a)
21 abrogated the sovereign immunity of the governmental unit, Oneida Indian Nation of New York.
22 *Vianese*, 195 B.R. at 575-76.

27 In contrast, the United States Bankruptcy Court for the Northern District of Iowa recently
28 held that although the Bankruptcy Code applied as a general act of Congress to the Sac and Fox

1 Tribe of the Mississippi in Iowa, § 106 (a) did not represent an unequivocally expressed waiver
2 of tribal sovereign immunity from suit. *In re Nat'l Cattle Cong.*, 247 B.R. 259, 265-67 (Bankr.
3 N.D.Iowa 2000). The Tribe filed a *Proof of Claim* in the Chapter 11 bankruptcy proceeding, but
4 accompanied such filing with a *Waiver of Disclaimer* retaining sovereign immunity. *Id.* at 264.
5 The Tribe wanted to preserve a real estate mortgage lien against the non-Indian debtor in the
6 amount of \$9.1 million. *Id.* at 263-64. The Bankruptcy Court required the Sac and Fox to either
7 withdraw its *Proof of Claim* or retract its *Waiver of Disclaimer* within fifteen (15) days of the
8 entry of the decision. *Id.* at 269. However, a decision to withdraw the *Proof of Claim* had the
9 effect of preventing the Court from extinguishing the mortgage lien. *Id.* at 271.

12 Upon a review of federal precedent, the Bankruptcy Court determined that Congress must
13 explicitly mention Indian Tribes in legislation purporting to waive sovereign immunity from suit.
14 *Id.* at 267 (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-358 (2nd Cir. 2000));
15 *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999), *cert. denied*
16 530 U.S. 1229 (2000); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe*, 166 F.3d 1126, 1131
17 (11th Cir. 1999); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir.
18 1989). The Bankruptcy Court, in part, felt compelled to arrive at this decision since a long-
19 standing canon of statutory construction directs courts to resolve ambiguities on the face of a
20 statute in favor of the Indians. *Cattle Cong.*, 247 B.R. at 266 (citing *Florida v. Seminole Tribe*,
21 181 F.3d 1237, 1242 (11th Cir. 1999)).

24 Unlike States and foreign governments, Indian tribes are not specifically
25 included in the § 101(27) definition of 'governmental unit'. In order to
26 conclude Congress intended to subject Indian tribes to suit under the Code,
27 the Court would need to infer such intent from the language which does
28 not unequivocally and unambiguously apply to Indian tribes.

Cattle Cong., 247 B.R. at 267.

1 Shortly thereafter, the United States Bankruptcy Court for the Western District of
2 Pennsylvania adopted the reasoning of the foregoing court in *dicta*. *In re Stringer*, 252 B.R. 900
3 (Bankr. W.D.Pa. 2000). The brief factual synopsis portrayed an Indian businesswoman, Pauline
4 Chrysler d/b/a Randy's Smokeshop, refusing to return personal property of Chapter 11 non-
5 Indian debtors, Robert C. and Bonnie Stringer d/b/a Stringer Trucking. Ms. Chrysler alleged that
6 Stringer Trucking failed to deliver a pre-paid gasoline shipment to her business located on Indian
7 trust property, but, like *Shape*, the Indian Tribe was not named as a party to the suit which
8 entirely dealt with the action of an individual tribal member. Regardless, the *Stringer* Court
9 announced in *dicta* that "[a]n Indian tribe or nation is not amenable to suit by a bankruptcy
10 trustee and the bankruptcy court's jurisdiction to hear adversary proceedings does not operate to
11 pierce an Indian nation's immunity from suit." *Id.* at 901 (*citing Greene*, 980 F.2d 590, *cert.*
12 *denied* 510 U.S. 1039 (1994); *Cattle Cong.*, 247 B.R. 259).

13
14
15 As relating to an actual holding, *Nat'l Cattle Cong.* represents the only case in which a
16 court has addressed and resolved the issue of whether 11 U.S.C. § 106 (a) effectively waived
17 tribal sovereign immunity from suit. The United States Bankruptcy Court for the Northern
18 District of Iowa could not find that this provision unequivocally expressed a waiver of immunity.
19 The Court shall now turn to the provision for the purpose of statutory interpretation.
20
21

22 **III. Did Congress by passing 11 U.S.C. § 106 (a) pronounce an**
23 **unequivocally expressed waiver of tribal sovereign immunity**
24 **from suit?**

25 The *Waiver of Sovereign Immunity* provision provides, in relevant part:
26 "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a
27 *governmental unit* to the extent set forth in this section with respect to . . .," 11 U.S.C. § 106 (a)
28 (emphasis added), an automatic stay entered by a bankruptcy court "applicable to all *entities*." 11

1 U.S.C. § 362 (a) (emphasis added). The obvious question, therefore, becomes what are
2 “governmental units” and “entities”? The definition of “entity” includes a “governmental unit”,
3 so the Court must direct its sole attention at that term. 11 U.S.C. § 101 (15).
4

5 Congress defined “governmental unit” as follows:

6 “governmental unit” means United States; State; Commonwealth; District;
7 Territory; municipality; foreign state; department, agency, or
8 instrumentality of the United States (but not a United States trustee while
9 serving as a trustee in a case under this title), a State, a Commonwealth, a
District, a Territory, a municipality, or a foreign state; *or other foreign or
domestic government*;

10 11 U.S.C. § 101 (27) (emphasis added). Congress continued by defining State as “includ[ing]
11 the District of Columbia and Puerto Rico . . . ,” 11 U.S.C. § 101 (52), and municipality as
12 “mean[ing] political subdivision or public instrumentality of a State.” 11 U.S.C. § 101 (40).
13 Likewise, Congress clearly indicated that the inclusion of foreign states or governments refers to
14 countries. 11 U.S.C. § 101 (23).⁶ However, Congress nowhere defined the term “other domestic
15 government”.
16

17 The U.S. Supreme Court first referred to Indian Tribes as “domestic dependent nations”
18 in the Marshall Trilogy. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Chief
19 Justice Marshall created this designation in order to distinguish Indian Tribes from foreign and
20 state governments. Elaborating on the United States Constitution, Art. I, § 8 (3),⁷ the Supreme
21 Court wrote:
22

23 In this clause [the Indian Tribes] are as clearly contradistinguished by a
24 name appropriate to themselves, from foreign nations, as from the several
25

26 ⁶ Congress also demarcated the geographical boundaries of the United States as encompassing “all locations where
27 the judicial jurisdiction of the United States extends, including territories and possessions of the United States.” 11
28 U.S.C. § 101 (55). This definition does not incorporate Indian Tribes for purposes of determining the existence of
an effective waiver of sovereign immunity, but rather relates solely to references to the United States “when used in
a geographical sense” *Id.*

⁷ “The Congress shall have the power To regulate Commerce with foreign Nations, and among the several States,
and with the Indian Tribes.” U.S. CONST., art. I, § 8 (3).

1 states composing the union. They are designated by a distinct appellation;
2 and as this appellation can be applied to neither of the others, neither can
3 the appellation distinguishing either of the others be in fair construction
4 applied to them. The objects, to which the power of regulating commerce
5 might be directed, are divided into three distinct classes -- foreign nations,
6 the several states, and Indian tribes. When forming this article, the
7 convention considered them as entirely distinct.

8 *Id.* at 18. As a result, Congress derived plenary power in relation to the Indian Tribes by means
9 of the foregoing constitutional delegation found in the Commerce Clause. *See Lone Wolf v.*
10 *Hitchcock*, 187 U.S. 553, 564-65 (1903).

11 The other notable U.S. Supreme Court decision in which the designation of the Indian
12 Tribes as domestic governments was articulated and subsequently proliferated involved the
13 determination of whether the various pueblos located principally in New Mexico constituted
14 Indian Tribes. *United States v. Sandoval*, 231 U.S. 28 (1913). The Supreme Court depicted the
15 character of the Santa Clara Pueblo in the following manner:

16 The people of the pueblos, although sedentary rather than nomadic
17 in their inclinations, and disposed to peace and industry, are
18 nevertheless Indians in race, customs and domestic government.
19 Always living in separate and isolated communities, adhering to
20 primitive modes of life, largely influenced by superstition and
21 fetichism, and chiefly governed according to the crude customs
22 inherited from their ancestors, they are essentially a simple
23 uninformed and inferior people.

24 *Id.* at 39. For apparent reasons, relying upon the *Sandoval* decision for the proposition that
25 Indian Nations are domestic governments is unfounded. Apart from the truly offensive rationale
26 offered by the Court, the decision identifies the pueblos as possessing a unique domestic
27 government, not that the pueblos are a domestic government in relation to the United States.

28 Interpreting the term “other domestic government” as properly encompassing Indian
Nations for the purpose of determining a waiver of immunity proves unprincipled at best. As

1 noted above, Congress must unequivocally express a waiver of sovereign immunity from suit.
2 *Martinez*, 436 U.S. at 58. The U.S. Supreme Court has never departed from this standard despite
3 waging recent objections to the ongoing validity and/or necessity of the defense in certain
4 contexts. *See Kiowa Tribe*, 523 U.S. at 756-59 (requiring “explicit legislation” to evidence a
5 waiver, and noting specific occasions when Congress complied with this requirement, *see e.g.* 25
6 U.S.C. §§ 450f (c)(3), 2710 (d)(7)(A)(ii)). The U.S. Supreme Court has announced a more lax
7 standard for assessing an Indian Tribe’s waiver of its own immunity, but consistently reiterates
8 the *Martinez* holding. *See C & L Enter. Inc. v. Citizen Band of Potawatomi Indian Tribe of*
9 *Okla.*, 69 U.S.L.W. 4249, 4292 (U.S., April 30, 2001). Specifically, “[t]o abrogate tribal
10 immunity, Congress must ‘unequivocally’ express that purpose. *Id.* (citing *Martinez*, 436 U.S. at
11 58).
12
13

14 11 U.S.C. § 106 (a) purports to abrogate the sovereign immunity of individually
15 enumerated “governmental units”, but nowhere mentions Indian Tribes. For that reason,
16 Congress has manifested its intention not to waive tribal sovereign immunity from suit. In 1788,
17 the constitutional convention deliberately distinguished Indian Tribes from foreign and state
18 governments, utilizing a “distinct appellation” for describing the indigenous nations. *Cherokee*
19 *Nation*, 30 U.S. at 17. This purposeful classification was incapable of referring to states and
20 foreign countries. *Id.* Yet, over two hundred years later at least one court was persuaded by an
21 argument that the generic catch-all term “other domestic government” properly incorporated
22 Indian Tribes, thereby abolishing the defense of tribal sovereign immunity. *Vianese*, 195 B.R. at
23 575-76.
24
25

26 Through its inaction, Congress declined to additionally enumerate Indian Tribes in the
27 definition of “governmental unit” when it amended 11 U.S.C. § 106 (a) in 1994. Prior to that
28

1 time, Indian Tribes made appearances in federal courts relating to bankruptcy. Most
2 significantly, a 1992 Ninth Circuit opinion appealed to the U.S. Supreme Court not only held that
3 tribes retained their sovereign immunity under the Bankruptcy Code, but avoided holding that
4 Indian Tribes constituted governmental units. *Greene*, 980 F.2d at 597-98. The proposition
5 simply cannot be argued that Congress inadvertently failed to mention Indian Tribes due to a
6 lack of tribal association with the subject matter. *See e.g. Reich v. Great Lakes Indian Fish &*
7 *Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993) (The Fair Labor Standards Act “was enacted in
8 1938, at a time when Indian problems were not at the forefront of the national policy agenda.”).

9
10
11 Moreover, the ambiguity present in the Bankruptcy Code, evidenced by the conflicting
12 interpretations of the federal courts, cannot operate to the detriment of Indian Tribes. “Statutes
13 are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to
14 their benefit.” *Montana, et al. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing
15 *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973)); *see also Miccosukee Tribe*,
16 166 F.3d at 1131. Arguments directed at intuiting congressional intent based upon the
17 uniformity of the Bankruptcy Code must likewise confront the same level of scrutiny. *See Equal*
18 *Employment Opportunity Comm’n v. Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d
19 246, 250 (8th Cir. 1993) (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 178
20 (1989)) (“ambiguities of congressional intent must be resolved in favor of the (*sic*) tribal
21 sovereignty.”).

22
23
24 Congress recognized the need for clarity when it determined to waive the sovereign
25 immunity of certain “governmental units”. The Bankruptcy Code carefully defined the scope
26 and breadth of terms, *e.g.* “State” and “municipality”, not susceptible to much controversy, yet
27 rested on the ‘intrinsic meaning’ of “other domestic government”. In essence,
28

1 Congress has demonstrated in this very statute its ability to craft laws
2 satisfying the Supreme Court’s mandate that courts may find that
3 Congress has abrogated sovereigns’ immunity from lawsuits only where it
4 has expressed unequivocally its intent to do so. That it chose not to
5 similarly include an abolition of the immunity of Indian tribes is a telling
6 indication that Congress did not intend to subject tribes to suit

7 *Miccosukee Tribe*, 166 F.3d at 1133.

8 In contrast, Congress has clearly expressed its intention to subject Indian Tribes to suit in
9 several statutes. *See Osage Tribal Council*, 187 F.3d 1174 (The Safe Drinking Water Act
10 includes Indian Tribes within the coverage of its enforcement provisions.); *Pub. Serv. Co. of*
11 *Colo. v. Shoshone-Bannock Tribes, et al.*, 30 F.2d 1203 (9th Cir. 1994) (The Hazardous
12 Materials Transportation Uniform Safety Act of 1990 (repealed 1994) permitted the filing of
13 preemption cases against Indian Tribes.); *Northern States Power Co. v. The Prairie Island*
14 *Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993) (same as *Shoshone-Bannock*);
15 *Blue Legs*, 867 F.2d 1094 (The Resource Conservation and Recovery Act of 1976 allows private
16 citizens to bring compliance suits against Indian Tribes.).⁸ Similarly, other courts have declined
17 to find waivers of tribal sovereign immunity in the absence of an explicit expression by
18 Congress.⁹ *See supra*; *see also Bassett*, 204 F.3d 343 (The Copyright Act does not subject

21 ⁸ The Tenth Circuit Court of Appeals correctly noted that “[t]here is very little case law defining the precise scope of
22 the ‘unequivocal expression’ of waiver required,” *Osage Tribal Council*, 187 F.3d at 1181, yet the U.S. Supreme
23 Court does draw an apparent distinction between waivers of sovereign immunity when performed by an Indian Tribe
24 as opposed to when Congress waives tribal immunity, requiring clarity in the former and an “unequivocal
25 expression” in the latter. *C & L Enter. Inc.*, 69 U.S.L.W. at 4292 (citing *Okla. Tax Comm’n*, 498 U.S. at 509).
26 Therefore, this Court withholds its agreement with the foregoing cases to the extent that the respective courts found
27 merely “clear” waivers in the legislation.

28 ⁹ “Tribal sovereign immunity does not bar suits by the United States.” *Reich v. Mashantucket Sand & Gravel, et*
al., 95 F.3d 174, 182 (2nd Cir. 1996); *see also Miccosukee*, 166 F.3d at 1134-35. Accordingly, several federal cases
that have grappled with the concept of statutes of general applicability and their impact on Indian Tribes are
inapposite. *See e.g. U.S. Dep’t of Labor v. Occupational Safety & Health Review Comm’n, et al.*, 935 F.2d 182 (9th
Cir. 1991); *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *Donovan v. Navajo Forest Prod.*
Indus. et al., 692 F.2d 709 (10th Cir. 1982). Also, in addition to being filed by the United States, suits filed against
individual Indians, tribal consortiums or other interested parties prove irrelevant as they do not possess sovereign
immunity. *See e.g. Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490 (7th Cir. 1993); *Smart v. State*
Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989); *United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986); *United States*
v. Farris, et al., 624 F.2d 890 (9th Cir. 1980).

1 Indian Tribes to the jurisdiction of the federal courts for purposes of individual civil actions.);
2 *Miccosukee Tribe*, 166 F.3d 1126 (The Americans with Disabilities Act failed to create a private
3 right of action against Indian Tribes for non-compliance with its provisions.). “Congress
4 comprehends the need to address Indian Tribes specifically and individually when it describes
5 the means of enforcing statutorily created rights through judicial action,” *Miccosukee Tribe*, 166
6 F.3d at 1132, and the proposition that the Bankruptcy Code accomplishes this task through
7 implicit recognition of Indian Tribes as “other domestic governments” cannot stand.
8

9 This Court instead notes its agreement with the fundamental proposition and holding
10 articulated by the Eleventh Circuit Court of Appeals in *Miccosukee Tribe*. “We conclude . . .
11 that Congress abrogates tribal immunity only where the definitive language of the statute itself
12 states an intent either to abolish Indian tribes’ common law immunity or to subject tribes to suit .
13 . . .” *Id.* Congress has not unequivocally expressed a waiver of tribal sovereign immunity from
14 suit by means of 11 U.S.C. § 106 (a).
15
16

17 **IV. Does the automatic stay and subsequent *Discharge of Debtor***
18 **entered by the United States Bankruptcy Court for the**
19 **Western District of Wisconsin implicate the sovereign**
20 **immunity of the Ho-Chunk Nation?**

21 The sovereign immunity of the Ho-Chunk Nation is distinctly at issue in the present case.
22 The defendant voluntarily entered into the *Proposal for Contract* on June 21, 1999, agreeing to
23 the terms and conditions contained therein. One such term declared the Ho-Chunk Nation Trial
24 Court as the forum possessing exclusive jurisdiction over any and all disputes arising under the
25 *Proposal for Contract*. The plaintiff, Housing Dept., filed its *Intervenor Complaint* alleging
26 several disputes in relation to the terms and conditions. The Court consequently afforded the
27 defendant his requisite due process, but ultimately the defendant chose not to answer the
28 properly filed pleadings.

1 The Court exercises personal jurisdiction over the plaintiff by virtue of his status as an
2 enrolled tribal member, the location of the construction project on trust land and the validly
3 entered *Proposal for Contract*. See HCN CONSTITUTION, ART. I §§ 1, 2; HO-CHUNK NATION
4 JUDICIARY ACT OF 1995 § 2. The Court obtained subject matter jurisdiction over the proceeding
5 by virtue of the *Proposal for Contract* containing a Governing Law clause, and the fact that the
6 HCN Legislature properly delegated the power to then President Jacob LoneTree to sign
7 contracts. The *Proposal for Contract*, therefore, became the law of the Ho-Chunk Nation for
8 purposes of this particular action.¹⁰ See HCN CONSTITUTION, ART. I §§ 1, 2; HO-CHUNK
9 NATION JUDICIARY ACT OF 1995 § 2. And, the Court accordingly entered the December 26, 2000
10 *Order (Default Judgment)* when the defendant offered no response. See HCN CONSTITUTION,
11 ART. VII §§ 5 (a), 6 (a).

14 The *Order (Default Judgment)* has effectively granted the Ho-Chunk Nation a security
15 interest in the defendant's per capita payments. See CLAIMS AGAINST PER CAPITA ORDINANCE §
16 103. The automatic stay and subsequent *Discharge of Debtor* directly threatens the Ho-Chunk
17 Nation's expectation of receiving monies until full repayment of the debt. Vacating the *Order*
18 (*Default Judgment*) would inevitably result in a monetary loss to the Ho-Chunk Nation. See
19 *Cattle Cong.*, 24 B.R. 269-72; see also *In re Pitts*, 241 B.R. 862, 868-870 (Bankr. N.D. Ohio
20 1999). As detailed above, Congress has not unequivocally expressed a waiver of the Ho-Chunk
21 Nation's sovereign immunity from suit, nor has the Ho-Chunk Nation "expressly waive[d]" its
22 sovereign immunity. See HCN CONSTITUTION, ART. XII § 1.

26 ¹⁰ The Court determined it lacked subject matter jurisdiction over non-Indian defendants in a recent case in which
27 the Ho-Chunk Nation alleged that several breaches of contract culminated in structural defects to a child care center
28 located on trust lands. *Ho-Chunk Nation v. B & K Builders and Ruka & Assoc.*, CV 00-91 (HCN Tr. Ct., June 20,
2001). The Court based its decision upon the fact that the HCN Legislature *f/k/a* Wisconsin Winnebago Business
Committee failed to delegate signatory authority to the Executive Branch despite its presumed knowledge of how to
accomplish this delegation. *Id.* at 12-15; see *supra* *Finding of Fact 8*.

1 **THEREFORE**, the Ho-Chunk Nation Trial Court concludes that it shall retain the
2 December 26, 2000 *Order (Default Judgment)* in full force and effect. **HOWEVER**, the Court
3 directs the Housing Dept. to contact the defendant within ten (10) days of the entry of this *Order*
4 to discuss the possibility of reducing, or eliminating, the quarterly withholdings from the
5 defendant’s per capita payments in light of his documented financial condition.¹¹

7 The parties retain the right to file a timely post judgment motion with this Court in
8 accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgement or Order*.
9 Otherwise, “[a]ny *final Judgement or Order* of the Trial Court may be appealed to the Ho-Chunk
10 Nation Supreme Court.¹² The *Appeal* must comply with the Ho-Chunk Nation *Rules of*
11 *Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right
12 of Appeal.” *HCN R. Civ. P. 61*. The appellant “shall within thirty (30) calendar days after the
13 day such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a
14 Notice of Appeal from such judgment or order, together with a filing fee of thirty-five dollars
15 (\$35 U.S.)” *HCN R. App. P. 7(b)(1)*. “All subsequent actions of a *final Judgement* or Trial
16 Court *Order* must follow the [*HCN R. App. P.*.]” *HCN R. Civ. P. 61*.

21 ¹¹ The Housing Dept routinely enables debtors to satisfy obligations to the Ho-Chunk Nation through partial
22 withholding of per capita payments. *See e.g. Housing Dept., Prop. Mgmt. Div. v. Charles C. and Simone I. Brown*,
CV 99-100 (HCN Tr. Ct., June 23, 2000) *appeal denied* SU 00-11 (HCN S. Ct., Aug. 18, 2000). No such equitable
adjustments occurred in the present case due to the defendant’s complete lack of participation in the matter.

23 ¹² The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.”
24 *Louella A. Kelty v. Jonette Pettibone and Ann Winneshiek, in their official capacities*, SU 99-02 (HCN S. Ct., Sept.
25 24, 1999) at 2. The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard “to determine
26 if an error of law was made by the lower court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek,*
Ona Garvin, Rainbow Casino Mgmt., SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov’t*
II v. Chloris A. Lowe, Jr. and Kathyleen Lone Tree-Whiterabbit, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and
27 *JoAnn Jones v. Ho-Chunk Nation Election Bd. and Chloris Lowe*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The
28 Supreme Court accepted the following definition of abuse of discretion: “any unreasonable, unconscionable and
arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted.”
Youngthunder, Sr., SU 00-05 at 2 *quoting* BLACK’S LAW DICTIONARY 11 (6th ed. 1990). Regarding findings of fact,
the Supreme Court has required an appellant to “demonstrate[] clear error with respect to the factual findings of the
trial court.” *Coalition II*, SU 96-02 at 8; *but see Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct.,
Mar. 25, 1997) at 1-2.

1 **IT IS SO ORDERED** this 31st day of July, 2001 by the Ho-Chunk Nation Trial Court
2 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.¹³
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6 Honorable Todd R. Matha
7 Associate Trial Court Judge
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Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070



27 ¹³ The Court notes for the Office of the President and the HCN Legislature that the instant case represents the third
28 occasion in which a contractor has failed to pay subcontractors on a housing project, necessitating Court
involvement. See *Boardman v. Housing Dept.*, CV 99-107 (HCN Tr. Ct., April 18, 2001) (resulting damage award
of \$31,807.20); *Ho-Chunk Nation Home Ownership Program v. Hindes*, CV 98-20 (HCN Tr. Ct., May 18, 1998)
(resulting damage award of \$49,492.20).