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Bree Black Horse

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## **The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity: Tribal Payday Lending Enterprises Are Immune Under A Proposed Universal Arm of The Tribe Test**

### **Erratum**

Due to error, volume 1, issue 2 was originally published as volume 2, issue 1 and some articles were misnumbered or not published at all. This document reflects the correct version of volume 1, issue 2.

## THE RISKS AND BENEFITS OF TRIBAL PAYDAY LENDING TO TRIBAL SOVEREIGN IMMUNITY

Bree R. Black Horse<sup>\*</sup>

### INTRODUCTION

Tribal leaders are regularly confronted with the challenge of funding their sovereign nations and providing for their people during this era of economic volatility and stagnant growth. While some tribal nations possess the substantial financial and natural resources necessary to overcome the difficulties associated with achieving self-determination, economic self-sufficiency, and self-governance, the reality is many tribal nations do not. Tribes geographically isolated from urban areas and lacking in natural resources often struggle to not only meet the needs of their people, but also to operate sustainable sovereign nations that provide all of the systems and resources present in modern governments. For these tribes, online payday lending operations may provide a temporary solution.

Opponents of tribal payday lending claim that non-Indian lenders attempt to conduct business with Indian tribes under the guise of the alleged “sovereignty model” in an effort to evade regulations and prosecution. While these critics question the legality and transparency of tribally affiliated payday lending operations, some tribal nations are operating payday lending enterprises consistent with the policies and legal framework of tribal sovereign immunity. Namely, the lending operations executed by the Miami Tribe of Oklahoma serve as an example of a tribally run business entitled to sovereign immunity.

This article begins with an exploration of the payday lending industry and the payday loan itself, emphasizing the arguments for and against allowing payday loans. Next, it will briefly discuss several state and federal efforts to regulate the payday lending industry in order to provide for an understanding of the regulatory entities that will likely

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<sup>\*</sup> Bree R. Black Horse is a 2013 J.D. candidate at Seattle University School of Law, and she is an enrolled member of the Seminole Nation of Oklahoma. The author would like to thank Professor Eric Eberhard for his guidance on this article, invaluable mentorship, and continued service to Indian Country. The author would also like to express gratitude to both the incoming and outgoing staff of the American Indian Law Journal for their assistance with this article, and their dedication to the Journal's mission and growth.

challenge the right tribes possess to operate payday lending enterprises. With the backdrop of the short-term, small-dollar credit market set, the relationship between tribes and payday lending is introduced.

While organizations argue both sides of the payday lending debate and regulators attempt to take action against the predatory practice, tribes may yet have the opportunity to operate such businesses under the sovereignty model. After a discussion concerning the basic principles of sovereign immunity, the wide array of the arm of the tribe tests implemented by the federal courts of appeals are examined in detail. At the conclusion of the discussion, a universal arm of the tribe test, informed by the trends in the federal courts, is presented and applied to an example entity from a federally recognized tribe.

## **I. THE PRACTICE AND REGULATION OF THE PAYDAY LENDING INDUSTRY**

### ***A. An Examination of the Short-Term, Small-Dollar Credit Market***

#### **1. What is a Payday Loan?**

A payday loan is a small personal loan secured by direct access to the borrower's bank account, either through a post-dated check or other authorization to withdraw funds from the account on the borrower's next payday. Obtaining a payday loan is relatively simple when compared to the requirements of obtaining a traditional bank-issued loan. Payday lenders often only require verification of an open bank account, a steady source of income, and identification for approval whereas traditional lenders commonly require satisfactory credit history and asset-based collateral to obtain a loan. In general, payday loans range in size from \$100 to \$1,000, and the average loan term is about two weeks. A payday loan is typically referred to as short-term, small-dollar credit due to the repayment period and the dollar amount of the loan.

Although borrowing is generally concentrated among younger, low-to-moderate-income individuals, research shows that people of most ages and incomes utilize payday loans.<sup>1</sup> More than twelve million Americans

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<sup>1</sup> THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: PART ONE - WHO BORROWS, WHERE THEY BORROW, AND WHY 10 (2012), [www.pewtrusts.org/small-loans](http://www.pewtrusts.org/small-loans) (last visited Apr. 20, 2013).

use payday loans annually.<sup>2</sup> Significantly, about three-quarters of borrowers obtain a payday loan through a storefront operation, while roughly one-quarter of borrowers acquire a payday loan online.<sup>3</sup> With millions of Americans routinely using this loan method, payday lending has grown into a multi-billion dollar industry. Payday loan users spend approximately \$7.4 billion annually at over 36,000 storefront operations and at hundreds of online websites.<sup>4</sup>

## 2. The Payday Loan Debate

While payday loans are advertised as short-term, small-dollar credit intended for emergency or special use, a majority of borrowers<sup>5</sup> use payday loans to cover ordinary living expenses over the course of months – not for unexpected emergencies over the course of weeks.<sup>6</sup> In reality, a borrower's initial reasons for taking out a payday loan stem from an ongoing need for income, rather than a short-term need to cover an unexpected expense.<sup>7</sup> A typical borrower uses payday loans multiple times a year, and much of this borrowing comes in relatively quick succession once the borrower begins using payday loans.<sup>8</sup> To illustrate, the average borrower takes out eight individual loans of \$375 each per year, and spends \$520 on interest annually.<sup>9</sup> As a result, the typical borrower is indebted about five to seven months of the year.<sup>10</sup>

Industry advocates and regulators advise consumers that using payday loans for recurring expenses is not an effective use of this high-cost credit, and emphasize that payday loans should be used to cover unexpected expenses for a short period of time.<sup>11</sup> In reality, about two-thirds of borrowers use a payday loan to cover a recurring monthly

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.*

<sup>5</sup> THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: PART TWO HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 9 (2013) (Four times more storefront borrowers used their first payday loan for a recurring expense (69 percent) than an unexpected expense (16 percent)).

<sup>6</sup> THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 6 (2012), [http://www.pewtrusts.org/our\\_work\\_detail.aspx?id=327397](http://www.pewtrusts.org/our_work_detail.aspx?id=327397) (last visited Apr. 20, 2013).

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *Id.* at 11.

expense,<sup>12</sup> while only one-third of borrowers use a payday loan to deal with an unexpected expense.<sup>13</sup> The controversial lending practices associated with payday loans, such as high interest rates and chronic borrowing, have ignited a fierce debate between consumer advocates, government officials, and representatives of the payday lending industry.

Opponents of payday lending claim that the practice is unethical in nature, preying on overburdened low-income individuals. For instance, the profitability of payday lenders is contingent on repeat borrowing, as a new customer only becomes profitable for the lender after the fourth or fifth loan.<sup>14</sup> Consumer groups also contend that payday loans are expensive debt, with interest rates often exceeding 400% APR.<sup>15</sup> Furthermore, opponents argue that a payday loan is usually impossible to repay by the borrower's next payday.<sup>16</sup> Moreover, most borrowers renew or re-borrow rather than repay their loans.<sup>17</sup> As a result, opponents claim that consumers are trapped in a cycle of debt subject to unfavorable and costly repayment terms.

On the other hand, advocates of payday lending argue that the model is a vital resource to under-banked<sup>18</sup> individuals facing an urgent need to solve temporary problems. In support of this argument, proponents cite the simplicity of the application process, and nearly immediate loan approval followed by a direct disbursement of cash funds. To demonstrate, payday lenders offer instant loan approval or denial decisions, and loan determinations are commonly based on the verification of employment rather than credit history or asset collateral. Advocates conclude that a payday loan is an easily attainable, unsecured

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<sup>12</sup> *Id.* (Examples of recurring monthly expense include rent or mortgage payments, food, utilities, car payments, and credit card payments).

<sup>13</sup> *Id.* at 14.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> [www.consumer.ftc.gov/articles/0097-payday-loans](http://www.consumer.ftc.gov/articles/0097-payday-loans) (last visited Apr. 20, 2013).

<sup>16</sup> THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: PART TWO HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 9 (2013) (The average borrower can afford to pay \$50 per two weeks to a payday lender, but only 14 percent can afford the more than \$400 needed to pay off the full amount of these non-amortizing loans).

<sup>17</sup> *Id.* at 13-19.

<sup>18</sup> THE FEDERAL DEPOSIT INSURANCE COMPANY ("Under-banked" consumers typically hold a bank account, but also rely on alternative financial services such as non-bank check cashing services, non-bank remittances, pawn shops, rent-to-own services, and payday loans), <http://www.fdic.gov/householdsurvey> (last visited Apr. 20, 2013).

debt designed to assist a financially challenged borrower in a timely manner.

In an effort to combat the claims of opponents, the payday loan industry trade group issued best practices, and a customer bill of rights.<sup>19</sup> The payday lending industry's stated best practices limit individual loan rollovers and encourage lenders to offer extended repayment plans.<sup>20</sup> Despite the promotion of these standards, marketing and lending practices differ greatly. In light of the recent payday lending debate and inconsistent business practices, most states have taken regulatory action intended to curb predatory practices.

### ***B. State Regulation of the Payday Lending Industry***

Currently, payday lending is primarily regulated at the state level through statutes designed to enable, control, or prohibit payday lending. Legislative efforts typically mandate interest caps, limit the number of loans a borrower can take on an annual basis, and implement more consumer-friendly repayment terms. Most states have taken some regulatory action in light of the recent controversy stemming from payday lending practices, but these regulatory schemes range from permissive to prohibitory.

A majority of states take a permissive regulatory approach to payday lending, implementing either minimal guidelines or no regulations at all. Twenty-eight states<sup>21</sup> follow this permissive regulatory approach, under which payday lenders can easily charge triple digit interest rates and dictate stringent repayment terms.

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<sup>19</sup> The Community Financial Services of America member best practices, <http://cfsaa.com/cfsa-member-best-practices.aspx> (last visited Apr. 20, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> Permissive states allow single-repayment loans with APRs exceeding 391%. These states include Alabama, Alaska, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, Wyoming. <http://www.pewstates.org/research/data-visualizations/state-payday-loan-regulation-and-usage-rates-85899405695> (last visited Apr. 20, 2013).

In states that enact strong consumer protections, the result is a large net decrease in payday loan usage.<sup>22</sup> Moreover, borrowers residing in these states are not driven to seek payday loans online or from other sources in response to stringent regulations.<sup>23</sup> While many states have enacted legislation over the past decade intended to curb predatory payday lending practices, federal regulators have only recently addressed the controversial practices associated with the payday lending industry.

### ***C. Federal Regulation of the Payday Lending Industry***

Federal policy on payday lending is swiftly developing, with action both at the congressional and executive levels. Beginning in 2007, Congress enacted a law regulating payday lending practices involving members of the armed services and their families.<sup>24</sup> More recently, the SAFE Lending Act was introduced in the 112<sup>th</sup> Congress.<sup>25</sup> The Act would require online lenders to abide by the regulations of the state in which the borrower resides.<sup>26</sup> Correspondingly, there was also a similar House Bill introduced in the same session.<sup>27</sup>

The Dodd-Frank Wall Street Reform Act and the Consumer Protection Act of 2010 established the Consumer Financial Protection Bureau.<sup>28</sup> The Bureau was created for the purpose, among other things, of protecting consumers from abusive financial service practices.<sup>29</sup> Accordingly, the Bureau has the authority to regulate payday loans.<sup>30</sup> While the Bureau recently commenced its first field hearing to gather information on the short-term, small-dollar credit market, it has not yet

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<sup>22</sup> THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 22-24 (2012), [www.pewtrusts.org/small-loans](http://www.pewtrusts.org/small-loans) (last visited Apr. 20, 2013).

<sup>23</sup> *Id.*

<sup>24</sup> 10 U.S.C. § 987, 32 C.F.R. § 232.3 (The Talent-Nelson Amendment to the John Warner National Defense Authorization Act, limits the permissible annual percentage rate and creates structural requirements for certain small dollar loans issued to members of the armed services and their dependents).

<sup>25</sup> SAFE Lending Act, S. 3426, 112<sup>th</sup> Cong. (2012).

<sup>26</sup> *Id.*

<sup>27</sup> SAFE Lending Act, H.R. 6483, 112<sup>th</sup> Cong. (2012).

<sup>28</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§5301-5641 (2010).

<sup>29</sup> 124 Stat. §1376.

<sup>30</sup> 12 U.S.C. § 5514.



taken measurable regulatory or legal action against payday lenders.<sup>31</sup> However, consumer advocates and federal officials anticipate that the Bureau will play a significant role in the future. Despite the absence of action from the Bureau, the Federal Trade Commission has recently taken an active role in policing the payday lending industry.

The Federal Trade Commission's Bureau of Consumer Protection, while lacking jurisdiction over banks, can exercise authority over the payday lending industry.<sup>32</sup> With regard to payday lenders, the FTC enforces the Federal Trade Commission Act, the Truth In Lending Act, and the Electronic Fund Transfer Act.<sup>33</sup> In 2011, the FTC brought action against numerous payday lenders, including tribal entities, for various deceptive practices in federal district court.<sup>34</sup>

## II. THE RELATIONSHIP BETWEEN INDIAN TRIBES AND THE PAYDAY LENDING INDUSTRY

Over the past two decades, the short-term, small-dollar credit market landscape has changed dramatically. While the payday loan industry mainly serves customers and generates revenue through storefront operations, the early twenty-first century has witnessed a migration of payday loan providers to the internet.<sup>35</sup> Consumer advocates and some storefront lenders have cautioned that online payday lending can exploit borrowers because these online loans often occur outside of the reach of state regulators.<sup>36</sup> Although some lenders purport to be state-licensed and to comply with state interest rate caps and loan terms, numerous online lenders claim choice of law from states with no rate caps

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<sup>31</sup> Press Release, Consumer Financial Protection Bureau, CFPB Examines Payday Lending (Jan. 19, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-examines-payday-lending/> (last visited Apr. 20, 2013).

<sup>32</sup> The Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2012).

<sup>33</sup> *Id.*

<sup>34</sup> See *Federal Trade Commission v. AMG Services, Inc., et al.* Case No. 2:12-cv-00536, FTC File No. 112 3024 (2012); *and Federal Trade Commission v. Payday Financial, et al.* Case No. 3:11-cv-03017-RAL, FTC File No. 112 3023 (2012).

<sup>35</sup> THE PEW CHARITABLE TRUSTS, A SHORT HISTORY OF PAY DAY LENDING LAW 1 (2012) (citing GARY RIVLIN, BROKE USA: FROM PAWNSHOPS TO POVERTY, INC. – HOW THE WORKING POOR BECAME BIG BUSINESS 54 (2001)).

<sup>36</sup> LAUREN K. SANDERS, ET AL., NATIONAL CONSUMER LAW CENTER, STOPPING THE PAYDAY LOAN TRAP: ALTERNATIVES THAT WORK, ONES THAT DON'T 4-6 (2010) (describing payday loans and the harms they cause consumers), [http://www.nclc.org/images/pdf/high\\_cost\\_small\\_loans/payday\\_loans/report-stopping-payday-trap.pdf](http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf) (last visited Apr. 20, 2013).

or from foreign countries.<sup>37</sup> Notably, a growing number of online lenders claim to be exempt from state law enforcement as a result of tribal sovereign immunity. Controversy has developed with regards to online payday lending operations that evade state regulations by affiliating with Native American tribes.

Sovereign immunity generally precludes tribally run businesses from state regulations.<sup>38</sup> Some tribes have claimed immunity in state and federal courts on behalf of the payday lending entities that consumer groups accuse of charging usurious interest rates to mainly low-income borrowers. Tribally affiliated payday lenders, due to this claim of immunity, are able to operate internet-based payday lending businesses in states where the interest rates charged by lenders exceed those permitted by the state or in states where payday lending is banned all together. This immunity is commonly referred to as the “sovereignty model.”

There are more than 560 federally recognized sovereign tribes in the United States, many of which do not benefit from the gaming industry, a proximity to urban centers, or abundant natural resources. For many tribes, geography creates a number of barriers to promoting economic growth. Proponents of tribal payday lending argue that these barriers to economic growth create a need for tribal internet-based opportunities.<sup>39</sup>

Presently, there are at least eleven federally recognized Native American tribes affiliated with payday lending.<sup>40</sup> A majority of the companies offering payday lending services claim ownership and operation by tribes located in Oklahoma, but numerous tribes from California to Wisconsin participate in the payday lending business.

The controversy surrounding tribally affiliated payday lending operations is predominately centered on the tribal lenders’ immunity from

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<sup>37</sup> CONSUMER FEDERATION OF AMERICA, CFA SURVEY OF ONLINE PAYDAY LOAN WEBSITES 5-6 (2011).

<sup>38</sup> See *infra* note 54.

<sup>39</sup> Native American Financial Services Association, <http://www.mynafsa.org/useful-information/nafsa-fact-sheet/> (last visited Apr. 20, 2013) (one of two trade organizations for tribally-affiliated payday lenders).

<sup>40</sup> Big Lagoon Rancheria Band of Yurok and Tolowa Indians; Big Valley Band of Pomo Indians; Cheyenne River Sioux Tribe of Nebraska; Chippewa Cree Tribe; Miami Tribe of Oklahoma; Modoc Tribe of Oklahoma; Otoe-Missouria Tribe of Indians; Santee Sioux Nation of Nebraska; Sokaogon Chippewa Community; Tunica-Biloxi Tribe of Louisiana; United Keetoowah Band of Cherokee Indians.

state regulation and suit. Tribes are entitled to this immunity under the doctrine of tribal sovereign immunity. Tribal businesses may also enjoy the protections of sovereign immunity if they function as an “arm of the tribe.” Critics of tribal payday lending and tribal officials disagree as to the legal status of these operations. Under established Federal Indian Law, the only manner in which to resolve the question of whether tribal payday lenders are entitled to the protections of tribal sovereign immunity is to submit tribal payday lending entities to an arm of the tribe analysis.

In order to determine whether tribal payday lending entities operate as an arm of the tribe consistent with the doctrine of tribal sovereign immunity, it is necessary to review the principles of tribal sovereign immunity, and the corresponding arm of the tribe test. First, the history and policies underlying the doctrine of tribal sovereign immunity will be examined. Next, the several arm of the tribe tests used by the federal courts of appeals will be scrutinized. From this point, it is possible to deduct a universal arm of the tribe test by which the immunity question can be resolved. Consequently, this proposed universal arm of the tribe test is applied to a specific tribe that operates payday lending entities.

### **III. TRIBAL SOVEREIGN IMMUNITY: THE ARM OF THE TRIBE TEST AND PAYDAY LENDING**

#### ***A. The Doctrine of Tribal Sovereign Immunity***

##### **1. The General Principles of Tribal Sovereign Immunity**

The Supreme Court of the United States has erroneously implied that the doctrine of tribal sovereign immunity developed almost by accident, resting on a single misinformed decision in the early twentieth century. However, the doctrine of tribal sovereign immunity is firmly established law in American courts.<sup>41</sup> Despite the Court’s limited enthusiasm, tribal sovereign immunity is an inherent, retained sovereignty that predates European contact, the founding of the United States, the United States Constitution, and individual statehood. Accordingly, Indian tribes are distinct, independent political communities, retaining their

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<sup>41</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998); *Turner v. United States*, 248 U.S. 354 (1919); *see, e.g., Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).

original natural rights as the undisputed possessors of the soil from time immemorial.<sup>42</sup>

Although no longer possessed of the full attributes of sovereignty, Indian tribes are domestic dependent nations entitled to all powers except those they have been forced to surrender to a single superior sovereign, the United States.<sup>43</sup> Tribes are not states, nor part of the federal government.<sup>44</sup> Rather, tribes enjoy a status higher than that of states, because tribes are sovereign political entities possessed of sovereign authority not derived from the United States.<sup>45</sup> Consequently, tribal immunity is a matter of federal law and is not subject to diminution by the states.<sup>46</sup>

The Court has taken the lead in drawing the bounds of tribal immunity, beginning in the late twentieth century, following a surge in tribal economic development. However, Congress, subject to constitutional limits, can alter the bounds of tribal immunity through explicit legislation.<sup>47</sup> Under federal law, the doctrine of tribal sovereign immunity precludes suit against a federally recognized Indian tribe except in instances where Congress has abrogated that immunity or the tribe has foregone it.<sup>48</sup> Accordingly, congressional abrogation or tribal waiver of sovereign immunity cannot be implied, but must be unequivocally expressed.<sup>49</sup> The relevant inquiry with respect to a tribe's exercise of its sovereignty is whether Congress, which exercises plenary power over Indian affairs,<sup>50</sup>

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<sup>42</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

<sup>43</sup> *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. at 509 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

<sup>44</sup> *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir.2002).

<sup>45</sup> *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir.1959) (Tribes are subordinate and dependent nations possessed of all powers as such, only to the extent that they have expressly been required to surrender them by the United States, and the United States Constitution is binding upon Indian nations only where it expressly binds them or is made binding by Treaty or by some act of Congress).

<sup>46</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. at 756; *see, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering*, 476 U.S. 877, 891 (1986).

<sup>47</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. at 759; *see, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. at 58.

<sup>48</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. at 754.

<sup>49</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58.

<sup>50</sup> *Talton v. Mayes*, 163 U.S. 376 (1896).

has limited that sovereignty in any way.<sup>51</sup> With regard to tribal sovereign immunity, Congress has elected to not obstruct the doctrine in an effort to encourage tribal economic development and self-sufficiency.

## 2. Tribal Sovereign Immunity and Tribal Enterprises

Tribal sovereign immunity applies without distinction between on-reservation or off-reservation activities, and between governmental or commercial activities.<sup>52</sup> Despite criticism that in some instances off-reservation tribal commercial businesses have become disconnected from tribal self-governance, Congress has elected to not abrogate tribal sovereign immunity with respect to these revenue generating business activities. Following the lead of Congress, the Court has upheld the application of tribal sovereign immunity to tribal businesses regardless of location or industry.<sup>53</sup>

Tribal sovereign immunity protects subordinate secular or commercial entities acting as arms of a tribe from state regulation and legal action.<sup>54</sup> Tribal sovereign immunity may extend to the subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity.<sup>55</sup> In order to determine which tribal entities can share in a tribe's immunity, courts implement what is commonly referred to as the "arm of the tribe" test.

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<sup>51</sup> See *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985).

<sup>52</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. at 754-55.

<sup>53</sup> *Id.*, at 757.

<sup>54</sup> *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920-21 (6th Cir.2009); *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir.2008); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir.2006); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir.2000); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d 21, 29 (1st Cir.2000).

<sup>55</sup> See *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d at 29 (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir.2002) (recognizing that tribal sovereign immunity "extends to agencies and subdivisions of the tribe").

### ***B. The Sovereign Immunity of Tribal Entities: The Arm of the Tribe Test***

Although the Court has not directly addressed the issue of which specific tribal entities acting as arms of a tribe are entitled to immunity, the Court has acknowledged that the United States has taken the position that corporate entities may be arms of the tribe entitled to the protections of tribal sovereign immunity.<sup>56</sup> Recognizing that Congress has not imposed any limitations on the application of tribal sovereign immunity to entities acting as arms of a tribe, all of the federal courts of appeals acknowledge that certain tribal corporate entities may enjoy the full extent of a tribe's sovereign immunity under specific circumstances.<sup>57</sup>

Consistent with federal Indian policy, the federal courts have established general rules regarding the application of tribal sovereign immunity derived from the reality of tribes' need to generate revenue through operating tribal businesses. As a threshold matter, an individual member of a federally recognized tribe operating a business entity is not entitled to tribal sovereign immunity.<sup>58</sup> Furthermore, a tribal entity engaged in business does not lose its immunity simply by contracting with non-Indian operators of the business.<sup>59</sup> This is because, as a matter of established federal Indian policy, Indian nations must be encouraged to generate their own revenue to fund their governments and activities. Therefore, tribes must be free to enter into commercial areas where they do not have expertise but have the ability to acquire the necessary expertise through non-Indian operators.<sup>60</sup>

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<sup>56</sup> See *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n. 1 (2003) (noting that the United States asserted, and the County did not dispute, that a corporation operating a casino was an arm of the tribe for the purposes of sovereign immunity).

<sup>57</sup> See, e.g., *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d at 920-21; *Seneca-Cayuga Tobacco Co.*, 546 F.3d at 1292; *Allen v. Gold Country Casino*, 464 F.3d at 1046-47; *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d at 1042-43; *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d at 29.

<sup>58</sup> *Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 171-172 (1977); Individual tribal members operating online payday loan companies have claimed tribal sovereign immunity in various court proceedings. See *PayDay Financial, LLC d/b/a Lakota Cash*; *PayDay Financial, LLC*, also d/b/a *Western Sky Financial, LLC*; and *Great Sky Finance, LLC*.

<sup>59</sup> See *Seneca-Cayuga Tobacco Co.*, 546 F.3d at 1296 (Tribal tobacco company immune despite fact that non-Indians operated company through a management agreement).

<sup>60</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (noting with approval that the tribal business was "operated by non-Indian professional operators, who receive a percentage of the profits").

In the absence of clarifying Court precedent, all of the federal courts of appeals have developed standards for determining which tribally affiliated entities are allowed immunity from regulation and legal suit. Rather than depending on the nature of the business a tribe is conducting through a particular entity, the question of whether tribal immunity is to be extended to the entity depends on whether, in the language of the federal courts, the entity is an “arm of the tribe.”<sup>61</sup> According to all the federal courts of appeals, the proper inquiry is whether the entity acts as an arm of the tribe such that its activities are properly deemed to be those of the tribe.<sup>62</sup> Each of the federal courts of appeals applies a unique arm of the tribe test, taking numerous and varied factors into consideration when determining which entities are entitled to tribal sovereign immunity.

In general, the federal courts of appeals implement tests that typically evaluate the creation of the entity, the benefits accorded to the tribe by the entity, the amount of control the tribe exerts over the entity, and whether the policies of tribal sovereign immunity would be served by holding the entity as an arm of the tribe. In the application of the arm of the tribe test, the federal courts vary in complexity and emphasis, often assigning varying weights to a diverse range of factors. While all of the federal courts apply slightly unique tests, the analyses of the First, Eighth, Ninth, and Tenth Circuit Courts of Appeals are representative of the diversity existent in federal Indian law, presented here from the least to most exacting.

### 1. First Circuit

The First Circuit utilizes an arm of the tribe test contingent upon a single factor. Specifically, the First Circuit analysis solely evaluates the creation of the entity, requiring only that the entity be formed pursuant to tribal law in order to enjoy immunity. In *Ninigret Development Corp. v. Narragansett Indian Wetuomuch Housing Authority*, the court held that a tribal housing authority is entitled to the full extent of tribal sovereign immunity.<sup>63</sup>

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<sup>61</sup> *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d at 920-921.

<sup>62</sup> *Allen v. Gold Country Casino*, 464 F.3d at 1046; *see also* *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d at 1043; *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d at 29.

<sup>63</sup> *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d at 21.



Although the issue of tribal sovereign immunity received limited discussion in the opinion, the *Ninigret* court cited the creation of the tribal housing authority pursuant to a tribal ordinance as sufficient justification for holding that the tribal housing authority is an arm of the tribe.<sup>64</sup> A tribal housing authority functions as an arm of the tribe, and thus is entitled to exercise the defense of tribal sovereign immunity. The arm of the tribe test implemented by the First Circuit illustrates the least strenuous test present in the federal court system, hinging only on the method of creation of the entity at issue.

## 2. Eighth Circuit

The Eighth Circuit employs a more exacting arm of the tribe test than the First Circuit. The Eighth Circuit test assesses the creation, funding, and control of the entity as well as the benefits accorded to the tribe by the entity. In *Hagen v. Sisseton-Wahpeton Community*, the court held that a tribal community college is an arm of the tribe, and thus entitled to tribal sovereign immunity.<sup>65</sup>

The entity at issue in *Hagen* was a tribal community college. The college was created pursuant to tribal law, and the college was chartered as a nonprofit corporation under the tribal constitution.<sup>66</sup> The *Hagen* court found both of these facts to favor the extension of tribal sovereign immunity to the college.<sup>67</sup> After examining the creation of the college, the court addressed the control and funding of the college.

The court also found that the college was sufficiently controlled and funded<sup>68</sup> by the tribe to grant the entity immunity from suit. First, the college's board of trustees is comprised of one enrolled member from each of the tribe's seven districts, which constituted appropriate tribal control of the entity in the view of the court.<sup>69</sup> Significantly, the college was founded to provide direct benefit to tribal members on the reservation by providing post-secondary education.<sup>70</sup> In sum, the college is chartered, funded, and adequately controlled by the tribe for the purposes of

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<sup>64</sup> *Id.* at 26-27.

<sup>65</sup> *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d at 1040.

<sup>66</sup> *Id.* at 1042.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (The court found that the tribe directly funded the College).

<sup>69</sup> *Id.* at 1043.

<sup>70</sup> *Id.*



providing education to tribal members on Indian land. Therefore, the *Hagen* court concluded, the college functioned as more than a mere business, the college was an arm of the tribe entitled to sovereign immunity.

Similar to the arm of the tribe tests used by the First and Eighth Circuits, the Ninth Circuit analysis also examines the creation, funding, and control of the entity by the tribe. However, the Ninth Circuit test is more exacting than the First and Eighth Circuits as the Ninth Circuit evaluates several additional factors.

### 3. Ninth Circuit

The Ninth Circuit implements an arm of the tribe test evaluating not only the creation, control<sup>71</sup> and funding of the entity, but also the benefits accorded to the tribe by the entity and the policies of tribal sovereign immunity. Specifically, in regard to the underlying policy considerations of tribal sovereign immunity, the Ninth Circuit evaluates whether the policies of tribal sovereign immunity are served by regarding the entity in question to function as an arm of the tribe. In reaching a conclusion, the court acknowledged that while a casino is no ordinary business, a tribal casino is nevertheless entitled to tribal sovereign immunity because it properly functions as an arm of the tribe.<sup>72</sup>

In *Allen v. Gold Country Casino*, the entity at issue was a tribal casino.<sup>73</sup> As justification for the holding, the court first relied on the findings relating to the method and process by which the casino was created. The formation of the casino was dependent upon tribal, state, and federal approval at numerous levels because the Indian Gaming Regulatory Act (IGRA) governs the process.<sup>74</sup> Importantly, the *Allen* court cited the passage of numerous tribal ordinances in order to create the casino as support for the extension of tribal sovereign immunity.<sup>75</sup> The *Allen* court concluded that the casino was adequately created, owned, and

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<sup>71</sup> *Allen v. Gold Country Casino*, 464 F.3d at 1047 (The court, relying on the stringent requirements of IGRA, simply conceded that the casino is without question owned and operated by the Tribe).

<sup>72</sup> *Id.* at 1047-1049.

<sup>73</sup> *Id.*

<sup>74</sup> Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1) (The IGRA requires a tribe to authorize the creation of a tribal casino through both a tribal ordinance and an interstate gaming compact with the respective state).

<sup>75</sup> *Allen v. Gold Country Casino*, 464 F.3d at 1047-1049.

operated by the tribe to sustain a holding that the entity acted as an arm of the tribe.

The *Allen* court additionally relied upon the benefits the casino provides to the tribe and the congressional policies underlying a tribal casino to support the holding that the casino is an arm of the tribe. To begin with, the court determined that the benefit immunity would extend to the tribe would protect the treasury of the tribe; this directly served one of the purposes of tribal sovereign immunity.<sup>76</sup> Moreover, IGRA provides for the creation and operation of Indian casinos to promote “tribal economic development, self-sufficiency, and strong tribal governments,”<sup>77</sup> all of which are corresponding goals of tribal sovereign immunity. Specifically, the compact enabling the creation of the casino provides that the casino will “enable the tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the tribe’s government, and governmental services and programs.”<sup>78</sup> The court determined that because the tribe owned and operated the casino, there is no question these numerous economic and invaluable social advantages ensure the benefit of the tribe itself.<sup>79</sup>

Under the Ninth Circuit arm of the tribe test, the creation of the entity, the control exerted by the tribe over the entity, the benefits accorded to the tribe by the entity, and the policies of tribal sovereign immunity are examined. However, the arm of the tribe test implemented by the Tenth Circuit dwarfs those of the First, Eighth, and Ninth Circuits. The Tenth Circuit illustrates the most complex arm of the tribe test, incorporating six factors to aid in the sovereign immunity determination.

#### 4. Tenth Circuit

The Tenth Circuit represents the most rigorous arm of the tribe test present in Federal Indian Law today. The Tenth Circuit analysis submits six factors for consideration, which range from the intention of the tribe in creating the entity to the details of the financial relationships between the

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<sup>76</sup> *Id.* at 1048 (citing *Alden v. Maine*, 527 U.S. 706, 750 (1999)) (Noting that sovereign immunity protects the financial integrity of States, many of which “could have been forced into insolvency but for their immunity from private suits for money damages”).

<sup>77</sup> 25 U.S.C. § 2702 (One of the principle purposes of IGRA is “to ensure that the Indian tribe is the primary beneficiary of the gaming operation”).

<sup>78</sup> *Allen v. Gold Country Casino*, 464 F.3d at 1047-1048.

<sup>79</sup> *Id.* at 1048.

parties involved.<sup>80</sup> Specifically, in determining whether an entity is entitled to tribal sovereign immunity, the Tenth Circuit gives weight to the following factors: (1) the method of the entity's creation; (2) the purpose of the entity; (3) the structure, ownership, and management, including the amount of control the tribe has over the entity; (4) whether the tribe intended for the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and, (6) whether the purposes of tribal sovereign immunity are served by granting the entity immunity.<sup>81</sup>

In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, the entity at issue was a tribal Economic Development Authority (the Authority), which owned and operated a casino in addition to other enterprises.<sup>82</sup> The governing body of tribes often creates an economic development authority to manage tribal economic and social enterprises. The court held that the Authority enjoys immunity from suit as an arm of the tribe.<sup>83</sup>

The *BMG* court found the first factor, the method of creation of the entity, and the fourth factor, whether the tribe intended for the entity to enjoy immunity, to favor the extension of tribal sovereign immunity based on tribal law and internal tribal corporate documents. Under the first factor, the entity was created pursuant to tribal law.<sup>84</sup> Additionally, the language used by the tribe described the entity as a "wholly owned enterprise of the tribe," which the court noted to naturally suggest that the entity enjoys a close relationship to the tribe.<sup>85</sup> Pursuant to the fourth factor, evaluating whether the tribe intended for the entity to enjoy sovereign immunity, the court found that because numerous tribal ordinances and corporate documents relating to the entity referenced sovereign immunity in a manner that clearly expressed the tribe's belief that the entities were entitled to immunity from suit, this factor also favored extending tribal sovereign immunity.

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<sup>80</sup> See *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1181 (10th Cir.2010) (The *BMG* court amended a prior ten factor arm of the tribe test, and adopted a less exacting six factor test. The previous Tenth Circuit arm of the tribe ten factor test can be found in *Johnson v. Harrah's Kansas Casino Corp.*, 2006 WL 463138 (D.Kan. Feb. 23, 2006)).

<sup>81</sup> *Id.* at 1182.

<sup>82</sup> *Id.* at 1178.

<sup>83</sup> *Id.* at 1173.

<sup>84</sup> *Id.* at 1191.

<sup>85</sup> *Id.*

Likewise, the *BMG* court found the second factor and the fifth factor to favor the extension of tribal sovereign immunity because the revenue generated by the Authority is predominately allocated to the tribe itself. Consistent with the second factor, the court found that the entity was created for the financial benefit of the tribe, because the language of the ordinances creating the entity showed intended economic benefit to the tribe, and the profit sharing scheme delegated a majority of the revenue back to the tribe or its members.<sup>86</sup> Similarly, under the fifth factor, the court found that the revenue scheme favored tribal immunity because about 85% of the profits are distributed directly to the tribal government.<sup>87</sup>

The *BMG* court found that while the board and executive level employees were not entirely comprised of tribal members, a sufficient number exercised control to find the third factor in favor of the Authority and immunity. In accordance with the third factor, which focuses on the amount of control the tribe has over the entity, the court found the managerial structures of the Authority and its subsidiary to weigh both for and against the tribe. While the Authority's board of directors are all tribal members and also hold seats on tribal council, the chief financial officer of the Authority, the general manager of the casino, the chief financial officer of the casino, and twelve of the fifteen directors of the casino are non-tribal members.<sup>88</sup> Lastly, under the sixth factor, the court found that the purposes of tribal sovereign immunity would be served in this case because immunity would protect the treasury of the tribe.<sup>89</sup>

## 5. A Universal Arm of the Tribe Test

While all of the federal courts of appeals apply slightly different tests when determining which tribal entities are entitled to tribal sovereign immunity, adequate consistency exists between the various tests to yield a universal arm of the tribal test by which tribes can create and operate revenue-generating enterprises. This proposed universal arm of the tribe test incorporates several factors present in all of the arm of the tribe tests used by the federal courts of appeals. Moreover, this proposed test incorporates the underlying federal policies of tribal sovereign immunity into the analysis. The factors incorporated into the universal arm of the

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<sup>86</sup> *Id.* at 1192.

<sup>87</sup> *Id.* at 1194.

<sup>88</sup> *Id.* at 1192-1193.

<sup>89</sup> *Id.* at 1195.

tribe test are: (a) the method of creation of the entity; (b) tribal control over the entity; (c) benefits accorded to the tribe by the entity; and, (d) whether the policies of tribal sovereign immunity are served by allowing the entity the protections of tribal sovereign immunity. The following section will evaluate criteria necessary to satisfy each factor as informed by previous decisions issued by numerous circuit courts of appeals.

### **i. Creation of the Entity**

The first factor examines the creation of the tribal entity. Under this inquiry, the court should consider whether the entity was created pursuant to tribal law, and whether the entity was dependent upon the tribal government approval and involvement throughout its formation. If the entity was created pursuant to tribal law, this significantly weighs in favor of the application of tribal sovereign immunity to the entity.<sup>90</sup>

### **ii. Tribal Control over the Entity**

The second factor examines the control the tribe exerts over the entity. Here, the court should examine how much influence the tribe has over the structure, ownership, and management of the entity. Additionally, the court should take the membership of the board of directors and executive officers of the entity into account, as well as their method of appointment. If the board of directors or trustees of the entity are members of the tribe, this weighs in favor of extending tribal sovereign immunity to the entity.<sup>91</sup> Similarly, if the chief executive officers of the entity are tribal members or are appointed by the tribe, this also favors immunity.<sup>92</sup>

### **iii. Benefits the Tribe Receives from the Entity**

The third factor examines the economic and social benefits the entity conveys to the tribe. When determining the benefits accorded to the tribe, the court should evaluate the financial contributions made to the

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<sup>90</sup> See, e.g., *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d at 1043; *Allen v. Gold Country Casino*, 464 F.3d at 1046; *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1191-1192;

<sup>91</sup> See, e.g., *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d at 1040; *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1194.

<sup>92</sup> See, e.g., *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1194.

tribe by the entity. Likewise, the court should examine how the revenue is allocated.

With regard to the non-financial benefits conferred on the tribe, the inquiry focuses on whether the entity will further enable the tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenue to support the tribe's government and governmental services and programs.<sup>93</sup>

#### **iv. Policy Purposes of Tribal Sovereign Immunity**

The fourth factor examines the policies underlying the doctrine of tribal sovereign immunity, its connection to tribal economic development, and whether those policies are served by granting immunity to the tribal business entity in question.<sup>94</sup> Specifically, the court should consider whether extending immunity to the entity "directly protects the sovereign tribe's treasury, which is one of the historic purposes of sovereign immunity in general."<sup>95</sup>

#### ***C. Are Tribal Payday Lenders Entitled to Immunity Under the Arm of the Tribe Test? An Examination of the Payday Lending Operations of the Miami Tribe of Oklahoma***

The decisions of the federal courts of appeals regarding tribal sovereign immunity and the corresponding arm of the tribe test, when evaluated together, reasonably inform a universal arm of the tribe test. This universal arm of the tribe test incorporates four factors. These factors evaluate the creation of the entity, the control the tribe has over the entity, the benefits accorded to the tribe by the entity, and determine whether the policies of tribal sovereign immunity would be served by deeming a particular entity in question an arm of the tribe.

To illustrate the application of these factors to tribal payday lending enterprises, the payday lending entities of the Miami Tribe of Oklahoma

<sup>93</sup> See *Allen v. Gold Country Casino*, 464 F.3d at 1046-1047.

<sup>94</sup> See *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1111 (Ariz.1989) ("Tribal sovereign immunity should only apply when doing so furthers the federal policies behind the immunity doctrine"); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 294 (Minn.1996) (Courts should determine "whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity").

<sup>95</sup> *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d at 1195; *Allen v. Gold Country Casino*, 464 F.3d at 1047.

(the Tribe) are evaluated. Given the specifics of the Tribe's payday lending operations and the corresponding analysis in the context of the universal arm of the tribe test, this paper concludes that these kinds of tribal payday lending operations do function as arms of the tribe under the law, and are therefore entitled to the protections of tribal sovereign immunity.

The Tribe operates numerous payday lending businesses in a manner consistent with the federal courts of appeals' application of tribal sovereign immunity to entities acting as arms of the tribe. The Miami Tribe of Oklahoma created the payday lending entities pursuant to tribal law, and the tribal government sufficiently controls the actions of the entities. Furthermore, the operation of the payday lending entities has conferred great benefits on the Tribe as a whole, and extension of immunity to the entities would honor the policies underlying tribal sovereign immunity.

The Tribe is a federally recognized tribe comprised of over 3,800 enrolled citizens.<sup>96</sup> The Tribe is associated with the online payday loan providers USFastCash®, AmeriLoan®, and UnitedCashLoans®.<sup>97</sup> The Tribe operates the tribal economic development authority Miami Nation Enterprises, Inc. (MNE), which in turn owns and operates the online payday loan providers in question.<sup>98</sup>

Currently, MNE operates as a political economic subdivision of the Tribe created by the Tribe to pursue economic development opportunities for the good of the Miami Nation and its citizens.<sup>99</sup> MNE oversees tribally owned companies such as Miami Business Services, Miami Cineplex, and ServiceWorld Computer in addition to several payday lending operations.<sup>100</sup> Similar to the tribal Economic Development Authority in

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<sup>96</sup> Miami Tribe of Oklahoma, <http://www.miamination.com/mto/about.html> (last visited Apr. 20, 2013).

<sup>97</sup> Miami Tribe of Oklahoma and MNE Services, Inc., [www.usfastcash.com](http://www.usfastcash.com), [www.ameriloan.com](http://www.ameriloan.com), [unitedcashloans.com](http://unitedcashloans.com) (last visited Apr. 20, 2013).

<sup>98</sup> The disclaimer on the websites affiliated with the Miami Tribe claim to be operated by MNE and owned by the Tribe ("MNE, Inc., doing business as USFastCash®/AmeriLoan®/ UnitedCashLoans®, is a tribal lending entity wholly owned and operated by the Miami Tribe of Oklahoma, a Sovereign Nation recognized by the United States government under the Oklahoma Indian Welfare Act of 1936"). See *supra* note 66.

<sup>99</sup> Miami Nation Enterprises Inc. <http://www.mn-e.com/> (last visited Apr. 20, 2013).

<sup>100</sup> Miami Nation Enterprises Inc., <http://www.mn-e.com/companies> (last visited Apr. 20, 2013).



*Allen*,<sup>101</sup> MNE is the Tribe's economic development authority and likewise enjoys immunity from suit as an arm of the tribe.<sup>102</sup>

### **1. Was the Payday Lending Entity Created Pursuant to Tribal Law?**

MNE and the payday lending subsidiaries were created pursuant to a tribal constitution and through the enactment of specific tribal ordinances, favoring application of tribal sovereign immunity to the entities. To begin with, the constitution of the Tribe creates a Business Committee, which is expressly authorized to enact resolutions and ordinances "to transact business and otherwise speak or act on behalf of the tribe in all matters on which the Tribe is empowered to act."<sup>103</sup> Citing a "critical need for the development of economic activities to provide for the well-being of the citizens of the Miami Tribe," the Business Committee established MNE pursuant to the tribal constitution as "a subordinate economic enterprise of the Miami Tribe of Oklahoma having the purposes, powers, and duties as herein or hereafter provided by tribal law."<sup>104</sup>

The tribal resolution and ordinances establishing MNE specifically authorized MNE to engage in "providing sources of revenue through direct tribal business activities."<sup>105</sup> Consistent with established tribal law, the Tribe enacted a tribal ordinance to permit MNE to engage in the payday lending business.<sup>106</sup> Specifically, the ordinance authorized the Tribe to issue payday loan licenses to MNE.<sup>107</sup>

### **2. How Much Control Does the Tribe Have in the Operation of the Payday Lending Business?**

The Tribe owns, operates, and sufficiently controls both MNE and the payday lending entities. The relationship between the Tribal Council, the Business Committee, MNE, and the payday lending entities is sufficiently close to properly permit the entity to share in the tribe's immunity.

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<sup>101</sup> Breakthrough Management Group, Inc., v. Chukchansi Gold Casino and Resort, 629 F.3d 1173 (10th Cir.2010).

<sup>102</sup> *Id.*

<sup>103</sup> MIAMI CONST., art. VI § 1.

<sup>104</sup> Amended Miami Nation Enterprises Act, §§ 202(a), 101(a).

<sup>105</sup> Miami Tribe of Oklahoma Business Enterprises Act § 102(a).

<sup>106</sup> Miami Tribal Council Res. 04-62 (2002).

<sup>107</sup> *Id.*



MNE's board of directors consists of three members, two of whom must be members of the Tribe.<sup>108</sup> Members of the board of directors are appointed by the Chief of the Tribe, with the advice and consent of the tribal Business Committee.<sup>109</sup> The tribal Business Committee appoints the executive officers of MNE, including the chief operating officer. The CEO of MNE is responsible for the day-to-day operations of MNE, but is accountable to and directed in policy matters by the MNE board of directors. In turn, the MNE board of directors is ultimately answerable to the tribal council.

The tribal ordinance permitting MNE to engage in the payday lending business also imposes substantive and regulatory requirements on MNE's payday loan business, charging the Tribe's Business Committee with ensuring MNE's compliance with the requirements of the ordinance.<sup>110</sup>

### **3. How Do the Payday Lending Entities Benefit the Tribe?**

The operation of the Tribe's payday lending enterprises through MNE confers substantial benefits on the Tribe itself, which favors the conclusion that the entities are in fact arms of the tribe. The revenues from the payday lending operations have been used, among other things, to build a new headquarters for MNE. This is a significant benefit to the Tribe because MNE provides a considerable portion of its revenues to the Tribe's general fund, which enables the operation of the tribal government. Moreover, MNE's payday lending operations also employ many tribal members on the reservations, where MNE headquarters are located. The revenues from the payday lending enterprises have also been used to fund various tribal programs, including a scholarship program for post-secondary education.

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<sup>108</sup> Amended Miami Nations Enterprise Act § 202(a); Miami Tribal Council Res. 05-14 (2005).

<sup>109</sup> Miami Tribal Council Res. 05-14 (2005).

<sup>110</sup> Miami Tribal Council Res. 04-62 (2002).

#### **4. Is Immunity Consistent with the Policies of Tribal Sovereign Immunity?**

Extending tribal sovereign immunity to MNE's payday lending subsidiaries would adhere to the policies of tribal sovereign immunity. First, MNE operates the payday lending subsidiaries and the Tribe itself exercises considerable control over MNE's actions as previously discussed. Furthermore, extending the Tribe's immunity to MNE and the payday lending operations is consistent with the policies of tribal sovereign immunity for no other reason than that the tribes have been economically and socially benefitted by the payday loan activities.

#### **CONCLUSION**

Payday lending itself may be predatory in nature and fall short of a reputable business operation, but in light of difficult economic circumstances, this business model may be a welcomed temporary solution to some tribes' financial challenges. While payday lending is in some respects analogous to the operation of gaming enterprises under the Indian Gaming Regulatory Act, it is by no means an appropriate permanent solution to solve the issue of tribal financial needs. More importantly, if the operation of tribal payday lending enterprises is within the law and policy of tribal sovereign immunity, tribes should be able to profit from this industry. Despite criticism of payday lending, tribes have the right to choose which industries they decide to profit from.

The Court has not yet taken a case addressing the specific kind of business entities, such as payday lending operations, entitled to tribal sovereign immunity. If the current Court is confronted with a case involving a tribally affiliated payday lender, likely deference will not be given to the objective and reasonable tests adopted by the federal courts of appeals. Instead, it is widely anticipated that if the Court were to take up a case involving tribal payday lenders who implement questionable business models and unethical practices, this set of facts would likely result in a harsh curtailment of tribal sovereign immunity. Reigning in sovereign immunity would undoubtedly have a detrimental economic and social impact on Indian Country.

Payday lending must be conducted ethically with regard to the treatment of consumers and recognition must be given to the regulatory frameworks governing the industry outside of Indian Country. Moreover,

tribes should not conduct payday lending over an extended period of time, and if a tribe elects to engage in this business, the tribe should attempt to fly under the radar of the press, federal officials, and the courts. Most importantly, tribally owned and operated payday lenders must act in a manner consistent with the principles of tribal sovereign immunity. Otherwise, a few misinformed tribal nations may abrogate the right to sovereign immunity for all of Indian Country.