

# The Precarious SOVEREIGN IMMUNITY of Tribal Business Corporations

By Brian L. Pierson

With increasing frequency, Indian tribes form wholly owned corporations for economic development purposes.<sup>1</sup> Tribes often assume these entities are immune from suit, but they may be wrong.

Like the United States and the 50 states, federally recognized Indian tribes enjoy immunity from suit based on their sovereign status: “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”<sup>2</sup> In its 1998 decision in *Kiowa Tribe v. Manufacturing Techs. Inc.*,<sup>3</sup> the U.S. Supreme Court held that tribal sovereign immunity extended to tribes’ commercial as well as governmental activities, both on the reservation and off. Acknowledging that, in an “economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims,” the six-justice majority nonetheless determined that it would “defer to the role Congress may wish to exercise” to impose limitations.<sup>4</sup>

The Supreme Court revisited *Kiowa* last year in *Michigan v. Bay Mills Indian Community*.<sup>5</sup> Bay Mills Indian Community (BMIC) had sought to operate a gaming enterprise on land in Vanderbilt, Michigan, approximately 108 miles from its reservation, asserting that the tribe had purchased the land as part of a land-

claim settlement, making it eligible for gaming under the Indian Gaming Regulatory Act (IGRA).<sup>6</sup> The state of Michigan disagreed and sued. Unfortunately for Michigan, the IGRA includes a waiver of tribal sovereign immunity permitting states to enjoin “class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact”<sup>7</sup> but includes no waiver to permit states to sue tribes for illegal gaming outside Indian lands. The state argued that the Supreme Court should either interpret IGRA’s waiver of immunity to reach illegal gaming conducted outside Indians lands or modify *Kiowa* to bar tribes from asserting sovereign immunity with respect to their commercial, off-reservation activities.

In a 5-4 decision authored by Justice Elena Kagan, the Court rejected Michigan’s arguments and reaffirmed its holding in *Kiowa*. While superficially a tribal victory, lower courts may view the decision as signaling the Court’s future willingness to limit immunity. First, the majority, repeating its acknowledgement in *Kiowa* of “reasons to doubt the wisdom of perpetuating the doctrine as to off-reservation commercial conduct,”<sup>8</sup> made no effort to defend tribal sovereign immunity on policy grounds, relying instead on stare



decisis.<sup>9</sup> The dissenters' impassioned attack on sovereign immunity, grounded in both policy and nontribal sovereign immunity legal theory, contrasts starkly with the majority's tepid opinion. Second, Justice Kagan, in footnote eight, effectively invites courts to recognize "special justifications" for exceptions to tribal immunity for torts and other situations falling outside the holdings of *Kiowa* and *Bay Mills*.<sup>10</sup> Finally, the six-justice *Kiowa* majority was reduced to five, including Chief Justice John G. Roberts, who has generally voted against tribal interests.<sup>11</sup> Court observers may well imagine the chief justice as part of a potential majority sympathetic to "special justifications" in cases in which stare decisis does control.

The immunity of tribal corporations falls into the category of situations not controlled by *Bay Mills* and potentially ripe for "special justifications" supporting an exception to immunity. At least one court has already taken note of the post-*Bay Mills* weakened condition of tribal sovereign immunity. Noting the *Bay Mills* court's "sharply fractured" position, the Court of Appeals of New York, that state's highest court, recently issued a ruling that will disqualify any normal tribal business corporation within the court's jurisdiction from asserting sovereign immunity. This article compares the New York Court's decision with recent decisions of the courts of appeals for the Ninth and Tenth circuits and the California state courts,<sup>12</sup> identifies the principal risks to tribes seeking to maintain the immunity of their incorporated businesses and suggests an approach to facilitate the achievement of that goal.

## "Arm of the Tribe" Status

The recent tribal sovereign immunity decisions of the Court of Appeals of New York Court and the U.S. courts of appeals for the Ninth and Tenth circuits are best understood in the context of extensive case law spanning several decades. In determining the right of a tribal corporation or other tribe-related entity to invoke sovereign immunity, courts have commonly examined whether the entity can be fairly regarded as an "arm" of the tribe.<sup>13</sup> Courts also broadly agree that certain quasi-governmental agencies fit this description, including tribal schools,<sup>14</sup> health agencies,<sup>15</sup> housing authorities,<sup>16</sup> and utilities,<sup>17</sup> and commissions and authorities relating to the conduct of gaming under the Indian Gaming Regulatory Act.<sup>18</sup>

For reasons this article will make clear, corporations chartered by the secretary of the Interior under Section 17 of the Indian Reorganization Act<sup>19</sup> merit a brief explanation. In the 1930s, the Office of Indian Affairs (OIA) encouraged tribes forming governments under Section 16 the Indian Reorganization Act to establish alter ego corporations under Section 17 for the purpose of carrying out business activities. The model OIA charter of that era provided that the corporation could "sue and be sued." Litigants wishing to avoid sovereign immunity argued that any tribal business activity was *necessarily* conducted under the corporate charter and that the charter waived immunity. While divided on the waiver effect of the "sue and be sued" clause, courts have not questioned that Section 17 corporations are tribal "arms."<sup>20</sup> As the Sixth Circuit has pointed out, "the language of Section 17 itself—by calling the entity an 'incorporated tribe'—suggests that the entity is an arm of the tribe."<sup>21</sup> Because of their antiquated features and the encouragement they gave parties wishing to sue tribes, Section 17 corporations were rarely used by tribes. Recently, however, the Bureau of Indian Affairs has prepared a new model charter that permits greater flexibility in governance, eliminates the "sue and be sued" language, and carefully preserves immunity from suit. In view of the uncertain immunity of state- and tribe-chartered corporations, these features may cause a revival of Section 17 corporations.<sup>22</sup>

While courts largely agree on the "arm" status of quasi-governmental agencies and Section 17 corporations, they disagree sharply with respect to whether non-Section 17 tribal corporations engaged in commercial businesses are entitled to "arm" status. While often citing similar criteria,<sup>23</sup> courts have adopted widely divergent interpretations to reach contradictory results. As the discussion below illustrates, disagreement relates principally to three issues. First, is a tribally-owned corporation disqualified from claiming "arm" status because it has incorporated under state law? Second, is a tribal corporation disqualified from claiming "arm" status because it performs the essential corporate function of shielding its shareholder's assets? Finally, is it sufficient if the corporation generates revenue, by whatever means, to support tribal government, or is the corporation disqualified from claiming "arm" status because its activities are somehow too "commercial?"<sup>24</sup>

## New York's "Arm of the Tribe" Jurisprudence

The 2014 decision of the New York Court of Appeals in *Sue/Perior Concrete & Paving Inc. v Lewiston Golf Course Corp.*<sup>25</sup> exemplifies judicial hostility to immunity for tribal corporations, imposing a vague "tribal purpose" requirement and disqualifying outright any corporation that performs the traditional corporate function of shielding shareholder assets.<sup>26</sup> Applying factors first

articulated in its 1995 decision in *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund Inc.*,<sup>27</sup> the Court denied immunity to Lewiston Golf Course Corp. (Lewiston), a wholly owned and controlled subsidiary of the Seneca Nation formed to own and operate a golf course as an amenity to the Nation's casino. The Court averred that Lewiston's purposes "to act as a regional economic engine and thereby serve the profit-making interests of the Seneca Nation's casino operations ... were sufficiently different from tribal goals that they militate against Lewiston Golf's claim of sovereign immunity."<sup>28</sup>

The Court's apparent premise—that serving the "profit-making interests" of the Seneca Nation's casino is incompatible with "tribal goals"—seems at odds with the holdings of *Kiowa* and *Bay Mills* that tribal sovereign immunity applies to commercial activity. Rejecting any contradiction, the Court declared that those decisions "do not illuminate" the question of corporate immunity because "they concerned lawsuits against Indian tribes themselves, not against corporate affiliates of tribes."<sup>29</sup> While correct, the Court's assertion overlooks the nature of tribal corporations, whose purpose is not to make profits for individual shareholders but, rather, to generate revenue to fund tribal government.<sup>30</sup> The Court's disqualification of revenue generation as a proper "tribal goal" for an "arm of the tribe" will apply to almost all tribal corporations.

Most significantly, the Court's application of *Ransom* requires corporations seeking "arm" status to forego all of the normal advantages of the corporate form. The circumstance that Lewiston, rather than the Seneca Nation, held title to the golf course counted against "arm" status, according to the Court.<sup>31</sup> Declaring the "financial relationship considerations" as "the most important of the *Ransom* factors," the Court observed that a judgment against Lewiston would not directly impact the Seneca Nation's treasury and concluded that

[i]f a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because the corporation lacks "the power to bind or obligate the funds of the tribe" ... then the corporation is not an "arm" of the tribe. However, if a tribe is legally responsible for a corporation's obligations, the tribe is 'the real party in interest.'<sup>32</sup>

In support of its holding, the Court relied on 11th Amendment jurisprudence, contending that that "in considering whether an entity is an 'arm' of an Indian tribe, the most significant factor is

theory that will effectively disqualify virtually any tribal corporation from asserting sovereign immunity, and (3) the assertion that a state court is bound only by the decisions of the U.S. Supreme Court, not by the decisions of lower federal courts.<sup>34</sup>

### Tenth Circuit "Arm of the Tribe" Jurisprudence

In its 2010 decision in *Breakthrough Mgmt. Grp. Inc. v. Chukchansi Gold Casino and Resort*,<sup>35</sup> the U.S. Court of Appeals for the Tenth Circuit concluded that the Chukchansi Economic Development Authority (CEDA), owner of the tribe's casino, was an arm of the tribe. The Court squarely rejected the premise of *Ransom* and *Sue/Perior* that CEDA was ineligible for "arm" status because the tribe's assets were not exposed to satisfy CEDA's liabilities. The Court applied six *Ransom*-like factors<sup>36</sup> but to very different effect, finding the decisive considerations to be that CEDA: (1) was formed under tribal law by resolutions that expressed the tribe's intention that it function as an arm of the tribe, (2) was formed "for the financial benefit of the Tribe and to enable it to engage in various governmental functions," with 50 percent of revenues earmarked for government,<sup>37</sup> and (3) had a sufficient "financial relationship" with the tribe, because a judgment adverse to CEDA would reduce funds available to the tribal government.

Two years after its decision in *Chukchansi*, the Tenth Circuit in *Somerlott v. Cherokee Nation Distributors*<sup>38</sup> concluded that CND LLC (CND), a limited liability corporation organized under Oklahoma law and wholly owned by Cherokee Nation Businesses Inc., a wholly owned and regulated corporation of the Cherokee Nation, was barred by its state law charter from asserting the Cherokee Nation's immunity, regardless of any other *Chukchansi* factors. The Court noted its longstanding position that "Indian Tribes' sovereign immunity is co-extensive with that of the United States,"<sup>39</sup> cited decisions denying immunity to federal entities chartered under state law, and concluded that the same rule applies to "entities which are legally distinct from their members and which voluntarily subject themselves to the authority of another sovereign which allows them to be sued."<sup>40</sup> Since many state corporate laws feature similar provisions, the *Somerlott* decision may prove highly impactful in jurisdictions that follow it.<sup>41</sup>

The Tenth Circuit provides a path for tribal corporations wishing to preserve immunity. Shielding shareholder assets is permissible, and commercial activities are allowed provided the revenue is ear-

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the effect on tribal treasuries, just as 'the vulnerability of the State's purse' is considered 'the most salient factor' in determinations of a State's Eleventh Amendment immunity."<sup>33</sup> The primary reason that tribes form business corporations is to pursue business opportunities without imperiling tribal assets. The Court's "most important" factor will deny these corporations immunity.

Features of the *Sue/Perior* decision likely to prove attractive to litigants and courts that are hostile to sovereign immunity include: (1) the denial that *Kiowa* and *Bay Mills* are relevant to "arm of the tribe" jurisprudence, (2) the adoption of an 11th Amendment-based

marked for the support of tribal government. The entity may not, however, be incorporated under state law.

### Ninth Circuit "Arm of the Tribe" Jurisprudence

In *Cook v. Avi Casino Enterprises Inc.*,<sup>42</sup> the Ninth Circuit held that Avi Casino Enterprises (ACE), a corporation formed by the Fort Mojave Tribe for the purpose of owning and operating the tribe's casinos, was an arm of the tribe. Key factors, according to the Court, were: (1) that ACE was created pursuant to a tribal ordinance under a charter providing for all new revenues to flow to

the tribal treasury, (2) that ACE was wholly owned and controlled by the tribal government, (3) that tribal members were required to comprise a majority of ACE's board, and (4) that the tribal council functioned as ACE's corporate shareholder.<sup>43</sup>

In its most recent tribal sovereign immunity decision, *White v. University of California*,<sup>44</sup> the Ninth Circuit adopted the six factors prescribed by the Tenth Circuit in *Chukchansi*. The Court upheld the "arm of the tribe" status and immunity of the Kumeyaay Cultural Repatriation Committee (KCRC), a tribal organization formed by tribal resolutions of each of the 12 Kumeyaay Nation member tribes and incorporated under California law. Relevant factors, according to the Court, were that were that KCRC was (1) created by tribal resolutions, (2) comprised solely of tribal members appointed by constituent tribes, (3) funded by the tribes, and (4) devoted to a purpose—recovery of remains and education of the public—that the Court deemed "core to the notion of sovereignty."<sup>45</sup>

Based on the *White* decision, the Ninth Circuit's "arm of the tribe" jurisprudence is now aligned with the Tenth Circuit's, with one important exception: The Ninth Circuit does not accept *Somerlott*'s bright line disqualification of entities chartered under state law.<sup>46</sup>

### The California Court of Appeals "Arm of the Tribe" Jurisprudence

The California appellate courts exemplify the contradictions among the courts discussed above. In its 2012 decision in *American Property Management Corp. v. Superior Court*,<sup>47</sup> the California Fourth District Court of Appeal applied the (largely contradictory) analyses of *Chukchansi* and *Ransom* to deny immunity to U.S. Grant Hotel Ventures LLC (USGHV), a limited liability company organized under California law as a subsidiary of another California LLC owned by a third California LLC, which, in turn, was owned by a development corporation owned by and formed under the law of the Sycuan Band of the Kumeyaay Nation. Predating *Somerlott* by several months but anticipating its conclusion, the Court characterized the California charter as "dispositive,"<sup>48</sup> i.e., fatal to "arm of tribe" status, but found USGHV undeserving on the additional grounds that: (1) USGHV's purposes, to own and operate a hotel as an investment, were not comparable to those of a tribal casino which, according to the court, Congress expressly intended as a vehicle to promote tribal economic development and self-sufficiency, (2) a judgment against USGHV would not expose the tribe's assets, (3) the Kumeyaay Nation's ownership of USGHV was indirect, and (4) USGHV was managed by a non-Indian management company.

Two years later, a different district of the California Court of Appeal applied similar factors but reached a quite different result. In *People v. Miami Nation Enterprises*,<sup>49</sup> the Court held that Miami Nation Enterprises (MNE), an economic development authority of the Miami Tribe of Oklahoma, and SFS Inc., a corporation wholly owned by the Santee Sioux Nation, both engaged in payday lending activities, were arms of their respective tribes, and were entitled to immunity. The Court cited the tribe's method and purpose for creating the entity as "predominate" considerations, noting that both entities were formed under tribal law and were intended to generate profits to support basic government services.<sup>50</sup> The Court dismissed the *Ransom* version of the "financial relationship" factor, noting that "the very purpose of creating any subordinate corporate entity is to create the opportunity for economic gain while protecting the tribe from potential liabilities."<sup>51</sup>

*People v. Miami Nation Enterprises* is currently before the California Supreme Court. The outcome, which could have broad impact on other courts, may depend on whether the Court defers to Ninth Circuit precedents or, like the New York's highest court, considers itself answerable solely to the U.S. Supreme Court.

### Strategies for the Post-Bay Mills Era

The law relating to the immunity of tribal business corporations is volatile. Litigants, and perhaps some courts, will take up Justice Kagan's invitation, at footnote eight,<sup>52</sup> to find "special justifications" for exceptions to sovereign immunity for torts and other claims falling outside the narrow boundaries of *Kiowa* and *Bay Mills*. The legal and policy arguments advanced by the *Bay Mills* dissent and the *Sue/Perior* and *American Property Management* decisions will provide support for such efforts.

Tribes should maximize their chances of preserving the immunity of their corporate subsidiaries by: (1) documenting the corporation's "arm" status in its organic documents and linking it to tribal economic development and self-determination, preferably by earmarking some percentage of revenue for tribal government, (2) preserving shareholder control through the tribal government's power to appoint and remove directors, (3) chartering corporations under IRA Section 17 or tribal law rather than under state law, (4) insuring against torts and taking other steps in anticipation of adverse changes in the law, and (5) preparing litigation strategies to counter the coming challenges to immunity.

Linkage of 11th Amendment jurisprudence to tribal sovereign immunity effectively eliminates the immunity of tribal corporations, as the New York Court of Appeals' decision in *Sue/Perior* demonstrates. A full discussion of the many important differences between state sovereign immunity and tribal sovereign immunity is beyond the scope of this article. Unique aspects of tribal sovereign immunity include: (1) the Supreme Court's rejection of an equivalency between state and tribal immunity,<sup>53</sup> (2) tribal immunity's roots in tribes' inherent, aboriginal sovereignty and the federal government's trust responsibility,<sup>54</sup> (3) tribes' need for revenue generated by tribal corporations as a substitute for property tax and other revenue sources available to state governments but unavailable to tribes,<sup>55</sup> and (4) tribal corporations' role as essential components of a tribal-federal system of government finance that also includes, and may mitigate, the financial obligations of the federal government under the trust doctrine. These distinctive features support a robust immunity for tribal corporations, functioning with the financial and operational independence typical of other business corporations, based on the principles of *Kiowa* and *Bay Mills*. ©



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### Endnotes

<sup>1</sup>In this article, the term "corporation" will be used to refer to

any entity that, under applicable law, has a legal existence separate from its parent. Corporations, limited liability companies, and public bodies politic such as housing authorities and utility districts are common examples.

<sup>3</sup>*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

<sup>4</sup>523 U.S. 751, 118 S.Ct. 1700 (1998).

<sup>5</sup>523 U.S. at 758.

<sup>6</sup>134 S.Ct. 2024 (2014).

<sup>7</sup>102 Stat. 2467, 25 U.S.C. § 2701 et seq., see § 2702(3) (describing the purpose of IGRA to establish “regulatory authority ... [and] standards for gaming on Indian lands”).

<sup>8</sup>§ 2710(d)(7)(A)(ii).

<sup>9</sup>134 S.Ct. at 2037 (internal quotes omitted).

<sup>10</sup>Only Justice Sonia Sotomayor, in a lone concurrence, made a spirited defense of tribal immunity, based in part on the importance of business revenue as a source of funds for tribal government. 134 S.Ct. at 2040-45.

<sup>11</sup>134 S.Ct. at 2036 n. 8 (“We have never, for example, specifically addressed [nor, so far as we are aware, has Congress] whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a ‘special justification’ for abandoning precedent is not before us.”).

<sup>12</sup>Except for his vote in *Bay Mills*, since joining the Court in 2005 Chief Justice John G. Roberts has voted against tribal interests in each of the Court’s 5-4 decisions relating to tribes. *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316, 128 S.Ct. 2709 (2008); *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012) (dissenting); *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

<sup>13</sup>The decisions of these courts carry special weight because of the number of tribes within their jurisdictions. The U.S. courts of appeals for the District of Columbia, First, Second, Seventh, and Eleventh circuits, and most states, have not squarely addressed the “arm of tribe” status of tribal business corporations, though they have sometimes referred to multifactor tests in connection with other tribal agencies and enterprises. The Sixth and Eighth Circuit courts of appeals have addressed “arm” status only in connection with Section 17 corporations.

<sup>14</sup>The term “arm” was used generically to describe tribal subsidiaries in the dissent in *Bay Mills*, 134 S.Ct. at 2051 n. 4, and has been used frequently by lower courts. See, e.g., *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014); *Somerlott v. Cherokee Nation Distributors Inc.* 686 F.3d 1144, 1154-55 (10th Cir. 2012); *Amerind Risk Management Corporation v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), cert. denied, 132 S. Ct. 1094 (2012); *Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d 917 (6th Cir., 2009); *Hagen v. Sisseton-Wahpeton Comm. College*, 205 F.3d 1040 (8th Cir., 1999) *Sue/Perior Concrete & Paving Inc. v Lewiston Golf Course Corp.*, 109 A.D.3d 80, 968 N.Y.S.2d 271 (N.Y. 2013); and *Koscielak v. Stockbridge-Munsee Community*, 340 Wis.2d 409, 811 N.W.2d 451, 2012 WI App 30 (Wis. App. 2012). Courts have also sometimes used the term “subordinate economic enterprise,” *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash.2d 108, 147 P.3d 1275 (2006); *Gavle v. Little Six Inc.*, 555 N.W.2d 284 (Minn.1996); *Dixon v. Picopa Const. Co.* 772 P.2d 1104, 160 Ariz. 251 (Ariz., 1989).

<sup>15</sup>*Hagen v. Sisseton-Wahpeton College*, 205 F.3d 1040 (8th Cir.

2000) (community college); *EFW v. St. Stevens Mission Indian School*, 51 F. Supp. 1217 (D. Wy. 1999) (tribal school).

<sup>16</sup>*Pink v. Modoc Indian Health Project Inc.*, 157 F.3d 1185 (9th Cir. 1998); *J.L. Ward Assocs. Inc. v. Great Plains Tribal Chairmen’s Health Board*, 842 F.Supp.2d 1163, 1176 (D.S.D. 2012).

<sup>17</sup>See *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 87 (2nd Cir. 2001) (holding that a tribal housing authority shared the tribe’s immunity and “sue and be sued” clause was not consent to suit in federal court); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000); *Duke v. Absentee Shawnee Tribe of Housing Authority*, 199 F.3d 1123 (10th Cir. 1999) (explaining that state incorporation did not eliminate tribal housing authority’s immunity); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Weeks Const. Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986) (holding that the “sue and be sued clause” effected a waiver but that federal jurisdiction was lacking); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975) (holding that the “sue and be sued” clause in the tribe’s housing ordinance effected a waiver to the extent of funds that the housing authority received from HUD).

<sup>18</sup>*Dille v. Council of Energy Res. Tribes*, 801 F.2d 373 (10th Cir. 1986).

<sup>19</sup>See, e.g., *Alabama v. PCI Gaming Authority*, 2014 WL 1400232 (M.D. Ala. 2014); *Martin v. Quapaw Tribe of Oklahoma*, 2013 WL 5274236 (N.D. Okla. 2013); *Swanda Bros. Inc. v. Chasco Constructors Ltd. LLP*, 2013 WL 4520203 (W.D. Oklahoma) (holding a tribal gaming authority to be an immune entity but finding that it had waived its immunity).

<sup>20</sup>25 U.S.C. § 477.

<sup>21</sup>*Memphis Biofuels LLC v. Chickasaw Nation Industries Inc.*, 585 F.3d 917 (6th Cir. 2009); *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir., 2002) (holding that the Tribe was not operating under its corporate charter and did not, therefore, waive its immunity); *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 381, 674 P.2d 1376, 1379 (Ct. App. 1984), review denied (1984) (holding that the “sue and be sued” clause contained in the corporate charter applied only to transactions where the entity was clearly acting in its capacity as a business corporation pursuant to section 17 and not to the community’s operation of commercial farm as a subordinate economic enterprise as provided for in the community’s constitution and bylaws.); *Native American Distributing et al. v. Seneca-Cayuga Tobacco Company et al.*, 546 F.3d 1288 (10th Cir. 2008) (holding that the “sue and be sued” clause in corporate charter would not waive immunity where a tribe was not operating under its corporate charter).

<sup>22</sup>*Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d 917, 921 (6th Cir. 2009).

<sup>23</sup>The model corporate charter is available at [www.bia.gov/cs/groups/public/documents/text/idc-001806.pdf](http://www.bia.gov/cs/groups/public/documents/text/idc-001806.pdf).

<sup>24</sup>Authorities most often cited as sources for these multifactor tests are *Dixon v. Picopa Const. Co.* 772 P.2d 1104, 160 Ariz. 251 (Ariz., 1989); *Ransom v. St. Regis Mohawk Educ. and Community Fund Inc.*, 86 N.Y.2d 553, 563 (N.Y. 1995); *Gavle v. Little Six Inc.*, 555 N.W.2d 284 (Minn.1996); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65 (Cal. App. 1999), and Vetter, *Doing Business with Indians and the Three S’s: Secretarial Approval, Sovereign Immunity and Subject Matter Jurisdiction*,

36 ARIZ.L.REV. 169, 176-77 (1994).

<sup>24</sup>In two decisions not related to business corporations, the Eighth Circuit remarked that each entity “serves as an arm of the [tribe] and not as a mere business and is thus entitled to tribal sovereign immunity.” The implication, of course, is that a tribal corporation engaged in “mere” business might not qualify. *Amerind Risk Management Corporation v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), cert. denied, 132 S. Ct. 1094 (2012); *Hagen v. Sisseton-Wahpeton Comm. College*, 205 F.3d 1040 (8th Cir. 2000).

<sup>25</sup>*Sue/Perior Concrete & Paving Inc. v. Lewiston Golf Course Corp.*, 2014 WL 6633546 (N.Y. 2014); 2014 N.Y. Slip Op. 08218. The slip opinion is available at [www.nycourts.gov/ctapps/Decisions/2014/Nov14/Nov14.htm](http://www.nycourts.gov/ctapps/Decisions/2014/Nov14/Nov14.htm).

<sup>26</sup>At least three other courts appear to have concluded that the protection of shareholder assets is a disqualifying factor. *Runyon ex rel. BR v. AVCP*, 84 P.3d 437 (Alaska, 2004); *American Property Management Corp. v. Superior Court*, 206 Cal.App.4th 491, 141 Cal.Rptr.3d 802 (2012) ( rehearing denied, review denied); *Dixon v. Picopa Const. Co.* 772 P.2d 1104, 1111, 160 Ariz. 251, 258 (Ariz. 1989) (explaining that corporate status “weighs heavily” against immunity and “the Community’s assets are not threatened by refusing to recognize immunity”).

<sup>27</sup>635 N.Y.S.2d 116, 86 N.Y.2d 553, 658 N.E.2d 989 (1995); In *Ransom*, the Court held that a tribal social services agency incorporated by the Mohawk Tribe under District of Columbia law shared the Tribe’s immunity. The factors considered in *Ransom* were: (1) whether the entity is organized under the tribe’s laws or constitution rather than federal law, (2) whether its purposes are similar to or serve those of the tribal government, (3) whether its governing body is comprised mainly of tribal officials, (4) whether the tribe has legal title or ownership of property used by the organization, (5) whether tribal officials exercise control over the administration or accounting activities of the organization, (6) whether the tribe’s governing body has power to dismiss members of the organization’s governing body, (7) whether the corporate entity generates its own revenue, (8) whether a suit against the corporation will impact the tribe’s fiscal resources, and (9) whether the subentity has the power to bind or obligate the funds of the tribe.” 86 N.Y.2d at 559-60.

<sup>28</sup>Slip op. p. 7.

<sup>29</sup>Slip op. p. 7.

<sup>30</sup>See 25 U.S.C. § 2702(1) (explaining Congress’ purpose in enacting the Indian Gaming Regulatory Act was to “provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”); *Bay Mills*, 134 S.Ct. at 2042 (Sotomayor, J., concurring: “For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes’ core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding”).

<sup>31</sup>Slip op., p. 7.

<sup>32</sup>Slip op. p. 8, quoting *Ransom*, 86 N.Y.2d at 559. Ironically, *Sue/Perior* seems to contradict the Court’s holding in *Ransom* that a corporation formed by a tribe under District of Columbia law, presumably shielding the assets of its tribal shareholder, was immune.

<sup>33</sup>Slip op. p. 8, quoting *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994).

<sup>34</sup>Slip op. p. 9.

<sup>35</sup>629 F.3d 1173 (10th Cir. 2010).

<sup>36</sup>629 F.3d at 1187, 1191 (“As we have stated, we will review the record in light of the following factors: (1) the method of the Authority and the Casino’s creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the Tribe has over the entities; (4) whether the Tribe intended for them to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the Authority and the Casino; and (6) whether the purposes of tribal sovereign immunity are served by granting them immunity”).

<sup>37</sup>629 F.3d at 1192.

<sup>38</sup>686 F.3d 1144, 1049-50 (10th Cir. 2012). The Court ultimately affirmed the district court’s determination that CNS was immune on the ground that the plaintiff had not properly preserved the argument based on its state charter. The Court’s discussion of the impact of state incorporation is, therefore, technically dicta.

<sup>39</sup>*Ramey Const. Co. Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982).

<sup>40</sup>686 F.3d at 1150 (quoting Oklahoma’s corporate statute providing that “each limited liability company may ... sue and be sued ... in all courts”).

<sup>41</sup>The Northern District of Oklahoma District Court applied *Somerlott* to deny immunity to the Association of Village Council Presidents because it was chartered under state law. *Eaglesun Systems Products Inc. v. Association of Village Council*, 2014 WL 1119726 (N.D. Okla. 2014).

<sup>42</sup>548 F.3d 718 (9th Cir. 2008).

<sup>43</sup>548 F.3d at 726.

<sup>44</sup>*White v. University of California*, 765 F.3d 1010 (9th Cir. 2014).

<sup>45</sup>765 F.3d at 1025.

<sup>46</sup>A number of state courts have addressed the immunity of tribal corporations in a manner generally consistent with the Ninth and Tenth circuit decisions, though generally without expressly adopting the *Somerlott* proviso. See *Cash Advance and Preferred Cash Loans v. State of Colorado ex rel. Suthers*, 242 P.3d 1099 (Colo. 2010); *Wright v. Colville Tribal Enterprise Corp.*, 147 P.3d 1275 (Wash.2006); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 327 Or. 318 (Or. 1998); *Koscielak v. Stockbridge-Munsee Community*, 340 Wis.2d 409, 811 N.W.2d 451, 2012 WI App 30 (Wis. App. 2012); *Gawle v. Little Six Inc.*, 555 N.W.2d 284 (Minn., 1996); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65 (Cal. App. 1999).

<sup>47</sup>206 Cal.App.4th 491, 141 Cal.Rptr.3d 802 (2012), rehearing denied, review denied.

<sup>48</sup>Id. at 501.

<sup>49</sup>166 Cal.Rptr.3d 800, 223 Cal.App.4th 21 (2014) ; review granted 324 P.3d 834.

<sup>50</sup>Id. at 814-15.

<sup>51</sup>Id. at 815.

<sup>52</sup>See note 10, above.

<sup>53</sup>*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991).

<sup>54</sup>*United States v. United States Fidelity Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940).

<sup>55</sup>See *Bay Mills*, 134 S.Ct. at 2041 (Sotomayor, J., concurring) (“If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal”).