

APPEAL NOS. 12-6004, 12-6005, 12-6006, AND 12-6007

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE EIGHT CIRCUIT**

APPEAL NO. 12-6004

In Re: Linda Rose Whitaker, Debtor.	UNITED STATES BANKRUPTCY COURT – DISTRICT OF MINNESOTA Bky. Case No. 10-3867
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Paul W. Bucher, Trustee Plaintiff-Appellant, vs.	Adversary No. 11-3154
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Dakota Finance Corporation,
Defendant-Appellee.

APPEAL NO. 12-6005

In Re: Cecil Ray Barth and Deanna Joan Barth, Debtors.	UNITED STATES BANKRUPTCY COURT – DISTRICT OF MINNESOTA Bky. Case No. 09-36006
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Michael S. Dietz, Trustee Plaintiff-Appellant, vs.	Adversary No. 11-3233
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The Lower Sioux Indian Community
in the State of Minnesota,
Defendant-Appellee.

APPEAL NO. 12-6006

In re: Morris Jerome Pendleton, Sr.
and Constance Louise Pendleton,
Debtors.

UNITED STATES BANKRUPTCY
COURT – DISTRICT OF MINNESOTA
Bky. Case No. 10-3867

Paul W. Bucher, Trustee
Plaintiff-Appellant,
vs.

Adversary No. 11-3234

The Lower Sioux Indian Community
in the State of Minnesota,
Defendant-Appellee.

APPEAL NO. 12-6007

In re: Linda Rose Whitaker,
Debtor.

UNITED STATES BANKRUPTCY
COURT – DISTRICT OF MINNESOTA
Bky. Case No. 10-38674

Paul W. Bucher, Trustee
Plaintiff-Appellant,
vs.

Adversary No. 11-3235

The Lower Sioux Indian Community
in the State of Minnesota,
Defendant-Appellee.

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SUMMARY OF THE ARGUMENT

The Trustees submit this Reply Brief to the Lower Sioux Indian Community in the State of Minnesota's (hereinafter "Lower Sioux") Response. The Lower Sioux's Response fails to disprove that the language "or other foreign or domestic government" found in 11 U.S.C. § 101(27) includes Indian tribes, such that 11 U.S.C. § 106 together with 11 U.S.C. § 101(27) embodies Congress' clear and unequivocal abrogation of tribal sovereignty immunity.

ARGUMENT

1. Appellees' Response fails to disprove that Congress clearly and unequivocally referenced Indian tribes by using the phrase "domestic governments."

The most glaring absence in the Appellees' Response brief is that of any rebuttal discussion of the unmistakable fact that Indian tribes, historically referred to as "domestic dependent nations," are clearly and unequivocally "domestic governments." The closest the Appellees come to such discussion is their critique of the 9th Circuit's Krystal Energy syllogism that concludes Indian tribes are without question domestic governments. Appellees dismiss this simple Krystal syllogism as "tortured."¹ Rather than attempting to disprove the fact that the Indian tribes are domestic governments to which Congress specifically referred to

¹ See Appellees' Brief at p. 16.

in § 101(27), the Appellees devote the bulk of their brief to the argument that the use of the magical words “Indian Tribe” is the only possible manner available to meet the standard of “unequivocal expression.”

The Appellees’ reason for avoiding this particular discussion is apparent: the Lower Sioux—an Indian tribe—is clearly and unequivocally a domestic government, referred to by Congress in § 101(27), and thus abrogated of their sovereign immunity pursuant to § 106. The word “domestic” means “(1) Of or relating to one's own country. (2) Of or relating to one's own jurisdiction. (3) Of or relating to the family or the household.” Black's Law Dictionary (9th ed. 2009). A “government” is “(1) The structure of principles and rules determining how a state or organization is regulated. (2) The sovereign power in a nation or state. (3) An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.” In this sense, the term refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with.” Black's Law Dictionary (9th Ed. 2009). So, a domestic government would be a group within the lands of the United States that operates through some form of ruling principles. In re Mayes, 294 B.R. 145, 158-59 (10th Cir. BAP (Okla.) 2003) (McFeeley, Chief Judge, dissenting). Reviewing the main body of § 101(27) demonstrates that the text embraces virtually every form of domestic government including, municipalities,

States and their instrumentalities, and the federal government. Id. at 158-59. Given that, the question remains: To what does the phrase following the semicolon “other ... domestic government” refer? Id.

Verily, a court must give operative effect to every word used by Congress. Walters v. Metropolitan Educ. Enters., 519 U.S. 202, 208, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997). Thus, a court must give operative effect to the words “or other foreign or domestic government.” Because in § 101(27) all other forms of domestic government prior to the semicolon are enumerated, if the phrase following the semicolon is not read as referring to Indian tribes and other indigenous peoples, the phrase becomes meaningless. In re Mayes, 294 B.R. 145 at 158-59. There are no other forms of domestic government that have not already been specified. Id. at 159. Thus, as further shown below, in § 101(27) Congress was plainly referencing those old “domestic dependent nations,” also commonly referred to as Indian tribes.

2. There is precedent for understanding “other...domestic government” as referring specifically to Indian tribes.

Historically, both the judiciary and the executive branch have referred to Indian tribes as “domestic dependent nations.” See e.g. 41 Am. Jur. 2d *Indians* § 8 (refers to Native American tribes as domestic dependent nations). The United States Supreme Court identified Indian tribes as “domestic dependent nations.” Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505,

509, 112 L. Ed. 2d 1112, v111 S. Ct. 905 (1991) (quoting Cherokee Nation v. Georgia, 30 U.S. 1 (5 Pet.), 9 L. Ed. 25 (1831)). A relatively recent Executive Order interpreting the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 410 *et seq.*, characterized Indian tribes as “domestic dependent nations.” See Executive Order No. 13,175, 65 Fed. Reg. 67, 249 (Nov. 6, 2000). Further, the Department of Justice’s website regarding Native Americans refers to the legal status of American Indians as that of “domestic dependent nations” and states that the relationship between the Indian tribes and the United States is “one of government to government.” United States Department of Justice – Office of Tribal Justice, About Native Americans, available at <http://www.justice.gov/otj/nafaqs.htm> (last visited April 21, 2012). The fact that Indian tribes have been historically referred to as “domestic dependent nations” and maintain a “government to government relationship” with the United States incorporates them into §101(27). See Krystal Energy Co. v. Navajo Nation, 357 F.3d. 1055, 1057-58 (2004); In re Mayes, 294 B.R. 145 at 159-160.

3. 8th Circuit precedent does not require the use of the magical words “Indian tribes,” and Congress can specifically reference Indian tribes without using those words.

The Appellees argue that because other statutes that abrogate tribal sovereign immunity do so by express mention of Indian tribes, Congress would have similarly made an express mention of Indian tribes by use of those same

words through § 106 if it had intended to abrogate their immunity. The Appellees note, for example, that the Eighth Circuit found that Congress abrogated tribal sovereign immunity as to suits under the Resource Conservation and Recovery Act of 1976 (RCRA) because it permitted suits against “any person,” and defined “person” to include municipalities, and defined “municipalities” to “include ‘an Indian tribe or authorized tribal organization.’ ” Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir.1989). Similarly, the Appellees argue that the Eighth Circuit found an abrogation of tribal sovereign immunity in the Hazardous Materials Transportation Uniform Safety Act of 1990, because it also expressly mentioned “Indian tribe.” Northern States Power Co. v. The Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458 (8th Cir.1993).

But, that is a weak inductive argument, that because Congress abrogated tribal sovereign immunity two times by mentioning Indian tribes, that must be the only way that Congress drafts (or could possibly draft) such legislation. In re Russell, 293 B.R. 34, 43 (Bkrtcy.D.Ariz.,2003). And, however powerful the induction might become through a multitude of examples, it fails to demonstrate any fallacy in the deduction made in the so called “tortured” syllogism, or any equivocation in the term “domestic government” as it is found in § 106. Id. at 43 (Bkrtcy. D. Ariz., 2003).

Indeed, the 9th Circuit in Krystal Energy faced precedent likewise to Blue Legs and Northern States Power in the cases of Public Service Co. of Colo. v. Shoshone–Bannock Tribes, 30 F.3d 1203 (9th Cir.1994) and Washington, Dep't of Ecology v. United States Env'tl. Prot. Agency, 752 F.2d 1465, 1469 (9th Cir.1985), which involved analysis, holdings and conclusions of law relating to the same exact statutes and legal issues as their respective 8th Circuit counterparts. Yet, faced with the same precedent as is now in the 8th Circuit, the 9th Circuit's holding in Krystal makes clear that even in light of such previous holdings it is not necessary to address Indian tribes specifically and individually to abrogate their immunity, when they are clearly and unequivocally referenced through the words “domestic government.” Krystal Energy Co. v. Navajo Nation, 357 F.3d. 1055, 1061 (2004). Krystal Energy carefully and thoughtfully reviewed, respected and acknowledged the Supreme Court's admonitions in the area of abrogation of tribal sovereign immunity and in light of those admonitions held the following:

The Supreme Court's decisions do not require Congress to utter the magic words “Indian tribes” when abrogating tribal sovereign immunity. Congress speaks “unequivocally” when it abrogates the sovereign immunity of “foreign and domestic governments.” Because Indian tribes are domestic governments, Congress has abrogated their sovereign immunity in 11 U.S.C. § 106(a).

Id. at 1061.

4. Dakota Finance Corporation is not an Arm of the Lower Sioux.

Without facts sufficient to prove Dakota Finance Corporation is an arm of the Lower Sioux, it cannot be so. Appellees admit that the Eighth Circuit has not established a specific test or list of factors available for courts to determine if an organization is entitled to tribal sovereign immunity. (Appellees' Brief at pg. 22). Likewise, there are no facts to support the Lower Sioux's claim that the purpose is governmental and that Dakota Finance Corporation promotes tribal autonomy.

Applying the Minnesota Supreme Court's version of the "subordinate economic entity" test, Dakota Finance Corporation is not an arm of the Lower Sioux. The Minnesota Supreme Court provided and examined a simplified version of the test in a case involving Little Six, Inc. Gayle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996). In Gayle, the court determined the principal factors in determining whether tribal sovereign immunity extends to a tribal business entity are:

- 1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;
- 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and
- 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.

Id.

Examining each of the three factors, the facts provided by Appellees fail to show that Dakota Finance Corporation is an arm of the Lower Sioux. First, the Lower Sioux's purpose in establishing Dakota Services Enterprise ("DSE") appears economic in nature. The purpose is, "to fulfill governmental purposes of generating Community governmental revenues by promoting economic development and self-sufficiency through business development." (Adv. No. 11-3154 at Doc. N0. 17 at p. 26 Article III). It appears the real purpose is to create more economic activity so government revenue is raised. At best, this is a hybrid of economic and governmental purpose. In reality, it appears to be a purely economic, capitalistic, money making endeavor.

The second factor appears to be satisfied. Based on the Lower Sioux's representations, DSE (and likewise Dakota Finance Corporation) operates under the Community Constitution. However, a shared governing structure does not provide sovereign immunity.

The final factor is unclear. At this point it is unclear what Dakota Finance Corporation is, and what it does. The Debtor received a loan from the entity, and granted the entity a security interest. It is unclear if Dakota Finance Corporation provides similar loans to persons or entities that are not members of the Lower Sioux. Likewise, it is unclear if the Debtor would have been able to obtain a similar loan from a conventional financial institution. Simply put, it is unknown

whether any federal policies (intended to promote tribal autonomy) are furthered by the extension of tribal immunity to Dakota Finance Corporation.

Dakota Finance Corporation operated as a financial institution. It loaned money to customers. It received security in collateral in exchange. Essentially, it operated as a bank or credit union. Regardless of its stated purpose, or governing structure of its ownership, it acted as an economic engine, outside the scope and purpose of sovereign immunity.

CONCLUSION

The language “or other foreign or domestic government” found in 11 U.S.C. § 101(27) includes Indian tribes, such that 11 U.S.C. § 106 together with 11 U.S.C. § 101(27) embodies Congress’ clear and unequivocal abrogation of tribal sovereignty immunity. The Trustees respectfully request this Court agree with the multitude of courts that hold that 11 U.S.C. § 106(a) abrogates tribal sovereign immunity.

Dated: April 24, 2012.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. The foregoing brief complies with the type-volume limitations as set forth in Fed. R. App. P. 32(a)(7)(B) and L.R. B.A.P. 8th Cir. 8010A(a) because this brief contains 2,775 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft ® Word 2010, in Times New Roman font, 14 point.

Dated: April 24, 2012

DUNLAP AND SEEGER, P.A.

By: s/Christopher D. Nelson
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CERTIFICATE OF SERVICE

I, CHRISTOPHER D. NELSON, attorney for the Appellants, and an officer of the court, hereby certify that a true and correct copy of the following:

APPELLANTS' REPLY BRIEF

was filed electronically with the Clerk of Court on the 24th day of April, 2012, through CM/ECF, and a copy of the above-referenced documents will be delivered to all individuals and entities identified on the electronic notice list for Case Nos. 12-6004, 12-6005, 12-6006, and 12-6007, by automatic e-mail notification pursuant to CM/ECF, and this notice constitutes service.

Dated: April 24, 2012

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