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## A FAILURE OF EXPRESSION: HOW THE PROVISIONS OF THE U.S. BANKRUPTCY CODE FAIL TO ABROGATE TRIBAL SOVEREIGN IMMUNITY

Greggory W. Dalton

*Abstract:* Sections 106(a) and 101(27) of the U.S. Bankruptcy Code use the general phrase “other foreign or domestic government” to abrogate sovereign immunity without specifically referencing Indian tribes. The U.S. Supreme Court has not yet decided whether these sections of the Code abrogate tribal sovereign immunity, and lower court decisions have come to varying conclusions. As a general rule, Indian tribes are immune from suit due to their inherent sovereignty. Congress, however, may abrogate the sovereign immunity of tribes by unequivocally stating its intent to do so in a statute. When interpreting abrogation provisions in a statute, courts have only found an unequivocal expression to be present when the statute explicitly references Indian tribes. The unequivocal expression standard used by courts in determining the abrogation of tribal sovereign immunity is also used in the context of state sovereign immunity and courts consider state sovereign immunity cases to be persuasive authority when addressing tribal sovereign immunity. In the state context, the U.S. Supreme Court has found general phrases in abrogation provisions to be insufficient to satisfy the standard. This Comment argues that the U.S. Supreme Court must find that §§ 106(a) and 101(27) of the Bankruptcy Code do not abrogate tribal sovereign immunity. The Bankruptcy Code contains no specific reference to Indian tribes. Moreover, courts have found general phrases such as the one in the Bankruptcy Code insufficient to abrogate the sovereign immunity of states. While the general phrase “other foreign or domestic government” logically seems to encompass Indian tribes, such an inference is insufficient to meet the unequivocal expression standard.

American Indian tribes are endowed with inherent sovereign power and, accordingly, have historically possessed a common-law immunity from suit.<sup>1</sup> Congress has the power to abrogate the sovereign immunity of tribes but may do so only where it unequivocally expresses an intent to abrogate tribal sovereign immunity on the face of a statute.<sup>2</sup> Traditionally, when interpreting abrogation provisions in a statute, courts have only found the statute to meet the unequivocal expression standard

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1. See *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172–73 (1977); *Turner v. United States*, 248 U.S. 354, 357–58 (1919).

2. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)); see also *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (stating that Congress can only alter the limits of tribal immunity through “explicit legislation”). Additionally, congressional intent to abrogate tribal sovereign immunity must be clearly expressed in, and not implied from, the language of a statute. See *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1265–66 (10th Cir. 1998).

when it explicitly references Indian tribes.<sup>3</sup> As a result, statutes that fail to reference tribes in either a direct statement of abrogation or a relevant statutory subsection do not abrogate tribal sovereign immunity.<sup>4</sup>

Courts also use an unequivocal expression standard in the context of state sovereign immunity.<sup>5</sup> Because the same standard applies in both settings, courts have deemed precedent in the state context to be persuasive in construing the abrogation of tribal sovereign immunity.<sup>6</sup> The U.S. Supreme Court has found general phrases in abrogation provisions to be insufficient to abrogate state sovereign immunity.<sup>7</sup> To “unequivocally express” congressional intent to abrogate the immunity of states, the Court requires statutes to specifically authorize suits against states.<sup>8</sup>

Sections 106(a) and 101(27) of the U.S. Bankruptcy Code use the general phrase “other foreign or domestic government” to identify those entities subject to suit without explicitly referencing Indian tribes.<sup>9</sup> The U.S. Supreme Court has not yet decided whether these sections abrogate tribal sovereign immunity,<sup>10</sup> and lower courts addressing the issue have reached varying conclusions.<sup>11</sup> For example, bankruptcy courts have

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3. See *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1132–33 (11th Cir. 1999). *But see* *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004); *In re Russell*, 293 B.R. 34, 41 (D. Ariz. 2003); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995).

4. See *Bassett*, 204 F.3d at 357; *Fla. Paraplegic*, 166 F.3d at 1132–33.

5. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

6. See *Krystal Energy Co.*, 357 F.3d at 1057; *see also* *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) (citing precedent on state sovereign immunity as support for determining the sufficiency of a congressional abrogation of tribal sovereign immunity).

7. See, e.g., *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (finding the phrase “every person” to be insufficient to abrogate state sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985) (finding the phrase “any recipient of Federal assistance” to be insufficient to abrogate state sovereign immunity).

8. See *Atascadero*, 473 U.S. at 246.

9. See 11 U.S.C. § 106(a) (2000) (“Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . .”); 11 U.S.C. § 101(27) (2000) (defining “governmental unit” as “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States[,] a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government”).

10. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).

11. See generally *Krystal Energy Co.*, 357 F.3d at 1059; *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003); *In re Nat'l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000).

held that because Indian tribes are not specifically named in the Bankruptcy Code, a court would have to infer that Congress intended the phrase “other foreign or domestic government” to encompass tribes, and such an inference is inappropriate.<sup>12</sup> The Ninth Circuit Court of Appeals, however, found this general phrase to encompass Indian tribes because a previous U.S. Supreme Court case referred to tribes as “domestic dependent nations.”<sup>13</sup>

This Comment argues that §§ 106(a) and 101(27) of the Bankruptcy Code do not abrogate tribal sovereign immunity. Courts traditionally do not allow Congress to abrogate tribal sovereign immunity using only a general phrase in a statute in the absence of a specific reference to Indian tribes.<sup>14</sup> Moreover, general phrases have been deemed insufficient to abrogate state sovereign immunity under the unequivocal expression standard—the same standard applicable to the abrogation of tribal sovereign immunity.<sup>15</sup> Part I discusses how Congress may abrogate the sovereign immunity of Indian tribes by unequivocally stating in a statute its intent to do so. Part II describes how courts use the same standard in determining the abrogation of both tribal and state sovereign immunity. Part III explains how the U.S. Supreme Court has found general phrases to be insufficient to demonstrate the requisite congressional intent for abrogation of state sovereign immunity. Part IV introduces the abrogation provisions of the Bankruptcy Code and summarizes the lower court decisions on whether §§ 106(a) and 101(27) successfully abrogate tribal sovereign immunity. Finally, Part V argues that the Bankruptcy Code does not abrogate tribal sovereign immunity because the general phrase “other foreign or domestic government” fails to constitute an unequivocal expression of congressional intent.

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12. See, e.g., *In re Mayes*, 294 B.R. at 148–49 n.10 (holding that § 106(a) of the Bankruptcy Code fails to abrogate tribal sovereign immunity); *In re Nat'l Cattle Cong.*, 247 B.R. at 267 (holding that because the Bankruptcy Code makes no mention of Indian tribes in the abrogation provisions, Indian tribes are not subject to suit under the statute).

13. See *Krystal Energy Co.*, 357 F.3d at 1057–59.

14. See *id.* (finding that there is “no other statute in which Congress effected a generic abrogation of sovereign immunity”).

15. See generally *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (finding the phrase “every person” insufficient to abrogate state sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985) (finding the phrase “any recipient of Federal assistance” insufficient to abrogate state sovereign immunity).

## I. CONGRESS MUST UNEQUIVOCALLY EXPRESS ITS INTENT TO ABROGATE TRIBAL SOVEREIGN IMMUNITY

Indian tribes, as independent sovereign entities, enjoy sovereign immunity from suit.<sup>16</sup> Tribal sovereign immunity, however, is not absolute.<sup>17</sup> Indian tribes are subject to suit when Congress unequivocally expresses its intent to abrogate tribal sovereign immunity in a statute.<sup>18</sup> Congressional intent to abrogate immunity must be clearly expressed in, and not implied from, the face of the statute.<sup>19</sup> Courts have only found statutes to meet this standard when the abrogation provisions explicitly reference Indian tribes.<sup>20</sup> As such, tribal sovereign immunity has been found to be successfully abrogated when statutes specifically reference tribes in either direct statements of abrogation or other statutory subsections.<sup>21</sup>

### A. *Indian Tribes Possess Sovereign Immunity*

Courts have historically deemed Indian tribes to possess a common-law immunity from suit.<sup>22</sup> This immunity is not a right explicitly granted by treaty or statute, but rather is an inherent natural right of all sovereign

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16. *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

17. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

18. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (stating that Congress can only alter the limits of tribal immunity through "explicit legislation").

19. *See Martinez*, 436 U.S. at 58; *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1265–66 (10th Cir. 1998).

20. *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (finding that Congress did not abrogate tribal sovereign immunity in the Copyright Act, 17 U.S.C. §§ 101–1332 (2000), because the statute did not specifically reference tribes or suits against tribes); *Fla. Paralegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1132–33 (11th Cir. 1999) (holding that Congress did not abrogate tribal sovereign immunity in the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2000), because the statute did not specifically reference tribes or suits against tribes).

21. *See Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1095 (8th Cir. 1989).

22. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172–73 (1977); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 357–58 (1919).

entities that has never been stripped from the tribes.<sup>23</sup> Thus, as a general rule, Indian tribes are immune from suit.<sup>24</sup>

*B. To Subject Indian Tribes to Suit, Congress Must Unequivocally Express Its Intent to Abrogate Tribal Sovereign Immunity*

Although tribal sovereign immunity is not absolute,<sup>25</sup> Congress may not subject Indian tribes to suit unless it unequivocally expresses an intent to abrogate tribal sovereign immunity.<sup>26</sup> The U.S. Constitution grants Congress the power to abrogate tribal sovereign immunity.<sup>27</sup> To do so, however, Congress must unequivocally express its intent to subject tribes to suit in the language of a statute.<sup>28</sup> Accordingly, abrogation of tribal sovereign immunity will not be found if the court must infer congressional intent from the language of a statute.<sup>29</sup> Moreover, courts readily adhere to the general principle that statutes are to be interpreted to the benefit of Indian tribes.<sup>30</sup> When the language of a statute is ambiguous, its provisions are liberally construed against abrogation and in favor of maintaining tribal sovereign immunity.<sup>31</sup>

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23. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

24. See *U.S. Fid. & Guar. Co.*, 309 U.S. at 512.

25. See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

26. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)); see also *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (stating that Congress can only alter the limits of tribal immunity through "explicit legislation").

27. The U.S. Constitution provides Congress with the authority "[t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. As such, Congress has the plenary authority to "limit, modify or eliminate" tribal sovereign immunity. *Martinez*, 436 U.S. at 56. Congress has done so by "occasionally authoriz[ing] limited classes of suits against Indian tribes." *Potawatomi*, 498 U.S. at 510; see also *Kiowa Tribe*, 523 U.S. at 758 (stating that Congress has "restricted tribal immunity from suit in limited circumstances").

28. See *Martinez*, 436 U.S. at 58 (finding that congressional intent to subject tribes to suit must be clearly expressed in, and not implied from, the face of a statute). In reaching this conclusion, Justice Marshall explained that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Id.* at 60.

29. See *id.* at 58–59; accord *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1265–66 (10th Cir. 1998) (holding that abrogation of tribal sovereign immunity will not be found if the court must "glean some congressional intent to [abrogate] immunity based on an examination of the structure or purpose of the statute").

30. See, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

31. See *Blackfeet Tribe*, 471 U.S. at 766.

Whenever any uncertainty exists in a statute, federal deference is granted to maintain the sovereignty of Indian tribes.<sup>32</sup> Therefore, unless there is an unequivocal expression of legislative intent to the contrary, suits against Indian tribes are barred.<sup>33</sup>

C. *To Successfully Abrogate Tribal Sovereign Immunity, Congress Must Evidence Its Unequivocal Intent to Subject Tribes to Suit by Explicitly Referencing Indian Tribes*

Courts only find Congress to have unequivocally expressed its intent to abrogate tribal sovereign immunity when Indian tribes are specifically referenced in the relevant provisions of a statute.<sup>34</sup> Conversely, in the absence of such a specific reference to tribes, courts have found statutes to lack the unmistakably clear indication of congressional intent necessary to successfully abrogate tribal sovereign immunity.<sup>35</sup> For instance, in *Florida Paralegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*,<sup>36</sup> the Eleventh Circuit considered whether Congress, in the Americans with Disabilities Act (ADA),<sup>37</sup> had abrogated tribal sovereign immunity.<sup>38</sup> The ADA provides civil remedies for acts of discrimination in public accommodations, but does not specifically provide for suits against Indian tribes.<sup>39</sup> Reasoning that Congress always

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32. *See id.*

33. *See Martinez*, 436 U.S. at 58.

34. *See, e.g., Osage Tribal Council*, 187 F.3d at 1181–82 (holding that the language of the Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2000), clearly abrogates tribal immunity by defining a “person” subject to suit to include a “municipality,” which in turn is defined to include “an Indian tribe”); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (finding that the Federal Debt Collection Procedure Act, 28 U.S.C. §§ 3001–3308 (2000), unequivocally expresses the abrogation of tribal sovereign immunity by defining a “person” subject to suit to include “an Indian tribe”); *Blue Legs v. EPA*, 668 F. Supp. 1329, 1337 (D.S.D. 1987) (holding that the definitions and provisions for citizen suits under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992 (2000), indicate congressional intent to subject tribes to suit).

35. *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (finding that Congress failed to abrogate tribal sovereign immunity in the Copyright Act because the statute did not specifically reference tribes or suits against tribes); *Fla. Paralegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1132–33 (11th Cir. 1999) (holding that Congress failed to abrogate tribal sovereign immunity in the ADA because the statute did not specifically reference tribes or suits against tribes).

36. 166 F.3d 1126 (11th Cir. 1999).

37. 42 U.S.C. §§ 12101–12213 (2000).

38. *See id.* at 1131–32.

39. *See* 42 U.S.C. § 12188(a)(1) (2000) (citing 42 U.S.C. § 2000a-3(a) (2000) (providing that “a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved”)); 42 U.S.C. § 12181(7)

“address[es] Indian tribes specifically and individually” when abrogating tribal sovereign immunity,<sup>40</sup> the court held that because the ADA lacks such an express reference, it fails to abrogate the immunity of tribes.<sup>41</sup> Moreover, by applying standard methods of statutory construction,<sup>42</sup> the Eleventh Circuit found that because the ADA abrogated state sovereign immunity by specifically referencing states, the absence of any equivalent reference to Indian tribes weighed heavily against finding the statute to successfully abrogate tribal sovereign immunity.<sup>43</sup>

The Second Circuit has also found statutes to lack an unequivocal expression of congressional intent to abrogate tribal sovereign immunity in the absence of a specific reference to tribes.<sup>44</sup> In *Bassett v. Mashantucket Pequot Tribe*,<sup>45</sup> the Second Circuit considered whether Congress, in the Copyright Act,<sup>46</sup> had abrogated tribal sovereign immunity.<sup>47</sup> Congress has granted the federal courts subject matter jurisdiction over civil actions arising from violations of the Copyright Act,<sup>48</sup> but has not expressly authorized suits against tribes.<sup>49</sup> Finding that nothing in the language of the Copyright Act “purports to subject tribes to . . . civil actions,”<sup>50</sup> the court of appeals held that the statute fails to

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(2000) (defining “[p]ublic accommodation” to include twelve expansive categories, each of which lists specific establishments); *Fla. Paraplegic*, 166 F.3d at 1132–34.

40. *Fla. Paraplegic*, 166 F.3d at 1132.

41. *See id.* at 1132–34 (stating that the absence of any reference to tribes was “a stark omission of any attempt by Congress to declare tribes subject to private suit”).

42. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (finding that “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent”).

43. *See Fla. Paraplegic*, 166 F.3d at 1130–33 (finding the reference to states in the abrogation provisions of the ADA to demonstrate Congress’s understanding of the need to specifically mention both states and tribes in a statute in order to abrogate their immunities); *see also In re Greene*, 980 F.2d 590, 594 n.3 (9th Cir. 1992) (stating that “Congress knows how to limit the sovereign immunity of others when it wants to”).

44. *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356–59 (2d Cir. 2000).

45. 204 F.3d 343 (2d Cir. 2000).

46. 17 U.S.C. §§ 101–1332 (2000).

47. *See id.* at 356–59.

48. *See* 28 U.S.C. § 1338(a) (2000) (providing for federal jurisdiction over “any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks”).

49. *See Bassett*, 204 F.3d at 357.

50. *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)).



abrogate tribal sovereign immunity because it lacks any specific reference to tribes.<sup>51</sup>

*D. Congress May Meet the Unequivocal Expression Standard by Referencing Tribes in Either Direct Statements or Definitions of Entities Subject to Suit*

While case law does not precisely define the term “unequivocal expression,”<sup>52</sup> courts have found the standard to be met when statutes either directly abrogate tribal sovereign immunity or indirectly do so by including tribes within the definition of entities subject to suit.<sup>53</sup> In a number of statutes, Congress has directly stated its intent to abrogate tribal sovereign immunity.<sup>54</sup> Courts have found such statements to constitute an unequivocal expression of congressional intent.<sup>55</sup>

Courts have also found abrogation of tribal sovereign immunity when Congress has expressed its intent by including Indian tribes in the definitions of parties who may be sued under a statute.<sup>56</sup> For example, in *Blue Legs v. United States Bureau of Indian Affairs*,<sup>57</sup> the Eighth Circuit

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51. See *id.* at 356–58.

52. See *Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999).

53. See *id.* at 1181–82.

54. See, e.g., 25 U.S.C. § 450f(c)(3) (2000) (“[an] insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit”); 25 U.S.C. § 2710(d)(7)(A)(ii) (2000) (“The United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into . . .”). Additionally, in certain instances, Congress has expressly declared an intention not to abrogate tribal sovereign immunity. See, e.g., 25 U.S.C. § 450n (2000) (“Nothing in this subchapter shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe . . .”).

55. See, e.g., *Osage Tribal Council*, 187 F.3d at 1182 (finding that Congress may abrogate the sovereign immunity of tribes by including within a statute “a provision directly stating its intent to [abrogate] tribal immunity”). While such direct statements effectively abrogate tribal sovereign immunity, Congress need not declare its intent to abrogate within a single statutory section. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74 (2000).

56. See, e.g., *Osage Tribal Council*, 187 F.3d at 1181–82 (holding that the language of the Safe Drinking Water Act clearly abrogates tribal immunity by defining a “person” subject to suit to include a “municipality,” which in turn is defined to include “an Indian tribe”); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (finding that the Federal Debt Collection Procedure Act unequivocally expresses the abrogation of tribal sovereign immunity by defining a “person” subject to suit to include “an Indian tribe”); *Blue Legs v. EPA*, 668 F. Supp. 1329, 1337 (D.S.D. 1987) (holding that the definitions and provisions for citizen suits under RCRA indicate congressional intent to subject tribes to suit).

57. 867 F.2d 1094 (8th Cir. 1989).

considered whether Congress, in the Resource Conservation and Recovery Act of 1976 (RCRA),<sup>58</sup> abrogated tribal sovereign immunity.<sup>59</sup> RCRA entitles citizens to bring compliance suits against “any person” in violation of the statute.<sup>60</sup> The definition of “person” under the statute includes municipalities.<sup>61</sup> Furthermore, a municipality is defined to include “an Indian tribe or authorized tribal organization.”<sup>62</sup> By piecing together the subsections of RCRA, the court found the statute to contain the requisite congressional intent to abrogate tribal sovereign immunity.<sup>63</sup>

In sum, while tribal sovereign immunity is not absolute, Indian tribes are only subject to suit if Congress unequivocally expresses its intent to abrogate tribal sovereign immunity on the face of a statute. An unequivocal expression may be found in either direct statements of abrogation or references in statutory subsections. Regardless of where in the statute the intent is expressed, courts have only found abrogation of tribal sovereign immunity to be unmistakably clear when the statute explicitly references Indian tribes.

## II. STATE SOVEREIGN IMMUNITY CASES ARE PERSUASIVE IN THE CONTEXT OF TRIBAL SOVEREIGN IMMUNITY

Courts consider precedent on the abrogation of state sovereign immunity to be persuasive authority in the context of tribal sovereign immunity.<sup>64</sup> Like Indian tribes, states possess sovereign immunity that may be abrogated by a congressional act.<sup>65</sup> To abrogate state sovereign immunity, Congress must satisfy the same unequivocal expression standard used by courts in determining the abrogation of tribal sovereign immunity.<sup>66</sup> Because courts use the same standard in determining the

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58. 42 U.S.C. §§ 6901–6992 (2000).

59. *See Blue Legs*, 867 F.2d at 1095–98.

60. 42 U.S.C. § 6972(a)(1)(A) (2000).

61. 42 U.S.C. § 6903(15) (2000).

62. 42 U.S.C. § 6903(13)(A) (2000).

63. *See Blue Legs*, 867 F.2d at 1095.

64. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004); *see also* *Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) (citing precedent on state sovereign immunity as support for determining whether language is sufficient to abrogate tribal sovereign immunity).

65. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

66. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Seminole Tribe*, 517 U.S. at 55; *see*

abrogation of state sovereign immunity, precedent in the state context is persuasive in construing the abrogation of tribal sovereign immunity.<sup>67</sup>

### III. GENERAL PHRASES DO NOT SATISFY THE UNEQUIVOCAL EXPRESSION STANDARD

When Congress uses a general phrase to subject a broad class of entities to suit, the use of such a phrase does not abrogate state sovereign immunity,<sup>68</sup> even if the phrase logically seems to encompass states.<sup>69</sup> One illustrative case is *Atascadero State Hospital v. Scanlon*.<sup>70</sup> In *Atascadero*, an unsuccessful applicant for a position with a state hospital filed a complaint alleging that the hospital's refusal to hire him was due to his physical disability and thus a violation of section 504 of the Rehabilitation Act.<sup>71</sup> On review, the U.S. Supreme Court held that the state hospital was immune from suit because the Rehabilitation Act fails to abrogate state sovereign immunity.<sup>72</sup> Section 505(a)(2) of the Rehabilitation Act provides for remedies for violations of section 504 by "any recipient of Federal assistance."<sup>73</sup> While states are unquestionably recipients of federal assistance, the Court held that Congress had not unequivocally expressed its intention to abrogate state sovereign immunity.<sup>74</sup> The Court declared that to abrogate state sovereign immunity, Congress must *specifically* authorize suits against states.<sup>75</sup>

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also *Green v. Mansour*, 474 U.S. 64, 68 (1985) (finding that Congress abrogates state sovereign immunity only where it "unequivocally expresses its intent" to abrogate the immunity); *Osage Tribal Council*, 187 F.3d at 1181 ("Conceding potential differences between tribal and state sovereign immunity, we note that courts have often used similar language in defining the requirements for [abrogation] of these immunities.").

67. See *Seminole Tribe*, 517 U.S. at 54; *Krystal Energy Co.*, 357 F.3d at 1056; see also *Osage Tribal Council*, 187 F.3d at 1181 (citing precedent on state sovereign immunity as support for determining whether language is sufficient to abrogate tribal sovereign immunity).

68. See, e.g., *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (finding the phrase "every person" to be insufficient to abrogate state sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–246 (1985) (finding the phrase "any recipient of Federal assistance" to be insufficient to abrogate state sovereign immunity).

69. See *Dellmuth v. Muth*, 491 U.S. 223, 230–32 (1989).

70. 473 U.S. 234 (1985).

71. 29 U.S.C. § 794 (2000). See *Atascadero*, 473 U.S. at 236.

72. See *Atascadero*, 473 U.S. at 246.

73. 29 U.S.C. § 794(a)(2).

74. See *Atascadero*, 473 U.S. at 243–46.

75. See *id.* at 246.

Likewise, the U.S. Supreme Court has held that a statutory provision that subjects “every person” to suit is insufficient to abrogate state sovereign immunity.<sup>76</sup> In *Will v. Michigan Department of State Police*,<sup>77</sup> a state employee who was denied a promotion brought an action against the Department of State Police for violating a federal civil rights statute.<sup>78</sup> On appeal, the U.S. Supreme Court held that the state was immune from suit because by subjecting “every person” to suit,<sup>79</sup> Congress had not unequivocally expressed its intent to abrogate state sovereign immunity.<sup>80</sup> While not disputing that a general term such as “person” encompasses municipalities,<sup>81</sup> the Court held that the term “person” fell short of demonstrating the unequivocal expression standard required to abrogate state sovereign immunity.<sup>82</sup>

The U.S. Supreme Court has even suggested that the general term “[e]very common carrier by railroad” is an insufficient indication of congressional intent to abrogate state sovereign immunity.<sup>83</sup> In *Hilton v. South Carolina Public Railways Commission*,<sup>84</sup> an employee of a state-owned railroad brought an action in state court against the railroad under the Federal Employers’ Liability Act (FELA).<sup>85</sup> Under FELA, Congress used the phrase “[e]very common carrier by railroad” to describe the type of employers subject to suit under the statute.<sup>86</sup> Prior to *Hilton*, the South Carolina Supreme Court held that FELA does not abrogate state sovereign immunity because the phrase “[e]very common carrier by railroad” fails to meet the unequivocal expression standard espoused in *Will*.<sup>87</sup> Nevertheless, in a decision made prior to *Will*, the U.S. Supreme Court had found FELA to effectively abrogate state sovereign

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76. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989).

77. 491 U.S. 58 (1989).

78. *Id.* at 60. The statute at issue in *Will* was 42 U.S.C. § 1983 (2000), which provides: “[e]very person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” *Will*, 491 U.S. at 64–65.

79. 42 U.S.C. § 1983.

80. See *Will*, 491 U.S. at 64.

81. See *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

82. See *Will*, 491 U.S. at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

83. See *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 201–07 (1991).

84. 502 U.S. 197 (1991).

85. 45 U.S.C. §§ 51–60 (2000). See *Hilton*, 502 U.S. at 199.

86. See 45 U.S.C. § 51.

87. See *Freeman v. S.C. Pub. Rys. Comm’n*, 393 S.E.2d 383, 383–84 (S.C. 1990).

immunity.<sup>88</sup> As a result of the prior decision, the Court, bound by stare decisis, subjected the state-owned railroad to suit in *Hilton*.<sup>89</sup> The Court did not, however, find the phrase to constitute a clear statement of congressional intent.<sup>90</sup> In fact, the Court's exhaustive discussion of stare decisis and its rationale for following the doctrine indicates that it viewed the phrase as insufficient to satisfy the "unequivocal expression" standard.<sup>91</sup> Therefore, *Hilton* strongly suggests that but for the FELA precedent established prior to *Will*, the general phrase "[e]very common carrier by railroad" would be an insufficient indication of congressional intent to abrogate state sovereign immunity.<sup>92</sup>

Moreover, the fact that a general phrase may logically seem to encompass states does not alone demonstrate the requisite congressional intent for abrogation of state sovereign immunity.<sup>93</sup> In *Dellmuth v. Muth*,<sup>94</sup> the U.S. Supreme Court conceded that one could infer from the language of the Education of the Handicapped Act (EHA)<sup>95</sup> that Congress intended to subject states to suit.<sup>96</sup> Nevertheless, the Court held that such a "permissible inference" was insufficient to abrogate sovereign immunity because the Court could not say with "perfect confidence" that Congress intended to subject states to suit.<sup>97</sup> Absent an unequivocal declaration of congressional intent in the statute, the "logical force" of the language is irrelevant.<sup>98</sup> The Court stated that abrogation of state sovereign immunity cannot be established by inference, implication, or even legislative history.<sup>99</sup> Only an unequivocal expression on the face of the statute will be deemed sufficient.<sup>100</sup>

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88. See *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 187–88 (1964) (holding that FELA authorizes suits for damages against state-owned railroads).

89. See *Hilton*, 502 U.S. at 202.

90. See *id.* at 201–07.

91. See *id.*

92. See *id.*; Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (finding it unclear whether the generic and ambiguous phrase "appointee at the policymaking level" included judges, despite acknowledging that judges were both appointees and policymakers).

93. *Dellmuth v. Muth*, 491 U.S. 223, 230–32 (1989).

94. 491 U.S. 223 (1989).

95. 20 U.S.C. §§ 1400–1482 (2000).

96. See *id.* at 232.

97. See *id.* at 231–32.

98. See *id.* at 230–32.

99. See *id.*

100. See *id.* at 230.

Because the Court concluded that the EHA lacked such an expression, the statute failed to abrogate state sovereign immunity.<sup>101</sup>

#### IV. COURTS DISAGREE ON WHETHER THE BANKRUPTCY CODE ABROGATES TRIBAL SOVEREIGN IMMUNITY

The abrogation provisions of the Bankruptcy Code refer only to “other foreign or domestic government,” with no explicit reference to Indian tribes.<sup>102</sup> The U.S. Supreme Court has not yet addressed whether this general phrase is sufficient to abrogate tribal sovereign immunity,<sup>103</sup> and lower courts faced with interpreting the abrogation provisions have come to varying conclusions.<sup>104</sup> Some bankruptcy courts have held that since Indian tribes are not specifically included in the Bankruptcy Code, a court would have to infer that Congress intended the phrase “domestic government” to encompass tribes, and such an inference is inappropriate.<sup>105</sup> The Ninth Circuit, however, has found the general phrase to be sufficient to abrogate tribal sovereign immunity because a previous U.S. Supreme Court case referred to tribes as “domestic dependent nations.”<sup>106</sup> In analyzing the Bankruptcy Code, neither the bankruptcy courts nor the Ninth Circuit looked to analogous cases addressing congressional abrogation of state sovereign immunity.<sup>107</sup>

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101. See *id.* at 230–32.

102. See 11 U.S.C. § 106(a) (2000); 11 U.S.C. § 101(27) (2000); *supra* note 9.

103. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).

104. Compare *Krystal Energy Co.*, 357 F.3d at 1055 (holding that §§ 106(a) and 101(27) of the Bankruptcy Code effectively evidence congressional intent to abrogate tribal sovereign immunity), with *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003) (holding that § 106(a) of the Bankruptcy Code fails to abrogate tribal sovereign immunity), and *In re Nat'l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000) (holding that because the Bankruptcy Code makes no mention of Indian tribes in the abrogation provisions, Indian tribes are not subject to suit under the statute).

105. See, e.g., *In re Mayes*, 294 B.R. at 148–49 n.10 (holding that § 106(a) of the Bankruptcy Code fails to abrogate tribal sovereign immunity); *In re Nat'l Cattle Cong.*, 247 B.R. at 267 (holding that since the Bankruptcy Code makes no mention of Indian tribes in the abrogation provisions, Indian tribes are not subject to suit under the statute).

106. See *Krystal Energy Co.*, 357 F.3d at 1057–59 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

107. See generally *Krystal Energy Co.*, 357 F.3d at 1055; *In re Mayes*, 294 B.R. at 145; *In re Nat'l Cattle Cong.*, 247 B.R. at 259.

A. *The Abrogation Provisions of the Bankruptcy Code Contain a General Phrase and Do Not Specifically Reference Indian Tribes*

In drafting the Bankruptcy Code, Congress chose to include a general phrase in the abrogation provisions without explicitly referring to Indian tribes.<sup>108</sup> Section 106(a) of the Bankruptcy Code abrogates the sovereign immunity of “governmental unit[s].”<sup>109</sup> Section 101(27) of the Code defines “governmental unit[s]” by including the general phrase “other foreign or domestic government” at the end of a seemingly exhaustive list of governmental entities.<sup>110</sup> While sovereign entities like states are specifically listed in the abrogation provisions, no reference is made to Indian tribes.<sup>111</sup> Thus, to hold tribes subject to suit under the Bankruptcy Code, a court must find the general phrase “other foreign or domestic government” to be an unequivocal expression of congressional intent to abrogate tribal sovereign immunity.<sup>112</sup>

B. *Courts Have Reached Varying Conclusions as to Whether the Bankruptcy Code Effectively Abrogates Tribal Sovereign Immunity*

The U.S. Supreme Court has not yet determined whether the general phrase “other foreign or domestic government” is sufficient to abrogate tribal sovereign immunity.<sup>113</sup> Courts faced with interpreting whether the phrase constitutes an unequivocal expression of congressional intent have come to varying conclusions.<sup>114</sup> For example, while bankruptcy courts have found §§ 106(a) and 101(27) of the Bankruptcy Code

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108. See 11 U.S.C. § 106(a) (2000); 11 U.S.C. § 101(27) (2000).

109. 11 U.S.C. § 106(a) (“Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . .”).

110. 11 U.S.C. § 101(27) (defining “governmental unit” to include “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States [,] a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government”). It may be that Congress intended to abrogate tribal sovereign immunity with the phrase “other foreign or domestic government.” This Congress cannot do. It must explicitly mention tribes in order to abrogate tribal sovereign immunity, so its chosen language trumps this assumed intent. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)).

111. 11 U.S.C. § 101(27).

112. See *Martinez*, 436 U.S. at 58 (citing *Testan*, 424 U.S. at 399).

113. See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).

114. See generally *id.*; *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003); *In re Nat’l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000).

insufficient to abrogate tribal sovereign immunity,<sup>115</sup> the Ninth Circuit has found the provisions to effectively abrogate the immunity of tribes.<sup>116</sup>

1. *Bankruptcy Courts Have Held that the Bankruptcy Code Fails to Abrogate Tribal Sovereign Immunity*

When interpreting §§ 106(a) and 101(27) of the Bankruptcy Code, bankruptcy courts have found the abrogation provisions not to represent an unequivocal expression of congressional intent to abrogate the sovereign immunity of tribes.<sup>117</sup> For example, in *In re National Cattle Congress*,<sup>118</sup> a debtor sought to confirm a Chapter 11 plan that proposed to extinguish a real estate mortgage lien held by the Sac and Fox Tribe.<sup>119</sup> The Tribe argued that tribal sovereign immunity prevented the court from negating the mortgage lien.<sup>120</sup> The bankruptcy court agreed, finding that Congress had not abrogated tribal sovereign immunity under the Bankruptcy Code.<sup>121</sup> The court began its analysis by noting that when Indian tribes are not specifically referenced in abrogation provisions, courts have found the statutes not to unequivocally express congressional intent to abrogate tribal sovereign immunity.<sup>122</sup> Therefore, the court concluded that since the Bankruptcy Code makes no specific mention of Indian tribes, a court would need to infer from the language that Congress intended to subject tribes to suit.<sup>123</sup> The court deemed such

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115. See, e.g., *In re Mayes*, 294 B.R. at 148–49 n.10 (holding that § 106(a) of the Bankruptcy Code fails to abrogate tribal sovereign immunity); *In re Nat'l Cattle Cong.*, 247 B.R. at 267 (holding that because the Bankruptcy Code makes no mention of Indian tribes in the abrogation provisions, Indian tribes are not subject to suit under the statute).

116. See *Krystal Energy Co.*, 357 F.3d at 1057–59.

117. See, e.g., *In re Mayes*, 294 B.R. at 148–49 n.10 (holding that § 106(a) of the Bankruptcy Code fails to abrogate tribal sovereign immunity); *In re Nat'l Cattle Cong.*, 247 B.R. at 267 (holding that because the Bankruptcy Code makes no mention of Indian tribes in the abrogation provisions, Indian tribes are not subject to suit under the statute).

118. 247 B.R. 259 (Bankr. N.D. Iowa 2000).

119. See *id.* at 263.

120. See *id.* at 264.

121. See *id.* at 267.

122. See *id.* (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357–58 (2d Cir. 2000) and *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999)).

123. See *id.*



an inference to be inappropriate and thus found the Tribe to be immune from suit.<sup>124</sup>

Similarly, in *In re Mayes*,<sup>125</sup> a bankruptcy appellate panel held that the term “other foreign or domestic government” in the Bankruptcy Code does not abrogate tribal sovereign immunity.<sup>126</sup> In *In re Mayes*, a debtor filed a motion to avoid a judicial lien, claiming the judgment lien secured by the Cherokee Nation against the debtor’s homestead was void.<sup>127</sup> Finding the avoidance motion to constitute a “suit,” the appellate panel concluded that the Cherokee Nation was immune from suit because the court did not consider the term “other foreign or domestic government” to include Indian tribes.<sup>128</sup> The court found the general phrase to be an insufficient indication of congressional intent to abrogate tribal sovereign immunity.<sup>129</sup>

2. *The Ninth Circuit Has Found the Bankruptcy Code to Unequivocally Express Congress’s Intent to Abrogate Tribal Sovereign Immunity*

The Ninth Circuit has found §§ 106(a) and 101(27) of the Bankruptcy Code to effectively evidence congressional intent to abrogate tribal sovereign immunity.<sup>130</sup> In *Krystal Energy Co. v. Navajo Nation*,<sup>131</sup> a debtor in a Chapter 11 bankruptcy proceeding was issued tax assessments by the Office of the Navajo Tax Commission.<sup>132</sup> The debtor appealed the assessments and filed an adversary proceeding against the Navajo Nation.<sup>133</sup> Both the bankruptcy court and the district court found the Navajo Nation to be immune from suit, holding that §§ 106(a) and 101(27) do not unequivocally express congressional intent to abrogate tribal sovereign immunity.<sup>134</sup> On appeal, however, the Ninth Circuit

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124. See *id.*; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267–68 (10th Cir. 1998).

125. 294 B.R. 145 (B.A.P. 10th Cir. 2003).

126. See *id.* at 148–49 n.10.

127. See *id.* at 147.

128. See *id.*

129. See *id.* at 148–49 n.10.

130. See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004).

131. 357 F.3d 1055 (9th Cir. 2004).

132. See *id.* at 1056.

133. See *id.*

134. See *id.*

reversed, finding the same provisions in the Code sufficient to abrogate tribal sovereign immunity.<sup>135</sup> Specifically, the court found the general phrase “other foreign or domestic governments” to encompass Indian tribes because the U.S. Supreme Court had in a previous case referred to tribes as “domestic dependent nations,”<sup>136</sup> and in another case asserted that tribes are more akin to states than foreign sovereigns.<sup>137</sup> On this basis, the court concluded that in using the phrase “other foreign or domestic government,” Congress intended to abrogate tribal sovereign immunity by “legislating against the back-drop of prior Supreme Court decisions.”<sup>138</sup> As a result, the Ninth Circuit concluded that Congress had unequivocally stated its intent to abrogate tribal sovereign immunity without referencing Indian tribes.<sup>139</sup>

In sum, the abrogation provisions of the Bankruptcy Code contain a general phrase without explicitly referencing Indian tribes. The U.S. Supreme Court has not yet determined whether the general phrase “other foreign or domestic government” is sufficient to abrogate tribal sovereign immunity, and lower courts addressing the issue have come to varying conclusions. In analyzing the Bankruptcy Code, however, neither the bankruptcy courts nor the Ninth Circuit looked to analogous cases addressing congressional abrogation of state sovereign immunity.<sup>140</sup>

## V. THE BANKRUPTCY CODE DOES NOT ABROGATE TRIBAL SOVEREIGN IMMUNITY

The Bankruptcy Code does not abrogate tribal sovereign immunity because it fails to unequivocally express congressional intent to do so.<sup>141</sup>

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135. *See id.* at 1057.

136. *See id.* (citing *Okla. Tax Comm’n. v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

137. *See id.* at 1058 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

138. *See id.* at 1059.

139. *See id.* at 1061; *accord In re Russell*, 293 B.R. 34, 41 (D. Ariz. 2003) (“[B]ecause [the Bankruptcy Code] expressly abrogates sovereign immunity as to all domestic governments, the statute applies to Indian tribes by deduction . . .”); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995) (“Indian nations are considered ‘domestic dependent nations’ and as such comprise ‘governmental units’ within the meaning of Code § 101(27).”).

140. *See generally Krystal Energy Co.*, 357 F.3d at 1055; *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003); *In re Nat’l Cattle Congress*, 247 B.R. 259 (Bankr. N.D. Iowa 2000).

141. *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)) (finding that Congress must unequivocally express the intent to abrogate tribal sovereign immunity in a statute in order to subject Indian tribes to suit).

The Bankruptcy Code uses the general phrase “other foreign or domestic government” in its abrogation provisions, but fails to specifically reference Indian tribes.<sup>142</sup> Traditionally, whenever courts have found an unequivocal expression of congressional intent to abrogate tribal sovereign immunity, Indian tribes have always been explicitly listed in a direct statement or statutory definition.<sup>143</sup> Moreover, precedent on the abrogation of state sovereign immunity is persuasive in the context of tribal sovereign immunity.<sup>144</sup> Accordingly, because the U.S. Supreme Court has found general phrases to be insufficient to abrogate state sovereign immunity, the general phrase “other foreign or domestic government” likewise fails to abrogate tribal sovereign immunity.<sup>145</sup> The mere fact that the general phrase logically seems to encompass Indian tribes does not suffice to meet the unequivocal expression standard.<sup>146</sup>

*A. The Bankruptcy Code Fails to Abrogate Tribal Sovereign Immunity Because It Does Not Specifically Reference Indian Tribes*

Sections 106(a) and 101(27) of the Bankruptcy Code are insufficient to abrogate tribal sovereign immunity because the provisions never specifically reference Indian tribes.<sup>147</sup> Whenever courts have found an

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142. See 11 U.S.C. § 106(a) (2000); 11 U.S.C. § 101(27) (2000).

143. See, e.g., *Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1181–82 (10th Cir. 1999) (holding that the language of the Safe Drinking Water Act clearly abrogates tribal immunity by defining a “person” subject to suit to include a “municipality,” which in turn is defined to include “an Indian tribe”); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (finding that the Federal Debt Collection Procedure Act unequivocally expresses the abrogation of tribal sovereign immunity by defining a “person” subject to suit to include “an Indian tribe”); *Blue Legs v. EPA*, 668 F. Supp. 1329, 1337 (D.S.D. 1987) (holding that the definitions and provisions for citizen suits under RCRA indicate congressional intent to subject tribes to suit). See also *Krystal Energy Co.*, 357 F.3d at 1059 (finding that there is “no other statute in which Congress effected a generic abrogation of sovereign immunity”).

144. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Krystal Energy Co.*, 357 F.3d at 1056; see also *Osage Tribal Council*, 187 F.3d at 1181 (citing precedent on state sovereign immunity as support for determining whether language is sufficient to abrogate tribal sovereign immunity).

145. See generally *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (finding the phrase “every person” to be insufficient to abrogate state sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985) (finding the phrase “any recipient of Federal assistance” to be insufficient to abrogate state sovereign immunity).

146. See *Dellmuth v. Muth*, 491 U.S. 223, 230–32 (1989).

147. See 11 U.S.C. § 106(a); 11 U.S.C. § 101(27). Cf. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (finding that Congress failed to abrogate tribal sovereign immunity in the Copyright Act because the statute did not specifically reference tribes or suits against tribes); *Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1132–33 (11th

unequivocal expression of congressional intent to abrogate tribal sovereign immunity, Indian tribes have traditionally been explicitly listed in a direct statement or a statutory definition.<sup>148</sup> Courts have refused to find abrogation of tribal sovereign immunity in the absence of a specific reference to tribes.<sup>149</sup> Accordingly, the Bankruptcy Code does not unequivocally express congressional intent to abrogate tribal sovereign immunity because the statute fails to specifically reference Indian tribes in its abrogation provisions.<sup>150</sup> Instead, the Bankruptcy Code abrogates the sovereign immunity of a “governmental unit” without directly listing tribes in the definition of a “governmental unit.”<sup>151</sup>

Moreover, while failing to list tribes, Congress did specifically list states in the abrogation provisions.<sup>152</sup> By applying standard methods of statutory construction,<sup>153</sup> courts have found statutes that abrogate state sovereign immunity by specifically referencing states to not abrogate tribal sovereign immunity in the absence of an equivalent reference to tribes.<sup>154</sup> Thus, the specific listing of states in the abrogation provisions

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Cir. 1999) (holding that Congress failed to abrogate tribal sovereign immunity in the ADA because the statute does not specifically reference tribes or suits against tribes).

148. See, e.g., *Osage Tribal Council*, 187 F.3d at 1181–82 (holding that the language of the Safe Drinking Water Act clearly abrogates tribal immunity by defining a “person” subject to suit to include a “municipality,” which in turn is defined to include “an Indian tribe”); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (finding that the Federal Debt Collection Procedure Act unequivocally expresses the abrogation of tribal sovereign immunity by defining a “person” subject to suit to include “an Indian tribe”); *Blue Legs v. EPA*, 668 F. Supp. 1329, 1337 (D.S.D. 1987) (holding that the definitions and provisions for citizen suits under RCRA indicate congressional intent to subject tribes to suit).

149. See, e.g., *Bassett*, 204 F.3d at 357 (finding that Congress failed to abrogate tribal sovereign immunity in the Copyright Act because the statute did not specifically reference tribes or suits against tribes); *Fla. Paraplegic*, 166 F.3d at 1132–33 (holding that Congress failed to abrogate tribal sovereign immunity in the ADA because the statute does not specifically reference tribes or suits against tribes).

150. See 11 U.S.C. § 106(a); 11 U.S.C. § 101(27). Cf. *Will*, 491 U.S. at 64 (finding the phrase “every person” to be insufficient to abrogate state sovereign immunity); *Atascadero*, 473 U.S. 245–46 (finding the phrase “any recipient of Federal assistance” to be insufficient to abrogate state sovereign immunity).

151. 11 U.S.C. § 101(27).

152. *Id.*

153. See *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (finding that “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent”).

154. See, e.g., *Fla. Paraplegic*, 166 F.3d at 1130–33 (finding the reference to states in the abrogation provisions of the ADA to demonstrate Congress’s understanding of the need to specifically mention both states and tribes in a statute in order to abrogate their immunities); see

of the Bankruptcy Code weighs heavily against finding that the statute effectively abrogates tribal sovereign immunity.<sup>155</sup> Because courts have only found an unequivocal expression of congressional intent when statutes specifically reference Indian tribes, the provisions of the Bankruptcy Code are insufficient to abrogate tribal sovereign immunity.

*B. The Bankruptcy Code Fails to Abrogate Tribal Sovereign Immunity Because General Phrases Do Not Satisfy the Unequivocal Expression Standard*

Sections 106(a) and 101(27) do not effectively abrogate tribal sovereign immunity because the general phrase “other foreign or domestic government” fails to demonstrate an unequivocal expression of congressional intent to subject tribes to suit.<sup>156</sup> Courts use the same unequivocal expression standard to determine the abrogation of both state and tribal sovereign immunity.<sup>157</sup> As a result, precedent regarding the use of general phrases in abrogating state sovereign immunity is instructive and persuasive in construing the abrogation of tribal sovereign immunity.<sup>158</sup> Nevertheless, in analyzing the Bankruptcy Code, neither the bankruptcy courts nor the Ninth Circuit looked to analogous cases addressing congressional abrogation of state sovereign immunity.<sup>159</sup>

In the state context, courts have found general phrases to be insufficient to unequivocally express congressional intent to abrogate state sovereign immunity.<sup>160</sup> Given this precedent, a general phrase like

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also *In re Greene*, 980 F.2d 590, 594 n.3 (9th Cir. 1992) (stating that “Congress knows how to limit the sovereign immunity of others when it wants to”).

155. See *Fla. Paraplegic*, 166 F.3d at 1130–33.

156. See 11 U.S.C. § 106(a) (2000); 11 U.S.C. § 101(27).

157. See *Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) (“Conceding potential differences between tribal and state sovereign immunity, we note that courts have often used similar language in defining the requirements for [abrogation] of these immunities.”).

158. See *id.* at 1181–82 (citing the context of state sovereign immunity as support for determining whether language is sufficient to abrogate tribal sovereign immunity).

159. See generally *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); *In re Mayes*, 294 B.R. 145 (B.A.P. 10th Cir. 2003); *In re Nat’l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000).

160. See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (finding the phrase “every person” to be insufficient to abrogate state sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985) (finding the phrase “any recipient of Federal assistance” to be insufficient to abrogate state sovereign immunity).

the one in the Bankruptcy Code would be insufficient, without further definition, to abrogate state sovereign immunity.<sup>161</sup> By analogy, the phrase “other foreign or domestic government,” standing alone, is also insufficient to abrogate tribal sovereign immunity.<sup>162</sup> In *Krystal Energy Co.*, the Ninth Circuit found the language in the Bankruptcy Code sufficient to abrogate tribal sovereign immunity under the assumption that Congress could have abrogated tribal sovereign immunity by simply stating that sovereign immunity is abrogated as to all parties.<sup>163</sup> Given the holdings of *Will* and its progeny, however, it is clear that such a broad statement would be insufficient to abrogate state sovereign immunity.<sup>164</sup> Furthermore, because precedent concerning state sovereign immunity is instructive in the tribal context, such a broad statement would also be insufficient to abrogate tribal sovereign immunity.<sup>165</sup> When Congress chooses to subject states or Indian tribes to suit, it must do so specifically.<sup>166</sup> Thus, the Bankruptcy Code does not abrogate the sovereign immunity of Indian tribes because the general term “other foreign or domestic government” does not indicate an unequivocal expression of congressional intent to abrogate tribal sovereign immunity.<sup>167</sup>

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161. See, e.g., *Will*, 491 U.S. at 64 (finding the phrase “every person” to be insufficient to abrogate state sovereign immunity); *Atascadero*, 473 U.S. at 245–46 (finding the phrase “any recipient of Federal assistance” to be insufficient to abrogate state sovereign immunity).

162. See *Osage Tribal Council*, 187 F.3d at 1181–82 (citing precedent on state sovereign immunity as support for determining whether language is sufficient to abrogate tribal sovereign immunity).

163. *Krystal Energy Co.*, 357 F.3d at 1057.

164. See *Will*, 491 U.S. at 64; see also *Woelffer v. Happy States of America*, 626 F. Supp. 499, 504 (N.D. Ill. 1985) (holding that neither the Copyright Act, 17 U.S.C. § 501(a)–(b) (2000), which authorizes suit against “anyone,” nor the Lanham Act, 15 U.S.C. § 1125(a) (2000), which authorizes suit against “any person,” contained the kind of “unequivocal statutory language” sufficient to abrogate state sovereign immunity).

165. See *Osage Tribal Council*, 187 F.3d at 1181–82 (citing the context of state sovereign immunity as support for determining whether language is sufficient to abrogate tribal sovereign immunity).

166. See *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (finding that Congress failed to abrogate tribal sovereign immunity in the Copyright Act because the statute did not specifically reference tribes or suits against tribes); *Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1132–33 (11th Cir. 1999) (holding that Congress failed to abrogate tribal sovereign immunity in the ADA because the statute does not specifically reference tribes or suits against tribes). Cf. *Atascadero*, 473 U.S. at 246 (finding a state hospital immune from suit because the Rehabilitation Act did not specifically authorize suits against states).

167. See also *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 704 (2003) (finding that a statute utilizing a generic phrase, like “any person,” does not indicate an unequivocal expression of congressional intent to abrogate tribal sovereign

Moreover, the fact that the phrase “other foreign or domestic government” logically seems to encompass Indian tribes does not suffice to meet the unequivocal expression standard.<sup>168</sup> It is true that Indian tribes have been referred to in case law as “domestic dependent nations.”<sup>169</sup> Nevertheless, it is unclear whether the use of the term “domestic government” in this instance is meant to include Indian tribes.<sup>170</sup> While one *may* be able to conclude that Congress intended the term “other foreign or domestic government” to encompass tribes, a court could not say with “perfect confidence” that Congress intended such a term to include tribes.<sup>171</sup> Even if a tribe is a domestic government, a state-owned railroad is certainly a common carrier by railroad. Nevertheless, the U.S. Supreme Court in *Hilton* seemingly conceded that the encompassing term “common carrier by railroad” was an insufficient indication of congressional intent to abrogate state sovereign immunity.<sup>172</sup> Thus, the fact that the phrase “other foreign or domestic government” logically seems to encompass Indian tribes does not alone demonstrate the requisite congressional intent.<sup>173</sup> Therefore, the Bankruptcy Code fails to abrogate tribal sovereign immunity even though the general phrase “other foreign or domestic government” may logically encompass Indian tribes.

Accordingly, §§ 106(a) and 101(27) of the Bankruptcy Code fail to effectively abrogate the inherent sovereign immunity of Indian tribes. The general phrase “other foreign or domestic government” in the abrogation provisions is insufficient to indicate an unequivocal expression of congressional intent to abrogate the sovereign immunity of tribes. Congress knows how to abrogate sovereign immunity when it so

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immunity).

168. See *Dellmuth v. Muth*, 491 U.S. 223, 230–32 (1989).

169. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

170. When statutes have defined a “governmental unit” or “governmental entity,” Indian tribes have often not been included in the definitions. See, e.g., 7 U.S.C. § 1997(a) (2000) (providing a definition for the term “governmental entity” that does not include Indian tribes). But see 28 U.S.C. § 3701 (2000) (providing a definition for the term “governmental entity” that includes Indian tribes).

171. See *Dellmuth*, 491 U.S. at 231.

172. See *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 206–07 (1991) (holding nonetheless that the phrase “every common carrier by railroad” abrogates state sovereign immunity under principles of stare decisis).

173. Cf. *Dellmuth*, 491 U.S. at 230–32 (1989) (finding a general phrase insufficient to subject states to suit even if it logically seems to encompass states).

chooses.<sup>174</sup> When abrogating tribal sovereign immunity in other statutes, Congress has clearly indicated that the abrogation provisions apply specifically to tribes.<sup>175</sup> To conclude now that Congress has unequivocally expressed its intent to abrogate tribal sovereign immunity through a general phrase like “other foreign or domestic government” would be to accept a standard for abrogation that has always been deemed insufficient in the state context.<sup>176</sup> To accept a lower standard of explicitness in the face of contrary precedent, and to construe an uncertainty in a statute against the benefit of Indians, would be to reverse the federal deference that has always been granted to the authority and sovereignty of Indian tribes.<sup>177</sup>

## VI. CONCLUSION

The U.S. Bankruptcy Code fails to effectively abrogate the inherent sovereign immunity of Indian tribes. In drafting §§ 106(a) and 101(27) of the Code, Congress did not abrogate tribal sovereign immunity because the general phrase “other foreign or domestic government” does not constitute an unequivocal expression of congressional intent to do so. To find such an unequivocal expression of congressional intent to abrogate tribal sovereign immunity, courts require tribes to be specifically referenced in the statute. In the absence of such a specific reference, general phrases like “other foreign or domestic government” have been found insufficient to abrogate sovereign immunity. The mere fact that the general phrase logically seems to encompass Indian tribes

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174. *In re Greene*, 980 F.2d 590, 594 n.3 (9th Cir. 1992) (stating that “Congress knows how to limit the sovereign immunity of others when it wants to”).

175. *See, e.g., Osage Tribal Council v. U.S. Dep’t of Labor*, 187 F.3d 1174, 1181–82 (10th Cir. 1999) (holding that the language of the Safe Drinking Water Act clearly abrogates tribal immunity by defining a “person” subject to suit to include a “municipality,” which in turn is defined to include “an Indian tribe”); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (finding that the Federal Debt Collection Procedure Act unequivocally expresses the abrogation of tribal sovereign immunity by defining a “person” subject to suit to include “an Indian tribe”); *Blue Legs v. EPA*, 668 F. Supp. 1329, 1337 (D.S.D. 1987) (holding that the definitions and provisions for citizen suits under RCRA indicate congressional intent to subject tribes to suit).

176. *See, e.g., Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (finding the phrase “every person” to be insufficient to abrogate state sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985) (finding the phrase “any recipient of Federal assistance” to be insufficient to abrogate state sovereign immunity).

177. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (stating that “statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit”); *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).



does not alone demonstrate the requisite congressional intent. To conclude otherwise would be to accept a standard for abrogation that has always been deemed insufficient in the past.