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One Nation - Reexamining Tribal Sovereign Immunity in the Modern Era of Self-Determination

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ONE NATION? REEXAMINING TRIBAL SOVEREIGN IMMUNITY IN THE MODERN ERA OF SELF-DETERMINATION**

I. INTRODUCTION

The concept of sovereign immunity is a remnant of early English common law.[1]

** I drafted this piece in the fall of 2009. At that time, Miami Tribe of Oklahoma had entered an appeal, but the Oklahoma Court of Civil Appeals court did not release a decision until September 24, 2010. As predicted in the fall of 2009, this case generated much discussion regarding the status of tribal sovereign immunity, particularly from various tribal interest groups. *See, e.g.*, Matthew L.M. Fletcher, *Seneca Telephone v. Miami Tribe Materials*, TURTLE TALK (Oct. 14, 2010, 9:41 AM), http://turtletalk.wordpress.com/2010/10/14/seneca-telephone-v-miami-tribe-materials/; Matthew L.M. Fletcher, *Oklahoma Appellate Court Holds that Tribes Have No Immunity in Telecommunications* Case, TURTLE TALK (Sept. 27, 2010, 1:50 PM), http://turtletalk.wordpress.com/2010/09/27/oklahoma-appellate-court-holds-that-tribes-have-no-immunity-in-telecommunications-case/; Matthew L.M. Fletcher, *Okla. SCT Grants Cert to Decide Tribal Immunity Case*, TURTLE TALK (Jan. 13, 2011, 10:02 AM), http://turtletalk.wordpress.com/2011/01/13/okla-sct-grants-cert-to-decide-tribal-immunity-case/; *Seneca Telephone Company v Miami Tribe of Oklahoma*, STAND UP FOR CALIFORNIA (Sept. 24, 2010), http://www.standupca.org/court-rulings/federal/seneca%20telephone.pdf/view; *Supreme Court Cases from the 2011-2012 Term Impacting Native Americans*, NATIONAL INDIAN LAW LIBRARY (last updated Jan 22, 2012), http://www.narf.org/nill/bulletins/sct/currentsct.html; *In the Courts*, ARENT FOX (Mar. 21, 2011), http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=3078.

These cited discussions suggest that tribes and tribal entities greatly feared an affirmation of the trial court's decision, especially by this nation's highest court. It is my position, as highlighted in this note, that this fear is warranted for only a small majority of tribal entities. As this note highlights, tribal sovereign immunity harms more than it protects. Some protected by this doctrine are analogous to what some call "Big Business" and others are tribal governments and tribal politicians. The assertion that this doctrine protects rights of self-government is at times mere pretext for the fact that some receiving protection are corrupt tribal government officials, corrupt tribal courts, and corrupt tribal executive branches — and the lines between these powers are oft blurred, or fail to exist.

Please note that I am not making a sweeping generalization of all tribal governments, tribal leaders, and/or tribal members. I am, in fact, a proud member of the Muscogee Creek Nation. I also believe that the majority of tribal governments are no more corrupt than those of our municipalities, states, and nation. There are, however, a rogue few using the shield of tribal sovereign immunity as a sword. Furthermore, as this note later elucidates, this doctrine is a threat to each of us. Whether affecting us directly as victims in tort or indirectly as members of a sluggish economy, the issue deserves an honest examination absent our individual biases and perspectives — an examination our nation's highest court is not yet willing to make.

The Oklahoma Court of Civil Appeals affirmed the judgment of the District Court of Ottawa County, Oklahoma by a unanimous 3-0 decision. Seneca Telephone Company v. Miami Tribe of Oklahoma, No. 107,431 (Okla. Civ. App. 2010). Miami Tribe appealed to the Oklahoma Supreme Court resulting in a reversal without remand in a 7-2 decision. Seneca Telephone Company v. Miami Tribe of Oklahoma. 253 P.3d 53 (Okla. 2011).

The issue in *Seneca* was nuanced rather than broadly balancing on a tribe's immunity from suit. The issue narrowly asks: What is the scope of tribal sovereign immunity in light of a regulatory preemption analysis? The Oklahoma Supreme Court failed to address this regulatory preemption analysis. It is purely speculative whether the Oklahoma justices collectively overlooked or ignored the analysis. Perhaps they were not persuaded. We are not, however, blessed with the same opportunity to ponder the United States Supreme Court's position on the issue at this time.

1. Erik S. Laakkonen, *Up in Smoke? Narragansett, Hicks, and the Erosion of Tribal Sovereign Immunity*,

Under this doctrine, the King is immune from suit because "the [K]ing can do no wrong."[2] This concept still survives today, though abrogated to some degree by the federal government and most state and local governments, in the form of tribal sovereign immunity.[3] Similar to the original concept, tribal sovereign immunity is a privilege conferred upon federally recognized tribal nations as a result of their sovereign status.[4] This doctrine's history is as old as our nation and results from the effort to create a "protectorate relationship" between the United States and the independent tribal nations, wherein the United States is the dominant sovereign.[5] Tribal sovereignty grants tribal nations the right to govern their own members within tribal lands with the consent of the United States.[6] Felix Cohen[7] suggested that the powers of a federally recognized Indian tribe are not delegated powers from "Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished."[8] However, Congress is the sole entity entrusted with the limitations of such tribal authority.[9]

In 1934, Congress passed the Indian Reorganization Act[10] ("IRA") authorizing formation of tribal governments under federal law.[11] This marked Congress's first attempt to incorporate the tribes as political entities within the United States.[12] The purpose of the IRA was to enhance the tribes' ability to self govern[13] and participate in the commercial world.[14] However, this dichotomy between a dominant sovereign, the United States, and the lesser sovereign, the tribal governments, created much conflict and confusion in the realm of federal Indian Law.[15]

The doctrine of sovereign immunity not only created conflict and confusion within our legal system, but also frustrated the spirit of American justice[16] and impeded the progress and efficiency of the American business structure.[17] The court in *Federal Sugar Refining Company v. Sugar Equalization Board*[18] expressed its concern that the doctrine

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11 J. Gender Race & Just. 453, 472 (2008).

2. *Id.* at 472.

3. *Id.* at 470.

4. *Id.* at 471.

5. Bittle v. Bahe, 193 P.3d 810, 816 (Okla. 2008).

6. *Id.*

7. Felix Cohen is the one of the "central figures in the development of federal Indian law." His *Handbook of Federal Indian Law* blazed the trail for Indian Law in federal courts during the 20th Century. Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 Am. Indian L. Rev. 583, 584.

8. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (Five Rings Corp. 1986).

9. Mark Anderson, *American Indian Policy Center, Sovereign Immunity*, http://www.airpi.org/projects/sovimmun.html (last updated Nov. 1, 2005).

10. 25 U.S.C. § 461.

11. Peter d'Errico, *Sovereignty: A Brief History in the Context of U.S. "Indian law,"* UNIV. OF MASS. LEGAL STUDIES DEP'T, http://www.umass.edu/legal/derrico/sovereignty.html (last visited Oct. 30, 2010).

12. Ann K. Wooster, *Application of the Indian Reformation Act*, 30 A.L.R. Fed. 2d 1 (2008).

13. d'Errico, *supra* note 11.

14. Bittle v. Bahe, 193 P.3d 810, 816 (Okla. 2008).

15. d'Errico, *supra* note 11.

16. Cook v. Avi Casino Enter., 548 F.3d 718, 720-726 (9th Cir. 2008). The plaintiff lost his leg after the defendant's employee hit him with a car while intoxicated. The plaintiff incurred over $1,000,000 in medical expenses but could not recover from the tribe, because tribal sovereign immunity shielded the tribe from suit.

17. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 758 (1998); Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd., Inc., 268 F. 575 (S.D.N.Y. 1920).

18. *Fed. Sugar Ref. Co.*, 268 F. 575.

of tribal sovereign immunity was unjust.[19] The doctrine privileged tribes and tribal corporations with the right to sue, yet granted immunity to those entities.[20] The United States Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[21] suggested that sovereign immunity "[could] harm those who [were] unaware that they [were] dealing with a tribe, who [did] not know of tribal immunity, or who [had] no choice in the matter, as in the case of tort victims."[22] Despite the Court's recognition of the inherent harm resulting from tribal sovereign immunity, the Court, out of respect for the Constitutional doctrine of Separation of Powers,[23] deferred to Congress to decide the issue of narrowing the scope of tribal sovereign immunity.[24] This trend continues.[25]

Such problems with tribal sovereign immunity are exemplified in the recent case of *Seneca Telephone Company v. Miami Tribe of Oklahoma*[26] ("*Seneca*"). The parties in *Seneca* tried the case before the small claims court of Ottawa County, Oklahoma.[27] However, the implications and magnitude of the ruling may prove to be much larger than any other case tried in a small claims court in the country.[28] In *Seneca*, the plaintiff, Seneca Telephone Company, prevailed in a lawsuit against the defendant, Miami Tribe, alleging negligent destruction of the plaintiff's telephone lines.[29] *Seneca*'s import lies in the fact that not only did the court deny the defendant's motion to dismiss based on tribal immunity,[30] but more significantly, that the plaintiff also received a favorable verdict for its tort claims against the tribe and the tribal corporation, White Loon Construction Company.[31]

Seneca is currently unpublished and holds no precedential value,[32] but the defendant, Miami Tribe, appealed the decision.[33] An affirmation of the trial court's decision by an appellate court will open the floodgates of litigation against tribal entities and force tribal corporations to re-examine their policies and behavior pertaining to their

19. *Id.* at 587.

20. *Id.*

21. *Kiowa*, 523 U.S. 751.

22. *Id.* at 758.

23. The Constitution prohibits the three branches of government from interfering with the others' specific constitutional duties. 16 C.J.S. *Constitutional Law* § 215 (2009).

24. *Kiowa*, 523 U.S. at 760.

25. Cook v. Avi Casino Enter., 548 F.3d 718, 728 (9th Cir. 2008) (Gould, J., concurring). Recognizing that tribal sovereign immunity caused severe injustice to the plaintiff, Justice Gould stated his desire that the United States Congress or Supreme Court limit sovereign immunity in the commercial context. *See also* Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991) ("Congress has consistently reiterated its approval of the immunity doctrine.").

26. Journal Entry J., Seneca Tel. Co. v. Miami Tribe of Okla., Nos. SC-08-530, SC-09-531, SC-09-532, SC-09-160 (D.C. Ottawa County July 20, 2009) [hereinafter Seneca].

27. *Id.*

28. Small claims court decisions contain "no more than *obiter dictum*." Patterson v. Beall, 19 P.3d 839, 848 (Okla. 2000). *Obiter dictum* is judicial comment that is "unnecessary to the decision in the case." Accordingly, *obiter dictum* holds no precedential value. BLACK'S LAW DICTIONARY 1177 (9th ed. 2004). Therefore, the small claims opinion in *Seneca* does not currently hold any precedential value. An affirmation of *Seneca* by the Oklahoma Supreme Court or the Court of Civil Appeals will make the decision of the small claims court controlling law, which could allow non-Indians to bring suit against Indian tribes.

29. *Seneca*, Journal Entry J. at 1.

30. *Seneca*, Order with Findings of Fact and Conclusions of Law (Mar. 3, 2009).

31. *Seneca*, Amended Journal Entry J. (Aug. 11, 2009).

32. *Patterson*, 19 P.3d at 848 (2000).

33. *Seneca*, Pet. in Error (Aug. 17, 2009).

participation in the private market as proprietary organizations.[34] Consequently, the appellate decision may drastically alter the relationship between the sovereign United States and sovereign tribes. Despite the fact that the doctrine of sovereign immunity allows tribes to injure citizens and businesses with impunity,[35] Congress refuses to modify sovereign immunity to comport with modern business practices.[36] Therefore, the *Seneca* appellate court should affirm the ruling of the trial court and narrow the scope of tribal sovereign immunity when tribes act in a proprietary capacity in order to prevent further injustice.

This case note summarizes a brief history of United States Indian policy, discusses the current state of the law regarding tribal sovereign immunity, and urges the appellate court to abrogate the doctrine of tribal sovereign immunity. Section II of this case note highlights the origin, purpose, and effects of tribal sovereign immunity. Section III details the events leading up to the filing of the complaint in *Seneca* and discusses the defendant's motion to dismiss, the trial, and the legal theories argued by both sides. Section IV offers arguments and analysis as to why courts, in the interest of justice, should no longer defer to Congress when deciding whether to abrogate the doctrine of tribal sovereign immunity. This section discusses the *Kiowa*[37] and *Potawatomi*[38] decisions and highlights the American Indian Policy Institute's recognition that tribal sovereign immunity may in fact harm tribal entities and citizens.[39] Based on the American Indian Policy Institute's assertion, section IV makes an economic and public policy argument in favor of abrogating tribal sovereign immunity and urges the appellate court to affirm the decision of the trial court in *Seneca* and narrow the scope of TSI as necessary in light of a regulatory preemption analysis. Additionally, this section also suggests that tribal nations model Oklahoma's abrogation of state sovereign immunity when the state acts in a proprietary capacity.[40] Finally, Section V concludes the case note and offers tribal nations, Congress, and the courts possible approaches to resolving the current state of tribal sovereign immunity in the modern commercial age. Section V also

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34. In *Seneca*, the defendant, a tribal corporation, filed a motion to dismiss based on tribal sovereign immunity, but the trial court allowed the case to proceed, and the plaintiff was successful. Seneca, *supra* note 26, Def.'s Mot. to Dismiss at 1 (Dec. 23, 2008); Seneca, *supra* note 26, Order with Findings of Fact and Conclusions of Law at 4 (Mar. 3, 2009). As discussed earlier, *Seneca* does not have precedential value and, consequently, does not change Oklahoma law with regard to tribal sovereign immunity. *Patterson*, 19 P.3d at 848. Accordingly, if an appellate court affirms the decision in *Seneca*, tribal corporations would no longer be protected by sovereign immunity.

35. *See generally* Cook v. Avi Casino Enter., 548 F.3d 718 (9th Cir. 2008). In *Cook*, an employee of the defendant hit the plaintiff with her car while he was on his motorcycle. *Id.* at 720. The employee was intoxicated after defendant's employees over served alcohol to her at the defendant's place of business. *Id.* The plaintiff lost his leg in the accident and incurred over $1,000,000 in medical expenses, but the Court held that Avi Casino Enterprises, a tribal corporation, was immune from suit. *Id.* at 721, 726. Thus, the plaintiff had no redress for his injuries. In *Kiowa*, the tribe signed a promissory note for $285,000 plus interest and defaulted on the note. 523 U.S. 751. The United States Supreme Court held that tribes are immune from civil suits on contracts whether made on or off the reservation. *Id.* at 751. Again, sovereign immunity deprived the plaintiff of redress for its injuries.

36. *Kiowa*, 523 U.S. at 759.

37. *Kiowa*, 523 U.S. 751.

38. *Potawatomi*, 498 U.S. at 509.

39. Anderson, *supra* note 9.

40. Howard K. Berry, Jr., *The Dragon of Sovereign Immunity – A Delay of the Slaying?*, 50 Okla. B.J. 884, 885 (1979).

sets forth a test courts should apply when deciding whether a tribe is immune from suit.

II. THE ORIGIN, PURPOSE, AND EFFECTS OF TRIBAL SOVEREIGN IMMUNITY

The relationship between tribal nations and the United States is complex,[41] resulting from the covenant relationship between two sovereigns as set forth in the United States Constitution.[42] When Europeans first arrived in what is now the United States, approximately 500 tribal nations existed in the newly discovered territory.[43] Most of the tribes openly welcomed the Europeans into their territories by assisting the newcomers with the challenges of colonial living and trading.[44] Between 1700 and 1750, the population of the British colonies increased by 400 percent, thus shifting the balance of power from the Indians to the colonists.[45] The American victory over the British in the American Revolution[46] marked the beginning of the tribal nations' struggle to maintain autonomy and sovereignty within the United States[47] because "[t]he new nation, born of a bloody revolution and committed to expansion, could not tolerate America as Indian country."[48]

When Christopher Columbus first arrived in North America, there were approximately one million Indians living in the Americas.[49] By the year 1900, the American Indian population declined to 300,000,[50] though the number of American Indians rebounded to 3.2 million as of 2006, as indicated by the United States Center for Disease Control.[51] Indian communities historically face many social and economic barriers.[52] Those prevalent barriers continue even today.[53] A majority of such problems are fairly attributable to geographical inconvenience.[54] Most Indian reservations are not located near large industrial centers, and most reservation land is void of valuable natural resources.[55] As a result, most tribes still rely on the assistance of the United States government for economic support.[56]

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41. JEDON A. EMENHISER, A PECULIAR COVENANT: AMERICAN INDIAN PEOPLES AND THE U.S. CONSTITUTION, AMERICAN INDIANS AND U.S. POLITICS: A COMPANION READER 3 (John M. Meyer ed. 2002).

42. *Id.*

43. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 1 (3d ed. 2002).

44. *Id.* at 2.

45. *Id.*

46. The American Revolution was the fight for independence from the British lasting from 1775 to 1783. JAMES H. O'DONNELL, III, SOUTHERN INDIANS IN THE AMERICAN REVOLUTION x (1973).

47. Pevar, *supra* note 43, at 2.

48. *Id.* (quoting COLIN G. CALLOWAY, THE AMERICAN REVOLUTION IN INDIAN COUNTRY xv (1995)).

49. *Id.*

50. *Id.*

51. CENTER FOR DISEASE CONTROL AND PREVENTION, *Health of American Indian or Alaska Native Population*, http://www.cdc.gov/nchs/fastats/indfacts.htm (last reviewed Mar. 6, 2009).

52. Indian tribes still struggle with poverty, disease, alcoholism, violence, and unemployment. Yvette Roubideaux, M.D., *Beyond Red Lake — The Persistent Crisis in American Indian Health Care*, 353 N. Engl. J. Med. 1881-1882 (2005).

53. Pevar, *supra* note 43, at 3.

54. *Id.*

55. *Id.*

56. *Id.*

A. History of United States Indian Policy Since the French and Indian War

The long and complex relationship between the United States and the Indian tribes largely resulted from wars fought between the several countries laying claim to the New World.[57] The British victory in the French and Indian War,[58] or the Seven Years War, is often attributed to the successful alliance between the British Army and the Iroquois Confederacy against the French.[59] As a result of the Iroquois' loyalty to the British, the King of England issued a proclamation restricting further takings of Indian lands by the colonists.[60] This proclamation, however, did little to discourage land disputes between the British colonists and the Indians, and conflicts over land became increasingly violent.[61] Consequently, American patriots remained suspicious of the prior relationship between the tribes and England during the Revolutionary War.[62] The patriots' suspicion prompted a strategy to move the war into Indian territory.[63] The patriots believed this strategy would discourage the tribes from forming another alliance with the British.[64] This strategy ultimately led to the destruction of Indian villages and crops.[65] Many tribes, although neutral, were nevertheless nearly decimated.[66] After American victory in the Revolutionary War, the newly formed government was anxious to create peace with tribal nations.[67] Years of war with the British weakened the U.S. economy and military, leaving the United States with minimal resources to support further wars with the tribal nations.[68] Immediate peace was necessary to secure the future success of the nation.[69] In its peace efforts with tribal nations, the United States government adopted a new stance with regard to tribal nations, elevating the nations to a stature equal to that of foreign nations.[70]

Between 1787 and 1793, Congress passed a series of laws designed to protect tribal land and sovereignty.[71] The laws prohibited whites from the following: 1) taking tribal property without tribal consent; 2) obtaining land from tribal nations without complying with federal guidelines; and 3) settling on Indian lands.[72] Additionally,

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57. *Id.* at 5.

58. The British prevailed in the French Indian War. Pevar, *supra* note 43, at 5.

59. *Id.*

60. *Id.* The Royal Proclamation of 1763 gave Indian groups the land between the Appalachia Mountains and the Mississippi River. This land spanned from the Hudson Bay watershed in the North to western Florida in the South. The proclamation restricted land purchases and trading in the new Indian territory and required settlers to withdraw from this region. Thomas Kindig, *Related Information: Resources to help better understand the context of the Declaration of Independence, Proclamation of 1763,* http://www.ushistory.org/declaration/related/proc63.htm (last visited Oct. 30, 2010).

61. Pevar, *supra* note 43, at 5.

62. The American Revolution was the fight for independence from the British lasting from 1775 to 1783. O'DONNELL, *supra* note 46, at x; Pevar, *supra* note 43, at 5.

63. Pevar, *supra* note 43, at 5.

64. *Id.*

65. *Id.*

66. *Id.*

67. Pevar, *supra* note 43, at 6.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Pevar, *supra* note 43, at 6.

Congress passed laws authorizing the prosecution of whites for crimes committed against Indians.[73] None of these laws had the purpose or effect of limiting tribal sovereignty.[74] Federal officials, however, rarely enforced these laws and *actual* United States Indian policy was usually at odds with *official* policy.[75] American settlers flooded Indian country as federal officials turned a blind eye to this incursion.[76] However, United States Indian policy achieved harmony under Andrew Jackson's administration in 1828.[77] This new Indian policy removed eastern tribes to the West[78] via Congress's passage of the Indian Removal Act of 1830.[79] This relocation, now known as the Trail of Tears,[80] marked the beginning of reservation life for most Indian tribes.[81] Ironically, two years after the passage of the Indian Relocation Act, the Supreme Court issued a decision in *Worcester v. Georgia*,[82] holding that tribal nations were autonomous entities.[83] Chief Justice John Marshall delivered the opinion of the Court:

> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and a firm purpose to afford that protection which treaties stipulate. All these acts . . . consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.[84]

This recognition of tribal sovereignty provided the necessary foundation for its "corollary," sovereign immunity.[85] Despite Chief Justice Marshall emphasizing the necessity of enforcing treaties with tribal nations, Congress terminated treaty formations with Indian tribes in 1871 leaving the relationship between the United States and the tribal nations to the discretion of Congress's legislative power and the President's executive power.[86]

Between 1887 and 1934, the two main objectives of United States Indian policy were claiming more Indian lands for white settlement and assimilating the Indians into American culture.[87] Many non-Indians sympathetic to the plight of native peoples shared the latter stance, as they believed that assimilation was the best means to overcome tribal poverty.[88] Congress collectively supported both of these objectives.[89] In 1887, Congress

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. Pevar, *supra* note 43, at 7.
78. *Id.*
79. *Id.*
80. AMY H. STURGIS, THE TRAIL OF TEARS AND INDIAN REMOVAL 2 (2007).
81. Pevar, *supra* note 43, at 7.
82. 31 U.S. 515 (1832).
83. *Id.* at 557-558.
84. *Id.* at 557.
85. *See* Laakkonen, *supra* note 1, at 470-471. *See also Bittle*, 192 P.3d at 819 ("It is the sovereignty that gives rise to the immunity from private suit in order to protect the dignity of the sovereign.").
86. Emenhiser, *supra* note 41, at 7.
87. Pevar, *supra* note 43, at 7.
88. *Id.* at 8.
89. *Id.*

passed the Dawes Act[90] which eliminated tribal sovereignty and expedited Indian assimilation.[91] As a result, more lands were freed for white settlement and tribes were driven further into poverty.[92]

These policies were in effect until 1934 when the Franklin D. Roosevelt administration, in response to public criticism of U.S. Indian policy, urged Congress's passage of the IRA, also known as the Wheeler-Howard Act.[93] The purpose of the IRA[94] was to facilitate an economic revival for tribal nations by implementing the following policies: prohibiting any further allotments of tribal land to non-Indians; granting authority to the Secretary of the Interior to create new land and add land to existing reservations for tribes that no longer had tribal land; and encouraging tribes to adopt their own constitutions and become chartered corporations under federal law.[95] Despite its criticisms,[96] the IRA succeeded in revitalizing both tribal governments and the opportunities of tribal people.[97] The IRA provided improvements to reservation infrastructure, education, housing, and health services.[98] However, under the Hoover administration in 1949, the pendulum of American Indian policy made a backswing in favor of Indian assimilation.[99]

Hoover's new policy, called *termination*, "terminat[ed] the tribe's trust relationship with the United States and, as a consequence, its loss of federal benefits and support services and the destruction of its government and reservation."[100] This *termination* policy led to the passage of laws in several states, wherein these states regained jurisdiction over Indian trust lands.[101] Then in 1968, the American Indian policy pendulum swung back toward an attitude of benevolence and support for tribal sovereignty.[102] This phase of policy, known as "Tribal Self-Determination,"[103] was first declared by Lyndon B. Johnson when he stated, "[w]e must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination."[104] The doctrine of Tribal Self-Determination was also endorsed by conservative administrations such as Nixon and Reagan, and continues today.[105] Programs enacted under this doctrine included the

90. 25 U.S.C. § 349.
91. Pevar, *supra* note 43, at 8.
92. *Id.*
93. *Id.* at 9-10.
94. 25 U.S.C. § 461.
95. Pevar, *supra* note 43, at 9-10.
96. The Act was criticized for being paternalistic, because it was passed without consultation with or assent of the tribes. It was also criticized, because the tribes were still under federal control. *Id.* at 10.
97. *Id.*
98. *Id.*
99. *Id.* at 11.
100. Pevar, *supra* note 43, at 11.
101. *Id.*
102. *Id.* at 12.
103. *Id.*
104. Lyndon B. Johnson, *Statement on Issuing Exec. Or. 11399*, 4 Wkly. Comp. Pres. Docs. 448 (Mar. 5, 1968).
105. Pevar, *supra* note 43, at 12.

passage of the Indian Mineral Development Act,[106] the allocation of funds to stimulate Indian businesses, and the passage of education bills and child welfare programs.[107] Although current Indian policy recognizes that tribal sovereignty and its corollary, tribal sovereign immunity, is well-rooted in American common law, the Supreme Court noted in 1978 that such rights conferred to the tribes by Congress can terminate at any moment under Congress's plenary authority.[108] Additionally, the Court has long recognized that tribal sovereign immunity is a source of injustice within our legal system.[109]

B. Examples of Injustice Resulting from Tribal Sovereign Immunity

The doctrine of tribal sovereign immunity precludes plaintiffs with meritorious claims against tribes or tribal entities from seeking redress for their injuries.[110] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies., Inc.,*[111] the United States Supreme Court held that the Kiowa tribe was immune from suit to enforce the tribe's default of a $285,000 promissory note.[112] The Court's decision deprived the plaintiff, Manufacturing Technologies, Inc. ("Manufacturing Technologies"), of any remedy to recover the proceeds of the defaulted note.[113] The defendant, Kiowa Tribe ("Tribe"), was a federally recognized Indian tribe owning trust lands in Oklahoma.[114] In 1990, the Kiowa Industrial Development Commission, a tribal entity, agreed to purchase stock issued by Clinton-Sherman Aviation Company.[115] The Tribe signed a promissory note in the name of the Tribe in order to pay for the stock.[116] The chairman of the Tribe's business committee signed the note on tribal land, promising payment to the plaintiff of $285,000 plus interest in exchange for the stock.[117] However, the Tribe actually executed and delivered the note to the plaintiff in Oklahoma City, outside the borders of their tribal land.[118] Furthermore, the language of the note obligated the Tribe to make payments in Oklahoma City.[119] The Tribe defaulted on the note, and Manufacturing Technologies initiated suit against the Tribe for non-payment.[120] The Tribe filed a motion to dismiss

106. 25 U.S.C.A. § 2102 (West 2009). The Indian Mineral Development Act allows tribes to partner with private mineral companies in order to fully exploit the natural resources within tribal lands. Pevar, *supra* note 43, at 12-13.

107. Pevar, *supra* note 43, at 12-13.

108. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependant status." *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

109. Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd., Inc., 268 F. 575 (S.D.N.Y. 1920).

110. *See generally* Cook v. Avi Casino Enter., 548 F.3d 718 (9th Cir. 2008); Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991).

111. *Kiowa*, 523 U.S. 751.

112. *Id.* at 751.

113. *Id.* at 753.

114. *Id.*

115. *Id.*

116. *Kiowa*, 523 U.S. at 753.

117. *Id.* at 753-754.

118. *Id.* at 754.

119. *Id.*

120. *Id.*

asserting the sovereign immunity defense.[121] The trial court denied the Tribe's motion and rendered a verdict in favor of Manufacturing Technologies.[122]

The Tribe appealed to the Oklahoma Court of Civil Appeals[123] which affirmed the trial court's decision, holding that Indian tribes were not immune from suit in state court for "breaches of contract involving off-reservation commercial conduct."[124] The Oklahoma Court of Appeals relied on *Hoover v. Kiowa Tribe of Oklahoma*[125] in its decision.[126] In *Hoover*, the Oklahoma Supreme Court held that the State may allow citizens to sue other sovereigns acting within the State, because the State held itself open to breach of contract suits.[127] The United States Supreme Court granted certiorari after the Oklahoma Supreme Court declined to review the case.[128]

The Court, adhering to prior Oklahoma court precedent, refused to distinguish tribal activities occurring on reservation land from tribal activities occurring off reservation land.[129] Furthermore, the Court asserted the Tribe was immune from suit unless the Tribe waived its immunity or Congress authorized suit.[130] Manufacturing Technologies argued that immunity from suit only applied to transactions occurring on reservations.[131] The Court disagreed, stating that precedent required that tribes possessed immunity from suit, regardless of whether the tribe acted in a governmental or proprietary capacity and no matter where the disputed action physically occurred.[132] The Court declined to follow the Oklahoma Supreme Court's reasoning in *Hoover*.[133] According to the Court, federal law controlled tribal immunity, and states lacked the power to abrogate the doctrine.[134] The Court recognized, however, that the doctrine of sovereign immunity was a product of errant case law, but notwithstanding this error the Court upheld prior precedent.[135] Despite the Court's recognition of the need to abrogate tribal sovereign immunity,[136] the Court deferred to Congress's plenary power to define the rights of tribal sovereign nations.[137] Therefore, the Court reversed the decision of the Oklahoma Court of Civil Appeals, leaving Manufacturing Technologies with no recourse for its $285,000 injury.[138]

The United States Supreme Court also held that tribes did not waive tribal

121. *Kiowa*, 523 U.S. at 754.
122. *Id.*
123. *Id.*
124. *Id.*
125. Hoover v. Kiowa Tribe of Okla., 909 P.2d 59 (Okla. 1995).
126. *Kiowa*, 523 U.S. at 755.
127. *Id.*
128. *Id.* at 754.
129. *Id.*
130. *Id.*
131. *Kiowa*, 523 U.S. at 755.
132. *Id.* at 754-55.
133. Hoover v. Kiowa Tribe of Okla., 909 P.2d 59 (Okla. 1995).
134. *Kiowa*, 523 U.S. at 756.
135. *Id.* at 756-57. The discussion of the Court's recognition that the doctrine of tribal sovereignty developed by accident is discussed later in this case note.
136. *Id.* at 758. Again, this case note discusses judicial recognition of tribal immunity's harm in a later section.
137. *Id.* at 759.
138. *Id.* at 760.

sovereign immunity when initiating suit against another party.[139] In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[140] the Potawatomi Tribe ("Potawatomi") sold cigarettes from a convenience store on tribal land.[141] The Oklahoma Tax Commission ("Commission") sent the tribe a letter demanding payment for $2.7 million in back taxes for previous cigarette sales.[142] Potawatomi filed suit against the Commission to enjoin the tax assessment.[143] The Commission counterclaimed seeking enforcement of the tax assessment and enjoining the tribe from future cigarette sales without paying state tobacco taxes.[144] Potawatomi filed a motion to dismiss the Commission's claims, arguing that Potawatomi did not waive its immunity from suit when it filed suit against the Commission.[145] The trial court denied the Tribe's motion, yet held on the merits that the Commission did not have the authority to tax the Tribe's on-reservation cigarette sales.[146] The Tribe then appealed the trial court's denial of the motion to dismiss to the United States Court of Appeals for the Tenth Circuit.[147] The Tenth Circuit reversed, stating that Potawatomi "enjoy[ed] absolute sovereign immunity from suit, and had not waived that immunity by filing an action for injunctive relief."[148]

The United States Supreme Court affirmed the Tenth Circuit's decision, holding that a party could not circumvent tribal sovereign immunity by filing a cross-claim against the Tribe because the Tribe was immune from all suits whether brought as an original action or as a counterclaim.[149] As a result, the State of Oklahoma could not enforce the collection of tobacco taxes through the court system.[150] In his concurring opinion, Justice Stevens conceded that tribal immunity from suit was "an established part of our law."[151] However, Justice Stevens also recognized the fundamental unfairness of this doctrine when he stated that "all Governments — federal, state, and tribal — should generally be accountable for their illegal conduct."[152] This was not the first time the federal judiciary expressed its disdain for the doctrine of tribal sovereign immunity.[153] This frustration was eloquently stated over seventy years earlier in *Federal Sugar Refining Company v. U.S. Sugar Equalization Board*[154] when the court stated "[i]t is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue,

139. Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991).
140. *Potawatomi*, 498 U.S. 505.
141. *Id.*
142. *Id.* at 505, 507.
143. *Id.* at 505.
144. *Id.*
145. *Potawatomi*, 498 U.S. at 505, 507-508.
146. *Id.* at 505.
147. *Id.* at 508.
148. *Id.* at 509.
149. *Id.* at 509-10.
150. *Potawatomi*, 498 U.S. at 514.
151. *Id.* (Stevens, J., concurring).
152. *Id.* (Stevens, J., concurring).
153. Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd., Inc., 268 F. 575 (S.D.N.Y. 1920).
154. *Id.*

and yet itself be immune from suit . . . ."[155]

A case out of California, *Cook v. Avi Casino Enterprises*,[156] demonstrated a particularly tragic example of how tribal sovereign immunity resulted in severe injustice. In *Cook*,[157] employees of Avi Casino[158] hosted a birthday party at the casino for another employee.[159] During the party, the on-duty manager announced that drinks were "on the house."[160] The manager continued to serve Andrea Christensen, an off-duty employee of the casino, alcoholic drinks after she was already noticeably intoxicated.[161] Later that night, the manager and another casino employee helped Christensen board a casino-run shuttle bus that took her to her car.[162] Once in her vehicle, she swerved across the median and hit Cook on his motorcycle.[163] Cook lost his leg in the collision and incurred over $1,000,000 in medical expenses.[164] Christensen served four years in prison for aggravated assault and driving under the influence.[165] Cook initiated a negligence and dram shop liability action against Avi Casino Enterprises and against the two casino employees who served Christensen drinks and helped her to her car.[166]

The defendants filed a motion to dismiss, arguing that they were immune from suit under the Tribe's sovereign immunity.[167] The trial court granted the defendants' motion to dismiss, finding that Avi Casino Enterprises was an arm of the Tribe, and tribal sovereign immunity extended to tribal corporations.[168] Further, tribal sovereign immunity also extended to tribal corporation employees.[169] The trial court dismissed Avi Casino Enterprises and the two employee defendants from the suit.[170] Cook appealed the trial court's dismissal to the Ninth Circuit Court of Appeals, where the court affirmed the trial court's decision.[171]

The Court of Appeals, relying on *Kiowa*,[172] asserted that a tribe was immune from suit regardless of whether the tribe acted in a governmental or commercial capacity.[173] Cook conceded that the Tribe was immune from suit but argued that Avi Casino Enterprises, a tribal corporation, did not enjoy such immunity.[174] Cook compellingly asserted that "tribal corporations competing in the economic mainstream should not

155. *Id.* at 587.
156. Cook v. Avi Casino Enter., 548 F.3d 718 (9th Cir. 2008).
157. *Id.*
158. Avi Casino was operated by Avi Casino Enterprises, Inc. Avi Casino Enterprises is a tribal corporation organized under the laws of the Fort Mojave Indian Tribe, a federally recognized tribe. *Id.* at 721.
159. *Id.* at 720.
160. *Id.* at 721.
161. *Cook*, 548 F.3d at 721.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Cook*, 548 F.3d at 720.
167. *Id.* at 722.
168. *Id.* at 721.
169. *Id.* at 722.
170. *Id.*
171. *Cook*, 548 F.3d at 722.
172. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998).
173. *Cook*, 548 F.3d at 725.
174. *Id.* at 725.

enjoy the same immunity from suit given to Indian tribes themselves."[175] Additionally, granting tribal corporations immunity from suit was unnecessary in protecting tribal sovereignty and autonomy, which was the purpose of tribal sovereign immunity.[176]

The Court of Appeals recognized that the Supreme Court "grudgingly accepted tribal immunity in the commercial context" in *Kiowa*,[177] but further stated that "restrictions on tribal immunity [were] for Congress alone to impose."[178] The Court of Appeals further held that "[t]ribal sovereign immunity 'extend[ed] to tribal officials when acting in their official capacity and within the scope of their authority.' "[179] Because Cook pled in his complaint that the two casino employees acted "within the course and scope of their authority as casino employees," the Court of Appeals held that the employees were also immune from suit.[180] Therefore, the Ninth Circuit upheld the trial court's decision.[181] Consequently, Avi Casino Enterprises and its employees escaped liability for their negligence.[182]

Tribal sovereignty and its corollary, tribal sovereign immunity, are not only harmful to non-Indians but are also detrimental to the well-being of tribal members.[183] In his report to the Senate Committee on Indian Affairs, Roland Morris, Sr.[184] made the bold statement that "basic human rights . . . [were] not guaranteed on Indian reservations under the present version of 'sovereignty.' "[185] He stated that many tribal governments were corrupt and that "[c]ronyism, nepotism and ballot box rigging [were] all part of political reality on many reservations."[186] Morris further stated that tribal governments often "ke[pt] their people in the bondage of poverty and oppression," and tribal members had no recourse for injustices occurring as a result of tribal corruption.[187] There was no separation of powers within tribal governments, allowing such governments to commit civil rights violations against their own people.[188] Tribal sovereign immunity prevented tribal members from bringing civil rights actions against their tribes in any venue other than tribal court,[189] thus perpetuating tribal government corruption and oppression.[190] Morris also suggested that tribal economies would improve and attract more businesses

175. *Id.*
176. *Id.*
177. *Kiowa*, 523 U.S. at 758.
178. *Cook*, 548 F.3d at 725.
179. *Id.* at 727 (quoting Linneen v. Gila River Indian Comm., 276 F.3d 489, 492 (9th Cir. 2002)).
180. *Id.*
181. *Id.*
182. *See generally Cook*, 548 F.3d 718.
183. Roland Morris, Sr., *Testimony before the S. Committee on Indian Affairs Regarding S. 1691; Tribal Sovereign Immunity, Testimony of Mr. Roland Morris, Sr.*, http://www.accessmontana.com/morris/page19.html#Morris (last visited Oct. 30, 2010).
184. Roland Morris, Sr. is a board member of the Citizens Equal Rights Alliance and president of All Citizens Equal. He is also a full-blood Anishinabe Indian. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Morris, *supra* note 183.
189. Tribal courts are often corrupt. William J. Lawrence, J.D., *Testimony before the S. Committee on Indian Affairs Concerning S. 1691 "The American Indian Equal Justice Act,"* http://www.citizensalliance.org/links/pages/news/Testimony_S_1691.html (last visited Oct. 30, 2010).
190. Morris, *supra* note 183.

to reservations if tribal governments were held accountable for injustices committed upon their own citizens.[191]

The American Indian Policy Center ("AIPC") also recognized that tribal sovereign immunity negatively affected tribal economies.[192] AIPC conceded that businesses were hesitant to conduct business with tribal corporations "because of the inherent risk."[193] These inherent risks were the lack of recourse for non-Indian businesses in the event that the tribal corporation breached a contract or committed a tort against the business.[194]

In the same Senate Committee hearing, William J. Lawrence[195] offered further testimony explaining how tribal sovereign immunity enabled oppression of tribal members by tribal governments.[196] Lawrence stated that most tribal governments were void of the crucial checks and balances present in the American system that ensure a stable and just Democracy.[197] Furthermore, tribal elections were rarely free and fair.[198] Tribal courts were not impartial, and consequently, provided little protection of the "basic liberties of speech, assembly, press, and property."[199] According to Lawrence, tribal governments were cyclical, and while one tribal government acted benevolently to its constituency, the next regime possibly ignored or reversed the protections offered by the previous government enabled by the sovereign immunity defense.[200] Lawrence suggested that these problems persisted so long as tribal citizens were forced to pursue redress for harms caused by their government in corrupt tribal courts instead of impartial state or federal courts.[201] The absence of adequate access to impartial courts "[gave] Indian people less rights and more poverty, discord, government corruption and abuse of power."[202] Lawrence concluded his testimony with the assertion that tribal sovereign immunity "protect[s] a culture of corruption, oppression, and unaccountability" within tribal governments.[203]

III. SENECA TELEPHONE COMPANY V. MIAMI TRIBE OF OKLAHOMA

The plaintiff, Seneca Telephone Company ("STC"), provided telephone service to more than 3,300 access lines in a 135 square mile territory encompassing northeast Oklahoma.[204] The Eastern Shawnee Tribe of Oklahoma ("Shawnees") was one of STC's largest customers.[205] STC provided telephone service to a travel plaza, a social services

191. *Id.*
192. Anderson, *supra* note 9.
193. *Id.*
194. *Id.*
195. Lawrence is an attorney with thirty years of experience in Indian affairs at the tribal, state, federal, and private levels, and he owns and publishes a weekly newspaper titled *Native American Press / Ojibwe News*. He is also a member of the Red Lake Band of Chippewa Indians located in Minnesota. Lawrence, *supra* note 189.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. Lawrence, *supra* note 189.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss at 2.
205. *Id.*

center, and a housing subdivision all owned by Shawnees in Ottawa County, Oklahoma.[206] The defendant, Miami Tribe, was a federally-recognized Indian tribe, and White Loon Construction Company ("White Loon") was an excavation company owned and operated by the Miami Tribe.[207] In 2007 and 2008, the Shawnees hired White Loon to perform excavation on Shawnees' land in Ottawa County.[208] On December 4, 2007, while White Loon excavated on Shawnees' property, they severed one of STC's telephone lines.[209] The resulting damage totaled $5,152.00.[210] Less than one year later on August 4, 2008, White Loon again severed one of STC's telephone lines, resulting in damages of $4,237.55.[211] Merely one week later, White Loon severed a third STC telephone line, causing $1,497.90 in damage.[212] This was the third time in less than a year that White Loon managed to destroy STC's telephone equipment.[213] On November 3, 2008, STC filed three affidavits with the Ottawa County Small Claims Court claiming that White Loon negligently and willfully damaged STC's telephone lines.[214] While these three claims were pending litigation, White Loon once again severed STC's, appallingly at the exact same locations as the first two cuts, on February 3, 2009, resulting in $3,351.48 in damage.[215] STC then filed a fourth affidavit demanding payment from White Loon.[216] These four claims were consolidated into a single bench trial, wherein STC sued White Loon for the negligent and willful destruction of its telephone lines.[217]

A. White Loon's Motion to Dismiss

The most remarkable procedural aspect in *Seneca* is that the case survived the defendant's motion to dismiss[218] based on White Loon's brandishing of the tribal sovereign immunity sword.[219] White Loon argued that they were immune from suit and that Congress did not waive tribal sovereign immunity for suits brought against the tribe for causes of action involving utilities on Indian land.[220] White Loon relied on *Santa Clara Pueblo v. Martinez*[221] and several federal cases[222] to establish Miami Tribe's

206. *Id.*
207. *Id.*
208. *Id.*
209. *Seneca*, Trial Tr. at 11:14-24.
210. *Id.*
211. *Id.* at 11:25, 12:1-6.
212. *Id.* at 12:7-15.
213. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss at 3.
214. *Seneca*, Aff. of Jay Mitchell at 1.
215. *Seneca*, Trial Tr. at 12:16-25.
216. *Seneca*, Aff. of Jay Mitchell at 1.
217. *Seneca*, Trial Tr. at 17:14-20.
218. Seneca, Def.'s Mot. to Dismiss.
219. *Seneca*, Order with Findings of Fact and Conclusions of Law at ¶ 26.
220. *Seneca*, Def.'s Reply Br. in Supp. Mot. to Dismiss at 1-5.'
221. 436 U.S. 49 (1978).
222. *See, e.g.*, Duke v. Absentee Shawnee Tribe Housing Auth., 199 F.3d 1123, 1125 (10th Cir. 1999) (recognizing that state-chartered housing authority of the tribe shared tribe's sovereign status for purposes of federal employment law); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (tribally-chartered community college was an arm of the tribe and entitled to the "full extent of the Tribe's sovereign immunity"); In re Greene, 980 F.2d 590 (9th Cir. 1992) (finding that wholly-owned enterprise of

immunity from suit.[223] The Court in *Santa Clara Pueblo*[224] stated that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[225] The Court further stated that there was no such implied waiver of tribal sovereign immunity, and any waiver of immunity by a tribe "must be unequivocally expressed."[226]

White Loon, relying on federal case law, asserted that, as a tribal enterprise, they were also immune from suit.[227] White Loon's contention was that STC failed to prove that White Loon waived its sovereign immunity or that Congress clearly abrogated tribal sovereign immunity under the circumstances.[228] According to White Loon, STC urged the Court to "ignore clear and well-established federal law and take the unprecedented step of first determining whether the cause of action 'affect[ed] tribal sovereignty' or touche[d] on a 'tradition of tribal sovereign immunity' to determine if sovereign immunity applie[d]."[229] In its conclusion, White Loon pointed to the lack of case law supporting the plaintiff's proposition that courts must first determine whether a cause of action affected tribal sovereignty when determining whether a tribe was open to suit.[230]

STC's first argument in response to White Loon's motion to dismiss was that there was no tradition of tribal sovereignty "in cases involving torts arising out of excavation activities . . . ."[231] Relying on *Bittle*,[232] STC asserted that tribal sovereign immunity only applied when the cause of action affected tribal sovereignty.[233] STC argued that a negligence claim arising from the commercial activity of excavation did not affect Miami Tribe's sovereignty; therefore, tribal sovereign immunity did not apply to White Loon.[234] Furthermore, tribal sovereign immunity was not a defense to suit in state court when there was a "lack of tradition of tribal self-government in a particular area of law or regulation" and that "[t]he Tribe's operation of an excavating company for profit in no way affect[ed] tribal self-government or the Tribe's internal affairs."[235] Accordingly, White Loon was not immune from a suit in state court.[236] STC asserted that White Loon

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Yakima Tribe enjoyed tribal sovereign immunity from a suit by the bankruptcy trustee); Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F.Supp.2d 1131, 1135 (N.D. Okla. 2001) (corporate and economic entities established by the tribe to further governmental objectives possess attributes of tribal sovereignty); Worrall v. Mashantucket Pequot Gaming Enter., 131 F.Supp.2d 328, 331 (D. Conn. 2001) (gaming enterprise of a tribe entitled to same immunity that protects the tribe from unconsented suit)." *Seneca*, Def.'s Br. in Supp. Mot. to Dismiss at 2.

223. *Id.*

224. 436 U.S. 49.

225. *Id.* at 58.

226. *Id.* at 58-59; *accord* Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991).

227. *Seneca*, Def.'s Reply Brief in Support of the Motion to Dismiss at 2.

228. *Id.* at 3.

229. *Id.*

230. *Id.*

231. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 3.

232. Bittle v. Bahe, 193 P.3d 810, 817 (Okla. 2008)

233. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 4.

234. *Id.*

235. *Id.* at 5.

236. *Id.* at 5-6.

incorrectly relied on *Kiowa*[237] in its motion to dismiss because the decision in *Kiowa*[238] was related to a breach of contract claim against a tribe and distinguishable from a private tort action claim as seen in *Seneca*.[239]

STC's second argument involved a creative interpretation of federal and state communications laws.[240] Once again relying on *Bittle*,[241] STC argued that if Congress implicitly delegated authority to the states to regulate a particular area of law, state courts had the right to exercise jurisdiction over tribes in order to enforce that particular area of law.[242] In deciding whether a state could exercise jurisdiction over a tribe or tribal activity, the *Bittle*[243] Court adopted a preemption analysis set forth in *Rice v. Rehner*.[244] In *Rice*,[245] the federal government issued a license to an Indian trader allowing him to sell liquor.[246] The Indian trader sought an exemption from California's state required liquor license, arguing that the federal laws of tribal sovereign immunity and federal liquor regulations preempted state law and deprived state courts of jurisdiction in that area.[247] The statute[248] under which the Indian trader obtained his license required that all liquor transactions occurring within Indian country comply with the laws of the state encompassing the Indian territory.[249] Accordingly, the *Rice*[250] Court found that Congress conferred state jurisdiction over tribes with respect to this particular area of law — liquor licensing.[251] More importantly, the challenged statute did not *expressly* authorize state jurisdiction over tribes for violating state liquor laws.[252] Nonetheless, the Court held that the statute abrogated tribal sovereign immunity with respect to liquor laws.[253]

The *Bittle*[254] Court used *Rice*'s[255] reasoning to develop the following preemption analysis when determining state jurisdiction over tribes absent explicit Congressional abrogation of tribal sovereign immunity:

> 1) the goal of preemption analysis is to determine the congressional plan; 2) in preemption

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237. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751 (1998).
238. *Id.*
239. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 6.
240. *Id.* at 9-12.
241. Bittle v. Bahe, 193 P.3d 810, 817 (Okla. 2008).
242. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 6-7.
243. *Bittle*, 192 P.3d at 823.
244. 463 U.S. 713 (1983).
245. *Rice*, 463 U.S. 713.
246. *Id.* at 716.
247. *Id.*
248. 18 U.S.C. § 1161.
249. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 7.
250. *Rice*, 463 U.S. 713.
251. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 7 (discussing *Rice*, 463 U.S. at 723-725).
252. *Id.*
253. *Id.*
254. Bittle v. Bahe, 193 P.3d 810, 817 (Okla. 2008).
255. *Rice*, 463 U.S. 713.

> analysis, the tradition of tribal sovereignty is a backdrop against which the federal statute must be read; 3) tribal sovereignty, as a backdrop, informs the preemption analysis but does not determine preemption; 4) in preemption analysis, the role of sovereign immunity with the traditions that accommodate the interests of the tribe and the federal government on the one hand and that state on the other; 5) if tradition has recognized a tribal sovereign immunity in favor of the Indians, then state law will be preempted unless Congress expressly provides otherwise; and 6) if there is no tradition of tribal sovereign immunity in favor of the Indians, preemption analysis may accord less weight to the backdrop of tribal sovereignty.[256]

Using this analysis, the *Bittle*[257] Court determined that federal law did not preempt state jurisdiction over a tribe in the area of liquor law because of the following: 1) there was no tradition of tribal sovereign immunity or tribal self-government in the area of liquor regulation; 2) 18 U.S.C. § 1161[258] authorized state jurisdiction over liquor licensing; and 3) the state had a strong interest in regulating liquor transactions because of its significant effect on the state's Indian and non-Indian citizens.[259]

STC employed the reasoning in *Bittle*[260] and *Rice*[261] to conduct a preemption analysis with respect to state and federal communications law.[262] STC noted that the first step in the preemption analysis was considering Congress's plan relating to state and federal regulation of utilities and telecommunications.[263] Relying on federal statute 47 U.S.C. § 152(b)[264] which mandates that the states, not the federal government, retained sole jurisdiction over the regulation of intrastate communications services,[265] STC pointed the court's attention to Oklahoma's Underground Facilities Damage Prevention Act.[266] That Act stated that excavators damaging underground facilities were required, as a remedy to the owner of the facilities, to repair all damage to the facility.[267]

STC addressed the second part of the *Bittle*[268] analysis, which determined the tradition of sovereign immunity as it related to telecommunications law.[269] STC relied

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256. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 8 (quoting *Bittle*, 193 P.3d at 817) (emphasis added).

257. *Bittle*, 193 P.3d 810.

258. 18 U.S.C. § 1161 mandates that all liquor transactions in Indian country comply with the state law encompassing tribal land.

259. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 8.

260. *Bittle*, 193 P.3d 810.

261. Rice v. Rehner, 463 U.S. 713 (1983).

262. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 9-12.

263. *Id.* at 9.

264. "[N]othing in this chapter shall be construed to apply or to give the Commission [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b).

265. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 9.

266. OKLA. STAT. tit. 63, § 142.1.

267. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 9.

268. Bittle v. Bahe, 193 P.3d 810, 817 (Okla. 2008).

269. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 10.

on a South Dakota case, *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*[270] in determining whether there existed a tradition of tribal sovereign immunity in the field of telecommunications law.[271] In *Cheyenne,*[272] the Public Utilities Commission of South Dakota ("PUC") prohibited the sale of telephone exchanges from a Colorado phone company to a tribal telephone company in South Dakota for use on Indian land.[273] The tribal corporation appealed PUC's decision arguing that PUC did not have the authority to prevent the sale because such authority infringed on the tribe's right to self-government, and only the Federal Communications Commission ("FCC") had jurisdiction over telecommunications regulation.[274] The court noted that the tribal telephone company was governed by both the FCC and PUC.[275] However, relying on 47 U.S.C. § 152(b), the court held that the FCC did not have jurisdiction over purely intrastate telecommunications facilities.[276] The court also stated that the PUC's authority furthered Congress's goal of protecting telecommunications consumers through regulation.[277] Accordingly, the court held that PUC had jurisdiction over telecommunications on tribal land, and this authority was not preempted by federal law.[278]

STC analogized the facts and reasoning in *Cheyenne*[279] to the facts in *Seneca*. STC proposed that *Cheyenne*'s[280] holding suggested that there was "no tradition of tribal self-government as such relate[d] to regulating telecommunications on Indian land."[281] Like the telephone companies in *Cheyenne*, telephone companies in Oklahoma were subject to the authority of both the FCC[282] and the Oklahoma Corporation Commission ("OCC").[283] Accordingly, OCC's authority to regulate intrastate telecommunications was not preempted by federal law, and White Loon was subject to the provisions of the Underground Facilities Damage Prevention Act[284] requiring excavators to repair damages to underground facilities.[285] Therefore, there was no tradition of tribal sovereign immunity in the area of state telecommunications regulation, and White Loon was obligated to compensate STC for damaging their telephone lines. [286]

Finally, STC addressed the state of Oklahoma's interest in regulating intrastate

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270. 595 N.W.2d 604 (S.D. 1999).
271. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 10.
272. *Cheyenne*, 595 N.W.2d 604.
273. *Id.* at 607.
274. *Id.* at 608.
275. *Id.* at 609-610.
276. *Id.*
277. *Cheyenne*, 595 N.W.2d at 611.
278. *Id.*
279. *Id.* at 604.
280. *Id.*
281. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 10-11.
282. 47 U.S.C. § 151.
283. OKLA. CONST. art. IX, § 18; OKLA. STAT. tit. 17, § 131.
284. OKLA. STAT. tit. 63, § 142.1.
285. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 10-11.
286. *Id.*

telecommunications.[287] According to *Cheyenne*, the purpose of dual federal and state regulation of telecommunications was to protect telecommunications consumers from service interruptions and unreasonably high rates.[288] STC asserted that White Loon caused "telecommunication services to be disrupted when it negligently damaged underground facilities . . . ."[289] Further, the state had a strong interest in protecting its telecommunications consumers, and this interest was protected under the passage of the Underground Facilities Damage Prevention Act.[290] Under this act, the state would require any other excavator, in same or similar circumstances, to pay for the damage to STC's lines.[291] Accordingly, White Loon should have been held to the same standard in order to protect both consumers and providers of telecommunications services.[292] STC concluded its argument by stating that the preemption analysis used in *Rice*[293] and *Bittle*[294] proved that: there was no tradition of tribal sovereign immunity or tribal self-government in telecommunications regulation; 47 U.S.C. § 152(b) authorized Oklahoma jurisdiction over intrastate telecommunications; and that Oklahoma had an interest in protecting its citizens, Indian and non-Indian, through telecommunications regulation.[295] Therefore, Miami Tribe and its subsidiary, White Loon, were not immune from suit.[296]

The court agreed with STC and denied White Loon's motion to dismiss.[297] The court justified its decision on several premises, but the most convincing was the preemption analysis set forth in *Rice*.[298] Invoking the reasoning in *Rice*,[299] the court stated that Indians did not possess the inherent attributes of sovereignty within the field of liquor regulation.[300] The court stated that this reasoning supported the proposition that tribes also did not possess inherent sovereignty within the field of telecommunications regulation.[301] Consequently, Oklahoma courts had proper jurisdiction over White Loon.[302] The court also listed the additional following reasons for denying White Loon's Motion: STC had a constitutional right to due process to seek redress for its injury; access to the courts was one of the most important privileges of citizenship; the Oklahoma constitution delegated the power to regulate telecommunications utilities to the OCC; and "the State of Oklahoma ha[d] dual if not exclusive jurisdiction over

287. *Id.* at 11.
288. Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utilities Comm'n of S.D., 595 N.W.2d at 611.
289. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 11.
290. *Id.*
291. *Id.*
292. *Id.*
293. Rice v. Rehner, 463 U.S. 713 (1983).
294. Bittle v. Bahe, 193 P.3d 810 (Okla. 2008).
295. *Seneca*, Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Br. in Supp. at 11-12.
296. *Id.*
297. *Seneca*, Order with Findings of Fact and Conclusions of Law at 1-4, 8.
298. *Id.* at 6.
299. Rice v. Rehner, 463 U.S. 713 (1983).
300. *Seneca*, Order with Findings of Fact and Conclusions of Law at 6.
301. *Id.*
302. *Id.*

intrastate communications facilities. . . ."[303]

B. The Trial[304]

In his opening statement, STC's counsel, Michael T. Torrone,[305] outlined the facts and series of events leading up to the filing of the lawsuit.[306] Before calling STC's first witness, Mr. Torrone stated that ". . . had White Loon Construction not acted in total disregard for the property of others, and acted with an uncaring attitude of almost arrogance . . . we wouldn't be here today."[307] STC's first witness, Larry Prader, an employee of STC for ten years, installed and repaired telephone lines.[308] Mr. Prader testified that, prior to the first line cut, White Loon was aware that STC had phone lines in the area where they were excavating, yet it failed to call STC in order to locate the lines before digging.[309] During the defendant's cross-examination, Mr. Prader testified that White Loon's behavior was not merely accidental, considering that White Loon cut the lines "so many times, so close together."[310]

STC's second witness, Mark Wyrick, worked for STC for 22 years installing and repairing telephone lines.[311] Wyrick's testimony established that White Loon was on actual and constructive notice that telephone lines were buried in the area where White Loon was excavating.[312] This notice was evidenced by pedestals visible in the area, indicating a presence of buried cables.[313] Further, on cross-examination, Wyrick revealed there were "buried cable" warning signs in the area displaying STC's phone number.[314] Wyrick's testimony further established that White Loon breached its duty to call STC in order to mark telephone lines before excavating.[315] According to Wyrick, between the first and second cuts, White Loon never called STC to locate and mark phone lines before continuing excavation.[316] Wyrick asserted that on August 4, 2008, White Loon cut the same line that was cut on December 4, 2007.[317] This disregard for procedure continued when White Loon did not contact STC in order to mark cables

303. *Id.* at 6, 7, 8.

304. For the sake of brevity, this section discusses only the plaintiff's portion of the trial. The defense set forth their case at a subsequent date wherein the court ruled in favor of the plaintiff. Additionally, most of the defendant's case is summarized in their motion for directed verdict or can be inferred from plaintiff's testimony. Again, the most significant aspect of this case is that it survived the defendant's motion to dismiss. Once the case went to trial, it was not difficult to establish a prima facie case of negligence and/or willfulness. It is matters of law such as tribal sovereign immunity that the court will consider on appeal. The purpose of this trial discussion is to give the reader a picture of the defendant's behavior and attitude during the events giving rise to the lawsuit.

305. Michael T. Torrone is a recent graduate of the University of Tulsa College of Law and is currently employed at Logan & Lowry, LLP located in Vinita and Grove, Oklahoma.

306. *Seneca*, Tr. of Oral Argument at 11-13.

307. *Id.* at 13:1-6.

308. *Id.* at 22:1-15.

309. *Id.* at 29–30.

310. *Id.* at 35:10-14.

311. *Seneca*, Tr. of Oral Argument, at 37-38.

312. *Id.* at 45-49.

313. *Id.*

314. *Id.* at 72:4-13.

315. *Id.* at 52-57.

316. *Seneca*, Tr. of Oral Argument at 52-53.

317. *Id.* at 53:11-25.

before severing yet another cable on August 11, 2009.[318] Furthermore, this cable had a pedestal providing White Loon with notice of the buried cable merely four feet from where White Loon severed the cable.[319] Wyrick further testified that White Loon eventually made a call to STC to come mark telephone lines before excavation commenced,[320] and he and Mr. Prader came to the work site to mark the lines.[321] Despite Wyrick's and Prader's marking, White Loon cut this cable on February 3, 2009.[322] This was the same cable that White Loon severed in the second incident.[323] Wyrick suggested that White Loon's actions demonstrated that White Loon did not care that they were consistently destroying STC's phone lines.[324] When asked if he, as an experienced excavator, would dig where lines were buried without first contacting the appropriate entity,[325] Wyrick answered that he would not.[326]

STC's president, Jay Mitchell, was called as the plaintiff's final witness.[327] Mitchell testified that whenever an excavator damaged STC's line, he billed the responsible party for the labor and materials required for repair.[328] Complying with this procedure, Mitchell sent a bill to White Loon for damages from the first cut.[329] White Loon's lawyers responded that the company was not liable for the damage and would not pay STC.[330] At that time, Mitchell retained Logan and Lowry, L.L.P., in order to prosecute STC's claims against White Loon.[331]

After Mitchell's testimony, White Loon's counsel demurred to the evidence.[332] The motion centered on the fact that STC was not a member of the One-Call Notification System requiring that telecommunications operators register with this system.[333] White Loon asserted that the purpose of this system was to provide a single phone number that operators could call before excavating, and the One-Call system would send agents to the excavation site to mark lines.[334] Based on this assertion, White Loon's counsel argued that STC's failure to join the One-Call System constituted per se negligence, and requested the court to direct a verdict in favor of the defendant based on STC's comparative negligence.[335]

STC responded that the statute authorizing the One-Call System[336] did not issue a

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318. *Id.* at 57:21-25.
319. *Id.* at 60:23-25.
320. *Id.* at 61:14-18.
321. *Seneca*, Tr. of Oral Argument at 62:14-18.
322. *Id.* at 64-66.
323. *Id.*
324. *Id.* at 103:22.
325. *Id.* at 103:23-25.
326. *Seneca*, Tr. of Oral Argument at 104:2.
327. *Id.* at 104:21-23.
328. *Id.* at 106:8-15.
329. *Id.* at 108-112.
330. *Id.*
331. *Seneca*, Tr. of Oral Argument at 112:13-14.
332. *Id.* at 130:4-6.
333. *Id.* at 130:21-25.
334. *Id.* at 131:4-10.
335. *Id.* at 132:7-22.
336. OKLA. STAT. tit. 63, § 142.3 (providing that, "Except for a municipality, all operators of underground facilities shall participate in the statewide one-call notification center and shall have on file with the

penalty for failing to join the system but instead created a benefit for registering with the system.[337] If a company was registered with the system and any excavator damaged underground facilities without first calling the One-Call System, that excavator was strictly liable for the damage.[338] STC argued that because neither party received the benefit of the statute, the resolution of the dispute fell outside its scope.[339] STC relied on *C. Wallace Construction Co. v. Western Steel Erection Co.*,[340] where the Oklahoma Supreme Court ruled that contractors owe a heightened sense of duty to inspect the premises on which they work.[341] Applying this ruling to the facts, STC argued that the pedestals present at the excavation site placed White Loon on actual notice that there were phone lines buried in the area.[342] Furthermore, prior testimony revealed that White Loon employees had actual knowledge of the buried phone lines.[343] Lastly, STC asserted that STC's failure to enlist in the One-Call System was irrelevant because White Loon breached its duty to act prudently when inspecting the site, and White Loon proceeded to excavate the site although they were aware of the buried phone lines.[344]

The court found that the Underground Facilities Damage Prevention Act,[345] read in conjunction with *C. Wallace Construction Co. v. Western Steel Erection Co.*,[346] made it clear that White Loon breached their duty to contact STC in order to mark telephone lines before White Loon excavated.[347] Accordingly, the court overruled White Loon's motion for directed verdict.[348] The court subsequently rendered a verdict in favor of STC.[349]

IV. ARGUMENT

Courts have long recognized that the doctrine of tribal sovereign immunity runs counter to the spirit of American justice.[350] Tort victims may not seek redress against tribes or tribal entities.[351] Also, businesses and individuals cannot seek contractual damages against tribes or tribal entities.[352] Although the courts recognize and admonish the doctrine, they refuse to abrogate the doctrine judicially, instead urging Congress to

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notification center a notice that such operator has underground facilities, the county or counties where such facilities are located, and the address and telephone number of the person or persons from whom information about such underground facilities may be obtained. A municipality may, at its discretion, participate in the statewide one-call notification center as provided for in this section or may provide information concerning the underground facilities of the municipality as provided for in Section 9 of this act.").

337. *Seneca*, Tr. of Oral Argument at 135:8-14.
338. *Id.* at 135:14-19 (discussing OKLA. STAT. tit. 63, §142.9a).
339. *Id.* at 137:3-7.
340. 380 P.2d 89 (Okla. 1963).
341. *Seneca*, Tr. of Oral Argument at 137-38.
342. *Id.* at 138:9-11.
343. *Id.* at 138:12-18.
344. *Id.* at 139-140.
345. OKLA. STAT. tit. 63, § 142.1.
346. C. Wallace Constr. Co. v. Western Steel Erection Co, 380 P.2d 89 (Okla. 1963).
347. *Seneca*, Tr. of Oral Argument at 141:5-13.
348. *Id.* at 141:14.
349. *Seneca*, Journal Entry of J. at 1.
350. Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd., Inc., 268 F. 575, 587 (S.D.N.Y. 1920).
351. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 758 (1998).
352. *Id.*

abrogate the doctrine statutorily.[353] This doctrine continues to harm non-Indians and Indians alike, and there is no time like the present for American courts to put their collective foot down and abrogate the doctrine of sovereign immunity, specifically when tribes act in a proprietary capacity.

Justice Stevens' concurring opinion in *Potawatomi* stated that all governments, whether state, federal, or tribal, must be held accountable for their conduct.[354] The Court also recognized that courts constructed the doctrine of tribal sovereign immunity upon a foundation of errant case law.[355] Stare decisis does not render these prior court precedents immutable.[356] The courts, particularly the United States Supreme Court, have the power to overturn prior precedent as societal values evolve or when the court determines that prior precedent is built on fallacy.[357] If this were not true, we would still live in a society where public schools were segregated.[358] With that in mind, the *Kiowa* Court declared that "tribal immunity extend[ed] beyond what [was] needed to safeguard tribal governance" in modern society.[359] Therefore, the courts have the power to abrogate tribal sovereign immunity, and they should no longer defer to Congress.

Additionally, Roland Morris, Sr.[360] and William J. Lawrence's[361] testimony before the Senate Committee on Indian Affairs revealed that the doctrine of tribal sovereign immunity was detrimental to the well-being of many tribal citizens because tribal governments were not held accountable for questionable conduct.[362] Consequently, non-Indian businesses are justifiably hesitant to conduct business with tribal companies because they cannot seek redress from tribal companies for tort liability or breach of contract.[363] Therefore, abrogating the doctrine when tribes act in a proprietary capacity will increase the net social and economic surplus for society by facilitating more business transactions between non-Indians and Indian businesses. When tribal companies face the same tort and contract liability as non-Indian companies, both will find it more desirable to engage in business with one another, thus increasing economic opportunities for tribal citizens and non-Indians. As tribal economic conditions improve, social conditions will follow. When the amount of business transactions rise, the economy grows and everyone gets a bigger slice of the economic pie. This freedom to conduct business ultimately leads to a net social and economic benefit for society as a whole.

Furthermore, the federal government and a majority of state governments already

353. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991). The court in *Cook* recognized that "the Supreme Court has somewhat grudgingly accepted tribal immunity in the commercial context." Cook v. Avi Casino Enter., 548 F.3d 718, 728 (9th Cir. 2008) (Gould, J., concurring).

354. *Potawatomi*, 498 U.S. at 514 (Stevens, J., concurring).

355. *Kiowa*, 523 U.S. at 756-757.

356. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 924 (2007) ("[T]he Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago.").

357. *Id.*

358. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

359. *Kiowa*, 523 U.S. at 758.

360. Morris, *supra* note 183.

361. Lawrence, *supra* note 189.

362. Lawrence, *supra* note 189; Morris, *supra* note 183.

363. Anderson, *supra* note 9.

abrogated their own sovereign immunities when acting in a proprietary capacity.[364] In 1978, the Oklahoma legislature abrogated state sovereign immunity when the "state engage[d] in a business normally carried on by private companies"[365] and when the state entered into a contract with a private person or entity.[366] According to former Oklahoma Supreme Court Chief Justice Hodges, "[w]e have no king and no claim of divinity for our government has been asserted. Yesterday's excuses are not today's answers."[367] Based on this assertion, tribal nations ought to follow the state and federal model of abrogation of their own volition. However, it is unlikely that tribal nations will voluntarily surrender their immunity from suit; thus, court action is required. Despite the obvious injustices incurred by tribal nations in the past, it is in the better interest of society to not merely apologize for the past by creating an entitlement for some and a burden for many, but to eliminate present and future injustices caused by tribal sovereign immunity. Again, it is time for the courts to abrogate tribal sovereign immunity when tribes act in a proprietary capacity.

Seneca[368] demonstrated that White Loon's sovereign status unnecessarily complicated the process of collecting damages from the responsible party. Although *Seneca* appeared to be an open and shut case of negligence and/or willfulness, White Loon forced STC to jump through unnecessary procedural hoops in order to collect a relatively small amount of damages. Absent any sovereign immunity issues, a trial would have been unnecessary. The Underground Facilities Damage Prevention Act holds all excavators that damage underground facilities strictly liable for such damage. [369] White Loon felt that its sovereign status shielded it from liability of any kind. This sense of entitlement offers explanation as to why White Loon repeatedly severed STC's phone lines. Any reasonable excavator, absent the cloak of sovereign immunity, would have exercised proper, even reasonable, precautions preventing such negligence and liability. Further, non-immunized excavators would likely take responsibility for their damages instead of forcing the damaged party to resolve the issue judicially. Therefore, in the interest of justice, the appellate court must affirm the ruling of the trial court. Alternatively, the appellate court should affirm based on STC's preemption analysis revealing that state courts have jurisdiction over intrastate telecommunications law.

Seneca provides the courts an opportunity to remedy an antiquated doctrine built upon almost 200 years of errant precedent. The appellate court must consider whether it is just to circumvent the constitutional rights of all citizens in order to preserve a doctrine that provides a privilege to a relatively small number of citizens — a doctrine running counter to the American spirit of justice. It is clear that preservation of this doctrine enables tribal entities to continually injure citizens with impunity. Nothing in this argument should be construed to mean that abrogation of tribal sovereign immunity unjustly limits the rights of tribal nations. Abrogation of this doctrine would merely

364. Berry, *supra* note 40, at 887.
365. *Id.* at 884-86.
366. *Id.*
367. Newman v. State, 490 P.2d 1079, 1082 (Okla. 1971) (Hodges, C.J., dissenting).
368. *Seneca*, Journal Entry of J.
369. OKLA. STAT. tit. 63, § 142.9a.

place tribal corporations within the scope of rights granted to all American citizens. Furthermore, abrogation of this doctrine will provide greater opportunities for tribal nations to reap the benefits of increased participation in the private market. In order to prevent future injustices caused by the doctrine of tribal sovereign immunity, the appellate court must affirm the trial court's decision in *Seneca*.

V. CONCLUSION

It is apparent that the appellate court must affirm the ruling of *Seneca* and abrogate the doctrine of tribal sovereign immunity when tribes act in a proprietary capacity for the following reasons: 1) tribal sovereign immunity is a product of errant case law;[370] 2) courts have the power to overturn prior precedent;[371] 3) it is unjust to grant tribal corporations immunity from suit while they retain the right to sue;[372] 4) tribal sovereign immunity harms Indian and non-Indian citizens alike;[373] 5) tribal sovereign immunity decreases the net amount of economic transactions;[374] and 6) citizens have a constitutional right to seek redress against those who injure them.[375] Judicial abrogation of this doctrine benefits all citizens of the United States, Indian and non-Indian. Alternatively, Congress should statutorily abrogate the doctrine. The evidence is overwhelming that the doctrine outlived its purpose and only functions to deprive individuals and businesses of justice and economic development. Also, tribes should take the initiative to remedy this issue on their own. Self-abrogation will improve both social and political relationships between Indians and non-Indians and provide more business opportunities for tribal citizens. Finally, the courts should adopt a two-part test to determine whether tribal sovereign immunity applies to a particular circumstance. The test would ask:

1) Does the action against the tribe negatively impact the tribe's right to self-govern?

2) Does the action against the tribe negatively affect the tribe's sovereign status?

If both questions are answered in the negative, the tribe would not be immune from suit.

There are many solutions to reconcile the interests of tribal nations with the interests of non-Indian citizens. A cooperative effort between tribal nations, the courts, and Congress can yield a beneficial result for all. Now is the time to take the initiative. The judiciary, Congress, and tribal governments have buried their collective head in the sand for too long, and there is no time like the present to settle the issue, remedying an injustice plaguing Indian and non-Indian citizens alike. Perhaps Thomas Hobbes, one of the great champions of democratic thought and modern justice, said it best whilst contemplating the dynamics of peaceful society: "That at the entrance into the conditions of peace, no man require to reserve to himself any right, which he is not content should

370. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 756-757 (1998).
371. Leegin Creative Leather Products, Inc. v. PSKS, Inc, 551 U.S. 877, 924 (2007).
372. Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd., Inc., 268 F. 575, 587 (S.D.N.Y. 1920).
373. Morris, *supra* note 183.
374. Anderson, *supra* note 9.
375. *Seneca*, Order with Findings of Fact and Conclusions of Law at 5, 6, 7, 8.

be reserved to every one of the rest."[376] For now, we can only hope that our nation's lawmakers soon see fit to make this axiom a reality for all citizens, tribal or non-tribal.

-Bryce P. Harp[*]

376. *Thomas Hobbes, Of Other Laws of Nature, in* LEVIATHAN, CHAPTER XV (1651).

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