San Manuel Indian Bingo and Casino *and* Hotel Employees & Restaurant Employees International Union, AFL–CIO, CLC and Communication Workers of America AFL–CIO, CLC, Party in Interest and State of Connecticut, Intervenor.
Cases 31–CA–23673 and 31–CA–23803

May 28, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

In this case, we have been asked to reconsider whether the Board should assert jurisdiction over a commercial enterprise that is wholly owned and operated by an Indian tribe on the tribe's reservation. The Respondent and amici contend that we should adhere to current Board precedent under *Fort Apache Timber Co.*, 226 NLRB 503 (1976) (*Fort Apache*), and *Southern Indian Health Council*, 290 NLRB 436 (1988) (*Southern Indian*), and decline to assert jurisdiction. The General Counsel, the Charging Party, and the Intervenor argue that we should overrule *Fort Apache*, supra, and *Southern Indian*, supra. They urge us to extend the Board's reasoning in *Sac & Fox Industries, Ltd.*, 307 NLRB 241 (1992) (*Sac & Fox*), in which the Board asserted jurisdiction over tribal enterprises located away from Indian reservations, to such enterprises on reservations. They contend that, under *Sac & Fox*, supra, we should assert jurisdiction here. For the following reasons**,** we have decided to overrule *Fort Apache* and *Southern Indian* and to modify *Sac & Fox*. We establish a new standard for determining the circumstances under which the Board will assert jurisdiction over Indian owned and operated enterprises. Pursuant to this new standard, we assert jurisdiction in this case.

I. PROCEDURAL HISTORY

The case comes to the Board on a motion to dismiss for lack of jurisdiction. On charges filed on January 8, 1998, in Case 31–CA–23673 and on March 29, 1999, in Case 31–CA–23803, the General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing on September 30, 1999. The complaint alleges that the Respondent violated Section 8(a)(2) and (1) of the National Labor Relations Act (the Act) by rendering aid, assistance, and support to the Communications Workers of America (CWA) by allowing CWA agents access to the Respondent's facility for organizing purposes, while denying similar access to agents of Hotel Employees & Restaurant Employees International Union (HERE) (the Union). The Respondent filed an answer denying any wrongdoing and asserting as an affirmative defense that the Board lacks jurisdiction over its operations.

On January 18, 2000, the Respondent moved to dismiss the complaint for lack of jurisdiction. On January 27, 2000, the Board issued an Order Transferring Proceeding to the Board and Notice To Show Cause why the Respondent's motion should not be granted. Amici National Indian Gaming Association, Shakopee Mdewakanton Sioux (Dakota) Community, Menominee Indian Tribe of Wisconsin, Indian Tribes and Tribal Organizations (Mashantucket Pequot Tribal Nation, Pascua Yaui Tribe of Arizona, and Mohegan Tribe of Connecticut), and Indian Tribes and Tribal Organizations (Jamestown S'Klallam Tribe, Habematolel Pomo of Upper Lake, Metlakatla Indian Community, Miccosukee Tribe of Indians of Florida, Mississippi Band of Chocktaw Indians, Seminole Tribe of Florida, St. Regis Mohawk Tribe, Duckwater Shoshone Tribe of Nevada, Ely Shoshone Tribe of Nevada, Pueblo of Jemez, National Congress of American Indians, Inc., Bristol Bay Area Health Corporation, and Norton Sound Health Corporation) filed briefs in support of the motion. The General Counsel, the Charging Party, and the Intervenor filed briefs opposing the motion and additional briefs in response to the amici briefs. The Respondent filed a reply brief.[1]

II. FACTS[2]

The San Manuel Band of Serrano Mission Indians is an Indian tribe located on the San Manuel Indian Reservation in San Bernardino County, California. The tribe is governed by a general council consisting of all tribal members 21 years of age and older.

The Respondent is a tribal governmental economic development project that is wholly owned and operated by the tribe. The project is located entirely within the limits of the reservation.[3] The tribe operates and regulates the

[1] The Intervenor has requested oral argument and leave to adduce additional evidence. The requests are denied as the stipulated record and briefs adequately present the facts, issues, and positions of the parties and amici.

[2] The facts stated here are essentially undisputed.

[3] The Union argues that the Respondent has not established that the casino is located on a reservation. We reject that argument. We take administrative notice of several reliable sources that establish the existence of the San Manuel reservation on which the casino is located. See, e.g., United States Department of the Interior, Bureau of Indian Affairs, "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 65 Fed.Reg. 13298, 13301 (2000) (listing the San Manuel Band of Serrano Mission Indians of the San Manuel Reservation, California); *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir. 1986) (noting that the tribe is a federally recognized Indian tribe "that

casino pursuant to its own legislation—the San Manuel Gaming Act—that establishes a tribal caming commission to regulate and license gaming activities, investigate wrongdoing, and perform other regulatory functions. The tribe, through the general council, sets all significant policies of the project, such as establishing budgets, setting wage, salary, and benefit scales, and setting vacation and leave policies. The tribe determines employees' general working conditions.

The project is operated by members of the tribe in key positions, and tribal members are involved in every facet of the project. However, not all employees are members of the tribe. In addition, many, and perhaps the great majority, of the casino's patrons are nonmembers who come from outside the reservation. The tribe has adopted a tribal labor relations ordinance regulating labor relations at the casino project.

III. DISCUSSION

For almost 30 years, the Board has wrestled with the question of whether the Act applies to the employment practices of this Nation's Indian tribes. During that time, the Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy.[4] As tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses.[5] This case requires the Board to accommodate Federal labor policy and Federal Indian policy in deciding whether to assert jurisdiction, under the Act, over tribal enterprises.

The Board's task is difficult because Indian tribes occupy a unique position in the Nation's political and legal history. As Felix Cohen's preeminent treatise on Federal Indian law has noted, "Indian tribes consistently have been recognized . . . by the United States, as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Felix Cohen, *Handbook of Federal Indian Law*, 232 (1982) (footnotes and citations omitted). That sovereignty actually predates that of the Federal government. See *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973). Although the Board—like the Congress, the Supreme Court, and other Federal agencies—acknowledges the Federal Government's superior sovereignty, it does so in a manner that is mindful of the Indian tribes' rightful claim to respect for their unique and important position in our Nation's history.

In our view, the Board's jurisprudence in this area during its 30 years of development has been inadequate in striking a satisfactory balance between the competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture. As a result, the Board's assertion of jurisdiction has been both underinclusive and overinclusive. Accordingly, we take the opportunity presented by this case and its companion case, *Yukon Kuskokwim Health Care Corp.*, 341 NLRB No. 139 (2004), to adopt a new approach that gives due recognition to those competing interests.

A. The Board's Precedent

The Board first addressed whether the Act applies to the economic activities of an Indian tribe in *Fort Apache*, 226 NLRB 503 (1976). In *Fort Apache*, the issue was whether the Board had jurisdiction over an Indian mining company located on Indian land. The Board found that "an Indian tribal governing council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation," was not an employer within the meaning of Section 2(2) of the Act. 226 NLRB at 504, 506.[6] Rather, the Board found that the tribal council was a government, that the commercial enterprise was a "governmental entity," and that both were excluded from the coverage of the Act. Id. at 506 and fn. 22. In finding that the commercial enterprise was a "governmental entity," the Board analogized such enterprises to "political subdivi-

resides on its reservation in the County of San Bernardino, California"); *American Indian Reservations and Indian Trust Areas* 289–290 (Veronica E. Velarde Tiller, U.S. Department of Commerce, Economic Development Administration ed., 1995) (describing the tribe's reservation and casino as "the reservation's most important and successful economic enterprise"). On the basis of the foregoing, we find that the casino is located on the tribe's reservation.

[4] The Supreme Court has noted this trend of "modern, wide-ranging tribal enterprises" affecting commerce, including "ski resorts, gambling, and sales of cigarettes to non-Indians." *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 757–758 (1998). See U.S. Department of Commerce, Economic Development Administration, *American Indian Reservations and Indian Trust Areas* (Veronica E. Velarde Tiller, ed. 1995). See also Richard J. Ansson Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity*, 11 Kansas J. Law & Public Policy 441 (2002).

[5] See, e.g., *"Indian Casinos Win By Partly Avoiding Costly Labor Rules,"* Wall Street Journal (May 7, 2002); *"Off the Reservation, Onto the Dealer's Lot,"* New York Times (May 14, 2002).

[6] Fort Apache Timber Company was owned and operated by the White Mountain Apache Tribe, and the operation was situated entirely on the tribe's reservation. The tribe was governed by a tribal council, which operated the Timber Company. All employees of the Timber Company, and of other tribal enterprises, were employed by the tribe. The tribal council set wages and working conditions and established the budgets for the various enterprises. Id. at 503–504.

sions," which are excluded from coverage under Section 2(2). Id.[7]

The Board reached the same conclusion in *Southern Indian*, 290 NLRB 436 (1988). There, a consortium of seven Indian tribes operated a nonprofit health care clinic on the reservation of one of the tribes. The Board applied *Fort Apache* and found that the tribal consortium and its clinic on the reservation were governmental entities that were implicitly excluded from the Act's definition of "employer." 290 NLRB at 437.

Next, in *Sac & Fox*, 307 NLRB 241 (1992), the Board confronted the question of whether to assert jurisdiction over an Indian-owned enterprise located off the reservation. There, a tribal agency operated a corporation that manufactured chemical resistant suits pursuant to a Department of Defense contract. In finding the assertion of jurisdiction appropriate, the Board relied primarily on the fact that the enterprise was located off the reservation. The Board repeatedly stressed that the enterprise in *Sac & Fox* was located away from the tribe's reservation, and relied on that fact in holding that *Fort Apache* and *Southern Indian* were not controlling in cases involving off-reservation enterprises. Id. at 242–243, 245.[8] Indeed, the Board concluded that its decision in *Fort Apache* was "limited to situations in which the tribal enterprise is located on the reservation." Id. at 245. Having found that the Act did not expressly exclude the tribal enterprise from its jurisdiction, the Board found that the Act was a statute of general applicability and, therefore, should apply to Indians under *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Id. at 243.

When next addressing the issue of Board jurisdiction over Indian tribes, the Board reiterated the principle that the location of the enterprise was pivotal to its decision on the jurisdictional issue. *Yukon Kuskokwim Health Corp.*, 328 NLRB 761 (1999) (*Yukon Kuskokwim*). *Yukon Kuskokwim* presented facts similar to *Southern Indian*; at issue was the Board's jurisdiction over a health clinic operated by a tribal consortium. 328 NLRB at 763. Unlike the clinic in *Southern Indian*, however, the clinic in *Yukon Kuskokwim* was not located on a reservation – Native Alaskans do not have any reservations in Alaska. Id. The Board rejected the tribe's argument that the Board should consider the nature of the enterprise in determining whether assertion of jurisdiction furthered the policies of the Act. Id. at 763–764. The Board instead followed its reasoning in *Sac & Fox* and found that the location—not the nature—of the enterprise was controlling. Id. Because the clinic at issue in *Yukon Kuskokwim* was not located on a reservation, the Board asserted jurisdiction. Id.

Two premises can be discerned from the foregoing Board precedent. First, in *Sac & Fox* and *Yukon Kuskokwim*, the Board firmly established that location is the determinative factor in assessing whether a tribal enterprise is excluded from the Act's jurisdiction. Indeed, in *Yukon Kuskokwim*, the Board specifically rejected an appeal to consider other factors—such as the nature of the enterprise**,** or the absence of Alaska Indian Reservations—in assessing whether the assertion of jurisdiction was appropriate. The second premise is that the text of Section 2(2) of the Act supported the geographically based distinctions made by the Board. Thus, in *Fort Apache* and *Southern Indian* the Board found that the text of Section 2(2) precluded the assertion of jurisdiction, while in *Sac & Fox* and *Yukon Kuskokwim* it did not.

As discussed below, we have reconsidered both of these premises. Finding both premises to be faulty, we now adopt a new approach to the question of the Board's jurisdiction over Indian tribes, which better accommodates the need to balance the Board's interest in furthering Federal labor policy with its responsibility to respect Federal Indian policy.

B. Reassessment of Board Precedent

1. Tribal enterprises under Section 2(2) of the Act

The Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis in original). The language of Section 2(2) of the Act "vests jurisdiction in the Board over any 'employer' doing business in this country save those Congress excepted with careful particularity." *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986), cert. denied 483 U.S. 1005 (1987).

[7] In *Fort Apache*, the Board determined that it was possible to conclude that the tribal council was the equivalent of a State specifically excluded from the Board's jurisdiction under Sec. 2(2). However, the Board further determined that it was unnecessary to make that finding because, in any event, the tribal council was implicitly exempt as a political subdivision of a State. Id. at 506 and fn. 22.

[8] Although noting that the tribal enterprises in *Fort Apache* and *Southern Indian* were implicitly exempt as governmental entities, the Board held that those cases were not "directly controlling . . . [as] the subject facilities are located well outside the Tribal reservation." 307 NLRB at 243.

Section 2(2) of the Act excepts the following from the definition of "employer":

> The United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), ... [29 U.S.C. § 152(2).]

On its face, Section 2(2) does not expressly exclude Indian tribes from the Act's jurisdiction**.** Clearly, the tribes are not a corporation of the Government[9] and they are not a Federal Reserve Bank. Nor do Indian tribes meet the Board's or reviewing courts' traditional definition of a State or political subdivision thereof. As **t**he Supreme Court held in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), "political subdivisions" excluded from the Act's coverage are defined as entities that are either "(1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." Indian tribes and their commercial enterprises satisfy neither prong of this definition. They are not created directly by the States, or departments, or administrative arms of State government. Moreover, neither public officials nor the general electorate are at all involved in the selection of an Indian tribe or its enterprises. Indeed, the Supreme Court and several Federal courts of appeals specifically have held that neither Indian tribes nor their enterprises are States or political subdivisions of States. See *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980); *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899, 905 (9th Cir. 1991), overruled on other grounds *Big Horn County Elec. Cooperative v. Adams*, 219 F.3d 944 (9th Cir. 2000); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989); *U.S. v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986).[10]

Accordingly, the Board's reasoning in *Fort Apache* and *Southern Indian*—that Section 2(2) prohibits the assertion of jurisdiction over Indian tribes—cannot withstand scrutiny. Indeed, the reasoning in those cases relies upon a very broad reading of the exemptions provided for in the statute—essentially an exemption by analogy. We are not aware of any precedent that suggests that the terms included in Section 2(2) should be construed so broadly. Indeed, just the opposite is true. As with any statutory exemption, the exemptions provided in Section 2(2) are to be narrowly construed. See, e.g., *Los Angeles County Museum of Art v. NLRB*, 688 F.2d 1278, 1282 (9th Cir. 1982).[11]

Moreover, nothing in the Act's legislative history suggests that Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes. See *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1002 (9th Cir. 2003) (affirming order enforcing Board subpoena, based on conclusion that jurisdiction was not plainly lacking); see also *Sac & Fox*, 307 NLRB at 245 (noting that the employer "has not referred us to, and we are not aware of, any discussion whatsoever in the legislative history of the NLRA dealing with Indians. Nor is there any basis in the language of the Act itself for inferring a Congressional intent to exempt Indians or their off-reservation tribal enterprises"). That Congress expressly excluded Indian tribes from other Federal statutory schemes regulating the workplace demonstrates that Congress knew how to exclude Indian tribes when it wanted to do so. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (term "employer" does not include "an Indian tribe"); Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(B) (same). These express statutory exclusions of Indian tribes from coverage under other Federal laws lead to the inescapable conclusion that Congress purposely chose not to exclude Indian tribes from the Act's jurisdiction.[12]

Finally, recent statutes that deal expressly with Indian tribes contain no indication that Congress intended to exclude tribal enterprises from the Act. Such an effort to exclude was recently made, but that effort was defeated. That is, in the original version of what became the Tribal Self-Governance Amendments of 2000 to the Indian Self-Determination Act, both Houses of Congress specifically excluded, for the purposes of Section 2(2) of the

[9] In context with the prior phrase, the term "Government" corporation means a corporation wholly owned by the U.S. Government.

[10] But see *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (finding that tribes are not States nor subdivisions of States, but refusing to find tribal "right-to-work" ordinance preempted by the Act because of Act's exception for such ordinances adopted by States).

[11] Our dissenting colleague argues that an expansive interpretation of the statutory exclusion for States and political subdivisions is supported by the courts' treatment of the governments of Puerto Rico and U.S. territories as exempt from the Act's jurisdiction. First, we note that the dissent does not point to a single Board case so holding and, therefore, provides no insight as to the *Board*'s basis for exempting those governments. Neither do the court cases upon which the dissent relies provide any analysis of the issue. In both *Chaparro-Febus v. Longshoremen Local 1575*, 983 F.2d 325, 328–330 (1st Cir. 1993), and *Virgin Islands Port Authority v. SIU de Puerto Rico*, 354 F.Supp. 312, 313 (D.V.I. 1973), the courts assumed that the governments at issue were excluded from the Act and instead considered whether the employers at issue constituted subdivisions of those governments.

[12] Thus, our dissenting colleague's frequent reference to Title VII's exclusion of Indian tribes from its jurisdiction does not support his position.

Act, an Indian tribe carrying out activities authorized by the ISDA, S. Rep. No. 221, 106th Cong., 1st Sess. 49 (1999); H.R. Rep. No. 477, 106th Cong., 1st Sess. 18 (1999). The House of Representatives dropped the language excluding the ISDA-authorized tribal activities when it passed the amendments. The exclusion was not in the final enactment.[13]

The location of a tribal enterprise on an Indian Reservation does not alter our conclusion that Section 2(2) does not compel an exception for Indian tribes. Indeed, there is nothing in Section 2(2) to suggest that the exemption for "employer" turns on *where* the entity is located. The Board's cases finding such a geographically based exception do not persuasively argue otherwise. In *Fort Apache*, the Board provided no authority for the proposition it ultimately adopted—that the text of Section 2(2)**,** and the Board's interpretation of that text**,** can support an exemption based on the location of the employer at issue. As discussed above, the Act does not explicitly exempt Indian tribes—wherever they operate. Nor does the precedent support the finding of implicit exemptions or exemptions by analogy based on an employer's location, or any other factor. Accordingly, we overrule prior precedent to the extent that it holds otherwise.

2. The impact of Federal Indian policy

Having determined that *the Act* does not preclude the Board's assertion of jurisdiction over the Respondent, we next address whether *Federal Indian policy* requires that the Board decline jurisdiction. We find that it does not.

If the Board's reasoning in *Fort Apache* is released from its statutory moorings, it is clear that underlying the Board's decision in that case is its conclusion that Federal Indian law and policy preclude Board jurisdiction. In *Fort Apache*, the Board noted that:

> It is clear that individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary. [226 NLRB at 506.]

The Board's conclusion in *Fort Apache*, however, stands in direct conflict to the position taken by the majority of Federal courts of appeals regarding the applicability of Federal law to Indian tribes. Through that judicial precedent it has become well established that statutes of "general application" apply to the conduct and operations, not only of individual Indians, but also of Indian tribes. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (*Tuscarora Indian Nation*). In *Tuscarora Indian Nation*, the Court held that land owned by an Indian tribe could be taken for a hydroelectric power project, pursuant to the Federal Power Act, under the same terms as applied to non-Indian-owned land, because the FPA provided no express exemption for Indians. Id. The Court concluded that "a general statute in terms applying to all persons includes Indians and their property interests." Id.

The Federal courts of appeals have applied widely the *Tuscarora* principle to a number of civil rights and employment-related statutes. See *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129–1130 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (*Coeur d'Alene*) (OSHA).[14] The rationale behind these decisions supports the proposition that because Congress intended the Act to have the broadest possible breadth permitted under the Constitution,[15] the Act is a statute of general application. See *Navajo Tribe v. NLRB*, 288 F.2d 162, 164–165 (D.C. Cir. 1961); *Sac & Fox*, 307 NLRB at 243.

In light of the expansive application of jurisdiction that would result from the broad principle established by the Supreme Court in *Tuscarora Indian Nation*, supra, the Ninth Circuit in *Coeur d'Alene* enumerated several exceptions that have been recognized by Federal courts to limit jurisdiction over Indian tribes. The court in *Coeur d'Alene* held that statutes of general applicability should not be applied to the conduct of Indian tribes if: (1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. *Coeur d'Alene*, 751 F.2d at 1115; see also *Mashantucket Sand & Gravel*, 95 F.3d at 177; *Smart*, 868 F.2d at 932–933.

[13] We are not suggesting that this legislative history, by itself, shows an intention to include Indian tribes under the jurisdiction of the Act. See *PBGC v. LTV*, 496 U.S. 633, 650 (1990). Rather our point is that prior Congressional actions show an intention to include, and there has been no recent action to alter that intention.

[14] Cf. *Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (*Tuscarora* applies where tribe is acting as an employer); *EEOC v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (*Tuscarora* applies unless right at issue was reserved to the Indians by treaty, statute, or common law, such as right to self-governance).

[15] *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).

The Board has adopted the *Tuscarora–Coeur d'Alene* standard in off-reservation cases. In *Sac & Fox*, the Board held "[t]he general rule of construction for determining whether a Federal statute covers Indians and their property interests was set forth in the Supreme Court's opinion in [*Tuscarora Indian Nation*]." 307 NLRB at 243. Having found that the Act was a statute of general applicability, the Board in *Sac & Fox* then examined the applicability of the *Coeur d'Alene* exceptions. Id. The Board found that none of the exceptions applied to the tribal manufacturing enterprises at issue and asserted jurisdiction. Id.; see also *Yukon Kuskokwim*, 328 NLRB 761, 764 (1999).

We now conclude that the Board was correct in *Sac & Fox* to apply the *Tuscarora–Couer d'Alene* analysis in assessing whether Federal Indian law and policy precludes jurisdiction. To the extent that the Board's precedent has held that the application of that analysis is improper in on-reservation cases, we overrule those cases. Nothing in *Tuscarora Indian Nation* or *Coeur d'Alene* suggests that the location of the enterprise at issue is determinative. In fact, the enterprise at issue in *Coeur d'Alene* was located on a reservation and the Ninth Circuit nonetheless found jurisdiction appropriate. See *Coeur d'Alene*, 751 F.2d at 1114–1116; see also *Smart*, 868 F.2d at 932–936; *Navajo Tribe*, 288 F.2d at 162. Again, the distinction that has driven the Board's decisions in this area—location on-reservation or off-reservation—cannot be squared with the applicable precedent.

Our dissenting colleague contends that the Board should not rely on *Tuscarora*'s holding that statutes of general applicability apply to Indian tribes in the absence of a Congressional statement otherwise. The full weight of his dissent rests on this point. He calls *Tuscarora* a "leaky vessel." We disagree. His dissent, which relies upon dissenting voices and minority positions, is premised upon his opinion of what the law should be, not what it is.

Our dissenting colleague's primary attack on the viability of *Tuscarora* is, in reality, an argument that the case was wrongly decided. He questions the wisdom of the Court's reliance on several tax cases to support its finding that statutes of general applicability apply to Indian tribes, absent an express Congressional statement otherwise. Such a question, however, has no place in the Board's analysis because the Board has no authority to challenge the wisdom of the Supreme Court's pronouncements. We decline to join with our dissenting colleague in a dispute over whether the Supreme Court decided *Tuscarora* rightly or wrongly.

Our dissenting colleague next tries to avoid the precedential authority of *Tuscarora* by deeming its seminal holding "dictum." The dissent's description of *Tuscarora*'s holding finds no support in the majority of the cases that have applied *Tuscarora*. As noted above, a number of courts of appeals have repeatedly applied the holding of *Tuscarora*—that statutes of general applicability apply to Indian tribes in the absence of a Congressional statement otherwise. Indeed, they have applied *Tuscarora* in cases involving statutes very similar to the Act; that is, statutes that generally regulate the workplace. Instead of judicial support for his position, our dissenting colleague points to commentators who share his views. We put the Board's decision on much firmer footing by looking to the broad consensus in the courts of appeals for the appropriate interpretation of Supreme Court precedent.[16]

Moreover, the dissent's implicit suggestion that the real holding of *Tuscarora* is limited to other cases involving the property rights of individual Indians under the Federal Power Act, stands in stark contrast to the consensus of the courts of appeals. That it would have been possible for the Court to decide the case on a narrow ground does not transform into dicta any analysis that goes beyond that narrow ground. See *Railroad Companies v. Schutte*, 103 U.S. 118, 143 (1880) ("It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter."); *Eustace v. Commissioner of Internal Revenue*, 312 F.3d 905, 908 (7th Cir. 2002) ("That an opinion contains multiple grounds of decision does not justify disregarding any of them.").[17]

[16] Our dissenting colleague relies upon the opinion of a single court of appeals to support his position. See *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). As discussed above, the Tenth Circuit's interpretation of *Tuscarora* stands in contrast to that of the other courts of appeals that have examined the issue. Moreover, the facts of *Pueblo of San Juan* are distinguishable. There, the Board sought declaratory and injunctive relief to challenge a right-to-work ordinance enacted by the tribe. Id. at 1188–1189. Here, the Respondent seeks to avoid the application of the Act to its commercial activities. Indeed, in *Pueblo of San Juan*, the court noted that its decision did not reach the applicability of Federal statutes to a tribe's proprietary capacities. Id. at 1199.

[17] Our dissenting colleague's analysis of the basis for the Court's decision in *Tuscarora* only reaffirms that there may have been narrower grounds upon which the Court *could have* decided the case. Nevertheless, the Court itself asserted that it "must hold" that the Indians at issue were covered by the FPA because of the "well settled" principle that "a general statute in terms applying to all persons includes Indians and their property interests." *Tuscarora*, 362 U.S. at 116, 118. Contrary to the dissent's contention, the Court did not hold that the express terms of the FPA dictated that result. Nor did the Court base its decision on a

Our dissenting colleague's argument that *Tuscarora* has been overruled by the Supreme Court is equally misguided. The dissent concedes, as it must, that the Supreme Court itself has never purported to overrule *Tuscarora* explicitly. Thus, the dissent is forced to argue that is has been implicitly overruled by subsequent cases that the dissent describes as contradictory to *Tuscarora*.

Again, we decline to sit in judgment of the Supreme Court's precedent. If the Court wishes to overturn precedent, it will ordinarily say so. Accordingly, absent the Court's acknowledgement that *Tuscarora* is no longer good law, the Board is bound to follow it. In the absence of such acknowledgement, the courts, and thereby also the Board, are not free to disregard applicable precedent in favor of another suggested line of cases.[18]

Moreover, the cases upon which our dissenting colleague as well as the Respondent and its amici rely do not supplant the rule of law announced in *Tuscarora*. First, they do not contest the principle that the U.S. Government is a superior sovereign. Indian tribes have no sovereign immunity against the United States. See *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d at 1135 (immunity doctrines do not apply to the Federal Government); *Mashantucket Sand & Gravel*, 95 F.3d at 182 ("tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign power"). The Board is an arm of the U.S. Government.

Second, the cases upon which the dissent and the Respondent rely are distinguishable because they concern critical internal matters of self-governance. While the obstacles to the infringement of tribal sovereignty regarding such critical functions are high, the Supreme Court's post-*Tuscarora* cases impose considerably lower obstacles where Congress has regulated matters outside that sphere. See *Duro v. Reina*, 495 U.S. 676, 685–686 (1990) (discussing "tribes' status as limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining necessary powers of internal self-governance"); *Montana v. U.S.*, 450 U.S. 544, 564 (1981) (noting "implicit divestiture of sovereignty" where "relations between an Indian tribe and nonmembers of the tribe" are at issue). The Supreme Court has described Indian tribal sovereignty as "of a unique and limited character." *Duro*, 495 U.S. at 685.

Accordingly, as the dissent notes**,** the courts have protected Indian sovereignty in cases involving tribal justice systems and tribal tax authority, which the courts have found to be critical to tribal self-government. See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (affirming tribal court exhaustion requirement because "tribal courts play a vital role in tribal self-government"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (affirming power of tribe to tax mining activities because "tribal power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management").

The *Tuscarora* doctrine, in contrast, is applied to assess the applicability of regulatory schemes that do not implicate such critical self-governance issues. Thus, *Tuscarora* is applicable in the instant case. The Respondent's activities at issue are commercial in nature—not governmental. Moreover, the operation of a casino—which employs significant numbers of non-Indians and that caters to a non-Indian clientele—can hardly be described as "vital" to the tribes' ability to govern themselves or as an "essential attribute" of their sovereignty. See id.[19] Such a reading of the Supreme Court's post-*Tuscarora* cases is clearly preferable to the dissent's interpretation because it avoids creating a conflict where none exists.

The contention of the dissent and the Respondent and amici that an Indian tribe's sovereign right to exclude non-tribal members from a tribe's reservation precludes our assertion of jurisdiction similarly fails. In fact, as the dissent acknowledges, the Board previously has rejected such an argument. In *Texas-Zinc Minerals Corp.*, 126 NLRB 603, 607 (1960), and *Devils Lake Sioux Mfg. Corp.*, 243 NLRB 163, 163 (1979), the Board asserted jurisdiction over commercial enterprises located on reservations, over the objection of the tribe. In affirming the Board's decision in *Texas-Zinc Minerals Corp.*, supra, the District of Columbia Circuit rejected the same

distinction between Indians and Indian tribes, as suggested by the dissent. Indeed, the land at issue was owned by the Tuscarora Nation, not individual Indians.

[18] See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)); see also *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*"); *U.S. v. Rodriguez*, 311 F.3d 435, 439 (1st Cir. 2002) ("implied overrulings are disfavored in the law"); *U.S. v. Sterling*, 283 F.3d 216, 219 (4th Cir. 2002) (same).

[19] As discussed in greater detail below, in the context of the application of the *Tuscarora-Coeur d'Alene* analysis, the Federal courts have defined internal or intramural matters as being confined to topics such as "tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116. We address in detail below our dissenting colleague's argument that the operation of a casino constitutes the kind of internal, critical governance function that is akin to those functions at issue in the post-*Tuscarora* cases upon which he relies, or those that the courts have found to meet the *Coeur d'Alene* exception.

argument, stating that "the circumstances that the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from the coverage of the Act." *Navajo Tribe*, 288 F.2d at 164; see also *Coeur d'Alene*, 751 F.2d at 1116–1117.

The distinction drawn by our dissenting colleague between these cases and this case makes no difference. Although the Respondents in *Texas-Zinc Minerals* and *Devils Lake Sioux Mfg. Corp.* were not native-owned enterprises, the Indian tribes who leased land to those employers asserted *their* rights to exclude nontribal members from the tribe's property. Thus, the Board and the court were assessing—and rejected as a basis for exemption—the tribe's own asserted right to exclusion, not that of the non-Indian employers.

Finally, there is no merit to the Respondent's and its associated amici's argument that Congress lacks the power to regulate labor relations on Indian Reservations as part of its power to regulate interstate commerce**.** The argument rests on the assertion that the Interstate Commerce Clause does not apply to Indian tribes. But the Supreme Court decisions on which this argument is based involved the validity of State and tribal severance taxes on oil and gas produced on reservations by non-Indians.[20] The Court held that such taxes were not precluded by the Interstate Commerce Clause. These decisions do not address the applicability of a Federal statute to an Indian tribe's commercial enterprise. Further**,** the Act specifically applies to any employer whose operations substantially affect commerce. *See Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The Respondent concedes such an effect here. In *Navajo Tribe*, supra, the District of Columbia Circuit rejected the argument that the Act did not reach an on-reservation facility because**,** in adopting the Act, Congress did not specifically rely on its power to regulate commerce "with the Indian tribes." Const., Art. 1, Sec. 8, Cl. 3. The court observed that Congress' "failure to mention its power over commerce with the Indian tribes" was not an "indication that it intended to narrow its action with respect to interstate commerce." 288 F.2d at 165.

3. Discretionary jurisdiction

Because application of the *Tuscarora–Coeur d'Alene* standard poses no impediment to the assertion of the Board's jurisdiction, the final step in the Board's analysis is to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction. Our purpose in undertaking this additional analytical step is to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture. It is incumbent upon the Board to accommodate the Act's interests with those of other Federal statutory schemes. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002).

We recognize that Indian tribes hold a special place in Federal law. As the Respondent and its amici demonstrate in their briefs in the instant case, our common law and Federal statutes are suffused with examples of the special status accorded Indian tribes. The Board's error in *Fort Apache* was not acknowledging this special status, but rather the effort to read it into Section 2(2), where it did not belong. In rejecting the Respondent's contentions that the applicable precedents preclude the Board's assertion of jurisdiction, we do not imply that such precedent should be ignored. Indeed, by adopting the *Tuscarora–Coeur d'Alene* analysis as a component of consideration in cases involving Indian tribes**,** we expressly take such precedent into account. In so doing, we recognize the necessity of going beyond the general test of *Tuscarora–Coeur d'Alene* to examine the specific facts in each case to determine whether the assertion of jurisdiction over Indian tribes will effectuate the purposes of the Act.

As demonstrated above, the applicable precedent does not compel a categorical exemption of Indians from the Board's jurisdiction. Nor do we find that a categorical exemption would effectuate the purposes of the Act. Tribal enterprises are playing an increasingly important role in the Nation's economy. As tribal businesses prosper, they become significant employers of non-Indians and serious competitors with non-Indian owned businesses. When Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way.

When the Indian tribes act in this manner, the special attributes of their sovereignty are not implicated. Running a commercial business is not an expression of sovereignty in the same way that running a tribal court system is. The Board's mandate is to "protect and foster interstate commerce,"[21] and assertion of discretionary jurisdiction over Indian tribes acting in these circumstances would effectuate the policies of the Act while doing little harm to the Indian tribes' special attributes of

[20] See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–193 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 152–158.

[21] *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318, 326 (1940); see also 29 U.S.C. § 151 ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce . . .").

sovereignty or the statutory schemes designed to protect them.

Neither, however, is a blanket assertion of jurisdiction appropriate. At times, the tribes continue to act in a manner consistent with that mantle of uniqueness. They do so primarily when they are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes. These functions are often performed on the tribes' reservations. Such traditionally tribal or governmental functions, so located**,** are less likely than commercial enterprises to involve non-Indians and to substantially affect interstate commerce. Accordingly, in those circumstances**,** the Board's interest in effectuating the policies of the Act is likely to be lower. Thus, when the Indian tribes are acting with regard to this particularized sphere of traditional tribal or governmental functions, the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy. In such circumstances**,** the Board should afford the tribes more leeway in determining how they conduct their affairs by declining to assert its discretionary jurisdiction.

Determining whether to assert jurisdiction will require careful balancing by the Board. Although such balancing, on a case-by-case basis, lacks the predictability provided by the former on-reservation/off-reservation approach**,** the process of litigation will mark the contours in due time. Indeed, there is already a body of law differentiating governmental functions and proprietary ones. In any event, the approach we announce today will allow the Board to better serve both its interests in effectuating the policies of the Act and in according proper respect to the unique status of Indian tribes.

C. Application to the Instant Case

Finally, we will apply our new approach to this case. Consistent with the foregoing analysis, we find that the Respondent is an employer pursuant to Section 2(2) of the Act. Further, applying the *Tuscarora–Coeur d'Alene* analysis, we find that there is no barrier to the Board's assertion of jurisdiction here. As discussed above, the Act is a statute of general applicability. Thus, the Act may apply to Indians and their enterprises provided that none of the *Coeur d'Alene* exceptions apply.

None of the exceptions apply here. First, applying the Act to the casino would not "touch exclusive rights of self-governance in purely intramural matters." Contrary to the dissent's and Respondent's contentions**,** the tribe's operation of the casino is not an exercise of self-governance. See *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999) ("tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes"). Intramural matters generally involve topics such as "tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116; see also *Mashantucket Sand & Gravel*, 95 F.3d at 179. Apart from its ownership and location, the casino is a typical commercial enterprise operating in, and substantially affecting, interstate commerce. Further, some, if not many, of the casino's employees are not members of the tribe.

Our dissenting colleague's argument that the Respondent's proprietorship of the casino should constitute an intramural matter cannot withstand scrutiny. He argues that because the tribe derives revenue from the casino and uses the revenue to address the tribe's intramural needs, the means by which such revenue is generated also must be categorized as intramural. Under this definition of intramural, the *Coeur d'Alene* exception would swallow the *Tuscarora* rule. Thus, it is evident that the dissent's analysis of the applicability of the narrow *Coeur d'Alene* exception is really just another attack on *Tuscarora*'s general rule.[22]

Second, the Respondent does not allege the existence of any treaties covering the tribe**;** thus**,** application of the Act would not abrogate any treaty rights. Third, as discussed above, neither the language of the Act, nor its legislative history, provides any evidence that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction.

Next, we find that policy considerations favor the assertion of the Board's discretionary jurisdiction in this case. As just stated, the casino is a typical commercial enterprise, it employs non-Indians, and it caters to non-Indian customers. Moreover, assertion of jurisdiction would not unduly interfere with the tribe's autonomy. As explained in *Sac & Fox*, the Act would not broadly and completely define the relationship between the Respondent and its employees. Nor would the Act's effects extend beyond the tribe's business enterprise and regulate intramural matters.[23]

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[22] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), upon which our dissenting colleagues relies, is distinguishable. At issue in that case is amenability of a tribe to suit by a *State* government to collect a tax on commercial transactions on a reservation; whereas, in the instant case, the *Federal* Government's regulatory power is at issue. Moreover, the Court found that the State could hold the tribe liable for taxes on sales by Indians to non-Indians because such liability imposed only a minimal burden on the tribe. Id. at 512–515.

[23] Contrary to our dissenting colleague, the collective-bargaining process will not impair the Respondent's ability to hire as it wishes. An employer is not obligated to agree in bargaining to hiring restrictions, and the Board cannot impose any agreements. See *H. K. Porter v. NLRB*, 397 U.S. 99 (1970).

The only factor weighing against assertion of jurisdiction is that the casino is located on the tribe's reservation.[24] This factor, however, is insufficient to outweigh the others. The Board's interest in asserting jurisdiction is high, especially in light of the keen competition in the gaming industry—the non-Indian sector of which is subject to the Board's jurisdiction.

Finally, we reject the contention of the Respondent and its amicus, the National Indian Gaming Association (NIGA), that the assertion of jurisdiction would conflict with the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2701). Although the Board has an obligation to accommodate other Federal statutory schemes where a conflict exists,[25] we find that no accommodation is warranted here, as no conflict exists. The assertion of the Board's jurisdiction over the Respondent would not in any way interfere with IGRA's statutory scheme.

The purpose of IGRA is to provide a statutory basis for Indian gaming, to provide Federal standards for the regulation of Indian gaming, and to establish a Federal regulatory authority for Indian gaming. 25 U.S.C. § 2702. Because the Act does not regulate gaming, application of the Board's jurisdiction will not interfere with application of IGRA's terms. Moreover, IGRA does not address labor relations—the only aspect of the Respondent's business with which the Board is concerned.

Contrary to the Respondent's contention, neither will assertion of the Board's jurisdiction undermine IGRA's goal of promoting tribal self-sufficiency. The Act does not dictate any terms of any agreement or even that an agreement be reached. The Board will treat the Respondent just as it treats any other private sector employer.

Finally, we find no merit in NIGA's contention that the IGRA "preempts" the Act. Preemption issues arise when a State law arguably conflicts with a Federal law. A primary purpose of IGRA was to limit State regulation of the tribes' gaming activities. Linda King Kading, Note, *State Authority to Regulate Gaming Within Indian Lands: The Effect of the Indian Gaming Regulatory Act*, 41 Drake L. Rev. 317, 328–330 (1992). The Board is an arm of the Federal Government, not State government. Accordingly, IGRA is not directed at excluding Board jurisdiction.

With this decision and its companion, *Yukon Kuskokwim Health Corp.*, 341 NLRB No. 139 (2004), we embark on a new approach to considering jurisdiction over Indian owned and operated enterprises. The standard established herein will better balance the competing interests that cases involving Indian tribes bring to the Board. That standard takes into account those aspects of tribal sovereignty which have a rich tradition in our Nation's history, yet at the same time, accords due recognition of the Federal Government's superior sovereignty and its role in setting and regulating national labor policy. The assertion of jurisdiction over the Respondent's commercial activities on the reservation strikes such a balance.

ORDER

The Respondent's motion to dismiss the complaint is denied.

Dated, Washington, D.C. May 28, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

While the Board may decline, on prudential grounds, to exercise its jurisdiction over certain entities Congress included within the scope of the National Labor Relations Act (the Act), the Board may not expand the reach of the Act beyond the limits set by its authors. A substantial body of Federal Indian law both predating and postdating the Act recognizes that Indian tribes are "distinct, independent political communities, having territorial boundaries, within which their authority is exclusive."[1] That same body of law makes equally clear that Indian sovereignty, which as the majority notes predates the sovereignty of the Federal Government, remains intact *unless expressly limited by Congress*. Consequently, and unlike my colleagues, I believe the issue presented in this case is not whether the Board should assert jurisdiction over a commercial enterprise wholly owned and

[24] We reject the Respondent's attempt to liken its casino to a governmental function by pointing to State governments' involvement in lotteries. Although the private, commercial sector does not have a monopoly on the gambling industry, we reject the contention that gambling has risen to the level of a traditional government function. The fact that a government regulates the enterprise does not mean that the enterprise is governmental. Similarly, even if an Indian tribe regulates the enterprise, that does not mean that the enterprise is governmental.

[25] See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002).

[1] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

operated by an Indian tribe and located on that tribe's reservation, but whether Congress has authorized us to do so.

In the instant case, there is no dispute that both the text of the Act and its legislative history are devoid of any reference to coverage of Indian tribes. Not surprisingly, therefore, the Board has never before asserted jurisdiction over an Indian-owned and operated business located on a tribal reservation. Rather, recognizing, implicitly or explicitly, the unique sovereign status of Indian tribes, the Board consistently has refused to find jurisdiction in such cases.

Providence, however, apparently breeds policy, for the Board today reverses course because, in the words of the majority, "[a]s tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses." In response to this new "prosperity," the majority undertakes a rebalancing of competing policy interests and finds that the Act extends to on-reservation tribal enterprises. To achieve this result, the majority rests heavily on broad dictum from the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*,[2] as subsequently gilded by the Ninth Circuit. The *Tuscarora* dictum, however, is distinguishable on its facts, lacks a basis in precedent, and has been criticized by scholars and rejected by other courts. Moreover, subsequent Supreme Court decisions have abandoned, if not implicitly overruled, the *Tuscarora* principle embraced by the majority. Thus, the majority, which claims to "embark on a new approach" to jurisdiction over tribal enterprises, does so upon a leaky vessel.

In my view, the rebalancing of competing policy interests involving Indian sovereignty is a task for Congress to undertake. Well-established principles of Federal Indian law and statutory construction compel the Board to determine, in the first instance, whether Congress has affirmatively addressed the potential effects of legislation on tribal rights and to err in favor of Federal noninterference where regulatory statutes, such as the Act, are silent or ambiguous as to coverage of Indian tribes. Because the assertion of jurisdiction in this case would offend those principles and conflict with both Board and Supreme Court precedent, I respectfully dissent.

I. FACTUAL BACKGROUND

The San Manuel Band of Serrano Indians (the Tribe) is an Indian tribe that has occupied a federally recognized reservation located in San Bernardino County, California, since 1891. A general council consisting of all tribal members 21 years of age and older governs the Tribe.

To further its economic development and independence, the Tribe established and operates a gaming casino—the Respondent in this proceeding. The casino is wholly owned and operated by the Tribe through the general council and is located entirely within the territorial limits of the reservation. Although the precise scope of its operations is not clear from the record, the casino appears to employ more than 1000 employees, many of whom are not members of the Tribe, and serves patrons drawn from the general public. In addition to gaming operations, the casino sells food, beverages, and retail items, and offers showcase entertainment. The casino meets the Board's jurisdictional commerce standards.

The Tribe operates and regulates the casino pursuant to its own legislation, the San Manuel Gaming Act, which established a tribal gaming commission to regulate and license gaming activities on the reservation. The general council, on behalf of the Tribe, sets all significant casino operating policies, including its budget, wage and benefit scales, and vacation and leave policies. Members of the Tribe hold key positions in the casino's management, and tribal members are involved in every facet of the project. As is required by Federal law, all casino revenues are used exclusively to support the operation of the Tribe's government and the provision by the Tribe of governmental services such as water and sewer projects, roads, educational services, housing, and job training, for the benefit of its members.

The Tribe has also adopted a comprehensive tribal labor relations ordinance (TLRO) regulating labor relations at the casino project. The TLRO provides that covered employees have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for mutual aid or protection, and to refrain from any of these activities. The TLRO implements established principles of tribal sovereignty by guaranteeing the primacy of "tribal law, ordinances, personnel policies or the tribe's customs and traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention." Strikes are allowed only when the parties reach impasse and have exhausted specified dispute resolution procedures, and strike-related picketing is prohibited on Indian lands.

II. ANALYSIS

A. Indian Tribes Enjoy a Unique Status and Retain Sovereign Powers not Affirmatively Diminished by the Federal Government

The unique relationship between the Federal and tribal governments impacts our analysis of whether a Federal statute applies to Indian tribes. Indian tribes existed as

[2] 362 U.S. 99 (1960).

independent sovereign nations long before European colonization, and initially interacted with the United States Government as such through intergovernmental treaties. Ultimately, tribal governments were subordinated to Federal authority and became "domestic dependent nations . . . under the sovereignty and dominion of the United States."[3] The Supreme Court has characterized the relationship between the Federal Government and Indian tribes as that of a "ward to his guardian," establishing a fiduciary trust relationship.[4] Pursuant to this relationship, tribes, while no longer possessing the attributes of full sovereignty, nonetheless retain those aspects of inherent sovereignty not affirmatively withdrawn by treaty or statute or by implication as a necessary result of their dependent status.[5]

The inherent sovereign powers retained by tribes are those necessary to effective self-government, and include the power to determine the form of government,[6] enact and enforce laws within the tribe's territorial jurisdiction,[7] levy taxes,[8] and exclude individuals from Indian territory.[9] Tribes also possess the inherent power to regulate commerce within their territory,[10] to manage their domestic affairs,[11] and to assert sovereign immunity from lawsuits.[12] All three branches of the Federal Government recognize and continue to reaffirm the vitality of principles of retained tribal sovereignty and Indian self-determination.[13] They refer to the relationship between the Federal government and Indian tribes as "government-to-government" and to tribes as "domestic dependent nations."[14]

B. Because of the Federal-Tribal Fiduciary Relationship and Deference to Indian Sovereignty, Special Canons of Construction Apply when Determining the Applicability of Federal Statutes to Indian Tribes

The trust obligation of the United States towards Indian tribes, first articulated by Chief Justice Marshall in *Cherokee Nation v. Georgia*, supra, has been reaffirmed repeatedly by the Supreme Court and remains "one of the primary cornerstones of Indian Law."[15] Courts therefore presume that Congress' intent towards tribes is benevolent and apply special canons of construction in assessing legislation affecting inherent tribal rights.[16] As the Supreme Court explained in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985):

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, . . . with ambiguous provisions interpreted for their benefit . . . . The Court has applied similar canons of construction in nontreaty matters.

Accord*: Merrion v. Jicarilla Apache Tribe*, supra, 455 U.S. at 152 ("[I]f there [is] ambiguity . . ., the doubt would benefit the Tribe, for '[a]mbiguities in Federal law have been construed generously in order to comport with traditional

[3] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

[4] Id.

[5] *U.S. v. Wheeler*, 435 U.S. 313, 322–323 (1978) ("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 dependent status.").

[6] See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978).

[7] *U.S. v. Wheeler*, 435 U.S. at 322 ("[Indian tribes'] right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (tribal governments retain the right to "make their own laws and be ruled by them").

[8] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (describing the power to tax as "a necessary instrument of self-government and territorial management" that "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction").

[9] *Merrion*, 455 U.S. at 137; *Montana v. U.S.*, 450 U.S. 544, 566 (1981) (tribes "retain inherent sovereign power to exercise civil authority over the conduct on non-Indians on fee lands within [their] reservations when that conduct threatens or has some impact on the political integrity, the economic security, or the health and welfare of the tribe[s]").

[10] *Merrion*, 455 U.S. at 137; see also *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1284 (10th Cir. 2000), affd. on rehearing en banc 276 F.3d 1186 (10th Cir. 2002) (tribes possess the "sovereign right to regulate internal economic matters" unless divested of that right by Federal law).

[11] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978), and cases cited therein.

[12] Id. at 58.

[13] See, e.g., the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C.A. § 3601 (West. Supp. 2003)) (in which Congress refers in its findings, inter alia, to the "government-to-government relationship between the United States and each Indian tribe," and the "self-determination, self-reliance, and inherent sovereignty of Indian tribes"); Executive Order No. 13175 § 2–3 (Nov. 6, 2000, 65 F.R. 67249) (in which President Clinton set forth "fundamental principles" guiding the development or implementation of policies having tribal implications, including the existence of a "government-to-government" relationship between the United States and Indian tribes, and recognition that Indian tribes "exercise inherent sovereign powers over their members and territory"); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations,' that exercise inherent sovereign authority over their members and territories.").

[14] Id.

[15] Felix Cohen, *Handbook of Federal Indian Law*, 221 (1982) (Cohen).

[16] Cohen at 221–225; see also *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.").

notions of sovereignty and with the Federal policy of encouraging tribal independence.'") (quoting *White Mountain Apache Tribe v. Becker*, 448 U.S. 136, 143–144 (1980)).

In addition to the principle that any ambiguities in treaties or statutes are to be construed in favor of Indian tribes, Federal courts apply a strong presumption that in enacting legislation Congress did not intend to abrogate or abridge sovereign tribal rights.[17] Thus, though stated variously in different cases, the Supreme Court generally has required a clear expression of Congressional intent in order to impair tribal sovereignty.[18] Mere silence on the part of Congress does not suffice. If a statute and/or its legislative history does not reflect an express intent on the part of Congress to impair retained sovereign rights, "the proper inference from silence on this point is that the sovereign power . . . remains intact."[19]

C. Application of Traditional Canons of Construction Dictates a Finding that the Act does not Apply to a Tribal-Owned and Operated Commercial Enterprise Located on Reservation Lands

1. Assertion of Board jurisdiction would impair tribal sovereignty

The Board's assertion of jurisdiction in this case would infringe upon the Tribe's sovereign rights in several important respects. First, it plainly would negate the Tribe's retained sovereign right to enact laws regulating commerce and the activities of persons employed by the Tribe on its reservation. The comprehensive TLRO, passed by the Tribe to govern employment relations, would be preempted, or, at the very least, subject to Board enjoinder. *NLRB v. Pueblo of San Juan*[20] is illustrative. There, the Board sued a federally recognized Indian tribe to enjoin enforcement of a tribal right-to-work law applicable to all employers (including non-Indian private employers) on tribal lands. The Tenth Circuit rejected the Board's challenge, explaining that the "application of federal statutes to Indian tribes must be viewed in light of the federal policies which promote tribal self-government, self-sufficiency, and economic development."[21] The Tenth Circuit concluded that the exclusion of Indian tribes from the definition of a covered "employer" under Title VII of the Civil Rights Act of 1964 "illustrates congressional intent not to interfere in employee-management disputes on reservations," unless the statute in question expressly provides for their inclusion.[22] Finding no such express provision for coverage of Indian tribes under the NLRA, and applying traditional canons of construction applicable to statutes affecting tribal rights, the court held that "the Pueblo has the inherent right to adopt an ordinance which regulates the commercial activities of a non-Indian company on tribal land operating under a lease with the tribe."[23]

Second, the Board's assertion of jurisdiction over tribal labor relations would impair Indian sovereignty no less than the Board's assertion of jurisdiction over a state's employment relationships with its employees. The fact that a tribe may, as here, employ some nonmembers in the conduct of its business no more negates the scope of its sovereignty than the fact that a State government employs nonresidents.[24] Tribes cannot reasonably be expected to look only to their members for all of the skills and expertise necessary to carry out their activities. A tribe's ability to establish and control the terms and conditions of employment for its member and nonmember employees is an essential aspect of self-government that clearly "has some direct effect on the political integrity, the economic security, or the health

[17] Cohen at 222; see also *Santa Clara Pueblo*, 436 U.S. at 60 ("[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 indication of legislative intent.").

[18] See, e.g., *Elk v. Wilkins*, 112 U.S. 94, 99–100 (1884) (noting that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them"); *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 413 (1968) (holding that Federal statute did not nullify treaty rights of tribal members to hunt and fish on reservation because the statute did not contain an "explicit statement" abrogating such rights, and such an intention would not be "lightly imputed to the Congress"); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 380–381 (1976) (applying canons of construction applicable to Federal statutes claimed to abrogate Indian immunities to find that absent an expression of Congressional policy, statute could not be read to infer Congressional intent to confer on States authority to tax Indians or Indian property on reservations); *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979) ("[a]bsent explicit statutory language, we have been extremely reluctant to find Congressional abrogation of treaty rights . . . ."); *Santa Clara Pueblo*, 436 U.S. at 580–560 (requiring "unequivocally expressed" Congressional intent to waive tribal sovereign immunity).

[19] *Merrion*, 455 U.S. at 149 fn. 14. See also *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 17–18 (1987).

[20] 280 F.3d 1278.

[21] Id. at 1284.

[22] Id. at 1285.

[23] Id. at 1286. The majority attempts to distinguish *Pueblo of San Juan* on the grounds that the case involved a tribe's authority to enact a right-to-work ordinance whereas the issue here is whether the Act applies to the Tribe's casino. That purported distinction is unpersuasive because, as discussed above, the Tribe's authority to enact the TLRO *is* at issue in this case.

[24] Cf. *Merrion*, 455 U.S. at 145–147 (tribe does not abandon sovereign powers when it engages in commercial activities with nonmembers). Of course, the degree of infringement on tribal sovereignty is particularly acute when an employee *is* a member of the tribe. *See EEOC v. Fond du Lac Heavy Equipment & Construction Co*, 986 F.2d 246 (8th Cir. 1993) (application of the Age Discrimination in Employment Act to a claim asserted by a tribe member against a tribal employer would dilute the sovereignty of the tribe).

and welfare of the tribe."[25] Moreover, application of the Act to the Tribe would restrict the Tribe's recognized sovereign right to regulate the employment of non-Indians who have chosen to "enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements."[26] Finally, extension of the Act to the Tribe would impair the Tribe's ability to accord tribal preferences in hiring by subjecting that ability to the collective-bargaining process and review by the Board.

As was recognized in *NLRB v. Pueblo of San Juan*,[27]

> The tribe's sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation. Lease provisions which restrict closed shops and give preferential hiring to tribal members are indeed internal economic matters which directly affect a sovereign's right of self-government.

In cases involving the applicability of Federal employment statutes to State governments, courts have required a clear and plain expression of Congressional intent to subject State government employment relationships to Federal regulation.[28] No lesser standard should apply here.

Third, although Indian tribes do not enjoy sovereign immunity against the United States, principles of sovereign immunity are implicated where a statute, such as the Act, subjects a sovereign to potential awards for backpay damages and unpaid benefits. Such awards must be paid from the tribe's treasury, as must the attendant legal fees, thereby depleting resources necessary to carry out government functions and to improve the economic status of the tribe's members. Indeed, tribal governments are particularly vulnerable to actions for damages, because, as the Respondent and its amici point out in their briefs, such governments are highly dependent for their survival upon revenues generated by tribal business enterprises. Subjecting tribal governments to administrative investigations, intrusions upon tribal lands, and the award of potentially significant damages clearly infringes upon tribal sovereignty. These effect, in essence, a forced waiver of sovereign immunity. Congress can, of course, waive tribal immunity, but as the Supreme Court has made clear, any such waiver must be "unequivocally expressed."[29]

Fourth, tribal sovereignty includes the right to exclude non-Indians from tribal lands. "A tribe needs no grant of authority from the federal government to exercise, either as a government or as a landowner, the inherent power of exclusion from tribal territory. . . . The exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members."[30] Even nonmembers who lawfully enter tribal lands "remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ."[31] The Board's assertion of jurisdiction would significantly interfere with that sovereign right. Application of the Act would require the Tribe to open its borders not just to Board officials, but also to union organizers and other agents for organizational and representational purposes. Similarly, the Board or an arbitrator could order either a member or non-member employee's reinstatement, which would require the Tribe to relinquish its sovereign authority to exclude persons from the reservation.[32]

In short, application of the Act to the Tribe and its wholly owned and operated casino on reservation land would directly impinge numerous important aspects of retained tribal sovereignty.

2. The Act does not reflect the required clearly expressed Congressional intent to impinge on tribal sovereignty, so the Board may not assert jurisdiction

As noted above, the Supreme Court consistently has held that infringements on a tribe's sovereign authority are impermissible absent express statutory language or a clear indication to that effect in the statute's legislative history.[33] The majority concedes that no such expression of intent is to be found in the Act. Accordingly, the Board lacks jurisdiction to regulate the labor relations of tribal enterprises operating on reservation lands.

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[25] *Montana*, 450 U.S. at 566.

[26] *Montana*, 450 U.S. at 565.

[27] 280 F.3d at 1286.

[28] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

[29] *Santa Clara Pueblo*, 436 U.S. at 58.

[30] Cohen at 252.

[31] *Merrion*, 455 U.S. at 144.

[32] Consider, for example, a tribe member casino employee who is expelled from the reservation (and subsequently fired) for conduct inimical to tribal values or interests, but unrelated to his or her employment duties. Could an arbitrator compel the employee's reinstatement and consequent admission to the reservation because the termination was not for just cause? Could the Board reach the same result if it found that the discharge was in violation of the Act?

[33] *Merrion*, 455 U.S. at 148 fn. 14; *Iowa Mutual Insurance Co.*, 480 U.S. at 17–18 (collecting cases).

This conclusion is consistent with extant Board law. In *Fort Apache Timber Co.*,[34] the Board dismissed for lack of jurisdiction a representation petition for a unit of employees of a tribal owned and operated logging operation doing business on reservation lands. There, as here, the tribe was governed by a tribal council that possessed the authority, inter alia, to act for the tribe in all matters concerning the tribe's welfare; to negotiate contracts for the tribe; to veto disposition of tribal lands and assets; to manage the tribe's economic affairs and businesses; to regulate and enact legislation; to levy and collect taxes and impose licenses; to establish tribal courts and law enforcement; and to remove and exclude any nonmember of the tribe from the reservation.[35] In addition, the logging operation, like the casino here, was owned by the tribe and operated by the tribal council, which paid the employees and established their wages and working conditions.[36]

In determining that it lacked jurisdiction, the Board in *Fort Apache*, supra, relied upon established Federal law and policy recognizing Indian tribes' existence as independent sovereigns; "distinct political bodies" possessing exclusive governmental authority within the defined boundaries of their reservations.[37] The Board also acknowledged as "one of the fundamental principles" of Federal Indian law, that unless "expressly qualified" by treaty or act of Congress, "full powers of internal sovereignty [remain] vested in the Indian tribes and in their duly constituted organs of government."[38] The Board concluded that, although the analogy between Indian tribes and their governing councils and other entities such as States, territories, or Nations is imperfect, "it is clear beyond peradventure that a tribal council such as the one involved herein—the governing body on the reservation—is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts." Thus, the tribal council as a government, and its "self-directed enterprise on the reservation," were implicitly exempt from the Act, 2(2)'s definition of "employer."[39]

The Board applied the same rationale in *Southern Indian Health Council*,[40] dismissing, again for lack of jurisdiction, a representation petition covering employees of a health care clinic operated by a consortium of seven Indian tribes and located on the reservation of one of the tribes. The clinic's governing body consisted of a board of directors, each of whom was a tribe member appointed to serve by his or her tribal government. The board of directors set all employment policies and had authority to approve the hiring and firing of designated employees. Tribe members received a hiring preference, and constituted most of the clinic's nonprofessional employees.[41] The Board concluded that *Fort Apache* controlled: in both cases, the employers were wholly owned and directed and controlled by tribal governing councils appointed by the tribes. Thus, the Board held:

> In *Fort Apache*, [we] found that a tribal council is a "government," and thus that an entity administered by individuals directly responsible to a tribal council is exempt from the Act as a "government entity." In the instant case we similarly conclude that the seven-member consortium of tribes, and its enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as government entities within the meaning of the Act.[42]

The driving principle in both *Fort Apache* and *Southern Indian Health Council* was not, as my colleagues suggest, either geography per se or a conclusion that Indian tribes constitute "states or political subdivisions thereof" within the meaning of the Act, Section 2(3).[43] Rather, both cases turned on the Board's recognition of and deference to the sovereign status of Indian tribes within reservation borders, and the corresponding limitation of the application of State and Federal statutes to tribal government entities except as explicitly authorized by Congress.[44] In each case, the Board acknowledged that Indian tribes on their reservations are separable sovereignties governed by a tribal council, and that their wholly owned and operated business enterprises constituted instruments of that governing body. Absent an

[34] 226 NLRB 503 (1976).
[35] Id. at 503–504.
[36] Id.
[37] Id. at 505 (quoting *Worcester v. State of Georgia*, supra, 31 U.S. at 557).
[38] Id. (quoting Cohen at 122).
[39] Id.
[40] 290 NLRB 436 (1988).
[41] Id. at 436.
[42] Id. at 437 (footnote omitted).
[43] The Board in *Fort Apache* did not hold that Indian tribes and their commercial enterprises are "political subdivisions" within the meaning of the Act, Sec. 2(3). Rather it found that exempting tribes from the coverage of the Act was *consistent with* the Supreme Court's conclusion in *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 604 (1971), that a utility district administered by individuals responsible to public officials was exempt from the Act as a political subdivision. Because the timber company was an entity administered by individuals directly responsible to the Fort Apache tribal council, the timber company was the type of sovereign government entity "to whose employees the Act was never intended to apply." Id. at 506 fn. 22.
[44] The statutory definition of "employer" may not have a geographic component, but the sovereign status of Indian tribes clearly does have an obvious and important territorial limitation. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) ("The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty.").

express indication on the part of Congress that the Act was intended to apply to such government entities, the Board would not presume such a result.[45]

Texas-Zinc Minerals Corp.[46] and *Devils Lake Sioux Mfg. Corp.*,[47] relied upon by the majority, do not compel a different conclusion. In both cases, the employers at issue were essentially nontribal commercial operations fortuitously situated on leased tribal lands.[48] Otherwise, their status as employers within the meaning of Section 2(2) was unquestioned. Only on these facts did the D.C. Circuit, in upholding the Board's assertion of jurisdiction in *Texas-Zinc Minerals Corp.*, opine that the mere fact that an employer clearly subject to the Board's jurisdiction happened to be located on a reservation does not "remove it or its employees—be they Indians or not—from the coverage of the Act."[49]

Moreover, although the Board in *Fort Apache* did not need to read an "implicit exemption" for Indian tribes into 2(2)'s definition of "employer" given the absence of any express Congressional intent to extend the Act to tribes, such a reading is, in fact, consistent with the principle that ambiguous statutory provisions are to construed liberally in favor of tribal sovereignty. Indeed, Federal courts have held that the governments of Puerto Rico and U.S. territories are exempt from coverage under the Act despite the fact that such entities, like tribal governments, are neither States nor political subdivisions of States.[50] Nonetheless, the essence of the Board's holding in *Fort Apache* is respect for Indian sovereignty, self-sufficiency and economic development, and the application of established canons of statutory construction that accord Indian tribes a presumption in favor of noninterference when regulatory statutes are silent as to their applicability to tribes. Application of those principles in this case leads inescapably to the conclusion that the Board's sudden departure from its past precedent is improper.

D. Tuscarora and Its Progeny do not Justify the Assertion of Jurisdiction

The majority avoids contending with years of Federal Indian law precedent by adopting the Ninth Circuit's decision in *Donovan v. Coeur d'Alene Tribal Farm*[51] as the standard to be applied in assessing the applicability of Federal statutes to Indian tribes. *Coeur d'Alene* fashioned a new rule of statutory construction, one wholly at odds with established Indian law, based solely upon dictum from the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*,[52] wherein the Court stated that "a general statute in terms applying to all persons includes Indians."[53] As demonstrated below, however, reliance on *Tuscarora* and its progeny is misplaced for several reasons. First, the quoted language from *Tuscarora* is mere dictum premised on inapposite authority, and has been called into question subsequently by other courts and criticized by scholars of Indian law, including the very treatise cited by the majority. Second, the *Tuscarora* dictum has been implicitly overruled, and is, in any event, inconsistent with subsequent Supreme Court precedent reflecting greater deference to Indian self-government and sovereignty. Finally, the approach followed in *Coeur d'Alene* trivializes Indian sovereignty, and ignores the standards of statutory construction applicable to laws affecting tribal interests.

1. The *Tuscarora* "principle" is questionable dictum lacking any foundation in Indian law

My colleagues cleverly posit that the Board's conclusion in *Fort Apache* "stands in direct conflict to the position taken by the majority of Federal courts of appeals regarding the applicability of Federal law to Indians." While it is true that *several* courts of appeal have elevated and applied the *Tuscarora* dictum (while other courts have declined to do so), this dictum, in fact, stands in sharp and isolated contrast to a significant and long-

[45] See id. at 506 ("It is clear that . . . Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary"), and fn. 14 (noting that even the rules and regulations of the Department of Interior, the entity charged with the administration of Indian affairs and reservations, are deemed inapplicable to tribes or reservations unless the "rule or regulation *specifically* states otherwise.") (emphasis in original).

[46] 126 NLRB 603 (1960). A suit to enjoin the election directed by the Board was rejected by the D.C. Circuit in *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961).

[47] 243 NLRB 163 (1979).

[48] In *Texas-Zinc Minerals*, supra, the privately owned employer operated a uranium concentrate mill on leased reservation land. In *Devils Lake Sioux*, supra, the employer was a North Dakota corporation in which the Sioux Indian tribe held an ownership interest, but another corporation exercised effective and complete management and control over the company's operations.

[49] *Navajo Tribe*, 288 F.2d at 164.

[50] *Chaparro-Febus v. Longshoremen Local 1575*, 983 F.2d 325, 329–330 (1st Cir. 1993); *Virgin Islands Port Authority v. SIU de Puerto Rico*, 354 F. Supp. 312, 313 (D.V.I. 1973), affd. 494 F.2d 452 (3d Cir. 1974).

The majority attempts to distinguish these cases, but neither disputes the lack of Board jurisdiction over territorial governments nor explains how this exemption fits within the analysis the majority adopts today.

[51] 751 F.2d 1113 (9th Cir. 1985). The Ninth Circuit actually fashioned the analysis applied in *Coeur d'Alene* in an earlier case, *U.S. v. Farris*, 624 F.2d 890 (9th Cir. 1980), cert. denied 449 U.S. 1111 (1981). However, because the majority refers to the *Coeur d'Alene* analysis, I will as well.

[52] 362 U.S. 99 (1960).

[53] Id. at 116.

standing body of contrary *Supreme Court precedent*, much of it cited above, with which *Fort Apache* is entirely consistent. *Tuscarora* and the gloss placed on its dictum by the Ninth Circuit, not *Fort Apache*, represent an abrupt departure from prior Supreme Court rulings that Federal statutes would not be deemed to apply to Indian tribes or individual members on tribal reservations absent a clear expression of intent on the part of Congress. When viewed in context and analyzed with care, the narrowness of what my colleagues refer to as the *Tuscarora* "principle" and the weakness of its foundation become readily apparent.

In *Tuscarora*, the Supreme Court determined whether the Federal Power Act (FPA) authorized the appropriation through eminent domain of 22 percent of the Tuscarora Nation's tribal homeland for a storage reservoir to be built for a hydroelectric power project. The Tuscaroras held the land in fee rather than as a federally-recognized reservation. The FPA sanctioned the use of eminent domain generally, but protected lands designated as "reservations" by requiring a Federal Power Commission finding that the project would "not interfere with or be inconsistent with the purpose for which such reservation was created or acquired." The Commission had issued no such finding in the proceedings below. The FPA defined "reservations," as "national forests, tribal lands . . . military reservations and other lands and interests in lands owned by the United States . . . ."[54]

The Supreme Court found first that the Tuscaroras' homeland was not a "reservation" within the meaning of the FPA because the tribe held the land in fee and the FPA explicitly limited the term reservation to those "lands and interests in lands owned by the United States." Thus, the Court reasoned, the land was not land "owned by the United States," did not meet the statutory definition of a reservation, and therefore no Commission finding was needed.[55]

The Court next considered whether the general eminent domain powers of the FPA authorized the taking, notwithstanding the Tuscaroras' argument that Supreme Court precedent clearly established that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[56] Acknowledging that authority, the Court nonetheless chose not to follow it, stating that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[57] However, the "many decisions" to which the Court referred (there were actually three) involved the taxation of individual Indians, *not* the inherent sovereign rights of tribes on reservations.[58] In each of those cases, the Court applied a principle unique to tax law, namely that such statutes are presumed to apply to all citizens and upon all sources of income unless an intent to exclude a person or source of income is clearly expressed.[59] Applying that tax rule, over an impassioned dissent by Justice Black joined by Chief Justice Warren and Justice Douglas, the Court concluded that the FPA authorized the taking of the Tuscaroras' land.[60]

What can be gleaned from *Tuscarora* is the following. First, the Court's broad language about the applicability of general statutes to Indians was merely dictum, because the FPA, unlike the Act, specifically addresses the taking of tribal lands, reflecting a clear Congressional intent to apply the FPA as a whole to Indians and tribes.[61] Second, *Tuscarora's* outcome turned on the fact that the land in question was held in fee simple and did not constitute a reservation within the meaning of the FPA. In contrast, application of the Act would directly impact the inherent

[54] Id., 362 U.S. at 107–111.

[55] Id., 362 U.S. at 110–114

[56] Id., 362 U.S. at 115–116 (quoting *Elk v. Wilkins*, 112 U.S. at 99–100).

[57] Id., 362 U.S. at 116.

[58] Id. (citing *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935) (Federal tax laws applied to earnings of funds invested on behalf of individual tribe member); *Oklahoma Tax Commission v. U.S.*, 319 U.S. 598 (1943) (State could impose inheritance tax on estate of tribal member).

[59] Id. (quoting *Choteau v. Burnet*, 283 U.S. 691, 693, 696 (1931) ("'The language of the [Internal Revenue Code] subjects the income of 'every individual' to tax. . . . [T]he intent of Congress was to levy the tax with respect to all residents of the United States and upon all sources of income. . . . The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject matter.").

[60] Id., 362 U.S. at 118.

[61] Citing the principle that language in an opinion is not dicta simply because a case could have been decided on another, narrower basis or involved multiple grounds of decision, the majority claims that the sentence from *Tuscarora* on which they rely is not dicta. I agree with the general principle my colleagues advance, but it has no application here. On its face, the language from *Tuscarora* is inapplicable because it speaks to "Indians" while this case involves the rights of Indian tribes. Moreover, the FPA explicitly addresses the statute's applicability to Indian lands. Thus, any implication in *Tuscarora* about statutes of general application that do not reference Indian tribes is dicta, a view shared not just by scholars, see fn. 37, infra, but a number of courts as well. See, e.g., *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (noting that the Ninth Circuit in *Coeur d'Alene* "borrowed a presumption from dictum in [*Tuscarora*] . . . that a general statute in terms applying to all persons includes Indians and their property interests.") (citations and internal quotations omitted); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 fn. 3 (10th Cir. 1989) (describing the language in *Tuscarora* concerning the applicability of statutes of general application to all persons including Indians as "broad dictum."); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp.2d 1131, 1135–1136 (N.D. Okla. 2001) (discussing rejection and limitation of the *Tuscarora* "dictum" by various courts).

sovereign rights of the Respondent. Third, *Tuscarora*, unlike *Fort Apache* and *Southern Indian Health Council*, and unlike the instant case, involved Indian property rights, not the interplay between Indian sovereignty and the authority of the Board under the Act. Finally, the cases relied upon by the *Tuscarora* majority involved a unique tax rule and its applicability to individual Indians living away from their reservations, not the parameters of tribal sovereignty on reservation lands, the issue presently before us.

2. The *Tuscarora* "principle" has been criticized by scholars and abandoned, if not overruled, by the Supreme Court

Numerous commentaries, including Felix Cohen's definitive *Handbook of Federal Indian Law* relied upon by the majority, have criticized the reasoning of the *Tuscarora* majority, as well as the adoption of its dictum by lower courts.[62] The Supreme Court itself has referred to the *Tuscarora* dictum only once in the last 44 years, in another decision involving the FPA.[63] Moreover, the Tenth Circuit, in a case involving the application of the Act to Indian tribes on their reservations, rejected the *Tuscarora* dictum outright, deeming it to have been limited if not implicitly overruled by subsequent Supreme Court cases recognizing that tribal sovereign rights may not be abridged in the absence of express Congressional intent.[64]

The majority vainly attempts to distinguish post-*Tuscarora* Supreme Court cases on the ground that they "concern critical internal matters of self-governance," while this case, in their view, does not. With due respect, and putting aside for the moment the fact that application of the Act in this case *would* impair the tribe's power to engage in self-governance, the majority misses the point. The issue at hand is the nature of the analysis we are bound to apply in determining whether Congress, in enacting the Act, intended the Act to extend to on-reservation tribal enterprises. If the *Tuscarora* dictum, as interpreted by *Coeur d'Alene*, is good law, we must presume that Congress intended to do so unless one of the *Coeur d'Alene*-crafted exceptions applies. On the other hand, if the vast body of pre-*Tuscarora* Supreme Court precedent on Indian sovereignty is controlling, we presume that Congress did not intend the Act to cover such on-reservation enterprises, absent a clear expression of intent to the contrary. That issue *is* addressed in the post-*Tuscarora* cases the majority so cavalierly dismisses, and the Supreme Court's resolution of the issue is fatal to the majority's position.

In *Merrion*, which postdates the *Farris* case upon which *Coeur d'Alene* is premised, the Court addressed whether Congress, in enacting two Federal acts governing Indians and various pieces of Federal energy legislation, implicitly deprived the Jicarilla Apache Tribe of its inherent sovereign power to impose a severance tax on companies extracting oil and gas from leased reservation lands. The Court did not cite to or engage in a *Farris-Coeur d'Alene* analysis, but rather reaffirmed traditional principles of Indian sovereignty and applied the normal rules of statutory construction governing Federal legislation impacting tribal rights. Specifically, the Court "reiterate[d] . . . [its] admonition in *Santa Clara Pueblo v. Martinez*: . . . [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.'"[65] The Court also restated the requirement of a "clear indication" of Congressional intent to impinge on tribal sovereignty, and reaffirmed the principle that ambiguities in Federal law must be construed generously "'in order to comport

[62] Cohen at 284; see also Vicki J. Limas, *Application of Federal Labor & Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 Ariz. St. L. J. 681, 696–699 (1994) (Tuscarora dictum represented an abrupt and unwarranted departure from established canons of construction applicable to tribal interests); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. Davis L. Rev. 85, 105–107 (1991) (distinguishing the tax cases relied upon in Tuscarora because of the presumption of universal coverage attending such laws); Maureen M. Crough, *Comment, A Proposal for Extension of the Occupational Safety and Health Act to Indian-Owned Businesses on Reservations*, 18 U. Mich. J. L. Ref., 473, 486–487 (1985) (noting that the Tuscarora dictum "says no more than that general laws apply to Indians living away from their tribes, a subject tangential to the holding that laws specifically referring to tribes apply to them"); Judith Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation and the Limits of State Intrusion*, 64 Wash. L. Rev. 581, 591 (1989) (discussing fragile underpinnings of Tuscarora dictum and its departure from established precedent).

[63] See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786–787 (1983). Indeed, in doing so, the Court reiterated that both the text and legislative history of the FPA "specifically define[] and treat[] with lands occupied by Indians," and "give[] every indication that . . . Congress intended to include lands owned or occupied by any persons or persons, including Indians." Id. at 787 (quoting *Tuscarora*, 362 U.S. at 118). By contrast, the Act and its legislative history are utterly silent as to coverage of tribal employers operating within the sovereign boundaries of reservations.

[64] *NLRB v. Pueblo of San Juan*, 280 F.3d at 1283–1284 (reiterating its conclusion in *Donovan v. Navaho Forest Products*, 692 F.2d 709, 712 (10th Cir. 1982), that the *Tuscarora* dictum had been limited or implicitly overruled by *Merrion*, 455 U.S. at 141).

[65] 455 U.S. at 149 (quoting *Santa Clara Pueblo*, 436 U.S. at 60).

with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'"[66]

Similarly, in *Iowa Mutual Ins. Co. v. LaPlante*,[67] decided after both *Farris* and *Coeur d Alene*, the Supreme Court considered whether Congress, in enacting the general Federal diversity statute, 22 U.S.C. § 1332, intended to deprive tribal courts of jurisdiction over suits covered by the statute. Again, the Court made no reference to *Coeur d'Alene* and instead reaffirmed traditional principles of Federal Indian law and rules of statutory construction. Applying the same, the Court concluded that § 1332 contained no clear expression of Congressional intent to impair tribal sovereignty, so tribal jurisdiction remained unabridged.[68]

Proffering the reddest of herrings, my colleagues accuse me of challenging the wisdom of the Supreme Court's pronouncements. Nothing could be further from the truth. In my view, *Tuscarora* was decided correctly and consistently with traditional Supreme Court Indian jurisprudence because the FPA, as the Supreme Court observed in *Tuscarora*, "neither overlooks nor excludes Indians or lands owned or occupied by them. . . . Instead, as has been shown, the Act [and its legislative history] specifically define[s] and treat[s] with lands occupied by Indians . . . ." 362 U.S. at 118. Rather, my concern is the elevation, by some other courts, of broad and long dormant dictum from *Tuscarora* over the clear and virtually unbroken line of Supreme Court precedent dictating the nature of the analysis we should apply in assessing whether a Federal statute applies to tribal owned and operated businesses located on Indian reservations. The fealty the majority swears is not to *Tuscarora*, but to a *Coeur d'Alene* analysis, which itself represents an implicit rejection and limitation of the broad *Tuscarora* dictum.

Nor am I encouraging the majority to "follow [me] to a place the Supreme Court has not gone"; that is a trail my colleagues blaze with their decision today.[69] Instead, I am encouraging the majority to stay put: to adhere to our existing precedent in *Fort Apache*, to adhere to the principles of Indian sovereignty and statutory construction repeatedly articulated by the Supreme Court both before and after *Tuscarora*. In fact, I am urging the majority to exercise the same restraint and deference to the role of Congress demonstrated by the Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998). In that case, the Court, noting (akin to the majority here) that there may be reasons to doubt the wisdom of perpetuating the doctrine of tribal sovereign immunity in light of "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs," nonetheless declined to revisit its established case law, deferring instead to Congress, which "is in a position to weigh and accommodate the competing policy concerns and reliance interests." Id. at 758–760. If Congress wishes to subject on-reservation, tribal enterprises to the Act, it can easily do so. Similarly, the Supreme Court could take the lead and adopt *Coeur d'Alene* as the law of the land. However, neither has yet so acted, and it seems both unwise and imprudent for the Board to depart from its existing precedent, usurp Congressional policy prerogatives, and ignore a substantial body of Supreme Court Indian jurisprudence on the basis of dictum from a single case.

The Supreme Court's post-*Tuscarora* adherence to the very principles that infused the Board's decision in *Fort Apache* affirms, in my view, the correctness of that decision and its applicability to the instant case. The *Coeur d'Alene* analysis presumes from Congressional silence an intent to extend the Act to on-reservation tribal enterprises (and requires an affirmative showing of Congressional intent that the Act was not meant to apply), despite the fact that the law, as articulated by the Supreme Court, was exactly to the contrary before and after the Act came into being. To paraphrase from the Supreme Court's decision in *Merrion*, such an analysis "turns the concept of [Indian] sovereignty on its head."[70]

3. The *Coeur d'Alene* analysis trivializes Indian sovereignty

Apart from its utter inconsistency with well-established law, the *Coeur d'Alene* analysis advocated by the majority trivializes Indian sovereignty. That analysis requires proof of Congressional intent to extend legislation to Indian tribes only if the law touches, in the view of a reviewing court, "exclusive rights of self-government in purely intramural matters." As the majority notes, a number of courts following this analysis have narrowly limited the scope of "internal or intramural matters" to topics such as tribal membership, inheritance rules, and domestic relations. Consequently, if, as here,

[66] Id. at 152 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–144 (1980)).

[67] 480 U.S. 9 (1987).

[68] Id., 480 U.S. at 18 (citing the *Merrion* principle that the proper inference to be drawn from Congressional silence is that Indian sovereign power remains intact).

[69] The Supreme Court has never cited, much less endorsed, *Coeur d'Alene*.

[70] *Merrion*, 455 U.S. at 148.

the subject involves a commercial activity affecting interstate commerce (and virtually any such activity would) or the employment of nontribal members, no sovereign interest is deemed to be implicated by the application of a Federal statute.

As noted previously, however, tribes cannot do business solely with themselves or other tribes, nor can they rely exclusively upon their membership for the skills and expertise necessary to carry out their activities. A tribe no more waives its sovereignty because it employs nonmembers than a state does when it employs nonresidents or the Federal Government does when it employs noncitizens. In fact, as the legislative history of Title VII reflects, Congress excluded Indian tribes from the definition of "employer" in recognition of Indian tribes' status as separate sovereign entities entitled to the same privileges accorded the Federal Government "to conduct their own affairs and economic activities" without regulatory interference.[71] Thus, Congress has explicitly recognized that interference with tribal employment relationships affects tribal sovereignty. Similarly, the Supreme Court has recognized that tribes retain civil jurisdiction over nonmembers within Indian lands, and regulatory authority over persons and entities doing business with tribes on reservations.[72] Consequently, when a tribe employs nonmembers, the terms of the employment relationship fall within the ambit of the tribe's sovereignty over internal matters.

The majority's reliance on the commercial nature of the Tribe's activity is no more persuasive. Indeed, the Supreme Court rejected an argument premised on just such a theory in the *Potawatomi Indian Tribe* case,[73] yet another post-*Coeur d'Alene* decision. In that case, the Potawatomi Tribe owned and operated a convenience store on land held in trust for it by the Federal Government. The Tribe sued the State of Oklahoma in federal district court to enjoin the State's efforts to collect State taxes on sales of cigarettes at the store. Oklahoma argued, as the majority does here, that tribal business activities such as cigarette sales were so detached from traditional tribal interests that no sovereign right would be affected by subjecting tribal business ventures to State regulation.[74] The Court disagreed. Congress "has always been at liberty to dispense with . . . tribal immunity or to limit it," the Court observed, but has not done so, and has, in fact, reiterated in various pieces of legislation "a desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development."[75] Consequently, the Court refused "to modify the long-established principle of sovereign immunity" simply because the tribe was involved in a commercial venture on Indian lands.[76]

The same reasoning applies here. Operation of the casino clearly furthers the repeatedly expressed Congressional objective of encouraging tribal self-sufficiency and economic development, which can only occur through commercial activity. The casino provides critical training and employment opportunities for Tribe members and has lifted many out of poverty. Unlike privately operated gaming establishments, the revenues of the casino flow directly to the Tribe and its members. Those revenues are vital not just to the plethora of social and educational projects the Tribe funds, but also to the economic security and stability of the Tribe itself. The employment policies, practices and regulations established by the Tribe embody and implicate tribal values, and the casino is situated within the territorial sovereign boundaries of the Tribe's reservation. Therefore, operation of the casino on the Tribe's reservation is an "internal matter" directly implicating "rights of self-governance," and we should not, even under a *Coeur d'Alene* analysis, assert jurisdiction in the absence of a clear expression of Congressional intent. Because no such "clear expression" appears in the Act, jurisdiction does not lie.

Conclusion

There may well be sound policy reasons for Congress to subject Indian-owned and operated business enterprises, including those located within tribal sovereign boundaries, to the full range of Federal labor and employment laws, including Title VII and the Act. As the majority correctly notes, such statutes may not be inherently incompatible with Federal policies favoring Indian

[71] *See Pueblo of San Juan*, 280 F.3d at 1285 and fn. 5 (discussing legislative history of Title VII).

[72] See, e.g., *Merrion*, 455 U.S. at 147 (explaining that Indian sovereignty is not conditioned on consent thereto by a nonmember; rather, "the non-member's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose"); *Montana*, 450 U.S. at 565 (tribes may regulate the activities of nonmembers who enter into consensual commercial relationships with the tribe).

[73] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, supra, 498 U.S. 505.

[74] Id., 498 U.S. at 509–510.

[75] Id., 498 U.S. at 510 (internal quotations and citations omitted).

[76] Id.

sovereignty, self-determination and economic development. Moreover, even if they were, Congress possesses plenary authority to abrogate Indian sovereign rights and immunities. All that is required is a clear and express indication that Congress has weighed the competing policy interests and resolved them in favor of Federal authority. Because the Act evinces no such express Congressional intent, and because the majority's analysis cannot be squared with controlling Board and Supreme Court precedent, I respectfully dissent.

Dated, Washington, D.C. May 28, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD