UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

SAN MANUEL INDIAN BINGO AND CASINO

and

Cases 31-CA-23673
31-CA-23803

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC

Party In Interest

STATE OF CONNECTICUT

Intervenor

Brief of Amici Indian Tribes and Tribal Organizations in Support of San Manuel Band's Motion to Dismiss

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NLRB Decisions

Statutes

Regulations

Other Authorities

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The Amici described below are 10 federally recognized Indian tribes, a national organization representing over 250 tribes, and 2 regional health organizations controlled by a total of 51 tribes. Amici submit this brief because of the vital importance of this case to every tribe in the United States. Amici urge the National Labor Relations Board to reject the General Counsel's request to overrule its long line of precedent recognizing Indian tribes as exempt from coverage of the National Labor Relations Act regarding their employment practices within Indian country, and to grant the motion of the San Manuel Band to dismiss the complaint.

INTEREST OF AMICI CURIAE

Amicus JAMESTOWN S'KLALLAM TRIBE is a federally recognized Indian Tribe inhabiting the historic settlement of the ancestors of the Tribe along the Strait of Juan de Fuca in Washington. The Jamestown S'Klallam Tribe was a signatory to the Treaty of Point No Point Jan. 26, 1855, 12 Stat. 933, 2 Kappler 674, and despite a lack of federal recognition, remained a cohesive community throughout its history. The Tribe regained recognition on February 10, 1981. The Jamestown S'Klallam Tribe governs itself under a constitution adopted in 1975.

Amicus HABEMATOLEL POMO OF UPPER LAKE (formerly known as the Upper Lake Rancheria) is a federally recognized Indian Tribe located adjacent to the Pomo township of Habematolel in Lake County, California. The Habematolel Pomo of Upper Lake was listed in the 1958 California Rancheria Act, Pub. L. 85-671,72 Stat. 619, as amended by Pub. L. 88-419, 78 Stat. 390, as one of 41 California Rancherias for which Congress had authorized termination. The Tribe regained recognition in connection with the lawsuit of Upper Lake Pomo Association, et. al. v. Cecil Andrus. et. al., C-75-0181-SW (May 15, 1979). The Habematolel Pomo of Upper Lake governs itself through an interim constitution and is in the process of completing a secretarial election to revise its constitution in compliance with Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus METLAKATLA INDIAN COMMUNITY is a federally recognized Indian tribe inhabiting the Annette Islands Reservation in Alaska. This Reservation, was established by Congress for the Metlakatla Indians "and such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101,48 U.S.C.A. §358. See Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962). The Metlakatla Indian Community governs itself under a Constitution and By-laws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus MICCOSUKEE TRIBE OF INDIANS OF FLORIDA is a federally recognized Indian tribe, which occupies the following Indian lands: (1) the "Miccosukee Reserved Area" ("MRA") in the Everglades National Park, reserved by federal statute within which the Miccosukee Tribe may exercise governmental authority "as though the MRA were a Federal Indian Reservation," Miccosukee Reserved Area Act, Pub. L. 105-313, 112 Stat. 2964,16 U.S.C.A. § 410 note, § 5; (2) a federal Indian reservation north of the Everglades National Park; and (3) and an additional area leased from the State of Florida which by federal statute is treated as a federal Indian reservation for certain purposes, 25 U.S.C. §§ 1745 (b), 1747. The Miccosukee Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus MISSISSIPPI BAND OF CHOCTAW INDIANS ("MBCI") is a federally recognized Indian tribe residing on the Mississippi Choctaw Reservation in Mississippi. MBCI is comprised of descendants of Choctaw Indians who resisted relocation to Indian Territory (now Oklahoma) following the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, 2 Kappler 310. The MBCI's lands were proclaimed a federal Indian reservation in December 1944, 9 Fed. Reg. 14,907, pursuant to an Act of Congress. 53 Stat. 851. Pursuant to the Indian Reorganization Act, the MBCI has adopted a constitution and bylaws which were approved by the Secretary of the Interior in May 1945. See United States v. John, 437 U.S. 634 (1978), which reaffirmed the Tribe's status as federally recognized and the Indian country status of its Reservation and trust lands.

Amicus SEMINOLE TRIBE OF FLORIDA is a federally recognized tribe which occupies federal trust lands in the Big Cypress, Hollywood and Brighton Reservations and in the Imokolee and Tampa Indian Communities in Florida. See Seminole Indian Land Claims

Settlement Act of 1987, 25 U.S.C. §§1772-1772g (transfer of East Big Cypress Reservation to the United States in trust for the Seminole Tribe). The Seminole Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus ST. REGIS MOHAWK TRIBE resides on the St. Regis Mohawk Reservation in northern New York, along the Canadian border. The reservation was reserved for the Mohawk Tribe by the Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55, 2 Kappler 45. The reservation was never allotted, nor was it diminished by any treaty with the United States or Act of Congress.

Amicus DUCKWATER SHOSHONE TRIBE OF NEVADA is a federally recognized Indian Tribe, whose reservation is located in a remote area of Nevada. The Duckwater Shoshone Tribe is organized and governs itself in accordance with a Constitution approved November 28, 1940, .pursuant to 25 U.S.C. § 476. Its present reservation lands are a portion of those recognized to the Tribe in the Treaty of Ruby Valley (1863).

Amicus ELY SHOSHONE TRIBE OF NEVADA (formerly known as the Ely Colony) is la federally recognized Indian Tribe whose reservation is also located in a remote area of Nevada. The Ely Shoshone Tribe is organized and governs itself pursuant to written Constitution first approved in 1966 and amended in 1990 and 1999, in accordance with 25 U.S.C. § 476. Its present reservation lands are a portion of those recognized to the Tribe in the Treaty of Ruby Valley (1863).

Amicus PUEBLO OF JEMEZ is one of the 19 Indian Pueblos of New Mexico. It is a federally recognized Indian Tribe of some 3,000 members which governs its Pueblo grant and reservation lands under unwritten traditional customs and procedures without a written

constitution and without a written tribal code. The Pueblo is located in central New Mexico, and exercises jurisdiction over approximately 90,000 acres.

All the Amici Tribes are included on the Indian Entities Recognized and Eligible for Services from the United States Bureau of Indian Affairs. See Exh. 1.

Amicus NATIONAL CONGRESS OF AMERICAN INDIANS, INC. is a nonprofit association of over 250 Indian tribes. It purposes are to secure and preserve the rights and benefits to which American Indian and Alaska Native people are entitled; to enlighten the public toward the better understanding of Indian people; to preserve rights under Indian treaties or agreements with the United States; and to promote the common welfare of American Indians and Alaska Natives. Founded in 1944, it is the oldest, largest and most representative national Indian organization serving the needs of a broad membership of American Indian and Alaska Native governments.

The remaining Amici are Alaska Native non-profit health organizations that are organized and controlled by Indian tribes and that provide health care services in designated service areas throughout Alaska pursuant to a compact and annual funding agreements between Alaska Native Tribes and the United States pursuant to Title III of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, as added by Public Law 100-472, 102 Stat. 2296, codified as amended at 25 U.S.C. § 450f note. Excerpts from the 1997 Alaska Tribal Health Compact are reproduced at Exh. 2.

Amicus BRISTOL BAY AREA HEALTH CORPORATION (BBAHC") is an Alaska Native non-profit organization organized and controlled by certain federally recognized tribes to deliver comprehensive health care services to Alaska Natives within a defined territory. BBAHC has been delegated authority by 32 Alaska Native Villages to provide health care as a tribal

consortium under the Compact in a service area consisting of the Bristol Bay Region and three additional villages.[1] In carrying out this delegated authority, BBAHC operates Kanakanak Hospital near Diliingham (the only hospital in the 40,000 square mile service area), as well as 28 tribal village health clinics.

Amicus NORTON SOUND HEALTH CORPORATION ("NSHC") is an Alaska Native non-profit organization, organized and controlled by certain federally recognized tribes to provide comprehensive health care to Alaska Natives in a defined area. It has been delegated authority by 19 Alaska Native Villages to provide health care as a tribal consortium under the compact in the Norton Sound Service Unit (or the Bering Strait Region) including the Norton Sound Hospital (the only hospital in its service area) and community health facilities and services.[2]

Several of the Amici have previously been held to be exempt from the Act and Board jurisdiction. E.g., Metlakatla Indian Community d/b/a Metlakatla Power and Light Co. et al., Case No. 19-RC-5183 (Oct. 7, 1969), attached as Exh. 5; Mississippi Band of Choctaw Indians, d/b/a Chahta Enterprise, et al., Case No. 15-RC-8143 (Regional Dir. Decision and Order, Aug. 13, 1998). request for review denied. (N.L.R.B. Oct. 20. 1998), attached as Exh. 6; Letter from Acting Regional Director Joseph Cohen to James Youngdahl, re Menominee Tribal Enterprises, Case No. 30-CA-4920 (Oct. 19, 1978) (refusing to issue complaint against arm of Menominee Tribe), attached as Exh. 7. These and all Amici have an interest in preserving the tribal exemption from the Act and from the jurisdiction of the Board.

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1 The list of tribes who have delegated authority to BBAHC is provided at Exh. 3.

2 The list of tribes who have delegated authority to NSHC is provided at Exh. 4.

CASE PRESENTED

The issue as it is presented at this stage of the proceeding is: Should the Board overrule over 30 years of precedent and hold that Indian tribes - alone among governments within the United States - are "employers" within the meaning of the National Labor Relations Act. Amici submit that there is no legal justification for the change urged by the Board's General Counsel.

SUMMARY OF ARGUMENT

The Board has never asserted jurisdiction over Indian tribal employers on tribal lands. For more than thirty years, tribes have been held to be implicitly exempt from the Act's definition of "employer" with regard to employment by the tribe on the reservation. E.g., Ft. Apache Timber Co., 226 N.L.R.B. 503 (1976); So. Indian Health Council. Inc., 290 N.L.R. B. 436 (1988); Metlakatla Indian Community, Case No. 19-RC-5183 (Oct. 7, 1969), attached as Exh. 5. In Fort Apache, the Board recognized 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." 226 N.L.R.B. at 506 (emphasis added)(footnote omitted). The Board has consistently followed this precedent, which was judicially approved by a federal district court as correctly applying the Act in Roberson v. Confederated Tribes of the Warm Springs of Oregon, 103 L.R.R.M. 2749, 2751 (D. Or. 1980). Indeed, the General Counsel of the Board has reiterated these principles in a recent case pending before the United States Court of Appeals for the Tenth Circuit. Reply Brief for the National Labor Relations Board in Support of Motion for Summary Judgment, NLRB v. Pueblo of San Juan, Nos. 99-2011 & -2030, at 19 (10th Cir. filed July 13, 1999), excerpts attached as Exh. 8 ; Reply of the National Labor Relations Board in Support of Motion for Summary Judgment, NLRB v. Pueblo of San Juan, No. CIV 98-0035, 30 F.Supp. 2d 1348 (D.N.M 1998), at 4 n. 4 (filed May 1, 1998), excerpts attached as Exh. 9. Congress has never sought to change the

Board's interpretation, although it was informed by the Board of the Fort Apache decision. Forty-Second Annual Report of N.L.R.B. at 32 (1977), attached as Exh. 10.

In this case, the Board's General Counsel takes a different position, urging the Board to impose the Act upon tribal governments based on dicta in a Supreme Court decision which predates all of the Board and court decisions that have held that tribes are not employers under the Act. The General Counsel relies on the dicta in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) - a case predating the Board's precedents — that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." Id. at 120. This dicta, however, applies to the application of federal statutes to individual Indians and to Indian property; it has never been applied by the Supreme Court to divest Indian tribes of their sovereignty. Cases decided by the Supreme Court since Tuscarora compel a different rule where tribal sovereignty is at stake. The Court will not find that Congress intended to divest a tribe of its sovereign powers by implication but only where the Congress has made express its intention to do so by statute. Santa Clara Pueblo v. Martinez, 436 U.S. 49(1978). In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982), the Court cautioned that it would not find a divestiture of a tribal power absent "clear indications" of Congress's intent to divest such power. See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980) ("[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence").

A number of courts have distinguished Tuscarora in cases involving the application of federal employment laws of general applicability to Indian tribes, and have held that the laws do not apply to tribes because such application may not be implied from Congressional silence on

the matter in light of these later Supreme Court decisions. E.g., EEOC v. Fond du Lac Heavy Equip, and Constr. Co., 986 F.2d 246 (8th Cir. 1993) (Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq. does not apply to Indian tribes); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (ADEA does not apply to Indian tribes as employers) Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 713 (10th Cir. 1982) (OSHA does not apply to Navajo Tribe; "Merrion. in our view, limits or, by implication, overrules Tuscarora.... at least to the extent of the broad language relied upon by the Secretary contained in Tuscarora ... ."). Cases to the contrary decided by other courts, e.g. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996)(OSHA applied to tribal construction business), were wrongly decided because they do not follow the Supreme Court's post-Tuscarora decisions that recognize that tribal sovereign rights cannot be assumed to have been abrogated by Congress where a statute is silent.

Moreover, none of the cases relied on by the General Counsel involved a reversal of a consistent interpretation of the statute over a thirty-year period. And none involved statutes that are as intrusive in the administration of tribal operations within their reservations as the NLRA. Under the interpretation urged by the General Counsel, the terms and conditions of tribal employment would be decided not by the tribe, but in concert with non-Indians by a tribal government through collective bargaining, or possibly by an arbitrator. Employees of tribal governments, which include police, firefighters, welfare workers, public housing officials, nurses, doctors, and schoolteachers, to name a few, would have Section 7 rights that are denied to all other public workers, including the right to strike.

There is no reason, legal or otherwise, to change the Board's thirty-year old interpretation of Section 2(2).

ARGUMENT - THERE IS NO REASON TO OVERRULE BOARD PRECEDENT

I. THE BOARD HAS CONSISTENTLY HELD FOR OVER 30 YEARS THAT TRIBES ARE NOT "EMPLOYERS" UNDER SECTION 2(2) OF THE ACT

For more than thirty years, the Board has held that tribes are implicitly exempt from the Act's definition of "employer" with regard to employment on the reservation. Ft. Apache Timber Co., 226 N.L.R.B. 503 (1976); So. Indian Health Council. Inc., 290 N.L.R.B. 436 (1988); Metlakatla Indian Community, Case No. 19-RC-5183 (Oct. 7, 1969), attached as Exhibit 5; Mississippi Band, Case No. 15-RC-8143 (Regional Dir. Decision and Order, Aug. 13, 1998), request for review denied. (N.L.R.B. Oct. 20, 1998), attached as Exhibit 6; Letter from Acting Regional Director Joseph Cohen to James Youngdahl, re Menominee Tribal Enterprises, Case No. 30-CA-4920 (October 19, 1978), attached as Exhibit 7; Memorandum, Associate General Counsel Robert Allen to James McDermott, Regional Director, Case No. 31-CA-19604, 1993 WL 255247 (N.L.R.B.G.C.) (May 28, 1993)(intertribal health consortium not an "employer" within § 2(2)); Memorandum, Associate General Counsel Harold Datz to Milo Price, Regional Director, Case No. 28-CA-7410, 1983 WL 29421 (N.L.R.B.G.C.) (June 23, 1983)(tribal engineering and construction authority and its managing agent not an "employer" within § 2(2)).

In Fort Apache, the White Mountain Apache Tribe owned and operated a lumber mill within the Fort Apache Indian Reservation. The Board found the Tribe to be a "government" and, therefore, exempt from coverage under § 2(2)'s exemption for federal and state governments. The Board recognized 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." 226 N.L.R.B. at 506 (emphasis added)(footnote omitted):

> Regardless of the particular label applied, however, it is clear beyond peradventure that a tribal council... is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts....

> [I]t would be possible to conclude that the Council is the equivalent of a State, or an integral part of the government of the United States as a whole, and as such specifically excluded from the Act's Section 2(2) definition of "employer". We deem it unnecessary to make that finding here, however, as we conclude and find that the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.

Id. at 506 (footnotes omitted). The Board's reasoning properly focused on Indian tribes' status as governments and treated them accordingly.

The Fort Apache exemption doctrine was subsequently applied by the Board in Southern Indian Health Council. Inc., 290 N.L.R.B. 436 (1988), where the Board found that an intertribal health consortium was not an "employer" within the meaning of section 2 (2) even though (1) the enterprise at issue had a payroll separate from the member tribes, (2) day-to-day working conditions were set by non-tribal managers and supervisors, and (3) the consortium employed non-tribal member employees. Indeed, the Board has never held that nationality or ancestry of employees is material to the determination of "employer" status.

The Board followed its past precedent just over a year ago in a case involving amicus Mississippi Band of Choctaw. There, the Board denied review to the regional director's order dismissing the case under Fort Apache, "as it raises no substantial issues warranting review." Mississippi Band of Choctaw, Case No. 15-RC-8143 (Regional Dir. Decision and Order, Aug. 13, 1998), request for review denied, (N.L.R.B. Oct. 20, 1998), attached as Exhibit 6. Last year, the Board held that a tribal health consortium was not a "government" within the meaning of § 2(2) because it provided services off-reservation, Yukon Kuskokwim Health Corp., 328 N.L.R.B. No. 101, 1999 WL 419507 (N.L.R.B.) (1999), but in so holding the Board did not overrule or question its decisions recognizing tribal governments as exempt from the Act; rather, it followed its earlier decision in Sac & Fox Indus., Ltd., 307 N.L.R.B. 241 (1992), which held a

tribe to be an "employer" subject to the NLRA with respect to tribal operations off the reservation.

The Board's General Counsel recently affirmed to the United States District Court for the District of New Mexico and to the United States Court of Appeals for the Tenth Circuit that the Board does not assert jurisdiction over tribal employers on tribal land. Reply Brief for the N.L.R.B., Pueblo of San Juan, at 19 ("the Board does not assert jurisdiction over a tribe when it acts as an employer"), excerpts attached as Exh. 8 ; Reply of the N.L.R.B., Pueblo of San Juan, at 4 n. 4, ("the Board has not asserted jurisdiction over tribal employers on tribal land"), excerpts attached as Exh. 9. The General Counsel was obviously aware of the Tuscarora case when he made those assertions, because he represented to the district court that "[i]t remains consistent with Tuscarora [citation omitted] to apply the Labor Act to private employers [as opposed to tribal employers] on tribal land." Reply of the N.L.R.B., Pueblo of San Juan, at 4 n. 4.

The Board's refusal to assert jurisdiction over tribal employers was upheld in the only court case in which the Board's rulings were challenged. In Roberson v. Confederated Tribes of the Warm Springs of Oregon, 103 L.R.R.M. 2749 (D. Or. 1980), the court stated:

> The Labor Management Relations Act, 29 U.S.C. § 185(a), confers jurisdiction on federal courts to entertain "suits for violation of contracts between an employer and a labor organization..." "Employer" is defined for purposes of the act by 29 U.S.C. § 152(2). That provision specifically excludes federal and state governments. Fort Apache Timber Company, 226 Board 63, 93 L.R.R.M. 1297 (N.L.R.B. 1976), holds that an Indian tribe cannot be an employer under 29 U.S.C. § 152(2). The conclusion reached in Fort Apache is correct. The Confederated Tribes is not an employer for purposes of the LMRA.

Id. at 2751 (footnote omitted).

Since the Board first held that tribes were not covered as employers by the Act over thirty years ago, Congress has not seen fit to amend the Act to make tribes subject to it, although the

Board reported to Congress on the Fort Apache decision . N.L.R.B. 42d Ann. Rept. at 32, Exh. 10. In these circumstances, Congress should be deemed as having approved the Board's interpretation. "[A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." Kay v. Federal Communications Commission, 443 F.2d 638, 646-47 (D.C. Cir. 1970). Accord. NLRB v. Bell Aerospace Co. Div. of Textron. Inc., 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress").

Now, for the first time, the Board's General Counsel takes a different position, urging this body to impose the Act upon tribal governments based on a Supreme Court decision which predates all of the Board and court decisions that have held that tribes are not employers under the Act. As will be shown below, the Board's precedents recognizing tribes as exempt from the Act were decided correctly, and the Board should dismiss the instant complaint.

II. THE BOARD'S DECISIONS RECOGNIZING TRIBES AS GOVERNMENTS EXEMPT FROM THE ACT'S COVERAGE ARE CORRECT AND SHOULD NOT BE OVERRULED

A. Tribes Exercise All Inherent Sovereign Powers Which Have Not Been Expressly Divested by Congress

This country has always recognized Indian tribes as governments: "They have been uniformly treated as a state from the settlement of our country." Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831) Tribes have been and continue to be recognized as sovereign governments by all three branches of the United States government. See e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies. Inc., 523 U.S. 751 (1998) (tribal sovereign immunity); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribal power to tax); Fisher v. District Ct., 424 U.S. 382 (1976) (upholding exclusive tribal civil jurisdiction to adjudicate court cases involving only

tribal members and arising on tribal lands); Williams v. Lee, 358 U.S. 217 (1959) (reservation Indians have right to make their own laws and be ruled by them; non-Indian civil plaintiffs must sue tribal members in Tribal Court rather than State Court for on-reservation transactions); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (allowing tribes to assume control of federal governmental programs for benefit of tribal members); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2720 (tribal gaming; a purpose of Act is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" Id. at § 2702 (1)); Exec. Order No. 13084, "Consultation and Coordination with Tribal Governments", 63 Federal Register 27655 (May 14, 1998)(U.S. has recognized tribes as "domestic dependent nations" with the right to "self-government" and with "inherent sovereign powers"), reprinted in 25 U.S.C.A. § 450 note. In the Indian Tribal Justice Act, Congress declared:

> (1) there is a government-to-government relationship between the United States and each Indian tribe;
>
> (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
>
> (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
>
> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems; ....

25 U.S.C. §3601.

Congress may limit or withdraw tribal sovereign powers. "But until Congress acts, the tribes retain their existing sovereign powers." United States v. Wheeler, 435 U.S. 313, 323 (1978). The Court will not find that Congress intended to divest a tribe of its sovereign powers by implication but only where the Congress has made express its intention to do so by statute.

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In Santa Clara, the Court held that although the Congress had expressly imposed substantive restrictions on the governmental activities of Indian tribes in the Indian Civil Rights Act, 25 U.S.C. § 1301, et. seq. ("ICRA"), Congress had not expressly abrogated tribal sovereign immunity from civil lawsuits or expressly created a private right of action in federal court to sue tribes for violation of those restrictions; neither an intent to abrogate tribal immunity nor to subject tribes to federal court lawsuits could be "implied" from the ICRA. The holdings on these two issues were summarized by the Court as follows:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit."
>
> It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. ... In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.
>
> Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

Id. at pp. 58-59, 72 (citations omitted).

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Court upheld a tribal tax against the argument that the tribe's power to tax had been divested by Congress. "[T]he power to

tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." Merrion, 455 U.S. at 137 (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152 (1980)). The Merrion Court cautioned that it would not find a divestiture absent "clear indications" of Congress's intent to divest such power:

> [P]etitioners argue that Congress *implicitly* took away this power when it enacted the Acts and various pieces of legislation on which petitioners rely. Before reviewing this argument, we reiterate here our admonition in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978): "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

Id. at 149 (emphasis in original). The Court then considered the taxpayer's divestiture argument and rejected it, again emphasizing that any divestiture must be "clear":

> We find no "clear indications" that Congress has implicitly deprived the Tribe of its power to impose the severance tax. In any event, if there were ambiguity on this point, the doubt would benefit the Tribe, for "[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980).

Id. at 152.

Again, in County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992), the Court reaffirmed that "a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" Id. at 269 (citations omitted). This rule of statutory construction obviously undercuts the General Counsel's new position that the Congress implicitly intended the NLRA to apply to Indian tribes as employers.

Indian tribes' sovereign powers clearly extend to non-Indians for their actions within tribe's reservation boundaries. However, the extent of tribal government jurisdiction over non-Indians is more limited as regards the activities of non-Indian-owned fee lands (or their equivalent) within reservation boundaries than as regards non-Indian conduct on Indian lands. Montana v. United States, 450 U.S. 544 (1981); Williams v. Lee, 358 U.S. 217 (1959); Strate v. A-1 Contractors, 520 U.S. 438 (1997); El Paso Natural Gas v.. Neztosie, 119 S.Ct. 1430, 1436, n.4(1999).

The exercise of such governmental jurisdiction over tribal lands and over all persons entering upon tribal lands is a critically important and territorially based aspect of tribal sovereignty, whether the persons involved are members or non-members, Indians or non-Indians. Protecting tribal lands, controlling what activities are allowed there and providing for the maintenance of law, order, and the administration of justice on tribal lands go to the heart of what it means to be a sovereign. Williams v. Lee, 358 U.S. 217 (1959) (upholding right of reservation Indians to make their own laws and be ruled by them.). In Williams v. Lee, the Court held that the state courts of Arizona could not lawfully exercise their ordinary jurisdiction over a civil lawsuit filed by a non-Indian against a Navajo Indian for a cause of action arising in the Navajo Indian Country:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations....

Id. at 223 (citations omitted). To like effect are Babbit Ford. Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (upholding jurisdiction of Navajo Nation to enact and enforce Tribal

laws regulating activities of a non-Indian automobile dealership on tribal lands); Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985) (reaffirming that maintaining a police force and courts are critical components of tribal sovereignty).

The leading case for determining the circumstances under which a tribe may exercise its own civil jurisdiction over non-Indians for their activities within the tribe's territorial jurisdiction remains Montana v. United States, 450 U.S. 544 (1981). In Montana, the principal question was whether a tribe could exercise civil regulatory jurisdiction over non-Indians' conduct on non-Indian-owned fee land located within the exterior boundaries of the tribe's reservation. This situation has arisen in many western reservations which were opened up through various federal allotment or homestead laws to purchase by non-Indians, resulting in non-Indian ownership of some parcels within reservation boundaries.

Montana ruled upon two questions: (1) whether the Crow Tribe had jurisdiction to civilly regulate the activities of the non-Indian hunters on lands held in trust for the Tribes by the United States, and (2) whether the Tribe could civilly regulate the activities of non-Indian hunters on non-Indian-owned fee land located within Indian reservation boundaries. Montana 450 U.S. at 557, 564-567. The Court in Strate v. A-l Contractors, 520 U.S. 438 (1997), summarized the Montana holdings on these questions as follows:

> The Montana Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the Tribe. Id., at 557, 101 S. Ct., at 1254. The Court held, however, that the Tribe lacked authority to regulate hunting and fishing by non-Indians on lands within the Tribe's reservation owned in fee simple by non-Indians. Id. at 564-567,101 S.Ct, at 1257-1259.

520 U.S. at 446-47 (emphasis added).[3] The first question briefly touched on by the Court in Montana was the extent of tribal civil regulatory jurisdiction over non-Indians for their conduct on "land belonging to the tribe or held by the United States in trust for the Tribe." 450 U.S. at 557. The Court's answer to this first question was provided in what may be characterized as the secondary rule of Montana:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F.2d at 1165-1166, and with this holding we can readily agree.

Id. at 557.

The Court's ruling on the second question gave rise to what the Court has recently referred to as the "main rule" of Montana, and its exceptions. Strate v. A-1 Contractors, 520 U.S. at 453, 459 n.14. In Montana, addressing "the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe, 450 U.S. at 557, the Court stated:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

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[3] Strate held that state highway rights-of-way crossing into Indian Country should be treated as non-Indian owned fee lands for purposes of deciding which Montana rule to apply unless the right-of-way agreement expressly reserved tribal civil jurisdiction. Applying that rule, the Court held the Tribal Court was without jurisdiction to hear a civil tort claim between two non-Indians. The Court left undisturbed the ongoing Tribal Court tort claims brought by Indian parties against A-1 Contractors for injuries sustained in the same accident. Id. at 1408. The Court in Strate also held that a tribal court has adjudicatory jurisdiction over a non-member for events occurring on non-Indian owned fee lands or its equivalent only where the tribe has regulatory jurisdiction with respect to the matter at issue. Id. at 1413. The Court has since reaffirmed that this holding of Strate does not apply when the dispute in question involves non-Indian conduct on Tribal Trust lands. El Paso Natural Gas v. Neztsosie, 526 U.S. 473, 119 S.Ct. 1430, 1436, n.4 (May 3, 1999).

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. (citations omitted) No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe.

Id. at 565-66 (emphasis added.)[4]

Thus, under Montana and its progeny, tribal regulatory and adjudicatory jurisdiction over non-Indians for their activities on tribal lands remains intact, though tribal jurisdiction over non-Indians on fee lands depends upon the circumstances of the case. Thus, for example, tribes can tax non-members, Merrion, 455 U.S. 130 (1982) (oil and gas severance tax); Buster v. Wright,135 F. 947 (8th Cir. 1905) (permit tax for privilege of conducting business on reservation), app. dism'd, 203 U.S. 599 (1906), cited with approval in Strate, 520 U S. at 457; Morris v. Hitchcock, 194 U.S. 384 (1904) (permit tax on non-member-owned livestock); and Washington v. Confederated Colville, 447 U.S. 134 (1980) (sales tax); and tribal courts can hear cases involving non-members. Strate, 520 U.S. at 446.

A tribe's power over non-members "derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land." Babbit Ford. Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th

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4 The San Manuel Band's Casino is on tribal trust lands. It therefore falls within Montana's secondary rule of retained jurisdiction over non-Indians. Indeed, Congress has expressly recognized that tribes have jurisdiction over the conduct of gaming, whether by Indians or non-Indians, on Indian lands. IGRA provides that such gaming is lawful on Indian lands if certain requirements are met, including the enactment of a tribal ordinance regulating such gaming., 25 U.S.C. § 2710(b). Tribes must provide for the licensing by the tribe of all employees of the tribal gaming operation, whether those employees are Indian or non-Indian. Id- § 2710(b)(2)(F)(ii). 25 CFR § 522.4{b)(5) §558.1(b).

Cir. 1983), (citing Merrion, 455 U.S. at 141-44), cert. denied, 466 U.S. 926 (1984). See Metlakatla Indian Community v. Egan, 369 U.S. 45, 49 (1962) (Metlakatla Indian Community [amicus herein] may exclude others from reservation); Ouechan Tribe of Indians v. Rowe, 531 F.2d 408,410-11 (9th Cir. 1976). The power to exclude non-members includes the power "to place conditions on entry, on conditioned presence, or on reservation conduct... ." Merrion, 455 U.S. at 144. A non-member who enters a reservation remains subject to the tribe's power to exclude, and its lesser included power to regulate his conduct. Id. at 144-45.

B. Application of The National Labor Relations Act Would Infringe Tribal Sovereignty

If the Board were to hold that a tribe is an "employer" under § 2(2) in the circumstances presented here, tribes would be subject on their reservations to all of the requirements of the Act applicable to private employers - unlike all other governments, all of whom have been excluded from treatment as an employer because of the recognition that subjecting a government to the Act's requirements would infringe on the government's sovereignty and its ability to govern and to provide services. If the Act applies to tribes under the circumstances here, then tribal governmental employees (both tribal members and non-members alike) will have the right, inter alia, (1) to self-organize, (2) to form, join, or assist labor organizations, (3) to bargain collectively about wages and working conditions through representatives of their choosing, and (4) to engage in concerted activities, including strikes. The tribal employer would be obligated not to interfere with these rights. Among other things, tribes may be precluded from exercising their sovereignty to determine the conditions of use or entry by the public, including union representatives, on the reservation. These employee rights and employer obligations clearly infringe upon the sovereign powers of tribes, in several ways.

Application of the Act to tribes on their lands would infringe upon tribes' fundamental right to "make their own laws and be ruled by them." Williams v. Lee, 358 U.S. The Act would apply to both non-tribal member and tribal member employees, and would preempt tribal laws that were inconsistent with the Act. Tribal members working for their own tribes could find themselves in the minority in a union dominated by non-tribal persons or employees whose only interest is in the terms and conditions of their employment, and not with the tribe as a sovereign government or the mission of the tribal program they serve.

Application of the Act to Tribes on their lands could impinge upon tribes' rights to decide whom to hire, and upon what terms and conditions, in violation of tribes' inherent sovereign rights and federally-approved tribal constitutions. The Constitution of the Mississippi Band of Choctaw In invested in it by existing law, the power to:

- Negotiate and enter into agreements with governments, private persons (including employees) and corporate bodies;
- Establish procedures for the conduct of all tribal government and business operations;
- Appropriate available tribal funds for the benefit of the Tribe or any its communities, approve or disapprove operating budgets submitted by the Tribal Chief, and approve or disapprove all allocations or disbursement of tribal funds;
- Create or provide for the creation of organizations for any lawful purpose, including public and private corporations, whether for-profit or non-profit, and to regulate the activities of such organizations;
- Promote and protect the health, peace, morals, education, and general welfare of the Tribe and its members; and

- Establish policies relating to tribal economic affairs and enterprises in accordance with the Constitution and Bylaws.

Art. VIII, attached as Exh. 12.

The democratically elected-Tribal Chief possesses executive powers and duties under the Constitution to:

- Negotiate agreements with governments, private persons (including employees), or corporate bodies, and to submit such agreements to the Tribal Council for approval;
- Manage, administer, and direct the operations of the Tribal programs, activities, and services, and to report to the Tribal Council the status of each program at least annually.

Art IX, attached as Exh. 12.

The Choctaw Constitution was approved by the United States Department of the Interior pursuant to Section 16 of the Indian Reorganization Act, 48 Stat. 984 ("IRA"), codified as amended at 25 U.S.C. § 476.[5] That constitution informs and "supplement[s]" the tribe's inherent powers. Ouechan Tribe. 531 F.2d at 411.

Requiring tribes to deal with unions as the exclusive representative of tribal employees would undermine tribes' efforts to provide full or increased employment to tribal members through the creation of jobs and the grants of preferences to tribal members in hiring. Unemployment on reservations vastly exceeds that of the rest of the United States. According to the Bureau of Indian Affairs, 50% of Indians residing in Indian country were unemployed in 1997 (the last year for which B.I.A. figures are available). United States Department of the

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5 The purpose of IRA Section 16 was to encourage Indians to revitalize their self-government. Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977). cert denied. 439 U.S. 820. This purpose of Section 16, enacted in 1934, belies General Counsel's argument that Congress intended to impose the NLRA on tribal governmental employees when it enacted the NLRA.

Interior, Bureau of Indian Affairs, 1997 Labor Market Information on the Indian Labor Force, at 4, excerpts attached as Exh. 11. Of those that were employed, 30 percent were living below the federal poverty guidelines. Id. One of the goals of tribes is to provide jobs to their members. Very often, a tribe is the primary employer on the reservation. Tribal businesses are often a break-even proposition, existing more to provide tribal employment than to make a profit.

The United States has recognized and encouraged tribal programs to increase employment of tribal members in several ways. Congress exempted tribes from Title VII of the Civil Rights Act, which prohibits discrimination based on race or national origin (among other things). 42 U.S.C. § 2000e-2(a). See Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986) (tribal consortium is a "tribe" exempt from Title VII); Barnes v. Bristol Bay Area Health Corp., No. A92-459 (D. Alaska, filed Ap. 20, 1993) (amicus BBAHC is a "tribe" exempt from Title VII). Federal law requires that any contract or grant with Indian organizations Stat. or for the benefit of Indians

> shall require that to the greatest extent feasible -
>
> (1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
>
> (2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises ....

25 U.S.C. § 450e(b); see also 25 U.S.C. § 450e(c)(notwithstanding § 450e(b), with respect to a "self-determination" contract, tribal employment preference laws shall govern).

The Act excludes from its coverage all other governmental employees. Although federal employees and many state employees have been granted similar rights pursuant to other laws, e.g.. Federal Service Labor - Management Relations Act, 5 U.S.C. §§ 7101 et seq., employees'

rights under those laws are not as extensive, nor are those laws as intrusive to the governments. Federal employees and most state employees generally do not have the right to strike, for example. See 5 U.S.C. §§ 7116 (b)(7), 7311; Michael A. DiSabatino, *Who Are Employees Forbidden To Strike Under State Enactments or State Common-Law Rules Prohibiting Strikes By Public Employees or Stated Classes of Public Employees, 22* A.L.R. 4th 1103 (1983); James Duff, *Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage,* 37 A.L.R. 3d 1147 (1971). Public employees are restricted from striking because strikes against the government are "contrary to the notion of government," and because a governmental activity "is usually undertaken by the government precisely because it is critically important to a large segment of the public, and the public is therefore especially vulnerable to 'blackmail' strikes by workers in this field." Virgin Islands Port Auth. v. SIU de Puerto Rico, 354 F.Supp. 312, 313 (D.V.I. 1973) (court enjoined strike by employees of Port Authority).

Tribes provide the same services and functions as do state and local governments (albeit with far fewer resources). Tribes have executive, legislative, and judicial bodies; operate schools, health clinics, and hospitals; provide police and fire protection; pay welfare and other governmental benefits to their members; collect taxes for die operation of their programs; operate public housing projects; and operate tribal businesses to raise money for tribal programs.

A strike would be just as disruptive to a tribe (if not more so) as it would be to any other governmental body.

C. *Tuscarora* and its Progeny Are not to the Contrary

1. Tuscarora is Distinguishable

The General Counsel relies on the dicta in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960) that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary" to support his argument that this Board should abandon Fort Apache and assume that the Congress intended the NLRA to extend to Indian tribes as employers. The holding in Tuscarora, however, was that the Congress in the Federal Power Act had expressly addressed and determined the extent to which the eminent domain powers conferred in the Act would apply to Indian lands and had expressly authorized the exercise of those powers against tribally owned fee lands without the necessity of making a finding required by the Act as a precondition to the condemnation of "reservation" lands. The Court held that because the tribe's fee lands were not a "reservation" as defined by the Act, which definition included only Indian lands owned by the United States, the government could condemn the lands. Id. at 110-15.

The Tuscarora Court then rejected the argument that 25 U.S.C. § 177 (which prohibits voluntary and involuntary transfers of Indian lands without Congressional consent) barred a Congressionally authorized exercise of eminent domain powers and, in the alternative, held that "§ 177 does not apply to the United States itself" or to acquisitions expressly authorized by federal statute. Id. at 118-24. In reaching the holding, the Court did state, in dicta, that "a general statute in terms applying to all persons includes Indians and their property interests." Id. at 116. In neither Tuscarora, however, nor in the cases cited in support of the dicta, were tribal sovereign powers at issue. Tuscarora itself dealt with tribal property, and in the context of a statute that plainly applied to reservation lands. The cases relied on by Tuscarora for its dicta involved the application of statutes to Indian individuals, id. at 116- 17, discussing Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935) (individual Indian subject to federal

income tax) and Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943) (restricted Oklahoma Indian subject to state inheritance and estate taxes), and in no way involved tribal sovereignty.

The linchpin of Counsel's argument and indeed of each of the federal appellate court decisions relied upon by him is dicta pure and simple, dicta which cannot be squared with the rule that Congressional abrogation of the powers and prerogatives of Indian tribes will not be implied, but must be expressly provided for in a federal statute.

2. Cases Decided Since Tuscarora Support Amici's Position

A number of courts have distinguished Tuscarora in cases involving the application of federal employment laws to Indian tribes, and have held that the laws do not apply to tribes because such application may not be implied from Congressional silence on the matter. E.g., EEOC v. Fond du Lac Heavy Equip. and Constr. Co., 986 F.2d 246 (8th Cir. 1993) (Age Discrimination in Employment Act, 29 USC § 621 et seq. does not apply to Indian tribes); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (ADEA does not apply to Indian tribes as employers); Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982) (Occupational Safety and Health Act does not apply to Navajo Tribe as employer). See, also, Reich v. Great Lakes Indian Fish and Wildlife Com'n, 4 F.3d 490 (7th Cir. 1993)(tribal police force is implicitly exempt from coverage under §207(k) of the Fair Labor Standards Act as "public agency").

In Donovan v. Navajo Forest Products Industries ("NFPI"), the court considered the application of the Occupational Safety and Health Act, 29 U.S.C. §651 et seq. ("OSHA"), to a tribal business enterprise that was "an arm or instrumentality of the Tribal government." 692 F.2d at 709. The business was operated by the tribal government, and its purposes were "to expand the enterprise into a fully integrated timber conversion facility, provide employment for

the Navajo people, provide additional income to the Tribe and generally promote the advancement of social, economic and educational goals for the Navajos." Id. The court held (1) that the application of OSHA to the tribal enterprise would abrogate the tribe's right to exclude non-members, a right confirmed by treaty, and (2) that such abrogation could not be implied from silence as to the issue in OSHA. Id. at 712-13. Responding to the Secretary of Labor's argument that, under Tuscarora. OSHA applied to tribal employers, the court questioned the continued vitality of the Tuscarora dictum in light of Merrion: "Merrion, in our view, limits or, by implication, overrules Tuscarora.... at least to the extent of the broad language relied upon by the Secretary contained in Tuscarora ...." Id. at 713. See also Cherokee Nation, 871 F.2d at 938 n.3 (questioning Tuscarora).

As further grounds for their decisions, the courts in both NFPI and Cherokee Nation also distinguished Tuscarora on the grounds that treaty rights were involved in those cases. NFPI, 692 F.2d at 711; Cherokee Nation, 871 F.2d at 938 n.3. The rule protecting tribal sovereignty does not require a specific treaty right, however; "[although the specific Indian right involved usually is based upon a treaty, such rights may also be based upon statutes, executive agreements, and federal common law." Fond du Lac Heavy Equip. and Constr. Co., 986 F.2d at 248. Thus, in Fond du Lac, the court found that the application to the tribal enterprise of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), would infringe upon tribal sovereignty even in the absence of an express treaty right. The court stated that the Tuscarora dictum "does not apply when the interest sought to be affected is a specific right reserved to the Indians." 986 F.2d at 248. The court held that the tribe's power to make its own laws and its right to self-government would be infringed by application of the ADEA. Id. at 248-49.

In Great Lakes Indian Fish & Wildlife Com'n, 4 F.3d 490 (7th Cir. 1993), the Seventh Circuit held that tribal police forces were implicitly exempt from coverage under §207(k) of the Fair Labor Standards Act ("FLSA") as "public agencies" engaged in law enforcement activities although the statute made no mention of tribes. Judge Posner, writing for the court, held that the Department of Labor's invocation of the "plain meaning" doctrine was parried by the rule requiring construction of treaties and statutes in favor of the Indians. Id. at 493. The Department did not offer, and the court did not find, any basis for disparate treatment of tribal and other police. Finding that the omission of tribal police was due to "oversight" by Congress, id. at 494 & 496, the court refused to read the statute literally to exclude tribal police officers: "[t]he idea of comity — of treating sovereigns, including such quasi-sovereigns as states and Indian tribes, with greater respect than other litigants — counsels us to exercise forbearance in construing legislation as having invaded the central regulatory functions of a sovereign entity." Id. at 494-95. "Comity argues for allowing Indians to manage their own police as they like, even though no treaty confers such prerogatives, until and unless Congress gives a stronger indication than it has here that it wants to intrude on the sovereign functions of tribal government." Id. at 495 (emphasis added). Accordingly, the Seventh Circuit held Indian tribal governmental employees to be exempt from coverage under the FLSA in the absence of "a stronger indication" from Congress, 4 F.3d 490, 495.

These cases support the Board's past rulings exempting tribes from the NLRA.

3. Couer d'Alene and Its Progeny are Distinguishable or Wrongly Decided

The General Counsel ignores the decisions in Fond du Lac. EEOC v. Cherokee Nation, and NFPI, and relies upon Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), and cases following it. E.g., Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996)(OSHA applied to tribal construction business); Dept. of Labor v. OSHRC, 935 F.2d 182

(9th Cir. 1991)(applying OSHA to tribal sawmill); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) (ERISA applied to tribal health center employees' group health policy). The Board should not follow these cases because they do not adhere to binding Supreme Court precedent regarding tribal sovereignty and divestment of tribal sovereignty, and because they are distinguishable.

Coeur d'Alene Tribal Farm ("Coeur d'Alene") and its progeny err in that they take a very constrained reading of tribal sovereignty. They look to treaties for a grant of sovereignty. Coeur d'Alene, 751 F.2d at 1117; Reich, 95 F.3d at 177, even though tribal sovereign powers are inherent. Wheeler, 435 U.S. at 322-23. They acknowledge that tribes have rights to self-government apart from treaty rights, and that such rights constitute an "exception" to the Tuscarora dictum, but they state that the exception for such rights are limited to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." Coeur d'Alene, 751 F.2d at 1116. Accord OSHRC, 935 F.2d at 184; Smart, 868 F.2d at 932; Reich, 95 F.3d at 179. This holding cannot be squared with the rights to self-government, including the exercise of civil regulatory and adjudicatory jurisdiction over non-Indians, enjoyed by tribes and recognized by the Supreme Court in cases such as Santa Clara Pueblo, Kiowa Tribe, Merrion, Montana and Williams v. Lee.

According to Coeur d'Alene and its progeny, the operation of a tribal business is not an aspect of self-government, e.g., Coeur d'Alene 751 F.2d at 1116, even if the tribe operates the business as an arm of the tribal government, and even if the "revenue from the [business] is critical to the tribal government...." OSHRC, 935 F.2d at 184. This clearly goes too far, both in general and as applied in the instant case. In Merrion, the Court recognized that raising revenues are essential to running a tribal government. 455 U.S. at 137; see also id. at 138-39 n.5 ("We

agree with [the circuit court opinion] that '[I]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers ... .'").

Unfortunately, tribes have insufficient tax bases to meet their revenue needs. Therefore, like other governments, Indian tribes must rely on running tribal businesses to raise revenue.[6] A tribal business raising "critical" revenues for the operation of tribal programs is just as much a governmental function as is tax collection, or the operation of a state lottery to raise revenues for state programs. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987); see also id. at 216 (speaking of the federal government's "'overriding goal' of encouraging tribal self-sufficiency and economic development"). See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983) (similar); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 201 (1985) (Indians' power to tax is "an essential attribute" of Indian self-government since it enables Navajos to gain independence from federal government by financing tribal programs with tribal revenues).

Party-in-interest San Manuel Band operates its casino pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.("IGRA"). The primary purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments ... ." 25 U.S.C. § 2702(1). IGRA requires that net revenues from tribal gaming be used only for the following purposes:

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6 Many of the States run businesses. For example, most states operate lotteries. Some states (e.g., New Hampshire, Virginia) have a monopoly on the sale of liquor. Employees of state lotteries and liquor stores, of course, are not covered by the NLRA.

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund the operations of local government agencies.

25 U.S.C. § 2710(b)(2)(B). This serves to distinguish this case from Coeur d'Alene and its progeny, in that Congress has specifically provided for the operation of tribal casinos to raise funds necessary for governmental programs. Thus, here, at least, the employer-employee relationship should be deemed an "internal matter." See Penobscot Nation v. Fellencer, 164 F.3d 706, 708 (1st Cir. 1999) (firing of community health nurse funded under government program was an "internal tribal matter," and nurse could not sue under state law, notwithstanding that "with very limited exceptions, the Nation is subject to the laws of Maine"), cert. denied, 119 S. Ct. 2367(1999).[7]

Moreover, the Mashantucket Sand & Gravel, decision rests upon a fatally flawed reading of Montana v. United States — a reading later expressly rejected by the Supreme Court. One of the key analytical underpinnings of Mashantucket Sand & Gravel, was the Court's misapprehension that Tribes do not presently retain their sovereign authority over non-Indians within their reservations:

> Limitations on tribal authority are particularly acute where non-Indians are concerned. . . . The Supreme Court has recognized that

7 We concur in San Manuel Band's argument that IGRA totally preempts any regulation of tribal labor relations by the Board with respect to tribal gaming operations. In further support of that argument, we note that the National Indian Gaming Commission, which has approval authority over agreements between tribes and others for the management of a tribal casino, 25 U.S.C. §27] 1, requires by regulation that such contracts set out "the responsibilities for each of the parties for... [hjiring, firing, training and promoting employees,... (establishing and administering employment practices, 25 CFR §531.1(b)(3)&(12), and that it "(cjontain a mechanism to resolve disputes between ... the management contractor and the gaming operation employees." Id- §531.1(k). These regulations leave no room for the application of the NLRA to tribal casinos managed by a third party.

> tribal "inherent sovereign powers ... do not extend to the activities of nonmembers of the tribe." Montana, 450 U.S. at 565, 101 S. Ct. At 1258: see also A-l Contractors v. Strate, 76 F.3d 930, 939 (8th Cir. 1996) [affd, 520 U.S. 438]. This is so because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . ." Montana, 450 U.S. at 564, 101 S.Ct. at 1258.

Mashantucket Sand & Gravel, 95 F.3d at 180.

As shown at pages 18-20 Montana actually articulated two different rules respecting the extent of tribal jurisdiction over non-Indians within their reservation boundaries. A "main" rule that limits (but does not eliminate) tribal jurisdiction over non-Indians for their activities on non-Indian-owned fee land within reservation boundaries, and a "secondary" rule that leaves intact the tribe's inherent jurisdiction over non-Indians for their actions on tribal trust or other reservation lands. Thus, the core premise of Mashantucket Sand & Gravel, was wrong, leaving nothing to support the court's erroneous view that finding OSHA applicable to tribal employees would not cause any interference with the tribes' retained sovereignty, a view premised on the court's misconception that Indian tribes do not retain civil jurisdiction over non-Indians after Montana.

Coeur d'Alene and its progeny also err in not recognizing the provision of jobs to tribal members as a governmental function. It is the function of every government to provide for the good of its citizens. The majority of tribal members residing on reservations are unemployed or underemployed. B.I.A, 1997 Labor Market Information on the Indian Labor Force, at 4, excerpts attached as Exh. 11. It is the obligation of the tribal governments to provide employment for these members. Indian tribes do not have the means to provide employment that are available to the United States and state governments. They cannot adjust interest rates to spur employment. They cannot lure employers to the reservations through tax breaks, since they cannot exempt

employers from federal or state taxes that are otherwise applicable. The principal tool available to them is the creation of tribal businesses.

Coeur d'Alene and its progeny are also distinguishable in that the statutes involved there (ERISA and OSHA) "do[] not broadly and completely define the employment relationship." Smart, 868 F.2d at 935 (ERISA). By comparison, the NLRA grants and imposes significant rights on employees and employers, including collective bargaining on terms and conditions of employment. Moreover, though the "general" right of the tribe to exclude non-members was deemed not to apply to OSHA inspectors in OSHRC, 935 F.2d at 185-87, a tribe's right of exclusion would certainly be held to apply to union organizers seeking to organize tribal employees who are not agents of the federal government enforcing or investigating federal law.

Thus, Coeur d'Alene and its progeny rely on dicta from Tuscarora, and simply ignore the controlling Supreme Court case law forbidding the courts from finding that the Congress has implicitly restricted or infringed upon the inherent governmental prerogatives of Indian tribes without an express or clear indication that the Congress intended to do so. Santa Clara Pueblo, 436 U.S. 49 (1978); Kiowa, 523 U.S. 751 (1998); Confederated Colville Tribes, 447 U.S. 134, (1980); Merrion 455U.S. 130 (1982): Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9. 17(1987) (court rejected argument that federal diversity statute preempted tribal court jurisdiction where that statute "makes no reference to Indians and nothing in legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government"); Burlington Northern R.R. Co., 924 F.2d 899, 905 (9th Cir. 1991) (rejecting claim that "silence" regarding Indian tribes in comprehensive regulatory scheme and legislative history of federal statute implicitly preempted tribal sovereignty on basis there was no "clear indication" of congressional intent to preempt inherent tribal sovereignty).

Similarly, although federal tax laws apply to individual Indians as taxpayers, e.g., Superintendent of Five Civilized Tribes, 295 U.S. 418, cited with approval in Tuscarora, 362 U.S. at 116, the Indian individual taxpayer cases have never been held to apply to Indian tribes. Instead, the Internal Revenue Service has consistently held that Indian tribes are not taxable entities under the Internal Revenue Code, even though nowhere in the Code are Indian tribes (or their federally chartered corporations) expressly exempted from federal income taxes. Rev. Rul. 67-284, 1967-2 C.B. 55. In fact, the IRS has ruled that federally-chartered tribal corporations are exempt from income tax, Rev. Rul. 81-295, 1981-2 C.B. 15, even though the Code imposes a tax on all "corporations," 26 U.S.C. §11, and even though tax exclusions must be construed narrowly in favor of taxation. Harbor Bancorp & Subsidiaries v. C.I.R., 115 F.3d 722 (9th Cir. 1997), cert. denied 520 U.S. 1108 (1998). It is impossible to reconcile the Internal Revenue Service's construction of the Tax Code with the new construction of § 2(2) urged by the General Counsel.

D. The Board's Decisions Concerning On-Reservation Tribal Government Employers Are Consistent with Decisions Involving U.S. Territories

Section 2(2) of the Act expressly exempts the United States and "any State or political subdivision thereof" from the definition of employer. No reference is made to "territories", "possessions," or "commonwealths". Compare NLRA § 2(6), 29 U.S.C. § 152(6) (defining "commerce" to include commerce with "any Territory"), §§ 14(b) and (c) 29 U.S.C. §§ 164(b) and (c) (State and "Territory"). Nonetheless, the Board and the courts have held that the Commonwealth of Puerto Rico, the Virgin Islands, and their subdivisions, are not "employers" within the meaning of section 2(2) and are therefore not covered by the Act. Chaparro-Febus v. Internat'l Longshoremen Ass'n, 983 F.2d 325 (1st Cir. 1993) (government agency of Commonwealth of Puerto Rico held exempt from NLRA as a subdivision, using the test employed in NLRB v. Natural Gas Util Dist. of Hawkins Cnty., 402 U.S. 600

(1971)("Hawkins")): Compton v. National Maritime Union, 533 F.2d 1270, 1274(1st Cir. 1976)(NLRB conceded that Puerto Rico Maritime Shipping Authority was "a 'political subdivision' exempt from the Act"); Virgin Islands Port Auth. v. S1U de Puerto Rico, 354 F.Supp. 312 (D.V.I. 1973)(court concluded that Virgin Islands Port Authority was "a bona fide government agency or instrumentality" under Hawkins, and therefore exempt from the Act); Letter from Associate General Counsel Robert Allen to Mary Zelma Asseo, Regional Director, re Sociedad Para Asistencia Legal, Inc., Case No. 24-CA-6517, 1992 WL 340634 (N.L.R.B.G.C.) (Oct. 30, 1992)(finding that legal assistance organization was not a subdivision of Puerto Rico, employing the Hawkins test); see also Saipan Hotel Corp. v. N.L.R.B., 114 F.3d 994 (9th Cir. 1997) (court holds that hotel is not controlled by government of the Commonwealth of the Northern Mariana islands, but does not question application of Section 2(2)'s government exception to the commonwealth government).

The Commonwealth of Puerto Rico, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands are no more States of the Union than are Indian tribes. See Examining Bd. v. Flores de Otero, 426 U.S. 572, 596 (1976) ("Puerto Rico occupies a relationship to the United States that has no parallel in our history."); see also id. at 606 , 607 (Rehnquist, J., dissenting) ("Puerto Rico is not a State."). It is impossible to reconcile the Board and the courts' broad reading of Section 2(2) vis-a-vis territorial and commonwealth governments with the General Counsel's constrained reading of the section with regard to tribal governments. Reading Section 2(2) of the NLRA in the manner urged by the General Counsel "would create a senseless distinction between Indian [governmental employees] and all other public [employees]." Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d at 494. Indeed, the Board is required to recognize and protect the Tribe's sovereignty as a governmental employer. Parravano v. Babbitt, 70 F.3d

539, 546 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996)(every federal agency bears a fiduciary obligation to tribes).

E. The Rule Urged by the General Counsel Would Require this Board to Inquire Into the Legal and factual Circumstances of Tribal Employment, and Would be Unworkable

The Board's current rule as announced in Fort Apache, which recognizes that tribes are governments exempt from the Act on their own lands, is clear and workable. Were the Board to accept the General Counsel's argument to overrule Fort Apache, the result would be increased, and possibly inconsistent rulings concerning the circumstances under which the NLRA applies to tribes. The federal courts of appeals disagree on the meaning of Tuscarora, which could potentially lead to different results in different circuits. More problematically for the Board, it would have to make a particularized inquiry into the facts and applicable legal authorities of every case involving an Indian tribe to determine the application of the Act to different tribes in different circumstances. The Board would need to inquire into (1) the nature of the tribal program; (2) whether treaty rights are involved; (3) the scope and nature of those rights; (4) the existence, scope and nature of any rights under federal statutes or executive orders; (5) whether the asserted rights conflict with contract, grant, agreement or self-governance compact between tribe and federal government (e.g., under the ISDEAA, 25 U.S.C. § 450 et seq.): (6) whether the asserted rights conflict with any agreement between a tribe and a third party approved by government (such as a management agreement or gaming compact approved under the IGRA, 25 U.S.C. §§2710, 2711, or an agreement approved under 25 U.S.C. § 81); and (7) whether the matter is "intramural."

Moreover, some state laws recognize state tribes or recognize tribes as municipalities or subdivisions, thus clearly taking those tribes within the language of Section 2(2). E.g., Alaska Stat. §§ 29.60.350-29 .60.375; Alaska Stat. § 29.60.365 (municipal assistance program;

municipality includes "Indian reserve" meeting certain criteria); Alaska Stat. Ann. §§ 18.55.995-18.55.998 (regional native housing authorities); Fla. Stat. Ann. §§ 285.17-285.18 (Seminole and Miccosukee tribal lands constitute special improvement district under state law, with tribes as governing bodies); Me.Rev.Stat. tit. 30, § 6206(1)(Passamoquoddy and Penobscot tribes "shall have ... the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality ....") N.Y. Indian Law Title 25 (McKinney 1950 and 1999 Supp.) (entire title regarding N.Y. tribes); Okla. Stat. Ann. tit. 63, § 1057 (tribal housing authorities); see United States v. Crossland, 642 F.2d 1113, 1114-5 (10th Cir. 1981) (tribal housing authority's creation under state statute did not preclude characterization as a tribal organization). Tribes also exercise functions delegated by state governments and their subdivisions (e.g., through cross-deputization agreements). The Board would have to consider this issue as well.

In short, overruling Fort Apache will lead the Board into a morass. The Board should not overrule a thirty-year old precedent that provides a clear rule to all parties. Any change should be for Congress to make.

III. THE CASE SHOULD BE DISMISSED BECAUSE SAN MANUEL BAND, AN INDIAN TRIBE, ENJOYS SOVEREIGN IMMUNITY

In the alternative to the controlling decision in Fort Apache, San Manuel Band possesses sovereign immunity from unconsented civil lawsuits or administrative proceedings, except where Congress has expressly abrogated that immunity or the tribal government has unequivocally waived that immunity. Santa Clara Pueblo, 436 U.S. at 58-59; Confederated Colville Tribes, 447 U.S. 134 (1980). This tribal sovereign immunity extends to commercial as well as to non-commercial activities of the Tribe. See Kiowa Tribe of Oklahoma v. Manufacturing Technologies. Inc., 523 U.S. 751 (1998): see also, Maryland Gas. Co. v. Citizens Nat'l Bank, 361

F.2d 517, 521 (5th Cir. 1966) cert. denied, 385 U.S. 918 (1966), ("The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material."); American Indian Agric. Credit Consortium. Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378-79 (8th Cir. 1985) (tribe's sovereign immunity not waived by virtue of engaging in business). Sovereign immunity waivers can never be implied, but must be unequivocally expressed. Santa Clara Pueblo, 436 U.S. at 58-59.

Tribal sovereign immunity bars a private suit against a tribe under the Act. Roberson, 103 LRRM at 2750. Tribal sovereign immunity bars administrative actions such as this one. See Wampanoag Tribe of Gay Head v. Massachusetts Com'n. Against Discrimination, 63 F.Supp. 2d 119 (D. Mass. 1999). In Wampanoag Tribe, the federal district court enjoined a discrimination action brought against the tribe by an individual before a state agency even though a federal statute limited tribal sovereignty and extended state civil and criminal laws to the tribe's lands. Id. at 123-24 (discussing 25 U.S.C. §§ 1771e(a), 1771g). " In view of the absence of a clear and unequivocal expression by Congress of an intention to abrogate the sovereign immunity of the Tribe, the court holds that the Tribe retains its traditional sovereign immunity from the exercise by Massachusetts of jurisdiction over the Tribe." Id. at 125. The court therefore enjoined the agency from going forward with the case, and enjoined the claimant from pursuing the case. Id. See also United States v. James, 980 F.2d 1314, 1319-20 (9th Cir. 1992) (district court correctly quashed subpoena against tribe in federal criminal action).

Even if certain substantive provisions of the NLRA were deemed applicable to Indian tribes, that would not ipso facto give the Board jurisdiction to enforce those provisions against Indian tribes. The questions of what federal law applies and of how that federal law can be enforced are entirely different questions. An affirmative answer to the first does not permit a

federal agency to infer an implied waiver of sovereign immunity to support an affirmative answer to the second. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 at 509-515 (1991) (even though tribes had duty under federal and state law to remit certain taxes to state, Tribe's sovereign immunity prevented state from taking direct action against tribe to enforce tax collections); Santa Clara Pueblo, 436 U.S. at 58-59 (Indian Civil Rights Act imposed substantive standards of governmental conduct on Indian tribes but did not waive tribal sovereign immunity; hence tribes could not be sued in federal courts for violating ICRA).

CONCLUSION

The Board should dismiss the complaint because San Manuel Band, an Indian tribe, is not an "employer" under Section 2(2) of the Act. The Board should not overrule its decision in Fort Apache, but instead should reaffirm that Indian tribes are not subject to the Act in regard to their on - reservation activities.

Respectfully submitted,

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