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

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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COMMUNICATION WORKERS OF AMERICA, AFL-CIO, CLC,
Party in interest

FEBRUARY __, 2000

STATE OF CONNECTICUT,
Intervenor

BRIEF OF AMICI INDIAN TRIBES IN SUPPORT OF SAN MANUEL BAND'S MOTION TO DISMISS

The Amici described below are federally recognized Indian tribes and all employ workers in various positions throughout their tribal government and enterprises located within the boundaries of their respective tribal lands. Amici Tribes were granted leave to file this amicus brief by Order of the Board dated February 10, 2000.

Amicus MOHEGAN TRIBE OF CONNECTICUT is a federally-recognized Indian tribe occupying a reservation within the State of Connecticut (25 U.S.C. §§ 1775). The Mohegan Tribe governs itself pursuant to its Constitution which was ratified by the Tribe as amended on April 12, 1996. (Exhibit A).

Amicus MASHANTUCKET PEQUOT TRIBAL NATION is a federally-recognized Indian tribe possessing a reservation within the State of Connecticut. 25 U.S.C. §1758. The Mashantucket Pequot

Tribal Nation governs itself pursuant to its Constitution and By-Laws, which were approved by the United States Department of the Interior on October 18, 1983. (Exhibit B).

Amicus PASCUA YAQUI TRIBE OF ARIZONA is a federally-recognized Indian tribe having a reservation in the State of Arizona. The Pascua Yaqui Tribe governs itself pursuant to its Constitution and By-Laws, adopted by the Tribe's members on January 26, 1988 and approved by the United States Department of Interior on February 8, 1988. (Exhibit C).

All Amici Tribes currently operate tribal gaming operations on their lands pursuant to the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. §§ 2701 et seq.

SUMMARY OF ARGUMENT

Application of the National Labor Relations Act ("NLRA") to tribal businesses on reservations would violate legal principles of tribal sovereignty and self determination. The Board correctly decided that it does not have jurisdiction over such enterprises in Fort Apache Timber Co., 226 NLRB 503 (1976) and in subsequent decisions. Neither the dicta in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) ("Tuscarora"), which predates Fort Apache, nor subsequent federal court decisions interpreting Tuscarora, compel or legally authorize the result sought by the General Counsel. In fact, in a subsequent decision, the U.S. Supreme Court has sharply limited Tuscarora in a manner wholly inconsistent with application of NLRA jurisdiction to tribal enterprises located on reservations.

Fort Apache remains valid and practical authority nearly 25 years after it was decided. A decision to overturn Fort Apache would conflict completely with the exercise of tribal sovereignty in the areas of tribal control of property, legislation of internal tribal affairs including employee relations, jurisdiction of tribal courts, and preference in employment of tribal members. Decisions of several federal courts applying

employment regulatory statutes such as OSHA and ERISA to tribal enterprises located and operating on reservations conflict with Supreme Court decisions and do not compel that Fort Apache be overturned. Unlike the NLRA, these other employment regulatory statutes, to the extent they are conclusively held to apply to tribes, would impose federal standards on tribal employers. They would not, as would the NLRA, force tribal employers to deal with third parties in their relations with employees and they would not jeopardize exercise of tribal employment preferences. Those other statutes would not create conflicts with tribal court jurisdiction, preempt normal tribal legislative processes, or implicate tribes' authority to limit access to tribal property by non-governmental outsiders.

ARGUMENT

I. TRIBES ARE RECOGNIZED BY THE UNITED STATES AS SOVEREIGN GOVERNMENTS WITH INHERENT GOVERNMENTAL POWERS, INCLUDING THE POWER TO ENACT LAWS GOVERNING THEIR EMPLOYMENT RELATIONSHIPS

The United States Supreme Court has long and consistently recognized that "Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive ...." Worcester v. Georgia, 31 U.S. 515, 557 (1832). The recognition of Indian tribes as sovereign governments possessing inherent governmental authority continues today. 25 U.S.C. §3601 (Indian Tribal Justice Act). This inherent authority encompasses the power to exercise civil and criminal jurisdiction over tribal territory, and to make and enforce tribal laws. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978) (noting that Indian tribes "have the power to make their own substantive laws in internal matters and to enforce that law in their own forums"); see also United States v. Wheeler, 435 U.S. 313, 326 (1978).

Many, if not most, Indian tribes recognized as such by the Department of the Interior have exercised their inherent governmental authority by establishing laws and regulations governing their employment relations. Defining and controlling the employment relationship is clearly within a tribe's inherent power, as recognized by the Supreme Court in Montana v. United States, 450 U.S. 544 (1981). In discussing the extent of tribal regulatory authority over non-Indians, the Supreme 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. [1] A tribe may regulate, through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. [2] 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.

Id. at 565-66 (citations omitted) (emphasis added). Under Montana, the regulation of an employment relationship between a tribe, as an employer, and its employees, including both tribal members and non-members, is a fundamental exercise of retained tribal sovereignty. By entering into an employment relationship with a tribe, an individual employee enters into a consensual relationship with that tribe. As such, tribal employees are fully subject to tribal employment laws, including the rights and remedies therein, and may be prohibited from engaging in conduct that threatens the political integrity of the tribe.

Almost all tribes, including the Amici Tribes, have enacted tribal employment laws in one form or another. For instance, the governing body of the Pascua Yaqui Tribe, as required by the Tribe's Constitution, has adopted as tribal law a comprehensive employee handbook which codifies the terms and conditions of employment with the Tribe. (Exhibit D). Similarly, the Mashantucket Pequot Tribal Nation, in exercising its right to self-governance, has enacted an Employee Review Code which provides

administrative and judicial review of certain employment actions. (Exhibit E). The governing body of the Mohegan Tribe has duly enacted a Discriminatory Employment Practices Claims and Appeals Ordinance. (Exhibit F). These tribal laws recognize the importance of the employment relationship between the tribe and the tribal employee and balance substantive employee rights and reasonable restrictions on employee conduct.

The respective Tribal Councils of the Amici Tribes also have determined that their sovereign interests are best protected by prohibiting organizing activity which, if allowed, would directly interfere with their political integrity, economic security and inherent right to self-governance. Mohegan Tribal Gaming Authority Ordinance 2000-2 (Exhibit G); Pascua Yaqui Employee Handbook, Section 1008 (Exhibit D).

II. THE BOARD'S ANALYSIS IN DETERMINING WHETHER THE NLRA APPLIES TO ON-RESERVATION TRIBAL EMPLOYERS MUST RESPECT TRIBAL SOVEREIGNTY

A. Generally.

The General Counsel, Charging Parties, and Intervenor State of Connecticut ask the Board to abandon its 25 year precedent and apply the NLRA to the direct operations of tribal governments located on tribal lands. In support of this, these parties rely exclusively on the decisions of three courts of appeals applying the Occupational Safety and Health Act (OSHA) and the Employee Retirement Income and Security Act (ERISA) to tribes. See Donovan v. Coeur d'Alene Tribal Farms, 751 F.2d 1113 (9th Cir. 1985), Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989), Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2nd Cir. 1996). On the basis of the analyses in these decisions, they argue that the NLRA also should apply to tribal governments.

Their approach is flawed. For one, it completely ignores the Board's own precedent in Fort Apache as well as the decisions of other circuit courts holding that tribal sovereignty bars application of OSHA and other employment regulatory statutes to tribes. Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982); E.E.O.C. v. Fond du Lac Heavy Equip. and Construction Co., Inc., 986 F.2d 246 (8th Cir. 1992); E.E.O.C. v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989). Moreover, as more fully discussed in Section III, the NLRA affects the employment relationship in a markedly different and far more intrusive way than OSHA, ERISA, or other federal employment regulatory laws.

B. The Ninth Circuit's Jurisdictional Analysis in a non-NLRA Matter Relies on Dicta in Tuscarora which has no Application to Questions of NLRA Jurisdiction over Indian Tribes.

The General Counsel, Charging Parties and Connecticut rely heavily on the Ninth Circuit's opinion in Coeur d'Alene for their argument that tribes are subject to federal laws of general applicability. The Ninth Circuit's approach presumes such laws apply to tribes unless one of three exceptions can be demonstrated:

> (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . .'.

Coeur d'Alene, 751 F.2d at 1116 (citations omitted).

The Ninth Circuit's analysis is misplaced and should not be applied to the question now before the Board for at least two reasons. First, the test set out in Coeur d'Alene is based on dicta in the Tuscarora decision which discussed a federal statute that expressly pertained to Indian lands. The NLRA is completely silent as to its applicability to tribes. Moreover, the Supreme Court subsequently discouraged application

of the Tuscarora dicta where a federal statute is silent with respect to Indian tribes. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Second, the cases referred to by the Court in Tuscarora, as well as the dicta itself, dealt with the application of laws to individual Indians, not to Indian tribes themselves or to tribal governmental authority.

In Tuscarora, the Supreme Court stated that: "[I]t 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." Id. at 116. This statement is simply dicta as it was not central to the Court's holding. The narrow issue presented in Tuscarora was whether the definition of "reservation" in the Federal Power Act (FPA) applied to land owned by the Tuscarora Indian Nation but located outside the Nation's reservation. The FPA expressly applies to "tribal lands embraced within Indian reservations ... and other lands and interests in lands owned by the United States." See id. at 111 (citing 16 U.S.C. § 796(2)) (emphasis added). The Court recognized that although the Nation's off-reservation land was not technically within the FPA's definition of "reservation," the Act's explicit reference to Indian lands evidenced congressional intent that tribally owned land fall within the definition. Id. at 118 (the Act "neither overlooks nor excludes Indians or lands owned or occupied by them...").

Tuscarora cannot be extended in the manner urged by the General Counsel -- i.e, to apply a statute to Indian tribes simply because Congress did not expressly exclude them from the statute's reach. Unlike the NLRA, which does not mention Indian tribes either in its text or its legislative history, the FPA -- the federal law at issue in Tuscarora -- was not silent with respect to Indians. Congress expressed its clear

intent to apply the FPA to the real property holdings of tribal governments by expressly referring to tribal lands and reservations. Thus, it was no great leap in logic or interpretation for the Court to extend the FPA to the off-reservation lands of the Tuscarora Nation.

Furthermore, the cases relied on by the Tuscarora majority support the conclusion that dicta should only be applied when determining whether a general law applies to individual Indians, not to tribes or tribal entities. Although the Tuscarora court stated that its dicta was established "by many decisions of this Court," the cases it cited to involved either application of federal tax laws to individual Indians or laws which expressly referenced Indians.[1/]

This distinction is critical. Whether a general law applies to individual Indians is an entirely different question than whether such a law would also apply to a tribal government. Federal statutes of general applicability presumptively are as applicable to individual Indians as they are to non-Indians. Said another way, individual Indians possess no greater powers of sovereignty or self-governance than do individual citizens of the various states and their political subdivisions. See Felix Cohen, Handbook of Federal Indian Law, at 283 (1982 ed.) (noting that while individual Indians and their property are normally subject to general federal laws, federal statutes using the term "persons" must include an expressed congressional

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1/ In his dissenting opinion in Tuscarora, Justice Black noted that the cases the majority cited "deal with taxation – federal and state ...," or "involved statutes that made it clear that Congress was well aware it was authorizing the taking of the Indians' lands ... ." Id. at 132. (citations omitted); see also United States v. Farris, 624 F.2d 890, 893-94, (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (addressing the issue of whether a general federal criminal statute applied to individual Indians).

intent to include Indian tribes because tribes are "unique aggregations" and exercise governmental powers. (footnotes omitted)).

C. Any Question about Application of the Tuscarora Dicta to Tribal Activities on Reservations was Answered in the Negative by the Merrion Decision.

The Supreme Court made clear that the Tuscarora dicta is not to be used to infringe on a tribe's inherent governmental powers. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Merrion squarely addressed a question the Tuscarora opinion did not: the extent to which federal laws of general application can be applied to limit a tribe's inherent governmental authority in the absence of an express Congressional statement of intent to do so.

Merrion involved a challenge by non-Indian lessees holding oil and gas leases on a reservation to the tribe's authority to impose a severance tax. The lessees argued that an Indian tribe's authority to tax non-Indians doing business on the reservation was divested and abrogated by two federal statutes regulating Indian lands. Id. at 137, 150-51. The statutes at issue expressly dealt with Indian lands. See 25 U.S.C. §§ 396a-396g (relating to oil and gas leases on Indian lands), 398a-398e (allowing state taxation of mineral leases on certain Indian reservations). The lessees argued that a tribal tax was inconsistent with the former statute because it imposed burdens not specifically authorized by the federal government, and that the latter statute, by authorizing states to tax such leases but not referring to tribes, divested tribes of that power. The Merrion Court soundly rejected those arguments and stressed that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the

absence of clear indications of legislative intent." Id. at 149 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)) (emphasis added).

The Merrion holding and strong cautionary language clarify that inherent tribal authority, such as the right to regulate activities within their reservations, to exclude non-Indians or to tax, can only be restricted by application of a federal statute which contains clear congressional intent to do so. Thus, Merrion defeats any argument that application of the Tuscarora dicta would allow a federal law which is silent as to Indian tribes to infringe on a tribe's inherent sovereign authority -- including its powers to legislate in the area of employment laws.

Indeed, the Tenth Circuit recognized Merrion's limitation of the Tuscarora dicta in Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982). In Navajo Forest Products, the court held that OSHA did not apply to an on-reservation tribal business because to do so would "dilute the principles of tribal sovereignty and self-government" which were recognized both in the tribe's treaty as well as its inherent governmental authority. Id. at 712, 713-14. In its analysis, the court rejected application of the Tuscarora dicta when a federal law would infringe on tribal sovereignty and the statute at issue was silent with respect to Indian tribes. The court concluded its analysis by noting that "Merrion, in our view, limits or, by implication, overrules Tuscarora .... " Id. at 713.

In deciding as it did in Navajo Forest Products, the Tenth Circuit first examined whether application of a particular law would interfere with treaty rights, tribal sovereignty or tribal self-governance. Id. at 712. If application of the law would interfere with these rights, the Tenth Circuit requires an express congressional

statement of intent to so limit tribal rights before it would find the statute applicable. Id. If the requisite clear intent cannot be found in the statute, the Tenth Circuit held that it cannot be applied to tribes. Id. at 712, 714.

Similarly, in refusing to apply the Age Discrimination in Employment Act ("ADEA") to an Indian tribe, the Eighth Circuit recognized that the dicta in Tuscarora "does not apply when the interest sought to be affected is a specific right reserved to the Indians." E.E.O.C. v. Fond du Lac Heavy Equip. and Construction Co., Inc., 986 F.2d 246, 248 (8th Cir. 1992) (citation omitted). The court also noted that "specific Indian rights will not be deemed abrogated or limited absent a 'clear and plain' congressional intent," and that such rights are not limited to treaty rights, but may also be based upon statutes, executive agreements, or federal common law. Id. (quoting United States v. Dion, 476 U.S. 734, 738, 745 n.8 (1986)). Within this framework, the Eighth Circuit held that federal control over a tribe's internal employment policies "dilutes the sovereignty of the tribe" and therefore the ADEA could not apply. Id. at 249. Like the Eighth Circuit in Fond du Lac, the Tenth Circuit similarly held the ADEA inapplicable to Indian tribes based on similar reasoning. E.E.O.C. v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).[2/]

[2/] However, while the Eighth and Tenth Circuits have rejected application of the Tuscarora dicta where the laws at issue were silent with respect to Indian tribes and were found to have infringed on tribal self government, both circuits have applied Tuscarora in certain circumstances. For example, the Tenth Circuit applied the whistleblower provisions of the Safe Drinking Water Act ("SDWA") to an Indian tribe, noting that the SDWA specifically refers to Indian tribes. Osage Tribal Council v. United States Dept. of Labor, 187 F.3d 1174, 1183 (10th Cir. 1999). Also, the Tenth Circuit in R.H. Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989) applied the Tuscarora dicta in determining whether federal civil rights statutes applied to individual tribal officials.

At least one federal court has expressly applied Merrion in the context of upholding the right of tribes to enact laws which prohibit agreements requiring union membership as a condition of employment under Section 14(b) of the NLRA. N.L.R.B. v. Pueblo of San Juan, 30 F.Supp.2d 1348 (D.N.M. 1998). In San Juan, the court rejected the argument that Congress abrogated Indian tribal sovereign authority by failing to specifically state that tribes retain such authority as a "position [that] turns the historic tribal sovereignty analysis on its head." Id. at 1355. The court further stated that: "silence regarding Indian tribes is insufficient to establish an abrogation of traditional sovereign authority. As in Merrion, Plaintiff and Intervenor 'cite no specific federal statute restricting Indian sovereignty. . . .'" Id. As such, the court ruled that the NLRA did not divest the Tribe of its right to enact such tribal legislation.

III. APPLICATION OF THE NLRA TO ON-RESERVATION OPERATIONS WOULD IMPERMISSIBLY AND DIRECTLY INTERFERE WITH A NUMBER OF IMPORTANT SOVEREIGN RIGHTS OF TRIBES.

The Amici Tribes strongly disagree with the application to this case of the test set forth in dicta in Tuscarora and expanded in Coeur d'Alene. However, assuming arguendo that the instant jurisdictional question is subject to this test, the Amici Tribes assert that application of the NLRA to tribally owned and controlled on-reservation enterprises would directly interfere in tribal rights of self-governance in purely intramural matters. The Amici Tribes believe that it is crucial to the correct resolution of this case that the Board fully consider how application of the NLRA to tribal activities on reservations is dramatically different than application of such other federal employment -related statutes as OSHA and ERISA. It is clear that this intrusive law does not apply to tribally owned and controlled on-reservation enterprises under either the Tuscarora dicta or Merrion and its progeny. Therefore, the Board should continue to follow its

precedent set 25 years ago in Fort Apache and rule that the NLRA does not apply to tribally owned and controlled enterprises located on tribal lands.

A. Self-Governance in Purely Intramural Matters Includes the Right to Bar Non-Elected Individuals From Participating in Tribal Legislation of Employee Relations.

Without explanation, the Ninth Circuit has interpreted the term "self-governance in purely intramural matters" in a very narrow fashion to include only issues of tribal membership, inheritance rules and domestic relations. Coeur d'Alene, 751 F.2d at 893. However, the case upon which this narrow interpretation is based did not so limit the term's meaning:

> First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians.... Or, to put it another way, "Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation.

United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) (emphasis added and citations omitted).

In determining whether the NLRA interferes with self-governance in purely intramural matters, the proper focus necessarily needs to be on how the law would affect "essential matters of reservation government;" not on how the law would affect tribal casinos. Any argument that tribal casinos are not "purely intramural matters" is misplaced and misses the point.[3/] The purely intramural matter, the essential

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3/ Such an argument that tribally owned and operated casinos or other for-profit enterprises are not intramural completely overlooks the fact that many state governments engage in quite similar activities, primarily state lotteries and state liquor sales. See KTSP-Taft Tel. & Radio Co. v. Arizona State Lottery Comm'n, 646 F.Supp. 300, 311 (D. Ariz. 1986) (noting that state lottery was governmental activity). Also, in determining whether a state entity is subject to federal regulation, the Supreme Court has rejected distinguishing between governmental and non-governmental functions, noting that such a distinction is "unsound in principle and unworkable in practice." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-547 (1985). Further, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. forecloses any doubt that tribal

matter of reservation government that is at issue in this case, is the tribal legislative and judicial processes themselves.

At the core of tribal self-governance is the notion that the tribal legislative process must be reserved for elected tribal governments. The effect of applying the NLRA to tribes would be to grant non-tribal, non-elected individuals the right to participate in determining the substantive provisions of tribal employment laws. Should a tribe's employees elect union representation, the tribe will be forced to negotiate new provisions of tribal law with outside, non-governmental entities. The tribe's legislative process would be opened to non-elected officials and its political integrity would be seriously compromised.

Nowhere in the NLRA or any other statute has Congress voiced its intent to abrogate this fundamental right. In the case of the Pascua Yaqui Tribe – where a majority of the employees at the tribe's casino are tribal members – the application of the NLRA and the collective bargaining process would not only change its employment laws, it would also violate the Tribe's Constitution, which was approved by the United States Assistant Secretary of the Interior under 25 U.S.C. § 476. Article VII, Section 1 of the Tribe's Constitution requires that "[t]he terms of employment for all tribal employees shall be set forth in a personnel policy manual prepared by the tribal administrator by the tribal council." This provision does not allow the terms and conditions of employment with the Tribe to be established by the collective bargaining process, or any other manner.[4/]

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casinos are governmental operations; the Act expressly requires tribal governmental ownership, regulation, and oversight of gaming activities on tribal land, and further requires that proceeds from such activities be used for tribal governmental purposes.

[4/] Because of the central importance of the Easter holidays to the Pascua Yaqui, the Tribe closes its casino completely for the Holy Tridium. This is a cultural imperative, and will not be negotiated by the Tribe. It is but one example of how the economic operations of an Indian tribe can be –

Federal employment-related laws such as OSHA and ERISA are as markedly different in their effect on tribal governance than would be the NLRA. OSHA and ERISA are among statutes that set workplace standards for worker safety and employee retirement plans. To the extent those laws are conclusively held to apply to tribes, tribal employment laws must be consistent with those standards. In contrast, the NLRA would do much more than impose standards on tribal employment – it would allow outside third parties to interfere in the relationships between tribes and their employees in a much more intrusive manner.

For example, OSHA imposes upon employers a general duty clause whereby employers must provide employees with a safe and healthful workplace free from recognized hazards and requires that employers comply with certain specific workplace safety standards. In the event that tribes are conclusively determined to be subject to OSHA, tribal employers must follow these pre-determined, specific standards. Although this burden will certainly add costs to the tribe's operations, unlike the NLRA it does not require the Tribe to change its employment laws or to open up its legislative process to non-members.

Similarly, ERISA imposes certain discrimination rules as well as disclosure and reporting requirements on employers maintaining employee welfare benefit plans. 29 U.S.C. § 1001(b). To the extent ERISA applies to tribes, a tribe electing to establish an employee welfare benefit plan must comply with its discrimination, reporting and accounting standards. Unlike the NLRA, ERISA does not "completely define the employment relationship" but instead "merely requires reporting and accounting standards for the

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and often are – interwoven with tribal cultural and spiritual values. Non-members are often invited to participate with, or work alongside, tribal members in on-reservation activities, but they enter the reservation voluntarily and while they are there they are always subject to the tribe's right to establish the rules that govern conduct within the reservation.

protection of the employees." Smart v. State Farm Insurance Co., 868 F.2d 929, 935 (7th Cir. 1989) (footnote omitted).

B. Application of the NLRA Would Impermissibly Interfere with the Jurisdiction of Tribal Courts.

Tribal judiciaries play an integral role in tribal government. As the Supreme Court has stated: "Tribal courts play a vital role in tribal self-government ... and the Federal Government has consistently encouraged their development." Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 14 (1987). In fact, in 1993, Congress enacted the Indian Tribal Justice Act in order to help fund further development of tribal courts and declared that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5).

It is also clear that tribal courts have exclusive jurisdiction over disputes between tribes and non-Indians for activities taking place on Indian lands. Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 389 (1976); Williams v. Lee, 358 U.S. 217 (1959). As a result, if a dispute arises between a tribal employee and a tribe, the tribal court has exclusive jurisdiction over the dispute. Barker v. Menominee Nation Casino, 897 F.Supp. 389, 394 (E.D. Wis. 1995) (terminated tribal casino employee required to pursue due process claim against tribe in tribal, not federal, court). Even if a tribe consents to an arbitration provision in a contract, the federal courts require that the dispute first be heard in tribal court. United States v. Turtle Mountain Hous. Auth., 797 F.2d 668 (8th Cir. 1986). The Supreme Court has further recognized that tribal court jurisdiction is the type of intramural matter that cannot be divested without express congressional intent. LaPlante at 14.

Tribes possess the inherent right to determine the structure and procedure of their judicial systems. 25 U.S.C. § 3601(4). Each of the Amici Tribes have organized their judicial systems in a manner that complies with their respective constitutions, governing structures and communities. For instance, the Mohegan Tribal Council, as required by the Mohegan Tribe's Constitution, has established the Gaming Disputes Court as the exclusive court for adjudication of disputes between the Tribal Gaming Authority (the tribally-established operating arm of its gaming enterprise) and its employees. Article XIII, Section 2 of the Tribe's Constitution provides, in part, as follows:

> The Tribal Council shall establish, by ordinance, the Gaming Disputes Court, ... Exclusive jurisdiction for the Tribe over disputes arising out of or in connection with the Gaming, the actions of the Tribal Gaming Authority, or contracts entered into by the Mohegan Tribe or the Tribal Gaming Authority in connection with Gaming, including without limitation, disputes arising between any person or entity and the Tribal Gaming Authority, including customers, employees, or any gaming manager . . . .

(Exhibit A; emphasis added). In fact, employees working for the Tribe sign an acknowledgment form which clearly states that the employees are subject to the laws of the Tribe:

> . . . The Mohegan Tribe and the MTGA have enacted ordinances which establish the laws applicable to Mohegan Sun employees and to patrons and visitors of Mohegan Sun, including laws which establish the Gaming Disputes Court as the exclusive court for adjudication of disputes between the MTGA and its employees. I agree to abide by those laws.

(Exhibit H). Similarly, the Mashantucket Tribal Council established the Tribal Court system according to requirements in the Tribe's Gaming Procedures. The Tribal Council has also enacted an "Employee Review Code" which expressly provides for jurisdiction in Tribal Court for "actions founded upon a review of a Final Decision of an employee Disciplinary Action." Section 2b (Exhibit E). As stated in this tribal law,

"[a]n action pursuant to this law shall be the Employee's exclusive cause of action against the Employer provided that the employee has first exhausted all administrative remedies." Section 2c. (Exhibit E).

NLRB assertion of jurisdiction over tribally-controlled enterprises on reservations would conflict with jurisdiction inherent in tribal courts as recognized by federal law. A conflict undoubtedly would arise between the NLRB and tribal courts over claims such as tribal interference in Section 7 rights and anti-union retaliation. Assertion of NLRB jurisdiction over such claims would conflict completely with the paramount authority of tribal court systems and diminish their jurisdiction at a time when Congress actively is promoting and encouraging the development of tribal courts. See 25 U.S.C. §§ 3601 et seq. (Indian Tribal Justice Act).

Tribal court jurisdiction would be further compromised upon certification of a bargaining representative. During negotiation of a collective bargaining agreement, unions are likely to insist to impasse on inclusion of an arbitration provision rather than agree to exclusive jurisdiction of the tribal court. However, the inclusion of an arbitration provision in any collective bargaining agreement entered into by Amici Tribes would directly contravene and usurp the Constitution and laws of the Amici Tribes. Contrary to express tribal law, federal policy, and Supreme Court decisions, tribal courts would no longer possess exclusive jurisdiction to hear disputes brought by their respective employees. For this reason, Amici Tribes, as well as almost every other tribe, will almost certainly not agree to arbitration provisions in collective bargaining agreements covering their employees, but will insist to impasse that any disputes under the collective bargaining agreement be subjected to the tribal court. Obviously, the specter of a collective

bargaining process surely doomed to failure from the outset due to such juxtaposed philosophies is not conducive to a stable labor relations policy.

C. Application of the NLRA to Tribally-controlled On-reservation Businesses would Impermissibly Interfere with Tribes' Right to Exercise Indian preference as Encouraged by Federal Law and Policy.

Title VII of the Civil Rights Act of 1964 encourages Indian employment by containing an Indian preference provision (Section 703(i)) expressly allowing all employers on or near an Indian reservation to exercise Indian preference in employment without violating the general prohibitions of the Act. 42 U.S.C. § 2000e-2(i). Section 703(i) provides:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation. Id.

The Supreme Court in Morton v. Mancari, 417 U.S. 535 (1974) identified Congress' clear intent not to modify or repeal Indian preference but to reaffirm it:

> There are the ... affirmative provisions in the 1964 Act excluding coverage of tribal employment and of preferential treatment by a business or enterprise on or near a reservation. 42 U.S.C. §§2000e(b) and 2000e-2(i) .... These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. Id. at 547-548.

The exemption is designed to encourage businesses near Indian reservations to grant preferential hiring treatment to Indian workers, Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir.

1986), and "is consistent with the Federal government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12,723 (1964) (statement of Senator Humphrey). In carrying out its trust responsibility toward Indians, the Congress has consistently provided for preferences for Native Americans in employment.[5/]

The Amici Tribes have enacted Indian preference laws.[6/] The Pascua Yaqui Tribe's law is typical of many tribal preference laws and provides that "[p]reference in all aspects of employment with the Tribe will be given to qualified members of the Pascua Yaqui Tribe and to other qualified Indians." Pascua Yaqui Tribe Employee Handbook, Section 200B. (Exhibit D). Pascua Yaqui tribal law also provides that Indian preference will be "taken into account and applied in all reduction in work force situations" and "exercised throughout the promotion process." Pascua Yaqui Tribe Employee Handbook, Sections 204H and 204B. (Exhibit D).

The application of the NLRA to on-reservation tribally-controlled operations would interfere with the tribes' ability to give preference in employment to their people. A union's ability to negotiate to impasse on inclusion of seniority rights in a collective bargaining agreement severely threatens this right. As with the

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5/ In fact, in 1994, Congress amended the Indian Self-Determination and Education Assistance Act to expressly require compliance with a tribe's preference laws in the administration of certain contracts:

> . . .with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.
>
> 25 U.S.C. § 450(e)(C) (emphasis added).

6/ See, e.g., Mohegan Tribal Gaming Authority Discriminatory Employment Practices Claims and Appeals Ordinance, Section I(i); Pascua Yaqui Tribe Employee Handbook, Section 200B.

strong threat to tribal court jurisdiction created by the advent of NLRA jurisdiction, the inherent collision between Indian preference and union seniority bodes ill for a stable collective bargaining situation.

D. Application of the NLRA Would Directly Conflict with the Right of Tribes to Exclude Non-Governmental Officials from Tribal Lands.

Tribes possess the inherent right to bar individuals from their reservations. Although this right is typically restated in treaties, courts have recognized that it is an inherent right and is not dependent upon congressional delegation or inclusion in a treaty. As the Supreme Court noted:

> ... [W]e conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal government and territorial management ... 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 .... .

Merrion at 141, 144 (emphasis original).

The Pascua Yaqui Tribe's Constitution, which was approved by the Assistant Secretary for Indian Affairs, provides that the Tribal Council has the power "[t]o bar for cause any person from entering the reservation, and to exclude and remove any such person from the reservation, . . .; except that this provision does not apply to certain Federal and state officials who must enter onto the reservation in performance of official duty." Article VI, Section 1(m). Thus, under the Pascua Yaqui Constitution, the right to exclude outsiders gives way only when the individual is a federal official entering tribal land on governmental business. The Amici Tribes do not dispute that inherent power to exclude does not extend to federal officials performing official business on the reservation. See United States v. White Mountain Apache Tribe, 604 F.Supp. 464, 466 (D. Ariz. 1985), aff'd, 784 F.2d 917 (9th Cir. 1986). However, the case before the

Board does not involve access by a federal official, but rather involves the right of Indian tribes to exclude non-governmental individuals from their tribal lands.

The fundamental right of exclusion, affirmed in Merrion, would be completely compromised if the Board exercised jurisdiction over tribal activities on reservations. Obviously, non-employee union organizers will seek access to employees working on tribal property well before a union is ever certified. See Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); see also L'Enfant Plaza Properties, Inc., 316 NLRB 1111 (1995). If a union becomes the certified bargaining representative of a tribe's employees, access will be sought for bargaining and contract administration reasons. Tribal property interests are further compromised by the advent of picketing and other potential economic activity before, during and after a certification process. However, union officials and other third parties who would seek access to tribal reservations in pursuit of collective bargaining objectives are not federal government officials seeking merely to impose or enforce standards; they are third parties seeking to insert themselves deeply into relationships between tribes and their employees.

E. Application of the NLRA Would Threaten the Economic Security of Tribal Governments.

The Supreme Court in Montana held that a tribe retains the inherent power to regulate the conduct of non-Indians within its lands when that conduct threatens the Tribe's "economic security." Montana at 566. Moreover, the Indian Gaming Regulatory Act ("IGRA") declares that "a principle goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government ...." (25 U.S.C. §2701(4)). In fulfilling that goal, the purpose of the 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 . . ." (25 U.S.C. § 2702(1).

In IGRA, the Congress has made clear the federal policy of protecting and promoting the right of tribes to engage in gaming to raise revenue for tribal government programs. Any interruption to the flow of revenues from tribal gaming to tribal government programs and activities would completely undermine the intent of IGRA. One attribute of collective bargaining rights that non-governmental employees possess is the right to strike. However, the exercise of this right to strike would have disastrous economic implications for tribal governments since their main revenue source is often their gaming operations. Unlike state governments, tribes have virtually no tax base from which to raise revenue that could be used to offset disruption in tribal governmental services.

IV. THE BOARD'S PRIOR DECISIONS RECOGNIZING ON-RESERVATION TRIBALLY-CONTROLLED EMPLOYERS AS EXEMPT FROM THE NLRA ARE CORRECT AND SHOULD NOT BE ABANDONED.

Longstanding Board precedent is correct in holding that on-reservation activities of Indian tribes are exempt under Section 2(2) of the Act. This precedent established in Fort Apache is consistent with the correct application of Tuscarora and should not be abandoned. If the Board abandons Fort Apache it would destroy principles of comity, which afford Indian tribes the same treatment as other sovereign governments, as well as the principle of stare decisis. In Fort Apache, the Board noted that given the parallels between tribal governments, state governments, and the federal government, "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 applied by Congress, the Executive, and the Courts," id. at 506 (footnotes omitted) and concluded 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. (footnotes omitted).

In Southern Indian Health Council, 290 NLRB 436 (1988), the Board reiterated its holding in Fort Apache by holding that a non-profit corporation operated by a consortium of Indian tribes within reservation boundaries was exempt under Section 2(2). The Board stated that, "[i]n the instant case we similarly conclude that the seven -member consortium of tribes, and its enterprise on the reservation that is here asserted by an employer, are implicitly exempt as governmental entities within the meaning of [Section 2(2)]." Even in Sac & Fox Industries, 307 NLRB 241 (1992), where the Board asserted jurisdiction over an off-reservation tribally-controlled employer, the Board reaffirmed the exemption established in Fort Apache for on-reservation tribal employers. See id. at 245.[7/] As recently as 1998, the Board reaffirmed its Fort Apache decision. 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).

The Board's precedent recognizing on-reservation tribal employers as exempt governmental entities is not limited to the Board decisions, but has also been recognized by the General Counsel in at least two other cases involving on-reservation tribally-controlled employers.[8/]

7/ The Board's distinction between applying the Act to tribally controlled off-reservation enterprises and refusing to apply the Act to on-reservation tribal enterprises is consistent with the limited governmental authority of Indian tribes over off-reservation entities. See See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (noting that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State").

8/ See Yoiyabe Indian Health Project, No. 31-19604, 1993 WL 255247 (N.L.R.B.G.C. May 28, 1993) (non-profit corporation which was owned and operated by consortium of Indian tribes and providing health care services on-reservation was exempt under Section 2(2) under Fort Apache), Warm Springs Forest Prods., No. 36-5889, 1988 WL 228400 (N.L.R.B.G.C. Dec. 23, 1988) (jurisdiction could not be asserted over employer "because it is owned and controlled by the tribal council of an Indian tribe and thus, is exempt as a governmental entity" (citing Fort Apache)).

A. Departure from Fort Apache would Destroy Principles of Comity Which Afford Indian Tribes the Same Treatment as Other Sovereign Governments.

Assertion of jurisdiction in conflict with Fort Apache would directly conflict with the principle of comity that Indian tribes be treated as sovereign governments, a principle which has been widely recognized by courts. For instance, the Seventh Circuit clearly recognized that principles of comity counsel against construing legislation so as to intrude on tribal governmental authority. See Reich v. Great Lakes Indian Fish and Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993) (Posner opinion). Reich addressed whether the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., applied to tribal game wardens employed by the Great Lakes Indian Fish and Wildlife Commission.[9/] Reich at 491. Like the NLRA, the FLSA does not mention Indian tribes. The Seventh Circuit ruled that the tribal game wardens were not subject to the FLSA because they fell within an exemption in the Act which applies to "the Government of the United States, the United States Postal Service or the Postal Rate Commission, and a State, political subdivision of a State, or an interstate governmental agency." Id. at 496. Despite the fact that "tribes" were not listed as political governments, the Court saw no reason to treat them differently than other governments. In fact, the Court saw a need to protect against erosion of the Wildlife Commission's sovereign powers:

> The courts have spoken of the 'inherent sovereignty' of Indian tribes and have held that it extends to the kind of regulatory functions exercised by the Commission with respect to both Indians and non-Indians. The 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.

9/ The Wildlife Commission is a consortium of 13 Chippewa tribes which collectively manage their treaty rights to hunt and fish off-reservation. Reich at 492.

Id. at 495. The court further reasoned that such a holding was "actuated by the same purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow." Id. at 496; see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 32 F.Supp.2d 497, 499 (D. R.I. 1999) ("As a sovereign that predates the United States, the tribe must receive comity or respect similar to that enjoyed by a foreign nation").

If the Board abandons its decision in Fort Apache, Indian tribes would be the only governmental entities within the United States subject to the NLRA. Tribal governments, like other governments, provide police, fire, and other essential services to their residents – often to both Indians and non-Indians alike. Abandoning the Fort Apache decision and applying the NLRA wholesale to on-reservation tribal employers opens up the possibility that employees working in these areas could disrupt essential services to residents living on Indian reservations by engaging in strikes. This result is even more troubling considering that the Section 2(2) exemptions for state and federal governmental entities were included in the NLRA because governmental employees did not enjoy the right to strike. Hawkins, 406 U.S. at 604 (footnote omitted).

Like all other sovereigns in the United States, tribes should be able to decide, as an exercise of self-determination and self-governance, whether to provide their employees with collective bargaining rights. Just as the States of Arizona, Arkansas, Colorado, Mississippi, North Carolina, South Carolina, Texas, Virginia, and West Virginia have declined to provide its employees with these rights, the Amici Tribes should be free to do so also.[10/]

[10/] States do not have the authority to regulate the employment policies of tribes, especially those policies pertaining to employees at tribal casinos. The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et. seq. ("IGRA") preempts any regulation by Connecticut of internal employment policies covering employees working at tribal casinos. It is well established that IGRA was intended by Congress to completely preempt state law regulation over on-reservation Indian gaming related

B. Abandonment of Fort Apache would Destroy the Fundamental Rule of Stare Decisis

Further, the principles of stare decisis would be completely nullified should the Board abandon its holding in Fort Apache and its progeny. In Electromation, Inc., 309 NLRB 990 (1992), a concurring opinion noted that in construing the NLRA, the Board must be mindful of Board precedent. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the [NLRA] against our prior determination of the statute's meaning." Id. at 1007 (citing Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 537 (1992)) (emphasis added).

The Supreme Court has recognized that "overruling a precedent ... is a matter of no small import, for 'the doctrine of stare decisis is of fundamental importance to the rule of law.'." Payne v. Tennessee, 501 U.S. 808, 842 (1991) (quoting Welch v. Texas Dept. of Highways and Public Trans., 483 U.S. 468, 494 (1987)). In the present case, since Fort Apache is correct and consistent with Tuscarora as well as the Eighth and Tenth Circuit decisions in Fond du Lac Heavy Equip. and Navajo Forest Products, there is no reason for the Board to depart from this well-settled principle that tribal governments are not subject to the NLRA for their activities on reservation.

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activities. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102 (8th Cir. 1999) (IGRA preempts state interference with Indian casinos on Indian lands); see also Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 544 (8th Cir. 1996) ("... [T]he text and structure of IGRA, its legislative history, and its jurisdictional framework ... indicates that Congress intended it completely preempt state law.").

CONCLUSION

The Amici Tribes respectfully urge the Board to decline the invitation by the General Counsel and others to overturn Fort Apache. Federal court decisions do not compel such radical departure from this long standing Board precedent. Instead, long established tribal sovereignty and self determination principles require that the Board refrain from extending jurisdiction to tribal enterprises on reservations.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the brief of intervenor State of Connecticut in opposition to motion to dismiss, in San Manuel Indian Bingo and Casino and Hotel Employees & Restaurant Employees International Union, AFL-CIO, CLC Case Nos. 31-CA-23673 and 31-CA-23803, was mailed first class postage prepaid on February 23, 2000, to the following counsel and parties of record:

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