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

SAN MANUEL INDIAN BINGO AND CASINO

Cases: 31-CA-23673
31-CA-23803

and

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

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC

Party in Interest

STATE OF CONNECTICUT

Intervenor

ERRATA AMICUS CURIAE BRIEF OF SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian Tribe located near the Twin Cities in Minnesota. The Community is organized pursuant to the Indian Reorganization Act through a Constitution approved by the Secretary of the Interior in 1969. The Community operates a casino and other tribal businesses, employing substantial numbers of non-member employees, who, together with the surrounding local units of government have profited tremendously from commerce with the Community. The Community regulates its employment relationships in an exercise of its inherent sovereignty, and since 1988 has had a tribal court that exercises general civil jurisdiction over matters arising on Community lands, including most civil issues involving non-members who are employed by the Community.

A decision by the National Labor Relations Board ("NLRB") to apply the National Labor Relations Act ("NLRA" or the "Act") to all Indian tribes will divest the Community of its sovereign right to exclude non-members from its territory, and the ancillary right to regulate commerce, including employment relationships with non-member employees. Such a decision would violate federal constitutional and Indian law, and the government-to-government relationship the Community enjoys with the Federal government, including its agencies, such as National Labor Relations Board.

ARGUMENT

"It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this."

Chief Justice John Marshall in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

Indian tribes have too long acquiesced in the denial of their sovereign right to exclude non-members, and to regulate commerce, on their reservations. Yet the bold and daring usurpation of power contemplated in this matter by the Hotel & Restaurant Employees International Union ("HERE"), in concert with the General Council, will be resisted, for it violates fundamental United States Supreme Court precedent respecting the sovereign rights of Indian tribes, and is contrary to the manner in which Indian commerce can legitimately be regulated, and subverts the fundamental principles of a free constitution.

I. UNLESS A STATUTE REGULATING COMMERCE EXPRESSLY CONTEMPLATES INDIAN TRIBES, AS ESTABLISHED BY CONGRESS INVOKING THE INDIAN COMMERCE CLAUSE, ITS APPLICATION TO INDIAN TRIBES VIOLATES THE UNITED STATES CONSTITUTION.

The government of the United States contemplated by the framers of the Constitution is "acknowledged by all to be one of enumerated powers." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). "The principle, that it can exercise only those powers granted to it, would seem too apparent" for argument, and "is now universally admitted." Id. But, as Justice Marshall so presciently stated there, "the question regarding the extent of the powers actually granted is perpetually arising, and will continue to arise, as long as our system shall exist." Id. That question arises once again here, for the extent of the powers actually granted to Congress by the United States Constitution, and whether Congress has invoked its powers with respect to Indian tribes, as well as the authority of the federal courts to interpret Congressional action (and inaction), is put in issue by this action. The threshold question presented by this matter is whether the NLRA can be held to apply to Indian tribes where Congress has invoked no enumerated power giving it authority over Indian tribes, and where Congress' silence cannot be transmogrified into congressional action by the federal judiciary without violating the fundamental structures of our government established by the United States Constitution.

A. WHEN CONGRESS LEGISLATES, IT MUST INVOKE SOME POWER ENUMERATED IN THE UNITED STATES CONSTITUTION.

Justice Marshall wrote in M'Culloch, ". . . as we all must admit, [] the powers of government are limited, and [] its limits are not to be transcended." Id. at 421. At issue in M'Culloch was the power of the federal government to charter a national bank, and whether, if the federal government possessed the authority to charter a national bank, the State of Maryland

had the authority to tax that bank. The court concluded that, although the Constitution did not contain an express power to charter a bank, the powers to "lay and collect taxes; to borrow money; to regulate commerce" were expressly conferred on Congress by the people of the United States. Id. at 408. Also conferred was the power to make "all laws which shall be necessary and proper" for carrying into effect the express powers set forth. Id. at 411-412. The express powers contained the implied power to charter a bank, as a "necessary and proper" means of raising revenue and regulating commerce. Id. at 424-425. As the court there noted, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end . . . are Constitutional." Id. at 421.

Supreme Court jurisprudence since has consistently held that Congress "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication," Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 326 (1816). "The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers." Carter v. Carter Coal Co., 298 U.S. 238, 291 (1935); Ex Parte Richard Quinn, 317 U.S. 1, 25-26 (1942) (holding that "Congress and the President, like the courts, possess no power not derived from the Constitution."). The force of this fundamental Constitutional principle continues to this day. United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.")

Therefore, in order for the question presented by this case to be answered in the affirmative, the end sought to be reached (i.e., the applicability of the Act to Indian tribes) must be legitimate and within the scope of the Constitution. M'Culloch, 17 U.S. (4 Wheat.) at 421. If it is indeed legitimate and within the scope of the Constitution to subject Indian tribes to the NLRA, then it must be determined that Congress exercised some expressly enumerated power, or some power necessary and proper to effectuate its legitimate purpose, for the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Absent a finding that Congress invoked an enumerated power, or some power necessary to effectuate an express power, thereby subjecting Indian tribes to the NLRA, the Tribe's motion to dismiss must be granted, for any exercise of jurisdiction by the NLRB over the Tribe would violate these fundamental constitutional principles.

B. THE INDIAN COMMERCE CLAUSE IS THE SOLE SOURCE OF CONGRESSIONAL POWER TO REGULATE INDIAN COMMERCE.

Under the Articles of Confederation, Congress was given the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated." Art. of Confed. art. IX. Because the manner in which various of the states interpreted this phrase annulled Congress' power, when the Constitutional Convention was convened, "Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Commerce Clause, Art. 1, § 8, cl. 3 . . ." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n. 4

(1985), THE FEDERALIST No. 42, 284 (James Madison)(J. Cooke, ed. 1961).

The only Constitutional "grant of power that specifically mentions Indians is the Commerce Clause, which includes the Indian Commerce Clause." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207 (Rennard Strickland et al. eds. 1982). Under the Commerce Clause, Congress is authorized to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3. The third phrase of clause 3, the Indian Commerce Clause, confers on Congress "all that is required for the regulation of commerce with the Indians," Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), and the "whole of regulating the intercourse with them is vested in the United States." Id. at 560. So long as the particular tribe of Indians "remains a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal . . ." United States v. 43 Gallons of Whiskey, 93 U.S. 188, 195 (1876).

As the Supreme Court recognized in McClanahan v. Arizona State Comm'n, 411 U.S. 164 (1973), "the source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." 411 U.S. at 172 n. 7 (citations omitted). This power is deemed to be plenary, Morton v. Mancari, 417 U.S. 535, 551 (1974), and is drawn "both explicitly and implicitly from the Constitution itself." Id. at 552; Blatchford v. Native Village of Noatak, 501 U.S. 775, 791 (1991). "Congress' authority over Indian matters is extraordinarily broad," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978),

and Congress can exert its plenary power to limit the exercise by Indian tribes of their sovereign powers.

Pursuant to its Indian Commerce Clause power, Congress has enacted thousands of laws specifically applicable to Indian tribes and individual Indians. *See* Morton, 417 U.S. at 553. ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indian living on or near reservations"). The Supreme Court has stated that "Congress knew well how to *express its intent directly* when that intent was to subject reservation Indians to the full sweep of state laws and state taxation." Bryan v. Itasca County, 426 U.S. 373, 390 (1976). Again, "when Congress wants to except treaty rights from jurisdictional grants, it knows how to do so." Menominee Tribe v. United States, 391 U.S. 404, 416 n.7 (1968).

In fact, Federal agencies and Federal courts will be overturned if they rely on Congressional silence:

> The Court of Appeals erred in its basic approach to construction of the 1926 Act. Its view was that Congress must be regarded as having relinquished its control over Indian lands in the absence of an express statement of its intent to retain the power. Just the opposite is true.

Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 (1976); *see* Martinez, 436 U.S. at 59. ("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.") Therefore, the Board must acknowledge Congress' silence in the NLRA and leave to

Congress, in its wisdom, the choice to apply the NLRA to Indian tribes and tribal organizations.[1]

While, "[t]he power of Congress over Indian Affairs may be of a plenary nature; [] it is not absolute," Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (citations omitted), and is subject "to the Constitution of the United States." Stephens v. Cherokee Nation, 172 U.S. 455, 478 (1899); *accord* Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919). In fact, any exercise by Congress of its power over Indian affairs must be tied rationally to the trust obligations of Congress, and when Congress acts with respect to Indian tribes, it must do so in a manner which fulfills the federal trust responsibility to them. *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 219-228. Therefore, the federal trust responsibility to Indian tribes is the limiting standard by which the Constitutional validity of any statute purporting to affect Indian tribes must be judged.[2] Consequently, before the Board can deny the motion to dismiss, it must determine not only that Congress has invoked an enumerated power, but that in so doing Congress has not violated its federal trust responsibility to Indian tribes.

---

[1]The Senate has established a permanent Committee on Indian Affairs. "[A]ll legislation proposed by Members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives is under the jurisdiction of the Committee." (Senate Committee on Indian Affairs, Website, 2/21/00). "Until 1946, when a legislative reorganization act abolished both the House and Senate Committees on Indian Affairs, the Senate Committee on Indian Affairs had been in existence since the early 19th century." The Senate Committee on Indian Affairs has provided a history of Indian related Committees on its website at www.senate.gov/~scia/cominfo.htm. Perusal of the many matters involving Indians considered by Indian related committees through the years, which are discussed at this site, conclusively demonstrates Congressional silence and inaction concerning the applicability of a law does not translate into Congressional action, rather, it signifies an intent not to act with respect to Indian tribes, and shows the Senate *never* considered Indian tribes in the context of the NLRA.

[2]"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. Absent explicit statutory language, this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. . . The Court has applied similar canons of construction in nontreaty matters." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (citations and internal quotation marks omitted).

C. THE INTERSTATE COMMERCE CLAUSE IMPOSES NO LIMITS ON THE COMMERCIAL ACTIVITY OF INDIAN TRIBES.

The structure, purpose and historical circumstances under which the Commerce Clause was adopted dictate that the Interstate Commerce Clause imposes no limitation upon the commercial activity of Indian tribes. While the Foreign Commerce Clause acts on trade "with foreign Nations," Japan Line, Ltd. v. County of Los Angles, 441 U.S. 434, 454 (1979), the Indian Commerce Clause prohibits activity that places undue burdens, or otherwise interferes with, Indian commerce. *See* Washington v. Confederated Tribes of the Colville Indians, 447 U.S. 134 (1980). The Interstate Commerce Clause, however, operates upon legislative action by *a state*, and commerce *between states*. The fact that the Framers gave separate expression to Congress' power to regulate Indian commerce demonstrates that Indian tribes are not to be regarded as "States" for purposes of the Clause. Cherokee Nation v. Georgia , 30 U.S. (5 Pet.) 1, 18 (1831). Consequently, their actions therefore are not subject to principles governing commerce "among the several States." Id. The fact that the Commerce Clause speaks of Congress' power to regulate commerce "with the Indian tribes," just as it delegates authority to Congress to regulate commerce "with foreign Nations" confirms that the Framers intended the two phrases to be parallel and contemplated in each the establishment, through the national government, of a bilateral relationship between this Nation and a distinct sovereign entity. As the Supreme Court held in Cherokee Nation v. Georgia:

> "In this clause [Indian tribes] are as clearly contradistinguishable by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes -- foreign nations, the

several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct."

30 U.S. (5 Pet.) at 18.

Cases involving the Interstate Commerce Clause reveal two broad areas of concern regarding the exercise by Congress of its authority to regulate interstate commerce. For the first century after Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), the first case examining the operation of the Interstate Commerce Clause, Supreme Court precedent dealt primarily with the limitations the clause imposed on *state legislation* that discriminated against interstate commerce. Lopez, 514 U.S. at 553. The cases in the period since have dealt primarily with the issue of *Congress'* power under the commerce clause, and have examined whether a particular legislative act invoking the Interstate Commerce Clause exceeds the scope of authority granted Congress by Art. 1, § 8, cl. 3 of the Constitution. Id. at 554-556. Under various circumstances the Court has affirmed that the "power to regulate commerce, though broad indeed, has limits." Maryland v. Wirtz, 392 U.S. 183, 196 (1968), *overruled on other grounds by* National League of Citizens v. Usery, 426 U.S. 833 (1976).

Consequently, the Supreme Court has identified three broad categories of activity that Congress may regulate under the Interstate Commerce Clause. Perez v. United States, 402 U.S. 146, 150 (1971); Hodel v. Surface Mining & Reclamation Ass'n., 452 U.S. 264, 276-277 (1988). First, Congress has the authority to regulate the use of the channels of interstate commerce. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964). Second, Congress has the power to regulate and protect the instrumentalities of interstate commerce, or the persons or things in interstate commerce. *See, e.g.*, Shreveport Rate Cases, 234 U.S. 342 (1914); Perez, 402

U.S. at 150. Finally, Congress can regulate those activities having a substantial relationship to interstate commerce. NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937). Notably, all aspects of the cases comprising Supreme Court precedent on issues raised by the Interstate Commerce Clause concern commerce involving *states*.

Indian tribes are not states. Nor does the Interstate Commerce Clause regulate commerce with Indian tribes. "In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, [], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (internal citations omitted). As set forth in the discussion above, the "extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our Constitutional system that is not readily imported to cases involving the Indian Commerce Clause." Id.

This conclusion is consistent with the fact that "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those Constitutional provisions framed specifically as limitations on federal or state authority," Martinez, 436 U.S. at 56, such as the Interstate Commerce Clause. There are two central reasons why the Constitution does not apply to Indian tribes. First, the sovereignty of Indian tribes pre-dates the Constitution, and accordingly, "neither the Tribe's Constitution nor the federal Constitution is the font of any sovereign power of the Indian tribes." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n. 14 (1981). Second, and most significant here, Indian tribes were not parties to the plan of

convention adopting the Constitution. *See* Kiowa Tribe of Oklahoma v. Mfg. Tech., 533 U.S. 751, 756 (1998) (stating "tribes were not at the Constitutional Convention[, t]hey were thus not parties to the mutuality of concession.") (citations omitted); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); Blatchford, 501 U.S. at 782.

Consistent with this proposition, those provisions of the Constitution intended to constrain the federal government do not apply to Indian tribes, nor do those provisions intended to constrain the activities of states (such as the Interstate Commerce Clause) affect Indian tribes, and those provisions that transfer power from the states to the federal government[3] effect no transfer of the inherent sovereign powers of Indian tribes to the federal government. *C.f.* Blatchford, 501 U.S. at 782.

Therefore, although Congress has plenary authority to legislate with respect to Indian tribes, and despite the fact that tribal sovereignty is subject to complete defeasance through an exercise of Congress' power, before the "powers of local self-government enjoyed by [] [Indian tribes]" and which "existed prior to the Constitution," Talton v. Mayes, 163 U.S. 376, 384 (1896); (including the power to exclude, and the power to regulate commercial relations with those persons entering their lands) can be defeated, Congress must exercise its power under the

---

[3] States are free to exercise those powers not specifically withheld from them by the Federal Constitution. New York v. United States, et al., 505 U.S. 144, 156 (1992). The Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984). "In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." Camps Newfound/Owatonna, Inc. v. Town of Harrision, 520, U.S. 564, 571 (1997). Imposing burdens on states to protect voting rights is within Congress' power to enforce the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 518 (1997); *see also* United States v. Harris, 106 U.S. 629, 639 (1883) (limiting Fourteenth Amendment prohibitions to state actors).

Indian Commerce Clause. No other provision of the Constitution grants authority to Congress to act to regulate commerce with Indian tribes for "[i]n contrast to when Congress acts with respect to the States, when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause . . . not pursuant to its authority under the Interstate Commerce Clause." Merrion, 455 U.S. at 155 n. 21.

Therefore, unless the Board finds that Congress enacted the NLRA in an exercise of its Indian Commerce Clause power, any application of the Act to the Tribe violates the fundamental constitutional principle that Congress can act only pursuant to an enumerated power, or such implied powers as are necessary to the proper exercise of that enumerated power. Here, Congress did not exercise its Indian Commerce Clause authority when enacting the NLRA. Consequently, the NLRB lacks authority to extend the Act to the Tribe, and is therefore without jurisdiction over the Tribe, and the Tribe's motion to dismiss must therefore be granted.

II. ANY APPLICATION OF THE "TUSCARORA RULE"TO DIVEST INDIAN TRIBES OF SOVEREIGN RIGHTS, PROPERTY INTERESTS, OR TO REGULATE INDIAN COMMERCE, VIOLATES THE UNITED STATES CONSTITUTION.

Both General Counsel and Intervenor State of Connecticut rely on the language in Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), for the proposition that general federal statutes, such as the NLRA, govern Indian tribes' activities on their reservation lands. In dicta in Tuscarora the Supreme Court stated that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." Id., at 116. This dicta has come to be know as the "Tuscarora rule," and, as originally formulated, did not contemplate Indian tribes, only individual Indians. In

Tuscarora, however, the "rule" did not contemplate application where tribal sovereign interests were implicated, or on-reservation activity involving Indian commerce was in issue. Decisions of various circuit courts have extended the "rule" to Indian tribes engaged in commercial activity on their reservations.[4] But in reaching the conclusion that the NLRA governs Indian tribes' dealings with unions, the General Counsel[5] and the State of Connecticut can cite only these circuit court decisions, because no decision of the United States Supreme Court has ever held that tribal sovereignty may be abrogated by statutory language that is completely silent with respect to tribes, in the absence of some evidence of Congressional intent. To the contrary, the Court has repeatedly held tribal sovereignty cannot be abrogated by silence in statutory language or legislative history. *E.g.*, Merrion, 455 U.S. at 152. Those circuit court decisions extending the dicta of Tuscarora to Indian tribes are therefore mistaken, for extending any federal statute to Indian tribes that is not enacted through an express invocation by Congress of its Indian Commerce Clause authority violates the fundamental Constitutional principles set forth above, and cannot withstand scrutiny.

---

[4]*See* Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2nd Cir. 1996); Lumber Indus. Pension Fund v. Warm Springs Forest Products Indus., 939 F.2d 683 (9th Cir. 1991); Dep't of Labor v. Occupational Health & Safety Comm'n ("DOL v. OSHSC"), 935 F.2d 182, 185-87 (9th Cir. 1991); State Farm Ins. Co. v. Smart, 286 F.2d 929 (7th Cir. 1989); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

[5]The Board should note that the General Counsel misrepresents the nature of the Court's statement in Tuscarora. The General Counsel asserts that "the Supreme Court stated that a general federal statute such as the NLRA, even if silent as to its application to tribes, nonetheless applies to tribal lands." (General Counsel's Brief in opposition at 4.) This is a blatant misstatement of the dicta relied upon, as the direct quote from the case set forth above establishes.

A. AS ORIGINALLY FORMULATED, THE "TUSCARORA RULE" DID NOT EXTEND TO THE EXERCISE BY A TRIBE OF ITS SOVEREIGN RIGHTS, NOR TO ON-RESERVATION COMMERCE ENGAGED IN BY AN INDIAN TRIBE.

The Supreme Court in Tuscarora, relying on the authority of cases involving federal and state tax statutes, held that the Federal Power Act ("FPA") applied to tribal owned land located outside a reservation, and not held in trust nor subject to any treaty. Tuscarora, 362 U.S. at 116-117, *(citing* Choteau v. Burnet, 283 U.S. 691 (1931); Superintendent of Five Civilized Tribes v. Commissioner of Internal Rev., 295 U.S. 418 (1935); Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943)). The "Tuscarora rule," was actually a general principle developed in the context of tax cases, and was originally applied to individual Indians and non-Indians dealing with Indians, not to tribal governments as employers. *See* Heiner v. Colonial Trust Co., 275 U.S. 232, 234 (1927)(holding that federal tax statutes "in terms plainly embrace the income of a non-Indian lessee derived from the lease of restricted Indian lands); Choteau, 283 U.S. at 694.

In such cases, there was nothing to distinguish individual Indians from any other citizen subject to a particular general federal statute, and, thus, the general rule that the intent to exclude or exempt a person from applicability of a tax must be definitely expressed applies. In other words, in those cases cited as authority in Tuscarora, the Court's analysis of whether a general federal statute applies to individual Indians and non-Indians held no significance for tribal sovereignty, for the issues involved land outside reservation boundaries, and did not contemplate an exercise by a tribe of its sovereign right to exclude, nor to engage in commerce where Congress had expressed no intention to regulate its activities.

Thus the facts of Tuscarora justified (to the extent the decision *can* be justified) the Court's reliance on Oklahoma Tax Comm'n v. United States, for in that case the Court upheld the

right of the State of Oklahoma to tax the estates of the members of the Five Civilized Tribes. 319 U.S. at 598. Although Worcester had held that states lacked jurisdiction over tribal lands because tribes are "separate political entities with all the rights of independent status," the Court in Oklahoma Tax Comm'n concluded that such independence "has not existed for many years in the State of Oklahoma." 319 U.S. at 602. Because Oklahoma Indians lacked "tribal autonomy," the Court declined to follow its previous cases that exempted Indians from federal tax with respect to income derived from Indian lands. Id. at 603. Similarly, in Choteau, the Court rejected the petitioner's claim that he was exempted from federal income tax based on his *status* as an Indian. 283 U.S. at 694. The Court looked to federal policies designed "to emancipate the Indian from his former status as a ward" and concluded that such polices included "imposing upon him both the responsibilities and the privileges of the owner of the property, including the duty to pay taxes." Id. Likewise, in Superintendent of Five Civilized Tribes, the Court held the investment income of an Indian "having petitioner's status" was subject to the federal income tax. 295 U.S. at 420.

As the Court stated in Squire v. Capoeman, 351 U.S. 1 (1956), however:

> "We agree with the Government that Indians are citizens and that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act."

351 U.S. at 6. (holding federal income tax did not apply to capital gains income derived from timber sales on allotted Indian lands, in light of the purpose of the General Allotment Act);

Donovan v. Navajo Forest Prod. Indus., 692 F.2d 709, 713 (10th Cir. 1982); *see also* United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976).[6]

In McClanahan, the Court again addressed the issue of state taxation with respect to Indians, and drew a contrary conclusion where the matter involved an Indian residing on a reservation. In reference to Oklahoma Tax Comm'n v. United States, the Court noted that the "[Worcester] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." McClanahan, 411 U.S. at 172. In defining the precise issue presented, the Court stated:

> "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accouterments of tribal self-government. Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands."

Id. at 167. In light of the status of reservation Indians, the Court held that, until Congress explicitly grants jurisdiction to state governments to tax reservation lands, state taxation is prohibited. Id. at 172.

Therefore, absent the infringement of *special Indian rights*, or the on-reservation exercise of those rights by an Indian or a tribal government, the canons of constructions applicable in

---

[6]The differential treatment with regards to the "Tuscarora rule" between individual Indians and Indian tribes is also supported by the fact that even the taxation exemption rule from which the Tuscarora dicta stems does not apply to Indian tribes as it does to individuals. Although the Internal Revenue Code would likely be classified as a "general federal law" beyond a couple of recent enactments, it too is silent as to Indian tribes, and the Code has never been construed to permit the income taxation of Indian tribes or their subordinate organizations. Rev. Rul. 94-16, 1994-1 CB 19; Rev. Rul. 65-284, 1967-2 CB 55. The NLRB has also recognized the inapplicability of the Tuscarora dicta to on-reservation activities of tribes when only applying it to off-reservation tribal enterprises. *See* Sac and Fox Indus., Ltd., 307 N.L.R.B. 241 (1992). Thus, the argument that the "Tuscarora rule" does not apply in this case is wholly consistent with Board precedent.

Indian law are not invoked. In such cases, there is nothing to distinguish Indians from any other citizen subject to the federal statute, thereby invoking the general rule that the intent to exclude or exempt an individual from application of the statute must be definitely expressed. In essence, the Court's analysis of whether a general federal statute applies to individual Indians and non-Indians in those cases cited as authority in Tuscarora did not implicate Indian rights or tribal sovereign authority to exclude, nor a tribe's right to engage in commerce free of strictures imposed by a court in the absence of congressional action, and thus involved only issues of citizenship.

To the contrary, what is in issue here is the sovereign right of the Tribe to exclude non-members from its territory, and the ancillary sovereign right to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Montana v. United States, 450 U.S. 544, 565 (1981) (upholding the right of the Crow Tribe to regulate hunting and fishing rights of nonmembers on reservation trust and Indian-owned lands, but rejecting the Crow Tribe's claim that the right of self-government included right to regulate nonmembers' hunting and fishing on non-Indian fee lands within the reservation).[7] Those rights cannot be abrogated

---

[7]Federal courts have consistently found that tribally-owned businesses possess the same sovereign rights as the tribes that own them. In Central Mach. Co. v. Arizona Tax Comm'n, 448 U.S. 160, 164 n.3 (1980), the Supreme Court rejected a state's attempt to tax the sale of a tractor by a non-Indian seller to a tribal business enterprise. In so holding, the Court treated the tribe's business enterprises as it would the tribe, explaining that "it is irrelevant that the sale was made to a tribal enterprise rather than to the tribe itself." 448 U.S. at 164 n.3 (*citing* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157 n.13 (1973)). Similarly, in Mescalero Apache Tribe v. Jones, the Supreme Court pointed out that "the question of a tribe's tax immunity cannot be made to turn on the particular form in which a tribe chooses to conduct its business." 411 U.S. at 157 n.13, *see also* Equal Employment Opportunity Comm'n. v. Fond du Lac Heavy Equipment, 986 F.2d 246, 247-48 (8th Cir. 1993) (analyzing applicability of ADEA to wholly-owned construction company of Fond du Lac Band of

absent express congressional action, undertaken as an exercise of its *Indian* Commerce Clause authority. Neither the General Counsel, nor the Intervenor State of Connecticut can point to the requisite congressional action in the context of the NLRA to sustain an exercise of jurisdiction here. Nothing in the statutory language, legislative history, or any other statute suggests that Congress even considered tribes in its enactment of the NLRA. In fact, the Act's definition of "commerce" significantly excludes any reference to commerce involving Indian tribes. *See* 29 U.S.C. § 152(6) (1994). The term refers to commerce among, between, or involving States and Territories,[8] the District of Columbia, and even foreign nations. Id. But, notably absent from this encompassing definition is any mention of Indian tribes whatsoever. Id.

In contrast, the Federal Power Act ("FPA") expressly delegated licensing authority with respect to reservations including "tribal lands embraced within Indian reservations." Tuscarora, 362 U.S. at 99, 112, 114. The FPA also provided for the payment of compensation for the use of "tribal lands embraced within Indian reservations." 16 U.S.C. §§ 796(2), 803(e). Unlike the NLRA, Congress did not overlook tribes in enacting the FPA. Consequently, the "Tuscarora

---

Chippewa as applicability to the Band itself); Lumber Indus. Pension Fund; 939 F.2d at 684 (analyzing applicability of ERISA to tribally owned saw mill as applicability to tribe itself); Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986) (finding that Title VII exemption for Indian Tribes applied with equal force to consortium of Indian Tribes).

[8]Although "Territories" are included in the definition, Indian tribes are not territories under this definition. The Supreme Court has held that tribes are not territories because "a territorial government is entirely the creation of Congress." United States v. Wheeler, 435 U.S. 313, 321 (1978). "When a territorial government enacts and enforces . . . laws to govern its inhabitants, it is not acting as an independent political community . . ., but as 'an agency of the federal government.'" Id. (*quoting* Domenech v. Nat'l. City Bank, 294 U.S. 199, 204-05 (1935)). Indian tribes, as noted, are extra-constitutional, deriving their sovereignty from the fact that they were independent nations prior to the establishment of the United States. Because of this, the Supreme Court expressly rejected that the Oklahoma "Indian territory" was a territory. In re Lane, 135 U.S. 443 (1890).

rule" has no effect here, and the Tribe's motion to dismiss must be granted, for to subject the Tribe to the Act would violate the fundamental constitutional principles upon which this country is founded.

B. BECAUSE CONGRESS INVOKED ONLY ITS INTERSTATE COMMERCE CLAUSE AUTHORITY WHEN ENACTING THE NLRA, APPLICATION OF THE "TUSCARORA RULE" TO EXTEND THE NLRA TO INDIAN TRIBES VIOLATES FUNDAMENTAL CONSTITUTIONAL PRINCIPLES.

In Jones & Laughlin Steel Corp., the Supreme Court held that the NLRA constituted a valid exercise of Congress Interstate Commerce Clause power. 301 U.S. at 31-32. The Court concluded Congress can invoke the Interstate Commerce Clause to regulate those activities having a substantial relationship to interstate commerce, and the activity in issue there was determined to have such a relationship to interstate commerce. Jones & Laughlin Steel Corp. is the seminal case respecting the constitutionality of the NLRA, and is replete with references to the power of Congress under the *Interstate Commerce Clause*. Id. Yet, throughout the Act, there is not *one* mention of Indians, Indian tribes, Indian commerce, or commercial relationships involving Indians and non-Indians taking place on a reservation. The legislative history is equally devoid of *any* mention of Indians, Indian tribes, or Indian commerce. Thus, it is beyond dispute that Congress enacted the NLRA in an exercise of *only* its Interstate Commerce Clause power, and not only did not invoke its authority to regulate Indian commerce, but did not contemplate regulating Indian commerce *at all*. *See* 29 U.S.C. § 152(6).

As discussed at length above,"the powers of government are limited, and [] its limits are not to be transcended." M'Culloch 17 U.S. (4 Wheat.) at 421. The power of Congress to act with respect to Indian tribes has been carefully defined by over two hundred years of jurisprudence

from the nation's highest court. That precedent uniformly confirms that Congress has *but one* affirmative grant of power to legislate with respect to Indian tribes, and even more particularly respecting Indian commerce, and that single source is the Indian Commerce Clause. For so long as the particular tribe of Indians "remains a distinct people, with an existing tribal organization, recognized by the political department of the government, *Congress* has the power to say with whom, and on what terms, they shall deal . . ." 43 Gallons of Whiskey, 93 U.S. at 195. What might be added to this immutable principle is that *only* Congress, to the exclusion of the Judicial Branch or the Executive Branch (or its agencies), has such authority. Nowhere does the Constitution vest the *federal judiciary* with the "power to say with whom, and on what terms, [Indian tribes] shall deal . . .," nor does it vest an agency of the Executive Branch with such authority. The Framers could not have intended that the federal courts, through the Commerce clause, to impose their own views of the proper relationship between Indians and those engaged in commerce with them.

While in the face of Congressional silence the federal courts may be the final arbiter of the legitimacy of state legislative action impeding interstate commerce, it has *never* been suggested by the Supreme Court that, in the absence of Congressional action, the Commerce clause permits a court to be the final arbiter of an Indian tribe's actions respecting the persons with whom they engage in commerce. To the contrary, the "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch." Lopez, 514 U.S. at 552. Where the federal judiciary presumes to attribute to Congress an act Congress has not taken, then the judiciary crosses the "line which circumscribes the judicial department, and [] treads on legislative ground." M'Culloch 17 U.S. (4

Wheat.) at 423. The "sound construction of the constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." Id. at 421. Congress has not acted to subject Indian tribal governments to the NLRA, and in the absence of such Congressional action, no federal court or administrative agency of the executive branch can presume to do so.[9]

As the Supreme Court noted in Mistretta v. United States, 488 U.S. 361 (1989), it "has consistently given voice to, and reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to our liberty." Id. at 380 (internal citations omitted). The court went on to resoundingly reaffirm these principles, quoting Madison, who said, "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." Id., (*quoting* THE FEDERALIST No. 47, 324 (James Madison)(J. Cooke ed. 1961)). The Mistretta Court confirmed that while the separate branches of government must remain free

---

[9]As noted, various federal courts have held that Congressional silence constitutes sufficient evidence of Congress' intent to apply general statutes to Indian tribes. *See* note 4, *(supra.)* But the Board should note that they have done so without addressing the constitutional questions placed squarely in issue here. Had the constitutional issues raised here been placed before them, it is likely the result would have been different, for the Supreme Court has generally "expressed [its] vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," Morrison v. Olson, 487 U.S. 654, 681 (1988); and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch." Mistretta v. United States, 488 U.S. 383 (1989), (*citing* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)). If the constitutionality of a federal court deciding Congress had exercised its Indian Commerce Clause authority through silence were ever presented to a court, undoubtedly that court would be compelled to conclude that it had been assigned a "task[s] that [is] more properly accomplished by [the legislative] branch[]." Morrison, 487 U.S. at 681. Further, as noted above, these question present a threshold issue which the Board must address before reaching any other issue presented.

of the control or coercive influence of either of the others, they are not required to be entirely separate and distinct. Again quoting Madison, the Court affirmed that separation of powers does not mean that the three branches could have no control over the acts of each other, but rather, "that where the *whole* of the power of one department is exercised by the same hands which possess the *whole* of the power of another department, the fundamental principles of a free constitution are subverted." Id. at 325-326.

At issue in Mistretta was whether the placement of the Sentencing Commission within the Judicial Branch violated the separation of powers doctrine, and whether the placement was an impermissible delegation of Congress' legislative power to the Judicial Branch. As the Court noted, the Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." Id. at 372, *(citing* U.S. CONST., art. I, § 1.) The Sentencing Commission was the result of congressional action seeking to redress wide dissatisfaction with the manner in which individuals were sentenced for federal crimes, and to interject uniformity into the administration of the federal criminal system. Id. at 362-370. The Court concluded that placement of the Sentencing Commission in the Judicial Branch did not constitute an impermissible delegation of Congress' legislative authority, at least in part because, unlike those circumstances where a court would be called upon to legislate where Congress had not acted, the Commission would be exercising some of the functions normally within the discretion of the Courts, i.e., setting the length of sentences for those convicted of crimes.

In contrast, the Ninth Circuit, in Lumber Indus. Pension Fund, 939 F.2d at 683, DOL v. OSHSC, 935 F.2d at185-87, and Donovan, 751 F.2d at 1113; the Second Circuit in Reich v Mashantucket Sand & Gravel, 95 F.3d at 174; and the Seventh Circuit in State Farm Ins. Co.,

286 F.2d at 929, have all presumed to exercise the *whole* of the power of Congress, and "the fundamental principles of a free constitution [were] subverted" as a result. Mistretta, 488 U.S. at 380 (*quoting* THE FEDERALIST No. 47 at 324.) When a federal court presumes to equate congressional silence with an exercise by Congress of its Indian Commerce Clause authority, then they have violated Art. I, § 1 of the U.S. Constitution, for "all legislative Powers" are no longer "vested in a Congress of the United States," but are exercised by the same hands which possess the *whole* of the power of the Judicial Branch.

Likewise, if the Board should presume to attempt to apply the NLRA to the Tribe, as both the General Counsel and the State of Connecticut so strenuously urge, it will have exceeded the scope of the authority vested in the Executive Branch by the Constitution. Considering that Congress has not acted to regulate Indian commerce involving unions, the source of any authority the Board asserts would have to arise from an executive order.[10] The President's power to issue an Executive Order, however, must stem either from an act of Congress or the Constitution itself. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Because Congress has not acted, and because the Constitution vests the Board with no authority to regulate commerce with Indian tribes, no Executive Order could apply the NLRA to Indian tribes. The Board lacks jurisdiction over the Tribe, for "[t]he power of Congress itself, when acting through the concurrence of both branches,

---

[10]Unless of course, the Board is prepared to rely for its authority on that unconstitutional usurpation of legislative power represented by the decisions of the various circuit courts cited in this matter, the only source of authority would of necessity derive from an Executive Order. The Board would be ill advised to do so, for ultimately a reviewing court will be confronted with the question, and the Board's reliance will likely be held to be unconstitutional as well.

is a power dependent solely on the Constitution." Kilbourn v. Thompson, 103 U.S. (13 Otto) 168, 182 (1880). Where Congress has not acted to abrogate the sovereign right of Indian tribes to exclude others from their lands, or the ancillary right to regulate commercial relationships with those persons entering its lands, the concurrence of both the other branches of government in Congress' decision is mandated by the Constitution. Therefore, any effort by the NLRB or a federal court to hold the NLRA applicable to a tribe violates the Separation of Powers Doctrine, and is an invalid exercise of Congress' legislative authority. Because Congress has not acted, the Tribe's motion to dismiss must be granted.

III. THE INSTANT ACTION CANNOT BE MAINTAINED AGAINST AN INDIAN TRIBE BECAUSE THE NLRA DOES NOT ABROGATE OR DIVEST TRIBES OF THEIR RIGHT AND POWER TO EXCLUDE OTHERS FROM THEIR TERRITORY.

A. INDIAN NATIONS POSSESS BROAD POWER TO EXCLUDE NONMEMBERS FROM THEIR TERRITORY, A POWER NOT POSSESSED BY ANY OTHER SOVEREIGN IN THE UNITED STATES.

The current action is brought under § 8(a)(1) and (2) of the NLRA on the grounds that an Indian tribe denied HERE access to its reservation. In essence, HERE complains that it has been excluded from tribal lands, while another union has been granted permission to enter those same tribal lands. At its core, this action does not ask whether tribal gaming operation employees have collective bargaining rights or whether a tribe must negotiate a collective bargaining agreement. It is only about a particular union being excluded from tribal lands. Both the General Counsel and the Intervenor State of Connecticut admit this to be the nature of the complaint. (General Counsel's Brief in Opposition at 2-3; Brief of Intervenor State of Connecticut in Opposition at 1).

Yet, Indian nations, including San Manuel, have the very broad right and power to exclude others from their territory, "a power unknown to any other sovereignty in this Nation." Merrion, 455 U.S. at 160 (Stevens, J., dissenting). In this respect, tribes have a power more broad than any state, any county, or any municipality. Id. at 185 n.44. Notably, "States do not have any power to exclude nonresidents from their borders." Id. Thus, tribes, unlike states, can entirely close their borders to outsiders, *see* Morris v. Hitchcock, 194 U.S. 384, 393 (1904), notwithstanding the constitutional right of interstate travel which may be rooted in the Commerce Clause, *see*, *e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1969); United States v. Guest, 383 U.S. 745, 758-759 (1966); Edwards v. California, 314 U.S. 160, 172-174, 177 (1941).[11]

The power to exclude nonmembers is an aspect of a tribe's civil powers. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 478 (9th Cir. 1985). It is a "necessary exercise of tribal self-government and territorial management." Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587, 593 (9th Cir. 1983). "Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them." Merrion, 455 U.S. at 144 (emphasis in original). This "right to exclude" not only arises from a tribe's inherent sovereignty, but also from treaties and executive orders setting aside a reservation or territory for the tribe's exclusive use and occupancy. South

---

[11]Notably, there are no restraints in the United States Constitution on San Manuel's power to exclude HERE, nor any grant of rights to HERE or tribal employees deriving from the federal constitution. *E.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896). The exercise of a tribe's power to exclude, on the other hand, may be subject to limitations found in the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §1301 *et seq.* (1994), such as equal protection and due process. However, if HERE were to complain that the tribe's exclusion of it was not in compliance with the ICRA, its remedy lies with the tribe, not the NLRB or any federal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Dakota v. Bourland, 508 U.S. 679, 688 (1993); Merrion, 455 U.S. at 144; McClanahan, 411 U.S. at 174-75.[12]

The power also derives from the simple fact that an Indian tribe holds the land. The right to exclude is an incident of Indian title, an incident "superior to that incident to fee simple title." Catawba Indian Tribe v. South Carolina, 865 F.2d 1444, 1448 (4th Cir. 1989); Delaware Tribe of Indians v. United States, 130 Ct. Cl. 782, 790 (1955) (holding that the combination of rights of Indian ownership includes "the right to exclude all other persons from being on the land for any purpose whatever.") Indian title is superior to normal fee title, in part, because it is not merely the power of a landowner, but also the power of a government – over its lands, the Tribe has "dominion as well as sovereignty." Merrion, 455 U.S. at 145 n.12.

B. IN THE ABSENCE OF CLEAR CONGRESSIONAL INDICATION TO ABROGATE THE TRIBAL POWER TO EXCLUDE, THIS ACTION CANNOT BE MAINTAINED.

Regardless of the source, an Indian tribe's power to exclude nonmembers entirely from the reservation is well established and beyond doubt. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332-33 (1983). The tribe's right to exclude means that it has the extremely broad power to exclude any individual, any entity, or any organization, including unions like HERE, from its territory. To find that the present action can be maintained against an Indian tribe pursuant to the NLRA requires finding that a tribe cannot exercise its sovereign power to close its borders as to a particular union. In order to allow this action to proceed, the Board would

---

[12]Whether a reservation is established by treaty, statute, or executive order does not alter the extent of a tribe's right and power to exclude. The Supreme Court has recognized that no distinction can be made, in terms of rights and powers, between tribes residing on executive order reservations and those residing on reservations established by treaty or statute. *See, e.g.*, Arizona v. California, 373 U.S. 546, 598 (1963).

have to find that Congress, when enacting § 8(a) of the NLRA, abrogated the tribal right to exclude, and that such abrogation is consistent with the federal trust responsibility of both Congress and the NLRB.

But, such a finding cannot be made here. As the Supreme Court has consistently reaffirmed, "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." Merrion, 455 U.S. at 149; Martinez, 436 U.S. at 60. Tribal powers may only be abridged by a "clear indication" to that effect found in a particular statute or its legislative history. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17-18 (1987); Merrion, 455 U.S. at 152. There is no indication in the legislative history of the NLRA that Congress intended to abrogate the tribal right to exclude – one of the most significant sovereign powers which tribes possess. In fact, Congress did not discuss or consider Indian tribes at all when it passed the NLRA. National Labor Relations Bd. v. Pueblo of San Juan, 30 F.Supp.2d 1348, 1354 (D.N.M. 1998); Sac and Fox Ind., Ltd., 307 N.L.R.B. 241, 242 (1992). "It would hardly be consistent with '[the] overriding duty of our Federal Government to deal fairly with Indians,' lightly to imply a cause of action on which the tribes had no prior opportunity to present their views." Martinez, 436 U.S. at 70 n.30 (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974)).

The only inference that can properly be drawn from this silence is that the tribal power to exclude a particular union from its territory remains intact. LaPlante, 480 U.S. at 18; Merrion, 455 U.S. at 149 n.14; Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899, 905 (9th Cir. 1991). In the absence of "clear indications," the Board cannot find that Congress even implicitly

deprived Indian tribes of their power to exclude others from their territory.[13] Merrion, 455 U.S. at 152; Burlington N. R.R. Co., 924 F.2d at 905.

In addition, any assertion that Congress intended to abrogate the Tribe's right and power to exclude must be viewed against the federal government's trust responsibility to Indian tribes. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 220-21. Under its trust duties, Congress' conduct is "judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942). This trust duty applies with equal force to the Executive Branch of the government, including the Board and the Department of Labor. *E.g.*, Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966); Pyramid Lake Painte Tribe v. Morton, 354 F.Supp. 252 (D.D.C. 1973). A finding by the Board that Congress, through silence, abrogated the Indian power to exclude, would violate the government's trust duty. *See* Martinez, 436 U.S. at 70 n.30.

---

[13]Although the Ninth Circuit has found the tribal right to exclude insufficient to overcome its reading of the Tuscarora rule, Dep't. of Labor v. Occupational Health & Safety Commission ("DOL v. OSHSC"), 935 F.2d 182, 185-87 (9th Cir. 1991), that decision does not alter the analysis or determination here. First, the Tenth Circuit has found precisely the opposite of the Ninth Circuit when faced with precisely the same issue. Donovan v. Navajo Forest Products Ind., 692 F.2d 709, 711 (10th Cir. 1982). Second, the Ninth Circuit noted it was not faced with whether the substantive requirements of the Occupational Safety and Health Act ("OSHA") offend the right to exclude – the specific problem application of the NLRA causes here. DOL v. OSHSC, 935 F.2d at 184. The Ninth Circuit also pointed out the result could be different if there was a more direct conflict. Id. at 186. In addition, although not expressly stated in the Ninth Circuit's opinion, there is a significant difference between asserting that agents of the United States (OSHA investigators in Ninth Circuit case) are precluded from entering the reservation and that private organizations (the union in this case) can be excluded from the reservation. While one acts under the color of a "superior sovereign," the other acts only under the authority of a private organization. Finally, when not obsessed with the Tuscarora dicta, the Ninth Circuit has consistently recognized that tribal powers may not be abrogated by congressional silence. *E.g.*, Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899, 905-06 (9th Cir. 1991). Thus, finding that Congress did not abrogate the tribal right to exclude and permit an action such as the current one when enacting the NLRA is separate from any Tuscarora argument and must be decided without reference to the Tuscarora dicta, whether valid or not.

The federal trust responsibility applies especially in dealing with Indian property. *E.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The Supreme Court has classified the tribal right to exclude as a compensable property right. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997). The Court has also noted, with respect to non-Indian land ownership, that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" compensable by itself under the Fifth Amendment of the Constitution. Aetna v. United States, 444 U.S. 164, 176 (1979). Since the incidents of Indian title are greater than the incidents of fee simple title, Catawba Indian Tribe v. South Carolina, 865 F.2d at 1448, the right to exclude as an aspect of Indian title is certainly compensable. Thus, to find that Congress abrogated the Indian right to exclude, even viewed solely as an incident to the Indian right of occupancy, would constitute a taking, for the "division of the right [of occupancy] with strangers is an appropriation of the land *pro tanto*, in substance, if not in form." Shoshone Tribe v. United States, 299 U.S. 476, 496 (1937).

Although Congress has the power to abrogate the Indian right to exclude, "[t]he power does not extend so far as to enable the Government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that would not be an exercise of guardianship, but an act of confiscation." Id. at 497 (internal quotation marks omitted).

> "It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has

> acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time."[14]

United States v. Sioux Nation of Indians, 448 U.S. at 408 (*quoting* Three Tribes of Ft. Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968). As with tribal powers, congressional intent to extinguish Indian title must be "plain and unambiguous" and will not be "lightly implied." County of Oneida, 470 U.S. at 247-48. Again, no such evidence exists here. Furthermore, it is undisputable that Indian tribes received no compensation upon the enactment of the NLRA. Therefore, a finding that Congress meant to abrogate Indian tribes' right to exclude by enacting the NLRA, even if viewed simply as a property right, would require finding "that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights," a finding that cannot be made. Menominee Tribe v. United States, 391 U.S. at 413.

Although the General Counsel and Intervenor State of Connecticut argue the broad applicability of the NLRA to Indian tribes, the answer to that question does not necessarily resolve the direct issue involved. The parties are asking the Board to find that Congress abrogated Indian sovereign authority to exclude nonmembers from its territory by failing to specifically state in the statute that tribes retain the authority. Such a notion is ridiculous and

---

[14]Similarly, Congress could not wear two hats when in enacting the NLRA. Through the NLRA, Congress sought to protect employees' collective bargaining rights vis-a-vis their employer. Congress cannot simultaneously "act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests." Three Tribes of Ft. Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968). To presume through silence that Congress intended to act with regards to Indian affairs at the same time it acted toward employee collective bargaining rights would be to allow Congress to wear two hats simultaneously, which is not permitted.

directly contrary to controlling federal law. Congressional "silence as to Indian tribes does not 'clearly' indicate Congress intended to restrict" the tribal sovereign power to exclude. Burlington N. R.R. Co., 924 F.2d at 905. Even "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.'" Merrion, 455 U.S. at 152 (*quoting* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)). This action cannot be maintained under the NLRA because to do so would mean finding that Congress, through silence, intended to abrogate Indian tribes' power to exclude others from their territory – a finding that cannot be made without violating the federal trust responsibility both Congress and the NLRB owe to Indian tribes. The Board "may not impute a meaning to a statute not clearly there when to do so would abrogate Indian rights." Burlington N. R.R. Co., 924 F.2d at 905.

IV. EVEN IF THE NLRA OTHERWISE APPLIES TO INDIAN TRIBES, THEY ARE NOT EMPLOYERS UNDER THE ACT, JUST AS THE UNITED STATES AND STATES ARE NOT EMPLOYERS UNDER THE ACT.

A. THE GOVERNMENT EXEMPTION FROM THE NLRA MUST BE CONSTRUED BROADLY TO AVOID AN ILLOGICAL RESULT AND TO COMPORT WITH THE SETTLED PRINCIPLE THAT STATUTES ARE TO BE CONSTRUED IN FAVOR OF INDIAN TRIBES.

Even if the NLRA can be construed, as a whole, to apply to Indian tribes as a "general federal law," Indian tribes, including San Manuel's gaming enterprise at issue in the instant matter, do not constitute "employers" as that term is defined in the statute. 29 U.S.C. § 152(2) (1994). The definition expressly exempts "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." Id.

Read strictly and literally, as HERE and the General Counsel would urge, Indian tribes and their economic enterprises would not be exempt from the NLRA.

The literal meaning of a statute cannot be relied upon "when doing so would produce a result senseless in the real world." Reich v. Great Lakes Indian Fish and Wildlife Comm'n. ["Reich v. GLIFWC"], 4 F.3d 490, 494 (7th Cir. 1993); *see also* Green v. Bock Laundry Machine Co., 490 U.S. 504, 527-30 (1989) (concurring opinion); United States v. Ryan, 350 U.S. 299 (1950). This rule of construction applies to the NLRA. *See* Crilly v. Southeastern Penn. Transp. Auth., 529 F.2d 1355, 1359 (3rd Cir. 1976). In addition, the Board is given statutory authority to decline to assert jurisdiction over any labor dispute including any class or category of employers, providing support for its ability to exempt Indian nations as governments despite the lack of an express exemption in the definition. 29 U.S.C. § 164(c)(1). Furthermore, the literal language of the statute cannot resolve the issue as against an Indian tribe because federal statutes are to be construed as reasonably as possible in favor of Indian tribes. *E.g.*, Merrion, 455 U.S. at 152; Montana v. Blackfeet Tribe, 471 U.S. 759, 766-68 (1985); County of Oneida, 470 U.S. at 247 (noting that the Supreme Court applies the canons of construction "in nontreaty matters"); EEOC. v. Fond du Lac Heavy Equipment, 986 F.2d at 250-51; Equal Employment Opportunity Comm'n. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989).

When the definition of "employer" is applied to Indian tribes, their agencies, and subordinate economic organizations, the definition becomes extrinsically ambiguous, for a literal meaning would create a senseless distinction between all other governments in the United States and Indian tribes. *See* Reich v. GLIFWC, 4 F.3d at 494. As the Seventh Circuit explained when faced with whether Indian police officers should be exempt the same as state police officers

under the Fair Labor Standards Act when the Act is silent as to tribes:

> [E]ven literalists do not interpret statutes literally when doing so would produce a result senseless in the real world. Even literalists, that is to say, acknowledge the applicability to statutes of the principle of contract interpretation that allows the court to seek meaning beneath the semantic level not only when there is an "intrinsic" ambiguity in the contract but also when there is an "extrinsic" one, that is, when doubt that the literal meaning is the correct one arises only when one knows something about the concrete activities that the contract was intended to regulate. . .
>
> A literal reading of the Fair Labor Standards Act would create a senseless distinction between Indian police and all other public police. Nothing in the Act alerts the reader to the problem; you have to know that there are Indian police to recognize it. But once it is recognized, the Act, viewed as a purposive, rational document, becomes ambiguous, creating room for interpretation. We cannot think of any reason other than oversight why Congress failed to extend the law enforcement exemption to Indian police. . .

Reich v. GLIFWC, 4 F.3d at 493-94. Precisely the same reasoning applies to the NLRA.

As mentioned, Congress did not consider whether the NLRA should apply to Indian tribes or their subdivisions. However, that is not atypical for the period in which the NLRA was initially enacted. *See, e.g.*, id. at 493 (noting that Congress was not concerned with Indian issues at the time it passed the Fair Labor Standards Act in 1938). The exemption for governments contained in the NLRA has existed since its initial enactment in 1935. Crilly, 529 F.2d at 1358. At this time, Indian tribes were not engaged in extensive economic activities. To the contrary, at that precise time, Congress had just enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (1994), "to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." Act of June 18, 1934, ch. 576, 48 Stat. 984, 984. Congress was concerned with

resolving the extremely dilapidated conditions of Indian nations caused by prior federal Indian policy. *See* INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (L. Meriam ed.) (Baltimore: The Johns Hopkins Press, 1928); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 144-45. Relations between Indian tribes and unions and the collective bargaining rights of tribal employees were simply nowhere near Congress' concerns. This is further evidenced by the simple fact that not even the Board was faced with the issue until 1976 in Fort Apache Timber Company, 226 N.L.R.B. 503 (1976).

B. THERE IS SIGNIFICANT EVIDENCE THAT CONGRESS WOULD INTEND INDIAN TRIBES TO BE EXEMPT FROM THE NLRA ALONG WITH OTHER GOVERNMENTAL ENTITIES.

Although Congress has not considered whether Indian tribes should be afforded the same treatment as the United States and the several states under the NLRA, there is significant evidence that if Congress were faced with the issue, it would consider Indian tribes similarly exempted. The legislative history of the governmental exemption from the NLRA reveals that it was based upon the fact that governmental employees did not usually enjoy the right to strike. *See* 78 CONG. REC. 10351 *et seq.*; Hearings on Labor Disputes Act before the House Committee on Labor, 74th Cong., 1st Sess. 179 (1935); 93 CONG. REC. 6441 (Sen. Taft); National Labor Relations Bd. v. Natural Gas Util. Dist. of Hawkins Cnty., 402 U.S. 600, 604 (1971). In addition, Congress was undoubtedly concerned with states' rights and state sovereign immunity. Crilly, 529 F.2d at 1360.

The concerns for exempting states and the United States are equally applicable to Indian nations. If Congress chose or believed that government employees generally do not have the right to strike, there is no reason why that rule would not apply to sovereign Indian tribes and

their governments.[15] Similarly, although the concept of states' rights does not apply directly to Indian tribes, they are due the same type of deference under the principles of comity. Reich v. GLIFWC, 4 F.3d at 495; *see also* Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985) (comity mandates deference to tribal courts in determining jurisdiction); Martinez, 436 U.S. at 61 n.10 (tribes are due the same deference due states in determining whether federal statute has implied private cause of action); Wilson v. Marchington, 127 F.3d 805, 809-10 (9th Cir. 1997) (adopting the principles of comity for the enforcement of Indian tribal court judgments by federal courts). This is in part because "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." New Mexico v. Mescalero Apache Tribe, 462 U.S. at 332 (citations and internal quotation marks omitted). They are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only

---

[15]Interestingly, the state of Connecticut wastes an exorbitant amount of energy arguing that Indian gaming operations are nothing more than businesses and asserting concerns about "fundamental rights of its employees to organize and bargain collectively, pursuant to the procedures and requirements of the NLRA." (Brief of Intervenor State of Connecticut at 4). However, the Intervenor makes no attempt to distinguish tribal gaming operations from its own Connecticut Lottery Corporation ("CLC"), whose mission statement is "to raise revenue in support of the various programs and services of the state of Connecticut by offering products to our players that are fun and entertaining and by ensuring the public trust through integrity and honesty." Its vision statement further provides the CLC "will be recognized throughout the State of Connecticut and in the gaming industry as a leader committed to helping the State achieve its revenue raising objectives." There is no distinction between Connecticut's gaming operation and that of an Indian tribe. Yet, the CLC's employees have no "fundamental rights" to collective bargaining under the NLRA. Instead, their rights are established by Connecticut statute, CONN. GEN. STAT. §§ 5-270 *et seq*. Again, the Intervenor cannot justify its request for different treatment between its gaming enterprise and that of San Manuel, whose rights to collective bargaining are affirmatively established under that Tribe's legislative enactments. In any event, the Board cannot consider the rights of tribal employees in its decision, as Connecticut urges, because the comity due Indian tribes is paramount. *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n., 4 F.3d 490, 495 (7th Cir. 1993). Also, to consider employee's right would violate the Board's trust responsibility. *See* Pyramid Lake Painte Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

acknowledged, but guarantied by the United States." McClanahan, 411 U.S. at 168 (*quoting* Worcester, 31 U.S. at 557.) Indian nations possess the authority to regulate their own internal and social relations, United States v. Wheeler, 435 U.S. 313, 322 (1978), and, as a result, "it has been traditional to leave the administration of Indian affairs for the most part to the Indians themselves," Reich v. GLIFWC, 4 F.3d at 494; *see also* Duro v. Reina, 495 U.S. 676, 694 (1990) ("With respect to . . . internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country.") Comity dictates that Indian tribes' rights of self-government be respected in a manner equivalent to that of the states. Reich v. GLIFWC at 495.

Certainly part of Congress' concern with excepting governments from the definition of employer was the usurpation of governmental decision-making authority. *Cf.* U.S. CONST. amend. X. Although the NLRA does not mandate that an employer actually enter into a collective bargaining agreement, it does mandate that an employer negotiate in good faith. 29 U.S.C. § 158(d). At a minimum, if held applicable, the NLRA would require a tribal government to sit down at the bargaining table, directly removing the decision making authority of the tribal legislative body whether to negotiate in the first instance.[16] Under the principles of comity, this

---

[16]Although the Tuscarora rule is inapposite to this argument, it is worth noting that the statutes held applicable by the Ninth Circuit do not intrude into government decision-making to this level. Rather, those statutes merely impose minimum regulatory standards applicable to the work place – they do not take away the tribe's power and right to decide whether to negotiate an agreement. In fact, under the Ninth Circuit's application of OSHA and ERISA, a tribe still has the authority to enact more stringent regulations. In Lumber Indus. Pension Fund, the Ninth Circuit noted that, although ERISA applied to the Tribe's operation, the Tribe was still free to enact its own ordinance and establish its own pension plan upon the expiration of the applicable collective bargaining agreement, subject to ERISA. 939 F.2d at 685.

is no different than usurping the legislative authority of a state whether to decide to negotiate a collective bargaining agreement.

Congressional concerns of sovereign immunity reflected in the governmental exemption from the NLRA are also applicable to Indian tribes because, like states and the United States, Indian tribes enjoy sovereign immunity, regardless of the nature or location of their activities. *E.g.*, Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998) (holding that tribes have sovereign immunity as a matter of federal law even though the activity is commercial in nature and off-reservation). Tribal economic organizations, including San Manuel's gaming operation, share this immunity. *E.g.*, Kiowa,523 U.S. at 754; United States v. James, 980 F.2d 1314, 1319-20 (9th Cir. 1992) (housing and social services); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th Cir. 1986) (housing authority); Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 320 (1982) (economic enterprise); Gavle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996) (gaming operation). Notably, if the Board were to hold that Indian tribes, or even their gaming operations, are "employers" under the NLRA definition, the Board would imply that tribes are "employers" for purposes of the Labor Management Relations Act ("LMRA"), which utilizes the same definition by cross-reference. *See* 29 U.S.C. § 142(3) (1994). Yet, tribal sovereign immunity would prevent the enforcement of the LMRA's provisions against tribes, *e.g.*, 29 U.S.C. § 185, because it could not be construed as an express congressional waiver of tribal sovereign immunity. *See* Martinez, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (internal quotation marks omitted)). In this respect, concluding that tribes are "employers" would further produce an absurd result since the labor laws could only be applied to

tribes in a fragmented manner. In addition, the lack of a congressional waiver of tribal sovereign immunity in either the NLRA or the LMRA is further evidence that Congress did not intend tribes to be subject to their terms.[17]

Since the same concerns justifying the congressional exemption of the United States and the several states from the definition of employer apply equally to Indian tribes, a literal reading of the statute to include Indian tribes solely because of the silence of the statute and its legislative history would create a senseless result. There is no reasonable justification for implying that congressional silence means an intent to include one single type of government, but no other government in the territorial limits of the United States. "[S]ome affirmative evidence of congressional intent, either in the language of the statute or its legislative history, is required to find the requisite 'clear and plain' intent to apply the statute to Indian tribes." Fond du Lac Heavy Equip., 986 F.2d at 250.

In addition to the similar justifications for excluding Indian tribes from the definition of employer in the NLRA, subsequent congressional enactments demonstrate a persistent and continuing intent and understanding to give Indian tribes the same treatment as state federal governments.[18] Subsequent legislative enactments are "entitled to great weight in resolving any

---

[17]Furthermore, even if only the NLRA, not the LMRA, were imposed on tribes, tribal sovereign immunity would prevent the union from suing a tribe directly for breach of any collective bargaining agreement. If Congress had intended tribes to be subject to the NLRA, would it not have ensured that unions could enforce them directly against tribes the same as any other employer?

[18]Other parties argue that Congress' failure to expressly exempt tribal gaming operations from the NLRA in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* (1994), is evidence that Congress would have tribal gaming operations subject to the NLRA. However, at the time Congress enacted the IGRA, the Board had already held that Indian tribes are exempt from the NLRA. It must be presumed that Congress knew of these decisions and, therefore, would have no reason to expressly exempt tribal gaming operations in the statute. *See* Tafflen v. Levitt, 493 U.S. 455, 462-63 (1990).

ambiguities and doubts" in prior legislation. Erlenbaugh v. United States, 409 U.S. 239, 243-44 (1972); Wilson, 127 F.3d at 809. Although Congress did not concern itself with the treatment of Indian tribes in its enactments at the time of the passage of the NLRA, it has since recognized that tribes are engaged in activities similar to those of the states and the United States and, therefore, are entitled to the same deferential treatment. For example, Congress has expressly provided that tribes be treated similarly to states and the United States for purposes of environmental laws and certain federal taxes. *E.g.*, 26 U.S.C. § 7871 (Indian Tribal Government Tax Status Act of 1982); 33 U.S.C. § 1377 (Clean Water Act); 33 U.S.C. §§ 2701 *et seq.* (Oil Pollution Act); 42 U.S.C. §§300j-11 (Safe Drinking Water Act); 42 U.S.C. §7601(d) (Clean Air Act); 42 U.S.C. §§ 9601 *et seq.* (CERCLA). But, the greatest example of this congressional expression is the consistent exemption of Indians tribes along with the states and the United States from the definition of "employer" in many civil rights statutes. *E.g.*, 42 U.S.C. § 2000e(b)(1); § 12111(5)(B)(i) (1994). Notably, the exceptions from these definitions are nearly identical to the exemption from the NLRA except for the inclusion of Indian tribes. Senator Mundt of South Dakota explained the reasoning behind including Indian tribes in the exemption of the definition of employer in Title VII:

> This amendment would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill. Let me emphasize that Indian tribes in an effort to decrease unemployment and in order to integrate their people into the affairs of the national community, operate many economic enterprises.

110 CONG. REC. 13702 (1964). The same reasoning would apply equally to the NLRA. This consistent congressional exemption has also been utilized as a justification for finding that

Congress implicitly intended Indian tribes to be excluded from other civil rights statutes where no express mention of tribes was made. EEOC v. Cherokee Nation, 871 F.2d at 939 (implicit exemption in ADEA). Whenever Congress is directly faced with whether Indian tribes should be exempt from legislation where states and the United States are exempt, it has uniformly provided that tribes receive the same exemption as other governments. Such consistent treatment demonstrates that Congress acts under the belief that Indian tribes are entitled to the same exemptions as states and the federal government in legislation which otherwise applies generally.

C. TRIBAL GAMING OPERATIONS ARE GOVERNMENTAL IN CHARACTER, EVEN UNDER THE FACTORS GENERALLY UTILIZED BY THE BOARD.

No reasonable argument can be made that Indian tribes are not governments and that excluding them from the general governmental exception of "employer" would lead to an illogical result. The fact that an Indian gaming operation is involved does not alter this result. In the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* (1994), Congress expressly stated and determined that Indian gaming is governmental in nature. 25 U.S.C. § 2701. Arguments that Indian gaming operations are merely businesses cannot be made because Congress has already determined otherwise. But, even if tribal gaming enterprises can be considered completely non-governmental, the distinction is irrelevant. The nature of the tribe's activities is entirely immaterial to a determination of its privileges and immunities. Kiowa, 523 U.S. at 755-56; Central Mach. Co., 448 U.S. at 64 n.3; Jones, 411 U.S. at 157 n.3. "The fact that the . . . Tribe was engaged in an enterprise private or commercial in character, rather than

governmental, is not material." Maryland Cas. Co. v. Citizens Nat'l. Bank, 361 F.2d 517, 521 (5th Cir. 1966).[19]

Although Indian tribes and their subordinate entities are not "political subdivisions of States," the factors the Supreme Court and the Board have developed for determining if an entity is a political subdivision further demonstrate the absurdity in holding that Indian tribes, including their gaming enterprises, are the only governments in the United States not exempt from the NLRA. First, Indian gaming operations are always subject to close tribal governmental control. The IGRA mandates that Indian tribes "have the *sole* proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A) (emphasis added). Ultimate authority over employment and management rests with the tribal government. The tribal government retains definitive control to fire an employee or replace a manager and, as a result, tribal gaming activities are administered by persons directly responsible to public officials. *See* NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. at 605, 607-08. As San Manuel has pointed out, the Tribal Council, not the gaming operation, sets all wages, benefits, and working conditions. In this respect, the employer named in this action has no authority to enter into a collective bargaining agreement – that authority rests squarely with the tribal legislature. In addition, tribal enterprises, like the tribes themselves, are completely exempt from federal

[19]Intervenor State of Connecticut spends a significant amount of time arguing that tribal gaming operations are merely businesses and not governmental in any respect. According to Connecticut, it follows that a gaming enterprise cannot be considered exempted from the term "employer." However, under the State of Connecticut's reasoning, its own gaming enterprise, the CLC, could not be considered governmental in character and would be subject to the NLRA.

income taxation. Rev. Rul. 81-295, 1981-2 C.B. 15. This is comparable to the utility district's bond exemption in NLRB v. Natural Gas Util. Dist. of Hawkins County. 402 U.S. at 606.

Finally, the Board has pointed to close regulation as a factor demonstrating governmental character. Fayette Elec. Coop., Inc., 308 N.L.R.B. 1071 (1992). Indian gaming is probably the most regulated activity in the United States – it is subject to extensive oversight and regulation by the tribes and the federal government and even the states play some role. As San Manuel pointed out, *every* employee of the Tribe's gaming enterprise is subject to licensure and background investigation. Tribal Gaming Commissions regulate gaming on a daily basis, often being present in the casino during all operating hours and having access to surveillance of the entire facility. Like the electric cooperative in Fayette, Indian gaming operations are subject to fines, closure, and injunctions for violations of the laws regulating their operations. *E.g.*, id. § 2705(a) (providing the Chairman of the NIGC may issue orders of temporary closure and levy fines), § 2706(a)(5) (providing NIGC power to permanently close facilities); 25 C.F.R. Part 573 (orders of temporary closure) Part 575 (civil fines).

The financial aspects of Indian gaming are also closely scrutinized, as in Fayette. Indian tribes must conduct annual independent audits of their operations and provide such audits to the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2710(b)(2)(C). In addition, all contracts for an amount in excess of $25,000 annually must be subject to such audits. Id. § 2710(b)(2)(D). Tribal ordinances and tribal-state compacts also provide similar audit requirements, with reports to tribal and state authorities. Furthermore, as governmental entities, their operating budgets (which would include amounts for payment of wages, benefits, etc.) are subject to approval of the tribal government, who has the unilateral authority to modify or reject

those budgets. Finally, allocations of tribal gaming revenue are subject to approval of the federal government. Id. § 2710(b)(3)(B). Thus, Indian gaming operations' financial matters are very restricted.

No serious argument can be proffered that Indian tribes and their gaming operations are not governmental. The President of the United States has ordered the Board, as an executive agency, to recognize that Indian tribes are governments and to deal with them on that level.[20] Exec. Mem. April 29, 1994, 59 Fed. Reg. 22,951. Indian gaming operations are no less governmental in character because they engage in gaming activities than state sponsored and run gambling in the form of lotteries. Even if the Board could find that the NLRA somehow applies to Indian tribes by virtue of its silence, Indian tribes and their gaming operations are exempt from the statutory definition of employer. To find that Indian tribes are "employers" under the Act when no other government, not even a city, is considered an employer would produce an illogical result. There are no relevant substantive differences between the characteristics of other governmental entities which except them from the definition of "employer" and the characteristics of tribal governments and their subordinate enterprises.[21] In order to avoid an absurd result and to comply with the well-established rule that statutes are to be read in favor of

---

[20]The various directives from the President to executive agencies regarding Indian tribes also mandate that the Board consider its decision in accordance with those directives and not enter a decision adverse to Indian tribal government status, unless expressly required by statute. Given the Board's discretion under 29 U.S.C. § 164(c)(1), treatment of Indian nations and their gaming operations as governments exempt from the NLRA is possible in accordance with Presidential directives.

[21]Other parties argue that Indian tribes are distinct from states and, therefore, cannot constitute "any State or political subdivision thereof." Such an argument can only be supported by a literal reading of the statute, which is not justified in light of the applicable canons of construction and the resulting absurd result. Furthermore, in this particular case, tribal gaming enterprises could be construed as a "wholly owned Government corporation" exempted from the definition.

Indian tribes, the Board should continue to follow its well-decided precedent and not assert jurisdiction.

CONCLUSION

For the foregoing reasons, the Tribe's motion to dismiss should be granted.

BLUEDOG, OLSON & SMALL, P.L.L.P.

Dated: February 22, 2000

Steven F. Olson, Esq.
5001 West 80th Street, Suite 500
Minneapolis, Minnesota 55437
(612) 893-1813
(612) 893-0650 (Facsimile)
ATTORNEY FOR THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, Jennifer R. Hjerleid, of the City of Hopkins, County of Hennepin, State of Minnesota, being first duly sworn, says that on the 22nd day of February, 2000, she served the annexed **Errata Amicus Curiae Brief of Shakopee Mdewakanton Sioux (Dakota) Community** on the following attorney(s) by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota directed to said attorney(s) at the following address(es):

San Manuel Indian Bingo & Casino
5797 Victoria Avenue
Highland, California 92346

John C. Kloosterman, Esq.
Kenneth R. Ballard, Esq.
Ballard, Rosenberg & Golper
10 Universal City Plaza
16th Floor
Universal City, California 91608-1097

Alice Garfield, Esq.
Counsel for the General Counsel
Region 31
National Labor Relations Board
11150 West Olympic Boulevard, Suite 700
Los Angeles, California 90064-1824

Kevin J. Wadzinski, Esq.
Dorsey & Whitney, L.L.P.
1001 Pennsylvania Avenue NW
Suite 300 South
Washington, D.C. 20004

Jerome L. Levine, Esq.
Levine & Associates
1049 Century Park East, #710
Los Angeles, California 90067-3109

H.E.R.E.
1247 West 7th Street
Los Angeles, California 90017

CWA, Local 92573
114 East Airport Drive
San Bernadino, California 92408

Richard G. McCracken, Esq.
Davis, Cowell & Bowe
100 Van Ness Avenue, 20th Floor
San Francisco, California 94102

Richard T. Sponzo
Assistant Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06141-0120

KURT V. BLUEDOG
NOTARY PUBLIC-MINNESOTA
MY COMMISSION EXPIRES 1-31-2005

Jennifer R. Hjerleid

Subscribed and sworn before me
this 22nd day of February, 2000.

Kurt V. Bluedog
Notary Public
My Commission Expires: