No. 05-1392

[Consolidated with 05-1432]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAN MANUEL INDIAN BINGO AND CASINO
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITE HERE! INTERNATIONAL UNION
Intervenor in Support of Respondent

and

STATE OF CONNECTICUT

Intervenor in Support of Respondent

On Petition For Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

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RESPONSE OF INTERVENOR UNITE HERE! INTERNATIONAL UNION TO PETITIONERS' PETITION FOR REHEARING OR REHEARING *EN BANC*

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under Circuit Rule 28(a)(1), counsel for Intervenor UNITE HERE! International Union certifies the following:

a. Parties and *Amici*

All parties, intervenors and *amici* appearing before the National Labor Relations Board and in this Court are listed in the Brief for Respondent National Labor Relations Board.

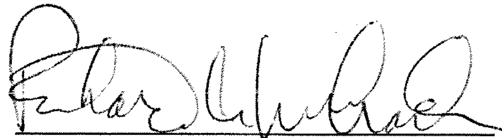
B. Ruling Under Review

The rulings at issue are set forth in the brief for Respondent National Labor Relations Board.

C. Related Cases

This case has not been before this Court or any other Court. The Intervenor is not aware of any related cases pending in, or about to be presented to this Court or any other Court.

Dated: April 23, 2007



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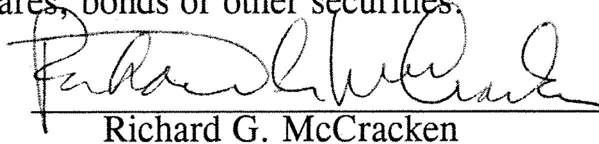
CORPORATE DISCLOSURE STATEMENT
[Fed.R.App. 26.1]

Intervenor UNITE HERE! International Union is a labor organization representing primarily private-sector employees in the United States and Canada. The Union owns Amalgamated Bank, a national bank headquartered in New York. The Union has not issued shares, bonds or other securities.



Dated: April 23, 2007

Richard G. McCracken

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Authorities upon which we chiefly rely are marked with asterisks.

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Intervenor UNITE HERE International Union respectfully responds to the Petition for Rehearing or Rehearing *en banc* by opposing the Petition. The Petition does not address the applicable authorities and fails to show that the decision of the panel is inconsistent with any existing principles of law.

1. The Band[1] repeats the claim it has made before that this case represents a change in a principle of law that has a long history. Pet. p. 1 ("unprecedented panel decision"). The real history is that the case upon which the Band pins its hopes, *Fort Apache Timber Co.*, 226 NLR 503 (1976), was actually an aberration rather than a landmark and the panel's decision is in keeping with what is now a very well-established approach in the federal courts to the determination of when a federal law applies to Indians and their enterprises.

In the first case in this area, the Board and this Court held that a business is subject to the NLRA even if it is located on an Indian reservation. *Texas-Zinc Minerals Corp.*, 126 NLRB 602 (1960), *inj. den. sub. nom. Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C.Cir. 1961). This

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[1] Petitioner San Manuel Band of Serrano Mission Indians.

Court relied upon *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and held that the NLRA is a general statute applying to all persons including Indians and their property. 288 F.2d at 165. *Texas-Zinc Minerals* involved a business that was not owned by the Indian tribe upon whose reservation it operated. In *Fort Apache*, the Board pointed to the tribe's right of self-government on its reservation and concluded that the NLRA's exemption for state and local governments should be construed to include tribally-owned businesses. 226 NLRB at 504-05.

The Board limited *Fort Apache* almost immediately. In *Devil's Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979), the Board asserted jurisdiction over a manufacturing facility located on a reservation. The business was owned by a corporation formed between the tribe and Brunswick Corporation. The tribe owned 51 percent of the stock, and Brunswick owned 49 percent. Despite the tribe's ownership of the majority interest of the corporation, the tribe did not direct the workforce. Instead, Brunswick officials were a majority on the corporation's board of directors and Brunswick set labor policy at the facility. Because the

corporation was "not a wholly owned tribal enterprise which [was] completely controlled by the tribal council," it was not exempt as an arm of a government. *Id.* at 164 (emphasis added).

The Board followed *Fort Apache* in only one case. In *Southern Indian Health Council, Inc.*, 290 NLRB 436 (1988), the Board refused to assert jurisdiction over a tribal health facility owned and operated on a reservation by a consortium of tribes.

The *Fort Apache* approach was abandoned four years later in *Sac & Fox Indus., Ltd.*, 307 NLRB 241 (1992), which clearly presaged the Board's decision in this case. The Board adopted and applied the analytical framework of *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) to find jurisdiction over an Indian-owned, off-reservation business. The Board distinguished *Fort Apache* and *Southern Indian Health Council* on the grounds that they involved on-reservation enterprises but studiously avoided endorsing the continued vitality of the holdings in those cases. *Id.* at 243 n. 14, 244 n.20 & 245 n.31. The Board applied in this case the same analysis as in *Sac & Fox*.

2. The panel decision enforcing the Board's order is in the mainstream of Indian law. It is the established rule that federal laws of general application apply to Indians. *Federal Power Comm'n. v. Tuscarora Indian Nation*, *supra* (Federal Power Act); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181-182 (2d Cir. 1996)(Occupational Safety and Health Act ("OSHA")); *U.S. v. Brisk*, 171 F.3d 514, 520, 522 n.6 (7th Cir. 1999)(drug offenses, 21 U.S.C. §§ 841(a)(1), 846); *U.S. v. Funmaker*, 10 F.3d 1327, 1330-1331 (7th Cir. 1993)(arson of bingo hall, 18 U.S.C. §§ 844(i), 942(c)); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495, 504 (7th Cir. 1993)(Fair Labor Standards Act); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 933-935 (7th Cir. 1989)(Employee Retirement Income Security Act ("ERISA")); *U.S. v. Wadena*, 152 F.3d 831, 842-843 (8th Cir. 1998)(money laundering and misapplication of tribal funds in the construction of a casino); *U.S. v. Baker*, 63 F.3d 1478, 1484-1485 (9th Cir. 1995)(trafficking in contraband cigarettes, 18 U.S.C. §§ 371, 2342); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods.*, 939 F.2d 683 (9th Cir. 1991)(ERISA); *United States Dep't of Labor v.*

Occupational Safety & Health Review Comm'n, 935 F.2d 182 (9th Cir. 1991)(OSHA); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)(same); *U.S. v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied sub nom*, *Baker v. U.S.*, 449 U.S. 1111 (1981)(illegal gambling operation, 18 U.S.C. § 1955); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462-63 (10th Cir. 1989)(42 U.S.C. §§ 1981 and 2000d); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999)(Americans with Disabilities Act). The Band does not cite any of these cases, presumably because it regards them all as decided wrongly.

Exceptions to the general rule have been recognized, including the need to protect sovereignty, properly understood. *See Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 ("(1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians or their reservations ....' [cit. om.] In any of these three situations, Congress

must expressly apply a statute to Indians before we will hold that it reaches them."). None of these exceptions applies in this case. The Band does not attempt any argument to the contrary.

Sovereignty is not the broad concept the Band espouses. It is about the maintenance of the key elements of culture.

> In *Strate* [*v. A-1 Contractors*, 520 U.S. 438 (1997)], we explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which Montana referred: tribes have authority "[to punish tribal offenders ,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." These examples show, we said, that Indians have "'the right . . . to make their own laws and be ruled by them.'"

Nevada v. Hicks, 533 U.S. 353, 379 (2001) (emphasis added; internal citations omitted); *see also Montana v. United States*, 450 U.S. 544, 563-564 (1981)(stating that in addition to punishing tribal offenders, the other inherent sovereign powers of Indian tribes are "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (holding that Indian tribes have the power to make law in internal matters such as membership, inheritance

rules and domestic relations and to enforce those laws in their own forums). Nothing in these decisions suggests that tribes' right to make their own laws extends to laws governing ordinary commercial activities.

3. Indian law has many principles. The rule that federal laws of general application apply to Indians is one of them. Another, entirely separate doctrine is that of sovereign immunity. It is inapplicable here. Sovereign immunity applies only against States and individuals, not the federal government. *See EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001); *U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987). It protects Indian tribes from being sued, not from the substantive applicability of either federal or state law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998).[2]

Despite its inapplicability, the Band relies on the Supreme Court's cases about sovereign immunity to show that the panel decision conflicts

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[2] *But see Agua Caliente Band of Cahuilla Indians v. Superior Court (FPPC),* 40 Cal.4th 239 (2006), where the California Supreme Court has held that an exception to the doctrine of sovereign immunity must exist to enable the State to protect its republican form of government against the corrupting influence of massive political contributions by tribes engaged in casino operations.

with Supreme Court precedent. Pet. p. 8. It does so in an attempt to show that the panel was wrong to take into account the economic and demographic realities of the Band's casino that show that it is fully engaged in commerce with the non-Indian world.[3] The Court's discussion of the realities of Indian commercial activities undoes the Band's claims in this case. The Court decided that despite the uncertain wisdom of the doctrine of sovereign immunity as applied to Indian commercial activities, the doctrine was of such long standing that it should be left to

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[3] This case involves a gambling casino, the San Manuel Indian Bingo and Casino, owned by the Band. The Casino has a large bingo hall, card games and over 1,000 video gaming machines, covering 115,000 square feet. JA 0188. It also sells food and beverages to patrons. JA 0188. It has approximately 1400 employees. JA 0188.

The Casino relies upon non-Indians for staffing and patronage. The vast majority of the Casino's employees are non-Indians who reside in California, off the Tribe's property. JA 0183. This will not change because, as of the 2000 census, there were fewer than 500 "Serrano" Indians in the United States. *See* United States Census Bureau, "Characteristics of American Indians and Alaska Natives by Tribe and Language: 2000, at 37 (December 2003) (available at http://www.census.gov/prod/cen2000/phc-5-pt1.pdf) (last visited June 29, 2006). The Casino is located 6.2 miles from the City of San Bernardino and 60 miles from Los Angeles. About 1.8 million people live within 25 miles of it. JA 0189. It is patronized almost entirely by non-Indians. JA 0183. The Band states that "a majority" of employees and customers are non-Indian, attempting to minimize the impact of the foregoing record facts. Pet. p. 6.

Congress to change. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757-758 (1998)("There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. [cit. om.]").[4]

In this case, the opposite situation is presented. There is a doctrine of long standing that federal laws apply equally to Indian enterprises that are commercial in nature. The federal courts have in fact looked at the

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[4] Because there is nothing of value to Petitioners in *Kiowa*, they are reduced to mischaracterizing its very words, let alone its holding. Petitioners claim, "[T]he Court recognized that even 'modern, wide-ranging tribal enterprises *extending well beyond traditional tribal customs'* are governmental activities." Pet. p. 8. In fact, the Court stated, "The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." 523 U.S. at 758. Nothing was said about these enterprises being governmental activities.

nature of the enterprises, to be sure that they are truly commercial and not part of the structure of self-government. *Compare Mashantucket Sand & Gravel*, 95 F.3d at 181 ("Indeed, a bingo hall and casino even on tribal grounds designed to attract tourists from surrounding states undeniably affects interstate commerce....") and *Florida Paraplegic Ass'n*, 166 F.3d at 1129 ("The Miccosukee Tribe's restaurant and gaming facility is a commercial enterprise open to non-Indians from which the Tribe intends to profit. The business does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members.") *with Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004)(law enforcement officers of the Navajo Nation Division of Public Safety not covered by FLSA because law enforcement is "a traditional governmental function.") and *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 495 (FLSA applies to tribe but because game wardens are law enforcement personnel, they come under FLSA's exemption of police officers). The Supreme Court's statements in *Kiowa* show the wisdom of this approach and why it should not be abandoned in favor of a presumption against the applicability of federal law. The Band would have

this court create for the law of Indian sovereignty the very irrationality the Court perceives in the separate doctrine of sovereign immunity that a majority is prepared to tolerate for now only because of *stare decisis*.

4. The panel used a somewhat different, more fluid test than the other circuits, but to answer the same question: whether application of general federal laws would interfere with the attributes of self-government. Like the Second and Eleventh Circuits, the panel reached the rather obvious conclusion that the Band's casino is commercial and not governmental.

Congress recently came to the same conclusion in the Pension Protection Act of 2006. Pub. L. No. 109-280, 120 Stat. 780 (2006). The Act included an amendment to the definition of "governmental plan". Generally, governmental plans are excluded from the coverage of ERISA. 29 U.S.C. §1003(b)(1). The amendment states:

> The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in

> the performance of commercial activities (whether or not an essential government function).

Pub. L. No. 109-280, §906 (a)(2)(A) amending 29 U.S.C. §1002(32) and 29 U.S.C. §1321(b)(2).

The amendment is obviously very carefully crafted to negate any argument that commercial enterprises like casinos that produce income that is useful or even necessary for the functioning of tribal government is therefore governmental as opposed to commercial. But just to be sure, the Joint Committee on Taxation, which issued the official legislative history for the Pension Protection Act, made this point as clear as could be:

> Thus, for example, a governmental plan would include a plan of a tribal government all of the participants of which are teachers in tribal schools. On the other hand, a governmental plan would not include a plan covering tribal employees who are employed by a hotel, casino, service station, convenience store, or marina operated by a tribal government.

Joint Committee on Taxation Rep., No. JCX-38-06 at 244 (2006).

5. The Band's contrary and disinegnuous claim that its casino really is "governmental" because of the purportedly limited uses to which the proceeds may be put, Pet. pp. 4, 10, cannot survive comparison with the facts and law. The Band's own Allocation Act shows this is not true.

The actual allocation is set forth in SMTC 8.6 of the Allocation Act, page 8-3. JA 0096. Thirty percent goes to governmental functions such as administration, security, education, housing, elder assistance, health care, fire protection and infrastructure. *Id.*, subsection 8.6.1. Forty-five percent goes to members of the Band in the form of per capita distributions. *Id.*, subsection 8.6.2. Another 20% goes to "tribal economic development". *Id.*, subsection 8.6.3. This is not further defined, but it probably includes other commercial, money-making businesses.[5] It parallels the provision in IGRA that casino profits can be used for "economic development". Indian Gaming Regulatory Act (IGRA), Section 2710(b)(2)(B)(iii). There is no definition or limit to this term. A tribe may invest the proceeds from its casinos in any other enterprise, finance, manufacturing, service, retail or construction, on or off a reservation. As the Band's Allocation Act

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[5] IGRA doesn't just authorize Class III gaming by Indian tribes. Tribes may permit non-Indian casinos on their lands. These are subject to the same requirements as Indian casinos, including tribal-state compacts. 2710(d)(2)(A)("If any Indian tribe proposes to engage in, <u>or to authorize any person or entity to engage in</u>, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section")(emphasis added). The Band's Gaming Act permits licensing non-Indian casinos on its land. Section 6.7.3, JA0081.

provides, IGRA allows it to pay cash dividends to its members, who are not limited in what they may do with the money. *Id.*, Section 2710(b)(3). According to Respondent, all of this investment, all of this income, is "governmental": "Congress views tribal revenue-generating activities, not just from gaming, as essential to tribal self-sufficiency and self-government." Opposition to General Counsel's Motion for Summary Judgment, p. 17, JA 0371.

There is apparently no end to this extraordinary claim. Nothing in its expression by the Band or its logic would confine it to the reservation or to any lines of business. Once the reservation had all the homes, roads, sewers, water, schools and hospitals it could use (which is probably already the case for small tribes with large gaming revenues, like the Band), a tribe may become a potent competitor in the national or international economy and may employ thousands of non-Indian employees. According to the Band, all would be exempt from the National Labor Relations Act as well as other federal laws silent about coverage of tribes. Such an imbalance in the regulation of competition cannot be attributed to the intent of Congress from the sparse materials Respondent

has assembled, which are devoid of any expression by Congress that it did not intend any of its laws to apply to Indian-owned businesses.

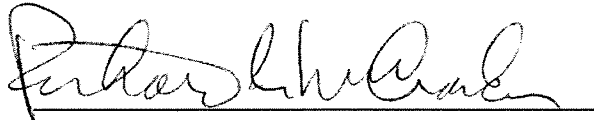
CONCLUSION

The Petition should be denied.

DATED: April 23, 2007

Respectfully Submitted,

DAVIS, COWELL & BOWE, LLP



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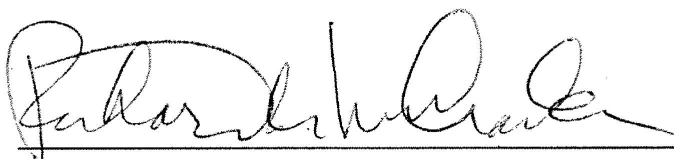
CERTIFICATE OF COMPLIANCE

Pursuant to and in accordance with the provisions of D.C. Cir. Rule 28(d) and 32(a)(3)(B)(i), I, Richard G. McCracken, hereby certify the attached Response of Intervenor UNITE HERE! International Union to Petitioners' Petition for Rehearing or Rehearing *En Banc*, in Case No. 05-1392, contains 3081 words excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7) (B)(iii), on the basis of a word count made by Davis, Cowell Bowe's WordPerfect version 12.0 word processing software that counts words in both text and footnotes. This brief has been prepared in a proportionally spaced typeface in 14 point, CG Times Roman type style.



Richard G. McCracken

CERTIFICATE OF SERVICE

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 595 Market Street, Suite 1400, San Francisco, California 94105.

On March 23, 2007 I served the 2 copies of document(s) described Response of Intervenor UNITE HERE! International Union to Petitioners' Petition for Rehearing or Rehearing *En Banc* in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

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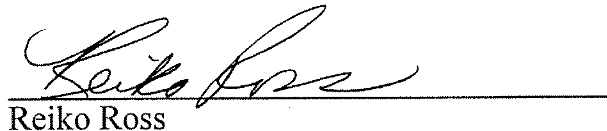

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