SAN MANUEL INDIAN BINGO AND CASINO:

CENTRALLY LOCATED IN THE BROAD PERSPECTIVE OF INDIAN LAW

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I. THESIS: AS INDIAN ENTERPRISES LIKE CASINOS GROW AND ENTER INTERSTATE COMMERCE IN WAYS INDISTINGUISHABLE FROM NON-INDIAN COMPETITORS, FEDERAL LAWS, INCLUDING LABOR AND EMPLOYMENT LAWS, WILL BE ASSERTED.

A prominent lawyer representing Native American interests said that as tribal enterprises become larger and more involved with the larger, non-Indian world, there will be an ineluctable tendency for other governments to assert themselves. The San Manuel[1] case is the latest proof that this view is correct. It is only the latest evidence, however, not the first or even most important. The fact is that the federal courts have over the past two decades been moving steadily to regulate tribal enterprises in many ways, including employment. The Board in San Manuel just caught up with the dominant view of the federal courts that generally, federal labor and employment laws apply to tribal enterprises, on and off reservations.

The federal courts' decisions have made it clear that Native American tribes are not going to be allowed to engage in businesses indistinguishable from those operated by non-Indians but free of any of the regulatory laws to which their non-Indian competitors are subject. Native American tribes would be wise to accept this and adapt their businesses to work within the federal regulatory framework. This outcome is inevitable and resisting it only wastes resources and creates disappointment and bitterness.

The outcome is inevitable because of fundamental principles. First, there is no doctrine of Indian sovereignty *vis-á-vis* the federal government. Such a doctrine has not existed and could not exist. The founding fathers held that *imperium in imperio* is a solecism in politics.[2] When the Native American nations were conquered, it was inconceivable that they could be given sovereignty co-equal with that of the federal government. If the tribes were allowed to operate large-scale enterprises in interstate commerce subject only to tribal law, the situation would eventually become intolerable politically, for the supremacy of the federal government would be impaired.

Second, the essential tenet of free enterprise is that all competitors will struggle in the same regulatory environment so that it is their resources and ingenuity that provide the advantage. If the government gives one type of competitor a special regulatory advantage, competition is compromised. For that reason, as a general rule, non-profit organizations are not allowed to engage in businesses unrelated to their non-profit missions in competition with for-profit entities, without subjecting themselves to the same tax burden as those entities. This prevents the obviously unfair advantage non-profits would otherwise enjoy, for they would be able to expand more rapidly and cheaply for no other reason than government favor. The same is true of tribal enterprises. When they are extended beyond traditional, intramural activities, in competition with

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[1] San Manuel Indian Bingo & Casino, 341 NLRB No. 138 (2004), overruling Fort Apache Timber Co., 226 NLRB 503 (1976). San Manuel will be summarized by another speaker.

[2] Rakove, Jack. Original Meanings: Politics and Ideas in the Making of the Constitution. New York: Vintage, 1997. 182.

non-Indian businesses, they cannot long enjoy a vast competitive advantage conferred only by a differential government attitude toward them.

In this regard, the San Manuel case was most opportune. The San Manuel Casino is not a small business. It is not an "Indian" business in any other sense than its ownership by the San Manuel Band of Serrano Mission Indians. The vast majority of the casino's approximately 1400 employees is made up of non-Indians who reside in California, off the Band's property. The casino is 6.2 miles from the City of San Bernardino and 60 miles from the City of Los Angeles. About 1.8 million people live within 25 miles of it. It conducts gambling operations patronized almost entirely by non-Indians. It includes a very large bingo hall, card games and over 1,000 video gaming machines. It has 115,000 square feet, approximately 95,000 square feet of which is for gamblers. It also sells food and beverage to patrons.[3] Unquestionably, it is in direct competition with non-Indian gaming, including racetracks and card clubs in California and casinos in Las Vegas. From an economic standpoint, what sense does it make for the non-Indian competitors to be subject to the full panoply of federal labor laws, and the San Manuel Casino subject to none? Even with the assertion of federal labor law, the non-Indian competitors are still at some disadvantage from government regulation, since they are subject to state labor and employment laws. Just as clearly as federal law can be applied to Native American businesses, state laws cannot be applied unless Congress makes them applicable.

Third, the central purpose of government is to protect its citizens. Very few Native Americans work in the casinos. Most of the workforce is non-Indian and comes from outside the reservation. Almost all the customers are non-Indian. Those who hold to an extreme view of Indian sovereignty would leave the protection of workers and customers (and non-Indian businesses dealing with tribal enterprises) to the tribes exclusively. While I am not saying that federal government or state government is better than tribal government, I think it is clear that there is a natural tendency for government to assert itself when it feels the necessity to do so to protect its citizens. The workers, customers and businesses dealing with tribal enterprises are citizens of the federal government, not of the tribe. They cannot participate in tribal government in any way. Because they are constituents of the federal government and not of the tribal government, it is only natural that the federal government will tend to exercise its right and ability to protect them. The San Manuel case was opportune in this regard, as well, because almost all of the employees of the casino are non-Indian.

Some might tend to regard the San Manuel decision as simple bureaucratic expansionism. This Board, however, has not shown a proclivity to expand its jurisdiction. See, e.g., Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000).

Another favored way to explain new directions in Board policy is "politics", in the sense of Republican versus Democratic or, as the party labels have come to signify in the NLRB world, favoring employer interests or union interests. That kind of thinking

[3] Because the San Manuel case was decided on a motion for summary judgment made on jurisdictional grounds and there has been no hearing, these facts are not in the decision.

also does not explain the San Manuel decision. The majority included Chairman Battista, one of the Board's Republicans, and was bipartisan. In September, there was a bill introduced in Congress by Representative Hayworth of Arizona to amend the MLRA to overturn the San Manuel decision.
H.R. 4906. It was defeated by a bipartisan majority.

Undoubtedly, this decision is viewed in Indian country as yet another example of the hostility of the non-Indian legal system to Native American interests. It is true that claims of Indian sovereignty have not been faring well in the courts. Whether this is because attempts have been made to expand the doctrine too far or because of hostility to Native Americans, or even racism, will remain a matter of opinion. Opinions about whether this kind of motivation exists are unlikely to alter the limited judicial acceptance of the notion of Indian sovereignty as a factor in interstate commerce.

II. GENERAL LAW OF INDIAN SOVEREIGNTY

Indian tribes have some attributes of sovereignty, but these are frequently misunderstood and overstated. Tribes are not akin to foreign nations with which the United States has "state-to-state" relationships. Indian tribes enjoy a limited sovereignty only by the grace of Congress. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323 (1978).

The Constitution does not give Indian tribes any sovereign rights. The Constitution, Art. I, §8, cl. 3, gives the federal government plenary authority over Indian affairs. Montana v. Blackfeet Tribe, 471 U.S. 759, 764-765 (1985). Congressional law is therefore the source of whatever rights Indian tribes possess, and Congress may restrict or modify those rights as it chooses. For example, in Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 787 n.30 (1984), an Indian tribe argued that a federal agency could not issue hydroelectric power licenses on reservation land without the Tribe's consent. The Court rejected this argument: "[I]t is clear that all aspects of Indian sovereignty are subject to defeasance by Congress. . .and Congress intended to [regulate the issuance of hydroelectric licenses on Indian lands] without the consent of the tribes involved." 466 U.S. at 787 n.30.

This means that the federal government has the power to regulate or tax Indian enterprises, whether on or off the reservation. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, 295 U.S. 418, 421 (1935)(income tax for on-reservation land); Escondido Mutual Water, 466 U.S. at 787 n.30 (hydroelectric power license for reservation lands); Wheeler, 435 U.S. at 330-331 (unrestricted federal jurisdiction to define and punish crimes on reservation land, notwithstanding tribal court rulings on same charges).

The tribes are therefore recognized to be not independent units of government. They are "dependents" of the United States. Duro v. Reina, 495 U.S.676, 686 (1990) ("dependent status") Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978)

("conquered and dependent"). This is no recent development. Indian tribes have been described by the Supreme Court as "domestic dependent nations" since Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

Such sovereign powers Indian tribes possess are limited to what is needed for self-government. Tribes have criminal jurisdiction only over their own members. Their criminal jurisdiction does not extend to non-members, even for offenses committed on reservation lands. Oliphant, supra. This was taken further in Montana v. Blackfeet, supra, where the Court announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S., at 565. "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be regulated by them." Nevada v. Hicks, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001)(emphasis added). There is a tendency to treat this standard expansively, for instance to contend that the proceeds from commercial endeavors in or outside Indian country are necessary for self-government because many of the valuable programs tribes adopt for their members can only be financed this way.[4] The Supreme Court sees the principle much more narrowly, however. The laws tribes have the right to make and enforce are limited to purely intramural matters.

> 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," 520 U.S., at 459 (brackets in original), quoting Montana, supra, at 564. These examples show, we said, that Indians have "'the right . . . to make their own laws and be ruled by them,' "520 U.S., at 459, quoting Williams v. Lee, 358 U.S. 217, 220 (1959).

Nevada v. Hicks, 533 U.S. at 379 (emphasis added).

Indian tribes, their members and their enterprises are not immune from state law, either, although the application of state law is much more limited than federal law. Once Indians go beyond reservation boundaries, they are generally held subject to non-discriminatory state laws that otherwise apply to all citizens. In Mescalero Apache Tribe, 411 U.S. at 148-149 and 157-158, the Supreme Court upheld New Mexico's right to apply a gross receipts tax on a ski resort operated by an Indian tribe off its reservation, on land leased under the Indian Reorganization Act, 25 U.S.C. §465. There is thus no question that both the states and the federal government may regulate and tax Indian activity off the reservation. Salt River Pima-Maricopa Indian Community v. Yavapai County, 50 F.3d 739, 740 (9th Cir. 1995)(property tax); Tunica-Biloxi Tribe v. Louisiana, 964 F.2d 1536, 1542 (5th Cir. 1992)(sales tax on vehicle purchased for reservation use); Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962)(criminal laws, including fish and game laws).

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[4] See, for instance, Member Schaumber's dissent in San Manuel, slip op. at 19-20.

In Nevada v. Hicks, supra, the Court made a very strong statement about the considerable power States have to regulate on reservations that should dispel many misimpressions about the nature of Indian sovereignty:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that "the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). [fn.om.][4] "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U.S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962).
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> That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980); see also id., at 181 (opinion of Rehnquist, J.). "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, *supra*, at 144. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision on *Confederated Tribes*. In that case, Indians were selling cigarettes on their reservation to nonmembers from off-reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could "impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax," 447 U.S. at 151. (Emphasis added).

533 U.S. at 362.

Another aspect of Indian sovereignty is immunity from suit by States or individuals. Even where state law applies, Indian tribes may not be sued except when they have waived this immunity. This concept of sovereignty, however, has also come under severe attack from the Court itself, in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 40 L.Ed.2d 981 (1998). Three dissenting justices would have discarded completely the doctrine of Indian immunity from state regulation. The majority decided against doing so, now, but recognized that the doctrine serves no legitimate purpose when applied to commercial enterprises dealing

with the world outside the reservation, and offered to Congress the first opportunity to eliminate or modify the doctrine. The Court stated:

> The doctrine of tribal immunity came under attack as a few years ago in [Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991)]. The petitioner there asked us to abandon or at least narrow the doctrine because tribal businesses had become far removed from tribal self-governance and internal affairs. We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. Potawatomi, 498 U.S., at 510. 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. JUSTICE STEVENS, in a separate opinion, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested it might not extend to off-reservation commercial activity. Id., at 514-515 (concurring opinion).
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> 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. See Mescalero v. Jones, 411 U.S. 145 (1973); Potawatomi, supra; Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
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> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

523 U.S. at 757-758.

III. DEVELOPMENT OF LABOR AND EMPLOYMENT LAW IN THE CIRCUIT COURTS: THE COEUR D'ALENE ANALYSIS

The federal courts have been called upon to determine whether various labor laws apply to tribal commercial enterprises located on reservation or trust lands. The Ninth, Seventh, Tenth, Second and Eleventh Circuits have adopted the same method of analysis and have ruled that OSHA, ERISA, FLSA and ADA apply to these businesses. This line of cases began with Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (CA9 1985). Analysis begins with a presumption based on the following statement from FPC v. Tuscarora Indian Nation, 362 U.S. 99, 116, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960) that "it is a principle now well settled by many decisions of the Supreme Court that a general statute in terms applying to all persons includes Indians and their property interests." Coeur d'Alene, 751 F.2d at 1115. The Ninth Circuit proceeded to point out that in all of its previous decisions involving laws other than labor laws, it uniformly applied this presumption and held the laws applicable instead of interpreting them to exclude Indians. Id., 751 F.2d at 1115-1116. The court observed, however, that there are three exceptions to the general rule:

> (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 .... [United States v.] Farris, 624 F.2d [890 (CA9 1980)] at 893-94. In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

751 F.2d at 1116.

The court applied these principles to the question whether OSHA applied to the Coeur d'Alene Tribal Farm. The farm was owned and operated by the Tribe. It produced grain and lentils for the open market both within and outside Idaho. Some of its workers were non-Indians, including the farm manager. Its operations were like those of other farms owned by non-Indians. Id., 751 F.2d at 1114. The court found that OSHA's coverage is comprehensive and clearly included the farm. It then examined the exceptions from the general rule of applicability. The Tribe argued that the application of OSHA would infringe on its powers of self-government. The court found that this proved far too much, for accepting it would mean that tribal enterprises would be exempt from virtually all federal laws, including tax laws which had already been held to apply. The court concluded:

> We believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and

> domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes. [cit. om.]

751 F.2d at 1116. The farm was obviously not a purely intramural matter for the Tribe.

> The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is neither profoundly intramural ... nor essential to self-government.

Id. [cit. om.] The Tribe tried to persuade the court to adopt a formulation different than "purely intramural matter". It asserted that the self-government exception existed whenever the Tribe would be deprived of a fundamental aspect of sovereignty. It argued that one such aspect was its power to exclude non-Indians from its lands and that this power would be limited improperly if it were required to admit OSHA inspectors to its farm. The court completely rejected the proposed formulation and the argument based on it. The court acknowledged that the power of a tribe to exclude people from its land or to tax those who enter upon it is a hallmark of sovereignty, as held by the Supreme Court in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), but pointed out that the Merrion case involved private citizens who were attempting to avoid tribal taxation and consequently, the Court had no occasion to, and did not, suggest that Congress had to respect this sovereignty and could not modify it to require tribes to admit the Government's own agents, such as OSHA inspectors, onto Indian lands. Id., 751 F.2d at 1117.

The court then quickly dispensed with the second, "treaty rights" exception because the Coeur d'Alene Tribe had no treaty with the United States, and had no other agreement with the Government that gave it any right to exclude anyone, including federal agents, from its reservation. The court distinguished Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (CA10 1982) because that decision involved the Navajo, who had a treaty with a specific provision giving the tribe the right to exclude people other than tribe members from its reservation. Id.[5] Finally, the third exception did not exist because there was nothing in the legislative history of OSHA suggesting a Congressional intent to exclude tribal enterprises from its scope. Id., 751 F.2d at 1118.

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[5] In Navajo Forest Products, the court recognized and applied the Tuscarora rule. However, it found that OSHA did not apply to a wood products enterprise on the Navajo Reservation because one of the three exceptions described in Coeur d'Alene was applicable: where application of the law to the tribe would abrogate rights guaranteed by Indian treaties. See Coeur d'Alene, 751 F.2d at 1116. The Navajo have a treaty which gives them the right to exclude non-Indians not authorized to enter upon the Navajo Reservation. The court in Navajo Forest decided that application of OSHA to the tribal enterprise would necessarily entail the presence of OSHA inspectors on the Reservation, whether or not authorized by the Navajo, in derogation of the treaty right. Id., 692 F.2d at 712.

The Ninth Circuit used its Coeur d'Alene analysis in two subsequent decisions. In U.S. Department of Labor v. Occupational Safety & Health Review Commission, 935 F.2d 182 (CA9 1991), the court once again addressed the question of the application of OSHA to tribal enterprises. In that case, the tribe owned and operated a sawmill on its reservation. The finished products were sold in interstate commerce. The majority of the mill workers were not Indians. The mill was the largest source of income for the tribal government and almost all of the timber cut at the mill was supplied by tribal loggers. Id., 935 F.2d at 183. Applying Coeur d'Alene, the court found that OSHA applied. It ruled that the mill was a commercial enterprise and not a purely intramural matter, despite the fact that the mill's income was "critical to the tribal government". Id., 935 F.2d at 184. The "treaty rights" exception was a more serious one: the tribe had a treaty with the United States that included a provision prohibiting any white person from residing on the reservation without permission. Applying the canon of construction that treaty rights are to be liberally construed in favor of Indians, the court did not give a narrow interpretation to the word "reside". It held that the tribe possessed a general right of exclusion. Id., 935 F.2d at 184-185. Nevertheless, the court had ruled that this right was not good against OSHA inspectors. It reasoned that OSHA gave inspectors a limited right of entry on private property and construed its earlier decisions as ruling implicitly that "the government was empowered to enforce the laws." Id., 935 F.2d at 186. Accepting the tribe's argument that the treaty right gave it the power to exclude any and all federal agents as well as private citizens would mean that "the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the Tuscarora rule inapplicable to any Tribe which has signed a Treaty containing a general exclusion provision." Id., 935 F.2d at 187. The court therefore rejected the argument and held that the treaty right of exclusion and the limited access of OSHA inspectors were not in conflict. Id.

In Lumber Industry Pension Fund v. Warm Springs Forest Products, 939 F.2d 683 (CA9 1981), a case involving the same sawmill, the court held that ERISA applied to the mill. The tribe had established a tribal pension plan for its members. It transferred the tribe members working at the sawmill from a collectively-bargained pension plan to the tribal plan and ceased making contributions to the former. In the plan's suit to collect the unpaid contributions, the tribe argued that application of ERISA would strip it of its self-government powers. The court disagreed. It held that ERISA would not prevent the tribe from establishing its own plan. Instead, the law would only subject the tribe to monetary damages for breaching its obligations under the collectively-bargained plan. It also found that there were no treaty rights that would be infringed by the application of ERISA and no evidence of Congressional intent to exclude tribes or their enterprises from the coverage of ERISA. Id., 939 F.2d at 685-686.

Two years before Lumber Industry Pension Fund, the Seventh Circuit had followed Coeur d'Alene and reached the same conclusion regarding the application of ERISA. Smart v. State Farm Insurance Co., 868 F.2d at 929 (CA7 1989). The Chippewa tribe operated a health center on its reservation for the use of tribe members. It purchased from State Farm a health insurance policy for the workers at the center, including the plaintiff (who was a member of the tribe). State Farm refused to pay a claim submitted

by the plaintiff and the suit followed. State Farm defended on the grounds that ERISA was the governing law and supplied a very high threshold for overturning a claims decision. The court ruled that ERISA is a statute of general application. It has exceptions for governmental plans, but has no exceptions for Indian tribes or any plans they might adopt. Following Tuscarora and Coeur d'Alene, the court found that ERISA was a comprehensive statute that was presumed to be applicable to the tribe's health insurance for its employees. The Seventh Circuit then turned to the exceptions listed in Coeur d'Alene. The court found that the application of ERISA did not invade a purely intramural matter. ERISA, in its view, did not broadly and completely define the employment relationship between the tribe and its employees. It only applies if a tribe decides to offer an employment benefit plan, and then only imposes reporting, disclosure and fiduciary requirements. Moreover, the plan was created by contract with a non-tribal entity, State Farm. The plaintiff also argued that the exemption given to federal and state governments in ERISA should be interpreted to include Indian tribes, too, because they are self-governing on their reservations. This was rejected.

> Finally, with respect to Smart's contentions that the exemptions provided for state and local governments indicate Congress' unwillingness to have ERISA apply to sovereigns generally, and thus Indian Tribes should also be similarly exempt, there is no clear evidence of congressional intent to exempt them. The analogy is particularly inapt given the significant differences between states and their political subdivisions on one hand and Indian Tribes on the other. *See* Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz, 691 F.2d 878, 880 (9th Cir. 1982) (distinguishing Tribes from States and their political subdivision); United States v. Barquin, 799 F.2d 619 (10th Cir. 1986) (refusing to hold that Indian Tribe was within ambit of "State or local government agency" as used in 18 U.S.C. §666(c)). Significant concerns of federalism, peculiar to Federal-State relations, account for federal deference to the autonomy of State government. Federalism uniquely concerns States; there simply is no Tribe counterpart. Smart is unable to point to any evidence of congressional intent that ERISA is not applicable to Tribe employers and Indians.

Id., 868 F.2d at 936.

The court found no "specific right" in the Chippewa Treaty that would interfere with the application of ERISA, id., 868 F.2d. at 935, and as indicated in the above-quoted passage from its opinion, the court found no evidence of a congressional intent to exclude Tribes or Indians from the coverage of this law.

That same year, the Tenth Circuit Court of Appeals also adopted the Coeur d'Alene test. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1462-1463 (CA10 1989). The court found that 42 U.S.C. §§1981 and 2000d, laws prohibiting racial discrimination, were generally applicable laws. Applying the first Coeur d'Alene exception, however, the court found that these laws should not be applied to the facts at hand. Plaintiffs, descendants of the former slaves of the Cherokees, alleged that the Cherokees "have discriminated on the basis of race by refusing to accord them tribal membership and its privileges and benefits." Id., 892 F.2d at 1463. The court held, "[N]o right is more integral to a tribe's self-governance than its ability to establish its membership." Id. Because the application of the laws would intrude into this "purely intramural matter", the court did not exercise jurisdiction.

In Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490 (CA7 1993), the Seventh Circuit considered the application of the Fair Labor Standards Act to game wardens employed by a commission formed by several tribes to enforce their members' treaty rights to fish and hunt on non-reservation lands. The majority and dissenting opinions agreed that employees of Indian agencies are covered by the FLSA. Id., 4 F.3d at 495, 504. The majority held, however, that because the wardens are armed law enforcement personnel, they come under FLSA's exemption of police officers. Id., 4 F.3d at 495. The Ninth Circuit later came to the same conclusion with respect to the law enforcement officers of the Navajo Nation Division of Public Safety, an almost entirely Navajo police force that maintains law and order within the Navajo reservation, "a traditional governmental function". Snyder v. Navajo Nation, 382 F.3d 892 (CA9 2004).

The Second Circuit Court of Appeals joined the Ninth, Seventh and Tenth Circuits in applying Tuscarora to federal labor and employment laws in Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (CA2 1996). The defendant was owned and operated by the Mashantucket Pequot, a tribe with a reservation but no treaty. The company has both Indian and non-Indian employees. It works exclusively on the reservation performing various construction jobs. These include the construction of roads and tribal homes, and also work on the continuing expansion of the Foxwoods High Stakes Bingo and Casino. The Foxwoods Casino is located on the reservation and is the principal source of income for the tribe. Id., 95 F.3d at 175. The question, once again, was whether OSHA applied to the company's operations. The Second Circuit held that it did, adopting and applying the Coeur d'Alene test. Accepting the established proposition that OSHA is a law of general applicability, court considered whether any of the exceptions applied. The company "liken[ed] itself to a department of public works", and claimed that OSHA would deprive it of its tribal sovereignty. It also argued that application of OSHA would prevent it from adopting its own safety rules. Both arguments were rejected. Id., 95 F.3d at 179.

The company claimed that its activities were purely intramural, because they were all performed on the reservation under the direction of the Tribal Council. The court found, however, that the company "is in the construction business; and its activities are of a commercial and service character, not a governmental character. See Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490, 495 (7th Cir. 1993)."

> That an entity is owned by a tribe, operates as an arm of a tribe, or takes direction from a tribal council, does not ipso facto elevate it to the status of a tribal government.

Id., 95 F.3d at 180. The company's admitted employment of non-Indians was very important to the court.

> Limitations on tribal authority are particularly acute where non-Indians are concerned. *See id.* The Supreme Court has recognized that tribal "inherent sovereign powers ... do not extend to the activities of nonmembers of the tribe." Montana, 450 U.S. at 565, 101 S.Ct. At 1258; *see also* A-1 Contractors v. Strate, 76 F.3d 930, 939 (8th Cir.1996). This is so because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes...." Montana, 450 U.S. at 564, 101 S.Ct. At 1258.
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> MSG's employment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters. In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government. Furthermore, intramural matters generally consist of conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe. *Cf.* Farris, 624 F.2d at 893 (intramural activities in the nature of conditions of tribal membership, domestic relations, and inheritance rules). Thus, the employment of non-Indians is another factor that tips the balance toward application of OSHA. (Emphasis added.)

Id., 95 F.3d at 180-181.

The final factor that caused the court to reject the company's claim that application of OSHA would interfere with its sovereignty over purely intramural matters was that its construction work was not just on reservation roads and tribal homes but also on the expansion of the Foxwoods Casino, an enterprise indisputably involved in interstate commerce. The court stated:

> Indeed, "a bingo hall and casino [even on tribal grounds] designed to attract tourists from surrounding states undeniably affects interstate commerce...." United States v. Funmaker, 10 F.3d 1327, 1331 (7th Cir.1993) (citing Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964)).

The court also quickly dismissed the company's claim that OSHA would prevent it from adopting its own safety regulations. The court pointed out that because tribes are not governments within the meaning of OSHA, OSHA's preemption of state and local laws does not affect the tribes, who are therefore entitled to enact their own safety regulations (just like other employers under OSHA) as long as they are consistent with OSHA. Id., 95 F.3d at 181. Because the Mashantucket Pequot have no treaty and because OSHA has no legislative history showing an intent to exclude Indian tribes or enterprises, these exceptions were not argued by the company. The court concluded that the only possibly applicable exception, that for purely intramural matters, did not exist and the company's operations were subject to OSHA. Id., 95 F.3d at 182.

In 1999, the Eleventh Circuit joined the ranks of the Courts of Appeals using Coeur d'Alene analysis to determine the applicability of federal laws to on-reservation Indian-owned enterprises. In Florida Paraplegic Association v. Miccosukee Tribe of Indians of Florida, 166 F. 3d 1126 (CA11 1999), the court held that a restaurant and entertainment facility operated by the Miccosukee Tribe was subject to the Americans with Disabilities Act ("ADA"). It found that the ADA is a law of general applicability, that the facility was not an intramural tribal function, that no treaty rights insulated the facility from federal law and that the ADA has no exclusion of Indian tribes or their enterprises. But this was a suit by a private entity against the Tribe. Thus, even though ADA applied to the facility, the doctrine of tribal immunity from suit—which is distinct from the question whether substantive laws apply—meant that only the federal government could enforce the statute against the Tribe. See Kiowa, supra.

The same thing happened in Chayoon v. Chao, 355 F.3d 141 (CA2 2004). The plaintiff brought a claim against the Mashantucket Pequot, the owners of the giant Foxwoods Casino, under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq. The court held that the statute showed no sign that Congress intended to waive Indian tribes' immunity from suit. The court did not say that the Tribe was exempt from FMLA, only that it could not be enforced privately. The plaintiff complained about the unfairness of this situation. The court replied:

> Foxwoods Resort Casino employs over 10,000 people and Native American gaming facilities are becoming more numerous throughout the country. Clearly, tribal sovereignty has the potential to deny many Americans employment benefits and rights that Congress has seen fit to extend to the private sector. See, e.g., *Garcia*, 268 F.3d at 85-86 (finding tribes immune from claims based on the Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.). While judges, as citizens, may be sympathetic to the plight of people like Mr. Chayoon, the courts are without authority to remedy the matter. Mr. Chayoon's remedy, if there is to be one, lies with Congress.

Id., at 143.

These cases manifest the recognition that as Indian tribes increasingly engage in business activities in commerce with people and business organizations from outside their reservations, there is no sound reason to treat them differently than non-Indian businesses. The courts of appeals have increasingly recognized this, as the cases discussed above demonstrate, and the Supreme Court has sounded the same theme. In other words, by the time the Board was presented with the San Manuel case, things had changed radically since the Board's decision in Fort Apache, both in terms of the nature and extent of Indian enterprises and in the judicial response to these developments.

IV. NLRB LAW CATCHES UP WITH THE FEDERAL COURTS

Many years ago, the Board held that a business is subject to the National Labor Relations Act even if it is located on an Indian reservation. Texas-Zinc Minerals Corporation, 126 NLRB 602 (1960), enf'd. sub. nom. Navajo Tribe v. NLRB, 288 F.2d 162 (CADC 1961). It does not matter whether the employees of the business are Indians or not. Texas-Zinc Minerals involved a business that was not owned by the Indian tribe upon whose reservation it operated. In Fort Apache Timber Company, supra, the Board was faced with the first time with the question of whether to assert jurisdiction over a commercial enterprise owned and operated by an Indian tribe on its reservation. The company was directed by the tribe's council, its governing body. Because of the tribe's right of self-government on its reservation, the Board concluded that the exemption in the Act for state and local governments should be construed to include tribal government-owned businesses.

In Devil's Lake Sioux Manufacturing Corporation, 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% of the stock and Brunswick owned 49%. 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 relations 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., 243 NLRB at 164 (emphasis added).

Next, in Southern Indian Health Council, Inc., supra, the Board followed Fort Apache in refusing to assert jurisdiction over a tribal health facility owned and operated by a consortium of tribes on a reservation in San Diego, California. There was no reference in the Board's opinion to Tuscarora, United States v. Wheeler, Montana v. Blackfeet Tribe or any of the Supreme Court decisions establishing the rules concerning the exercise of federal jurisdiction on Indian reservations. There was no reference to the Coeur d'Alene decision which intervened between Fort Apache and Southern Indian Health Council. There is no evidence in either Fort Apache or Southern Indian Health Council that the Board was even aware of the governing federal law.

That changed dramatically four years later in SAC and Fox Industries, Ltd., 307 NLRB 241 (1992) (referred to hereafter as "SFI"), which clearly presaged San Manuel. The Board adopted the Coeur d'Alene analysis. Id., 307 NLRB at 243. It did so even though it recognized that the Coeur d'Alene test was "developed in cases involving Indian or tribal activities on the reservation", id., 307 NLRB at 244 n. 20, and the business before it was located off the tribe's reservation.

The Board started with the Tuscarora presumption of applicability, because:

> ... there is little question that the NLRA is a statute of general applicability. Like various other Federal employment-related statutes which have been held to be of general applicability, [fn. om.] the NLRA's jurisdictional definitions of "employer," "employee" and "commerce" are of "broad and comprehensive scope," [fn. om.] containing only a few specified exemptions.[18] Nowhere in the list of exemptions or elsewhere in the statute is there any mention of Indians or their off-reservation enterprises. [fn. om.] Thus, the Tuscarora rule clearly applies, and contrary to the result in Fort Apache and Southern Indian Health Council in which the tribal enterprises were located on the reservation, we cannot conclude in this case that SFI is exempt from the coverage of the Act at its Commerce [Oklahoma] facilities merely because those facilities are owned and controlled by the Tribe.
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> [18]See Sec. 2(2), (3), and (6) of the Act. The only exemptions specified in Sec. 2(2)'s definition of "employer" are: "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

SFI, 307 NLRB at 243.

The Board then considered the exceptions listed in Coeur d'Alene. It decided that application of the Act would not interfere with the tribe's right to self-government in "purely intramural matters". The facility in question was a manufacturing operation and the majority of its workforce was composed of people who were not tribal members. The Board pointed out that the Act does not broadly and completely define the relationship between an employer and its employees, but simply provides the means for workers to organize and to create a collective bargaining relationship, without compelling any

agreement or the substantive terms of any agreement. Finally, the Act does not "regulate purely intramural matters such as Tribal membership, inheritance rules, or domestic relations." Id., 307 NLRB at 244.

The Sac and Fox nation had numerous treaties with the Federal Government. There was no "specific provision", however, in any of these treaties that would be abrogated by application of the Act. Turning to the last exemption, the Board ruled:

> SFI has not referred us to, and we are not aware of, any discussion whatsoever in the legislative history of the NLRA dealing with Indians. Nor is there any basis in the language of the Act itself for inferring a Congressional intent to exempt Indians or their off-reservation tribal enterprises.... Further, even if true, as our dissenting colleague would read it, that Fort Apache did in fact hold that all enterprises owned by governmental entities are exempt from the Act wherever they do business, this holding was implicitly overruled less than a year later with the Board decided to assert jurisdiction over foreign-government instrumentalities that do business within the territorial jurisdiction of the United States.[27] .... The Act's exemption in Sec. 2(2) for a "political subdivision" of a "State" does not clearly include an off-reservation enterprise. Accordingly, we find that application of the NLRA to SFI in this proceeding would not be contrary to Congressional intent.
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> [27]See State Bank of India, 229 NLRB 838 (1977). See also State Bank of India, 262 NLRB 1108 (1982); and State Bank of India, 273 NLRB 267 (1984), enfd. 808 F.2d 526 (7th Cir. 1986).

The Board distinguished Fort Apache and Southern Indian Health Council but studiously avoided endorsing the continued vitality of the holdings in those cases. Id., 307 NLRB at 243 n. 14, 244 n.20 and 245 n.31. The reasoning in SFI was completely incompatible with those earlier decisions, which were based on the notion that an Indian tribe is a "government" within the mean of Sec. 2(2) of the Act. "Nowhere in the list of exemptions or elsewhere in the statute is there any mention of Indians or their off-reservation enterprises." SFI, 307 NLRB at 243. It is equally true that there is no mention of on-reservation enterprises. "The Act's exemption in Sec. 2(2) for a political subdivision" of a 'State' does not clearly include an off-reservation tribal enterprise." Id., 307 NLRB at 245. Section 2(2) does not clearly include an on-reservation tribal enterprise. Thus, the reasons given by the Board why off-reservation businesses wholly owned and controlled by an Indian tribe are not exempt as a part of a government exempt under Sec. 2(2) apply with equal force to on-reservation businesses.

In its last decision in this area before San Manuel, Yukon Kuskokwim Health Corporation, 328 NLRB 101 (1999) a three-member panel of the Board upheld the decision of the NLRB Regional Director in Alaska to direct an election among the employees of a hospital in Alaska operated by and for Alaska Natives. The Board agreed that the hospital was subject to its jurisdiction because it is not on reservation land and most of the employees are not Indian.

The hospital tried to distinguish SFI on the grounds that the business in that case was an ordinary manufacturing enterprise, whereas the hospital is set up to serve the Alaska Natives themselves. The Board decided that this difference was not important. The Board distinguished Indian Health Council on the grounds that the hospital in that case was on reservation land, whereas the hospital in Yukon is not and that most of the employees in the Southern Indian Health Council case were members of Indian tribes, but the Yukon employees are predominantly non-Indian.

The Board in Yukon also took a view of what is a "reservation" that was quite restrictive. The land on which the hospital is located is not technically reservation land. There is only one reservation in Alaska. The federal government owns the land and building used by the hospital. The hospital is run by a non-profit corporation whose directors are elected by the membership of the Alaskan tribes located in the area served by the hospital, pursuant to a compact with the federal government, which had originally operated the facility under the Indian Health Services. The hospital's operations continue to be funded by the federal government. It is located in a Native Region established under federal law, and serves the native population. The Native Region is not a reservation, however. The land within it is not protected by federal law from being sold to non-Natives, and this was the point relied upon by the Board to find that the land in question should not be regarded as a reservation or its equivalent.

The Board was not faced with the question whether it could or should exert jurisdiction over on-reservation, Indian-owned businesses, and so it did not rule on this subject or even make a direct statement of its current views. Instead, whenever it addressed the distinction between on-reservation and off-reservation businesses, it did so in carefully-crafted passages that left room for a change in the policy adopted in Fort Apache. For example, Southern Indian Health Council was not distinguished solely on the grounds that the hospital in that case was on a reservation. If that were all that mattered, it would have been the only distinguishing factor cited. Instead, the Board further distinguished the earlier case on the grounds that most of the employees in the hospital involved in that case were Native American, whereas in Yukon, only one or two out of the 40 to 44 employees were Alaska Natives, a "factor favoring application of the Act." (Slip op. p. 3). This reduces the importance of whether businesses are on or off a reservation from the status of a test in and of itself (as it was in Fort Apache) to the status of one factor in the analysis whether to apply the Act.

When the Board in Yukon described its earlier holding in SFI it said, "the Board held that since the NLRA is a statute of general applicability, in the absence of certain

specific exemptions, it applies to all persons including Indians and, at least, *Indians' off-reservation* property interests." (Slip op. p.3, italics in original, emphasis added).

The holding in Yukon further undermined the vitality of the Fort Apache-type analysis. The Fort Apache reasoning was very simple and straightforward: Indian tribes are sovereign governments and therefore exempt under the NLRA's exemption for state and local governments. The hospital in Yukon was owned by a non-profit corporation governed by a board of directors elected by the Alaskan Native tribes located in the area served by the hospital. That non-profit corporation took over operation of the hospital from the federal Indian Health Services pursuant to a self-determination compact with the federal government. Under Fort Apache, this enterprise would have been regarded as part of tribal government, and therefore exempt. In fact, that is exactly what happened in Southern Indian Health Council. As mentioned, one of the ways the Board distinguished Southern Indian Health Council was that the hospital was located on reservation land, but the actual decision in Southern Indian Health Council laid no emphasis on this point, instead resting on the theory that tribal operations are government operations and therefore exempt. At the end of its decision in Yukon, the Board explicitly rejected the contention that Indian-owned enterprises are "government" operations and therefore exempt. Although it confined this ruling to the case before it, involving an off-reservation operation, Yukon Kuskwokwim showed that the Board had not retreated from SFI's effective abandonment of Fort Apache.

Its order, however, was denied enforcement by the Court of Appeals for the District of Columbia Circuit. Yukon Kuskokwim Corp. v. NLRB, 234 F.3d 714 (CADC 2000). While the court agreed that an Indian tribe is not a "state" within the meaning of Section 2(2) of the Act, and found no fault with the Board's use of the distinction between enterprises on a reservation or off, it returned the case to the Board for further exploration of the hospital's claim that it was part of the United States Government pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450, et seq. ("ISDA"). The Board's supplemental decision was issued at the same time as San Manuel. Yukon Kuskokwim Health Corporation, 341 NLRB No. 139 (2004). The Board continued to reject the ISDA argument but applied the completely new analytical framework of San Manuel and reversed itself on the question of jurisdiction over the hospital. Instead of inquiring whether or not the operation was on a reservation, it applied the "governmental vs. proprietary" distinction, familiar from many other contexts, and came to the unsurprising decision that because the hospital functioned as the public hospital for the Alaskan Natives in the Yukon-Kuskokwim Delta area, and did not serve the non-Native population and was not in competition with any private hospitals, it was governmental in character. The differences between such a hospital and a casino like San Manuel are so stark and pervasive that the pairing of these two cases should give all practitioners good guidance for predicting future cases involving Indian enterprises, even though the Board will be proceeding case by case. See San Manuel, slip op. at p. 9. [6]

[6] There will be gray areas, of course. Yukon Kuskokwim can be compared with NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 1000 (9th Cir.2003), a subpoena enforcement action where the court determined that a financially independent, nonprofit tribal health services organization, which contracted to

V. IGRA AND NLRB JURISDICTION

The Board in San Manuel rejected the argument that whatever jurisdiction it had was divested by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq. The Board pointed out that IGRA regulates gaming but the LMRA does not, and the LMRA regulates labor relations but "IGRA does not address labor relations—the only aspect of the Respondent's business with which the Board is concerned." Slip op. at p. 10. The United State Court of Appeals for the Ninth Circuit considered the labor relations aspects of IGRA in In re Gaming Related Cases, 331 F.3d 1094 (2003), certiorari den. sub nom. Coyote Valley Band of Pomo Indians v. California, 540 U.S. 1179 (2004). At issue were the negotiations for a gaming compact between the State of California and tribes in California desiring to operate casinos. Under IGRA, slot machines and table games may be included in Indian casino offerings only under a compact between the tribe and the State in which the casino is located. IGRA requires the State to negotiate the compact in good faith. Several California tribes claimed that the State had negotiated in bad faith by insisting on provisions requiring tribes with casinos to share their profits with poor, non-gaming tribes and to adopt a model "Tribal Labor Relations Ordinance" that guaranteed tribal casino employees the right to organize for collective bargaining.

The court held in favor of the State on all issues. It concluded that the State had not negotiated in bad faith under IGRA. The court decided the TLRO issue on the grounds that IGRA allows the State to negotiate on any subject that is "directly related to the operation of gaming activities". 25 U.S.C. §2710(d)(3)(C)(vii). Without employees, there would be no gaming activities, and furthermore, the State has a legitimate interest in their conditions since most of them are non-Indian residents of the State. The court also decided that the State did not bargain in bad faith by insisting on the terms of the model TLRO because it gives only "modest organizing rights", it was negotiated largely by the tribes and union representatives and it has been accepted by most of the tribes.

Thus, although IGRA itself is not concerned with labor relations, gaming compacts between tribal employers and the States where their casinos are located may include provisions about labor relations. One of the more interesting areas of the intersection of labor and Indian law will be the development of the relationship of NLRB jurisdiction to rules of employer and union conduct established in gaming compacts—a species of State conduct that is not either regulatory or proprietary.

VI. NEXT? ANTI-DISCRIMINATION LAWS.

Beyond the issue of the NLRB's jurisdiction, possible further erosion of the insulation of tribal enterprises from the federal labor and employment law is foreseeable. Although most such laws have been held to apply to Native American-owned businesses on reservation land, the notable exception has been the anti-discrimination laws. Title VII

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provide services to the tribe as well as others and operated outside a reservation, was not clearly exempt from the LMRA because of its commercial nature.

of the Civil Rights Act of 1964 has been held not to apply. Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (CA10 1986)(express exclusion from definition of "Employer"); Wardle v. Ute Indian Tribe, 623 F.2d 670 (CA10 1980)(same); Dawavendewa v. Salt River Project Agr. Imp., 276 F.3d 1150,1159 fn.9 (same, dictum)(CA9 2002); Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 88 (CA2 2001) (same, dictum). I believe there is a question, however, whether the exemption in 42 U.S.C. section 2000e(b) for "Indian tribes" is just for the tribes internally or for all of their enterprises, including those which are fully engaged in interstate commerce, employing mostly non-Indians and serving non-Indian customers. It does not make any sense for Indian tribes as employers to be privileged to engage in race, sex, religious and other forms of discrimination, including harassment, against non-Indian employees and applicants for employment. These cases did not involve large-scale businesses employing mostly non-Indians and selling to non-Indian clientele. The legislative history shows that the intent of the exclusion was to protect Indian businesses employing their own members. 110 **CONG. REC.** 13701-13702 (June 13, 1964). Where discrimination cases are presented that involve businesses like the San Manuel casino, it is possible that the federal courts will revisit the question whether Title VII applies with more in-depth consideration.

On the other hand, it is likely that the Age Discrimination in Employment Act ("ADEA") will be held to apply to Indian businesses like casinos, despite the current state of the law. In E.E.O.C. v. Cherokee Nation, 871 F.2d 937 (CA10 1989), the court relied on the "abrogation of treaty rights" exception in Coeur d'Alene to find the Age Discrimination in Employment Act not applicable to the Cherokee Nation. Id., at 938 n.3. There was a dissent by Judge Tacha, the author of the opinion in Dille, who would have found the ADEA applicable because it does not exclude Indian tribes explicitly. In E.E.OC. v. Fond du Lac Heavy Equipment and Construction Co., Inc., 986 F.2d 246 (8th Cir. 1993), the court recognized the Tuscarora rule, id., at 248, but found the ADEA inapplicable on the particular facts because the dispute was "a strictly internal matter." The court explained:

> The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation. Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe. The consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions. Likewise, disputes regarding this issue should be allowed to be resolved internally within the tribe. Federal regulation of the tribal employer's consideration of age in determining whether to hire a member of the tribe to work in the business located on the reservation interferes with an

> intramural matter that has traditionally been left to the tribe's self-government.

Id., at 249. The court did not find the tribe generally exempt from the ADEA, but just that "the ADEA does not apply to the narrow facts of this case which involve a member of the tribe, the tribe as an employer, and on the reservation employment . . . ." Id., at 251. Despite the narrowness of the decision, there was a dissent which would have followed Judge Tacha's reasoning in E.E.O.C. v. Cherokee Nation, and four other judges of the circuit voted for rehearing en banc. The same kind of narrow approach was taken in EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (CA9 2001). The ADEA was held not to apply to a Tribe member's complaint that he was terminated from the Karuk Tribe Housing Authority due to his age. The court saw this a "strictly internal matter." "The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation." Id., at 1079.

Because the ADEA is a statute of general applicability and contains no express exclusion of either Indian tribes or their businesses, it should be anticipated that in future cases, it will be held applicable to "proprietary", commercial enterprises such as casinos.