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Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of San Manuel Band of Indians v. National Labor Relations Board, 40 J. Marshall L. Rev. 1259 (2007)

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LABOR REGULATION, UNION AVOIDANCE AND ORGANIZED LABOR RELATIONS STRATEGIES ON TRIBAL LANDS: NEW INDIAN GAMING STRATEGIES IN THE WAKE OF *SAN MANUEL BAND OF INDIANS V. NATIONAL LABOR RELATIONS BOARD*

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I. INTRODUCTION

In 2004, the National Labor Relations Board ("NLRB" or "Board"), in a three-to-one decision, reversed its own twenty-eight-year precedent to hold that the National Labor Relations Act ("NLRA" or "Act")[1] applies to a tribal enterprise, even when it generates government revenue and operates on an Indian reservation.[2] The Board's previous decisions held that the NLRA applied only to tribal enterprises operating outside the tribe's reservation or outside of "Indian Country."[3]

In February 2007, the U.S. Court of Appeals for the District of Columbia upheld the Board's decision in *San Manuel Indian Bingo*

1. 29 U.S.C. §§ 151-59 (2000).

2. San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1062-63 (2004).

3. "Indian Country" is a legal term of art developed under federal common law, which Congress codified in 1948 in 18 U.S.C § 1151. Although codified in a criminal statute, the term is also used for civil purposes and, to a great extent, in tribal legislative and adjudicatory bodies. Tribal jurisdiction has a strong geographic component. *See generally* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 183-99 (Nell Jessup Newton et al. eds., LexisNexis Matthew Bender rev. ed. 2005) (serving as the leading treatise on federal Indian law) [hereinafter COHEN 2005]. Earlier editions have been routinely cited by the Supreme Court. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992); Blatchford v. Native Vill. of the Noatak & Circle Vill., 501 U.S. 775, 793 (1991); Duro v. Reina, 495 U.S. 676, 687 (1989); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 124-231 (4th ed. 2004) (remaining one of the best written and concise mini-treatises, written by Senior Judge Canby of the United States Court of Appeals for the Ninth Circuit; Judge Canby provides considerable civil and criminal Indian country jurisdictional analysis and historical context); *see also* Mike McBride III, *Oklahoma's Civil-Adjudicatory Jurisdiction over Indian Activities in Indian Country: A Critical Commentary on* Lewis v. Sac & Fox Tribe Housing Authority, 19 OKLA. CITY U. L. REV. 81, 120-34 (1994) (providing an analysis of Indian country jurisdiction).

& Casino v. NLRB.[4] This sharp about-face subjects tribes to federal labor laws despite the fact that the NLRA makes no mention of Indian tribes. As a practical matter the decision invites labor organizations to organize tribal commercial operations, particularly casinos. The decision conflicts with laws promoting the self-government and economic development of tribes, infringes on some tribes' treaty rights to exclude non-members and departs from well-established canons of construction that favor tribal sovereignty when treaties or laws remain ambiguous or silent. In short, the decision is a major blow to the inherent power of tribes to regulate themselves and to exclude non-members, a basic attribute of sovereignty, whether protected by treaty or not.[5] As a result, the NLRB will treat tribal enterprises, regardless of whether the resulting revenue funds governmental services and programs, just like a private commercial enterprise. Yet, tribes are not "for profit" employers. Despite the Board's focus on "commercial activity," a tribe can use Indian gaming revenue only for restricted governmental purposes; no other industry is subjected to such restrictions. While federal, state and local governments enjoy exemptions under the NLRA, tribal governments now must endure new constraints on their ability to regulate revenue-generating sources. Tribes should prepare for a new era of labor and employment relations. This shift is dramatic and demonstrates the increasing adjudicatory, legislative and administrative distinctions made between commercial and governmental tribal conduct.

This Article will briefly discuss *San Manuel Indian Bingo & Casino v. NLRB* and its background, the applicability of federal labor laws to tribes generally, and the decision's significance to federal Indian law and gaming. This Article will then provide suggested strategies and options for tribes in regulating labor, either avoiding or working with unions and negotiating Indian gaming tribal state compacts.

II. SAN MANUEL HISTORICAL BACKGROUND

The San Manuel Band of Serrano Mission Indians (the "Tribe") is a federally recognized Indian tribe that owns and operates the San Manuel Casino (the "Casino"), a tribal governmental enterprise. Through purported and failed treaties, and historic oppression, the San Manuel, like most California

4. *See* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007) (denying the Tribe's petition for review and granting the NLRB's cross application for enforcement of its cease-and-desist order, San Manuel Indian Bingo & Casino, 345 N.L.R.B. No. 79, 2004-05 N.L.R.B. Dec. (CCH) ¶ 17008 (Sept. 30, 2005)), *reh. en banc denied*, (Jun. 8, 2007). The San Manuel Band of Serrano Mission Indians (the "Tribe") is the real party in interest.

5. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

tribes, experienced centuries of land dispossession, relocation to the most undesirable and least productive parcels of land, and significant reduction of their historic lands. The late Professor Florence Shipick chronicled how these small California tribes and Rancherias were literally being "pushed into the rocks" away from California's more desirable, productive and fertile areas.[6]

The United States created the San Manuel's current reservation in 1891.[7] The Tribe's reservation is one square mile within San Bernardino County, California, and lies approximately one hour east of Los Angeles by car.[8] Absent the Casino, the Tribe has no other economic development opportunities, such as agriculture or other viable commercial activities. Like all Indian tribal governments, the San Manuel cannot fund essential governmental services through the collection of property or income taxes, and, prior to the Casino, the San Manuel citizens subsisted in deplorable social and economic circumstances.[9] Federal law, however, provided the San Manuel and other tribes an alternative means by which they might fund such services.[10] Specifically, the

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6. *See* FLORENCE CONNOLLY SHIPEK, PUSHED INTO THE ROCKS: SOUTHERN CALIFORNIA INDIAN LAND TENURE, 1769-1986 (Univ. of Neb. Press 1988) (describing and chronicling the deplorable history and mistreatment of Native Americans in California, including dispossession of their lands, failed treaties, incredible impoverishment, and relocations to unproductive rocky and arid tracts of land in other areas that no one else wanted); Bryan H. Wildenthal, *Federal Labor Law, Tribal Sovereignty, and the Indian Law Canons of Construction*, 86 OR. L. REV. (forthcoming Dec. 2007), *available at* http://www.SSRN.com/abstract=970590.

7. *See San Manuel*, 341 N.L.R.B. at 1065 (Schaumber, J., dissenting); *see also* Petitioner San Manuel's "Motion to Dismiss the Instant Complaint for Lack of Jurisdiction" before the NLRB at 3 (Jan. 17, 2000) (on file with authors) (describing when the reservation was created).

8. Brief of Petitioner San Manuel at 6-7, *San Manuel*, 475 F.3d 1306 (D.C. Cir. Mar. 21, 2006) (on file with authors).

9. Petitioner San Manuel's opening brief states:

> For almost the first hundred years of the Reservation's existence, the Tribe had virtually no resources. A majority of the tribal members received non-tribal public assistance. Few tribal members completed high school. Alcoholism, drug abuse, and various health problems were prevalent among members. The Tribe had an extremely high rate of unemployment, at times reaching 75 percent or more. The Tribe's housing stock, water supply, sewage disposal, and road infrastructure are all grossly substandard.

Id. at 8. With remote locations, lack of infrastructure, meaningful tax bases, tribes struggle to pay for governmental services. *See* Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1315 n.21 (D.D.C. 1987) (stating that "the Indians have no viable tax base and a weak economic infra-structure").

10. In *California v. Cabanzon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court ruled that states cannot civilly regulate gaming conducted by tribes on their lands. The next year, Congress stepped in and passed the comprehensive Indian Gaming Regulatory Act of 1988 ("IGRA") that divided Indian gaming into three classes and apportioned regulation between tribes, the federal government, and the states depending on the class

Indian Gaming Regulatory Act ("IGRA")[11] provides a path by which a tribe may develop a gaming enterprise. However, the IGRA mandates that net gaming revenues must be used for governmental and public purposes.[12] Revenue from such casino development must be used only for funding tribal government operations, including law enforcement, clinics, roads, education, social services, tribal courts, sanitation and the like or for contributions to charitable organizations and other governments.[13] The Tribe's Casino, together with supporting retail, is the Tribe's only source of revenue for the Tribe's total population of less than two hundred.[14] Moreover, the Tribe is entirely dependent upon this revenue.[15] As is the case for many tribal peoples, the Tribe's commercial enterprises are closely intertwined with its governmental services; if the Casino or other enterprises fail, the Tribe's government cannot deliver those services.[16]

Pursuant to the IGRA, the Tribe entered into a mutually negotiated tribal state compact with California prior to opening the Casino. This compact required the Tribe to enact its own labor relations laws, specified conditions for labor relations, and stated that the Tribe would agree to bargain collectively with Casino employees pursuant to tribal labor laws.[17]

The dispute in *San Manuel* arose when the Hotel Employees and Restaurant Employees International Union ("HERE") filed an "unfair labor practice"[18] complaint with the NLRB, alleging that the Casino supported another union, the Communications

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of games and whether the respective tribe and state negotiated and entered into a "Class III" compact. The Supreme Court recognized the inherent right of tribes to engage in and regulate gaming for their governments. IGRA represents a compromise and restriction on the power of tribal governments to engage in gaming revenue activities. *See generally* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39 (2006) (discussing the history of IGRA and the delicate balance Congress struck between state and tribal interests); STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005).

11. 25 U.S.C. §§ 2701-21; 18 U.S.C. §§ 1166-68 (2000).

12. 25 U.S.C. § 2710(b)(2)(B).

13. 25 U.S.C. § 2710(b)(2)(B).

14. *San Manuel*, 475 F.3d at 1308; *San Manuel*, 341 N.L.R.B. at 1055-56.

15. *See San Manuel*, 475 F.3d at 1308 (noting that revenues are used to fund various tribal government programs and to provide for the general welfare of Tribe members).

16. Kathryn R.L. Rand & Steven Light, *Virtue or Vice?: How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 430 (1998).

17. *San Manuel*, 475 F.3d at 1314-15, 1317-18; *San Manuel*, 341 N.L.R.B. at 1055-56, 1064 (majority opinion), 1065 (Schaumber, M., dissenting).

18. Section 8 of the NLRA defines "unfair labor practice." 29 U.S.C. § 158 (2000).

Workers of America ("CWA"), and violated the NLRA.[19] The Board, disregarding a quarter century of prior Board precedent, asserted jurisdiction and, in a subsequent ruling, issued a cease-and-desist order against the Casino.[20] The Tribe filed a petition for review with the D.C. Circuit, challenging the Board's claim of jurisdiction, while the Board sought the enforcement of its cease-and-desist order.[21] The Circuit Court upheld the Board's finding that the Tribe constituted an "employer" subject to the NLRA,[22] ripping a hole in the fabric of tribal sovereignty and threatening the fundamental executive and legislative powers of the Tribe's government.

Since then, under the authority of the *San Manuel* decision, the Board has asserted jurisdiction and summarily denied the challenges of two tribal government to the application of the Act on Indian lands.[23] As this article goes to press, the latest tribe to

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19. The *San Manuel* case did not involve a situation where the Tribe attempted to disallow unions. The Tribe had its own labor laws that recognized another union and had ongoing relations with that organization. The Tribe's governing body established the Casino's general working conditions, including approving budgets, salaries, wages, and benefits. Here was an aggrieved union that sought an opportunity to obtain dues rather than establish labor representation for the first time.

20. *San Manuel*, 345 N.L.R.B. No. 79.

21. *San Manuel*, 475 F.3d at 1310.

22. *Id.* at 1316. For a discussion of the impact of the *San Manuel* decision, see Nora Lockwood Tooher, *Indian Casinos Are Subject to Federal Labor Laws*, LAWYERS USA at 1, 22-23 (Feb. 26, 2007) (describing the decision and describing the anticipated impact by tribal leaders and commentators).

23. Since the D.C. Circuit decided *San Manuel*, unions have increasingly targeted Indian country casinos and filed unfair labor practice charges under the Act. Targets have included the Foxwoods Resort Casino operated by the Mashantucket Pequot Tribe in Connecticut and the Soaring Eagle Casino & Resort operated by the Saginaw Chippewa Tribe in Michigan. *Soaring Eagle Casino & Resort, a Governmental Subdivision of the Saginaw Chippewa Indian Tribe of Michigan and Local 486, Int'l Brotherhood of Teamsters*, No. GR-7-RC-23147 (N.L.R.B., Region 7, Nov. 20, 2007), *Decision and Direction of Election* (on file with the authors); *Foxwoods Resort Casino and Int'l Union, UAW, AFL-CIO & State of Connecticut*, No. 34-RC-2230 (N.L.R.B., Region 34, Oct. 24, 2007), *Decision and Direction of Election*, *available at* http://www.nlrb.gov/shared_files/Regional%20Decisions/2007/34-RC-2230%2010-24-07.pdf; *see also Union Vote Set for Saginaw Chippewa Casino*, Indianz.com, Nov. 29, 2007, http://www.indianz.com/IndianGaming/2007/006084.asp; *Mashantucket Tribe to Challenge Union Vote*, Indianz.com, Nov. 26, 2007, http://www.indianz.com/IndianGaming/2007/006029.asp.; Erica Jacobson, *Foxwoods Dealers Say "Yes" to Union*, NORWICH BULLETIN, Nov. 25, 2007, *available at* http://www.norwichbulletin.com/casinos/x187562437. The Saginaw Chippewa appealed the Regional Director's decision on December 4, 2007 to the NLRB. Telephone Interview with Sean Reed, Tribal Attorney for the Saginaw Chippewa Indian Tribe, in Tulsa, Okla. (Dec. 4, 2007). Their appeal differs from the *San Manuel*'s situation in that they assert violation of protected treaty rights. *Saginaw Chippewa Indian Tribe of Michigan*, Memorandum in Support of Motion to Dismiss, (Nov. 7, 2007) (on file with

face a union challenge, the Saginaw-Chippawa Tribe of Michigan, held an NLRB-ordered election on December 20, 2007.[24]

III. INHERENT TRIBAL GOVERNMENTAL POWERS AND FEDERAL RELATIONSHIP

Both the NLRB and D.C. Circuit decisions demonstrate the failure to understand the historical context in which Indian tribes came to operate seemingly commercial enterprises as an essential part of their self-governance.

Indian tribes are governments that serve their citizens by providing essential governmental services. Such tribes are unique sovereigns within American jurisprudence. The United States Constitution expressly mentions Indian tribes three times,[25] and, as a result, a surprisingly large percentage of the Supreme Court's docket each year addresses Indian law matters.[26] The Supreme Court, in a series of decisions in the 1830s called the "Marshall trilogy,"[27] first defined the contours of Indian tribes as distinct governments that occupy territory over which state laws have no force.[28] In 1942, Felix Cohen, the leading scholar of Federal Indian law of his time, articulated the classic vision of tribal sovereignty:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribes subject to the legislative power of the United States and, in substance, terminates the external powers of the sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in

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authors) (arguing in part at 14-20, that the NLRA does not apply to trust lands within the Tribe's reservation because it has treaty-protected rights that have not been abrogated by Congress).

24. *Id.* The employees subsequently voted against organizing as a union by a vote of 192 to 88. It is reported that the International Brotherhood of Teamsters did not object to the election procedure or results. Interview with Philip B. Wilson, Vice President & General Counsel, LRI Management Services, Inc., in Tulsa, Okla. (Dec. 31, 2007).

25. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. amend. XIV, § 2.

26. COHEN 2005, *supra* note 3, at (ILL); McBride, *supra* note 3, at 88-90; Reid P. Chambers, *Oklahoma Indian Law—Cases of the Last Decade and Opportunities for the Next Decade*, 24 TULSA L.J. 701, 705-07 (1989).

27. So named for Chief Justice John Marshall who crafted the opinions and the early principles of federal Indian law. Worcester v. Ga., 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 pet.) 515 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

28. *Worcester*, 31 U.S. (6 Pet.) at 559.

> the Indian tribes and in their duly constituted organs of government.[29]

Federal courts subsequently adopted Cohen's view,[30] and the Supreme Court recognized that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them."[31] In 1959, the Supreme Court also stated that "[the Court] has consistently guarded the authority of Indian governments over their reservations . . . [i]f this power is to be taken away from them, it is for Congress to do it."[32] In later years, the Supreme Court has recognized tribes as "unique aggregations possessing attributes of sovereignty over both their members and their territory."[33]

The residual questions have tended to focus on the meaning of the phrase "internal sovereignty" as set forth in Cohen's statement.[34] A tribe, in short, is the source of its own power.[35] Accordingly, Indian tribes do not depend upon Congress to vest power in them, but rather hold inherent powers of limited sovereignty that have never been extinguished.[36] Congress, in exercising "plenary power" over Indian affairs derives its authority

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29. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (Univ. of N.M. Press 1971) (1942) (footnotes omitted) [hereinafter COHEN 1971].

30. Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 335 (1989); *see, e.g.*, United States v. Wheeler, 435 U.S. 313, 322 (1978) (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).

31. Williams v. Lee, 358 U.S. 217, 220 (1959).

32. *Id.* at 223.

33. *Wheeler*, 435 U.S. at 323.

34. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564-66 (1981) (establishing default common law standard review applicable to tribal assertions of regulatory jurisdiction over non-members on intra-reservation fee lands); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (denying tribes criminal jurisdiction over non-Indians).

35. Unlike state or local governments, no one may challenge a tribe's right to establish a court, nor may they levy attacks on the basis that Congress did not delegate the power to the tribe to take such actions. *Merrion*, 455 U.S. at 149; Ironcrow v. Oglala Sioux, 231 F.2d 89, 94-95 (8th Cir. 1956).

36. COHEN 1971, *supra* note 29, at 122; *see also* Mont. v. United States, 450 U.S. 544, 566 (1981) (describing inherent power to exercise civil jurisdiction and regulate non-Indian activities on Indian lands, including leases); Washington v. Confederated Tribes, 447 U.S. 134, 152-53 (1980) (detailing the inherent power to tax); *Wheeler*, 435 U.S. at 323-24 (illustrating the power to exercise criminal jurisdiction over Indians); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (describing membership and immunity from suit by reason of sovereign immunity); United States v. Quiver, 241 U.S. 602, 603 (1916) (discussing domestic relations); Jones v. Meehan, 175 U.S. 1, 24 (1899) (illustrating inheritance); Roff v. Burney, 168 U.S. 218, 222 (1897) (discussing membership); Worcester v. Ga., 31 U.S. (6 Pet.) 515, 521 (1832) (describing the power to exclude non-members). *See generally Merrion*, 455 U.S. at 137 (describing the inherent power to tax, regulate, and exclude non-Indians).

from the Commerce Clause of the Constitution.[37] The Supreme Court has long recognized that Congress' policy towards tribes is one of tribal self-government and self-determination.[38]

IV. BACKGROUND OF FEDERAL LAWS APPLYING TO OR EXEMPTING TRIBES

Generally, labor and employment relations within Indian country are governed in the first instance according to tribal law. Although tribal customs and culture should inform resolution of labor relations and employment disputes within tribal reservations, non-Indian notions of due process, adjudication and justice frequently are the norm.[39] Federal law may also govern tribal employment relationships, as well, but such coverage is dependent upon the language of the federal enactment. In large measure, except for civil rights statutes, federal labor and employment statutes are silent regarding applicability to Indian tribes and their businesses.

Since the passage of the Indian Reorganization Act of 1934,[40] Congress has repeatedly included exceptions for federal, state, and local government entities – *including tribal governments* – almost all civil rights statutes enacted in the past seven or so decades. Congress specifically excluded Indian tribes from employment discrimination and sexual harassment laws under Title VII of the Civil Rights Act of 1964[41] and from Title I of the Americans with

37. Congress shall have the power to regulate commerce "with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

38. *See, e.g.*, Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 854 (1985) (leaving jurisdiction with the Chocktaws to settle civil controversies); *see also* N.M. v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (stating that tribes retain their "historical sovereignty" as long as it does not clash with principles of the national government); *Merrion*, 455 U.S. at 143-44 & n.10 (describing the power to govern and raise revenues); Morton v. Mancari, 417 U.S. 535, 551 (1974) (discuissing enforcement of Indian self-government policies); Williams v. Lee, 358 U.S. 217, 223 (1959) (discussing infringements of Indians rights to govern themselves).

39. *See generally* Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273, 343 (2005) (arguing that "non-Indian principles of law, individual rights, and justice imported into Tribal governments in the guise of administrative review panels and judicial review seriously undermine Tribal government operations and communities.").

40. Wheeler-Howard Act, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79).

41. *See* 42 U.S.C. § 2000e(1) (2000) (prohibiting discrimination in employment because of race, color, sex, national origin, and religion). Title VII's legislative history, for example, recognizes tribes' inherent power "to conduct their own affairs and economic activities without consideration of the provisions of the Act." 110 CONG. REC. 13702 (1964). Where non-Indian employers have engaged in commerce within Indian country, courts have found Title VII to apply. *See, e.g.*, Tidwell v. Harrah's Kan. Casino Corp., 322

Disabilities Act of 1990.[42] Additionally, the Workers Adjustment and Retraining Notification Act[43] has been interpreted as exempting tribes in its associated regulations.[44] Congress has, on occasion, specifically *included* tribes in a law's coverage.[45] Finally, Congress in recent years has addressed the unintended omission of tribes from congressional acts, such as the Federal Unemployment Tax Act[46] and the Indian Tribal Government Tax Status Act.[47]

On the other hand, certain general anti-discrimination laws, like 42 U.S.C. § 1981, do not mention Indian tribes.[48] However, courts have regularly dismissed section 1981 employment discrimination suits brought against tribes.[49] Most labor and employment laws similarly fail to include coverage of Indian tribes.

In *Federal Power Communication v. Tuscarora Indian Nation*,[50] the Supreme Court set forth a two-part test to determine whether a statute has resulted in the "implied waiver" of an Indian tribe's sovereign immunity and self-determination. The *Tuscarora* test asks (1) is the statute one of general application, intended by Congress to apply to all citizens; and (2) can the statute be applied to Indian tribes without infringing on treaty rights or interfering with internal tribal self-governance?[51] Commentators, including the editors of *Cohen's Handbook of*

F. Supp. 2d 1200, 1205-06 (D. Kan. 2004) (allowing Title VII claim by non-member employee; rejecting tribal exhaustion doctrine defense); *see also* Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753, 755 (D.N.D. 1989) (describing a Title VII claim by non-member employee against business incorporated under state law wherein tribe owned fifty-one percent of business).

42. *See* 42 U.S.C. § 12111(5)(b)(i) (mandating employers to provide reasonable accommodations to qualified disabled employees).

43. 29 U.S.C.A. §§ 2101-2109 (2001).

44. 20 C.F.R. § 639.3(a)(1) (1989).

45. *See* 25 U.S.C.A. § 1644 (2001) (discussing Tribal access to health services).

46. *See* COHEN 2005, *supra* note 3, at (ILL Sec. 8.02(2)(c)) (describing how Congress moved to explicitly include Indian tribes).

47. *See* 26 U.S.C.A. § 7871 (2001) (indicating that Indian tribal governments can be treated as states for certain purposes).

48. 42 U.S.C.A. § 1981 (2001).

49. *See* COHEN 2005, *supra* note 3, at 1294, n.109 (citing Wardle v. Ute Indian Tribe, 623 F.2d 670, 673 (10th Cir. 1980)) dismissing § 1981 claim against a tribal employer because facts were same as a Title VII claim); *see also* Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1035 (11th Cir. 2001) (disallowing § 1981 claim because the court reasoned that plaintiffs sought to circumvent Title VII's explicit exemption of tribal employers); Stroud v. Seminole Tribe of Fla., 606 F. Supp. 678 (S.D. Fla. 1985) (dismissing § 1981 claim on the same facts as a Title VII claim).

50. 362 U.S. 99, 141 (1960).

51. *Id.* at 118-19.

Federal Indian Law, provide extensive analysis regarding the extent to which general federal laws are intended to apply to Indian tribes.[52] The unfortunate reliance by some courts on *Tuscarora* dictum, as a general rule, in federal Indian law has been roundly criticized by courts and commentators in exhaustive detail.[53]

The application of other federal employment laws to tribes is uncertain, as appellate courts have disagreed about coverage. Some courts carefully consider statutory and legislative history to determine whether to apply labor and employment laws to tribes as employers, while adhering to the primacy of tribal sovereignty and rules of statutory construction favoring sovereignty.[54] The Tenth Circuit, in particular, respects inherent tribal sovereignty and only finds divestiture of reserved tribal rights when Congress

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52. *See* COHEN 2005, *supra* note 3, § 2.03 (discussing the application of general federal statues and the effects on tribal sovereignty); Wildenthal, *supra* note 6, at 66 (discussing the application of federal laws on non-traditional tribal functions). *See generally* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994) (detailing the background and criticism of the Tuscarora analysis); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 89-90 (1991) (questioning the methods courts use when determining if a law applies to a Indian tribe); William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEMPHIS L. REV. 1365, 1379 (1995) (addressing the applicability of various federal and state labor and employment laws to Indian tribal employers); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004).

53. *See* Singel, *supra* note 52, at 702-06, n.94 (collecting commentary and cases); Brian P. McClatchey, *Tribally-Owned Businesses Are Not "Employers": Economic Effects, Tribal Sovereignty, and NLRB v. San Manuel Band of Mission Indians*, 43 IDAHO L. REV. 127, 145-74 (2006) (demonstrating the Board's faulty reliance on the Tuscarora Rule); Anna Wermuth, *Union's Gamble Pays Off: In San Manuel Indian Bingo & Casino, the NLRB Breaks the Nation's Promise and Reverses Decades-Old Precedent to Assert Jurisdiction Over Tribal Enterprises on Indian Reservations*, 21 THE LABOR LAW., 81, 93-103 (2005) (providing excellent analysis of "where the Board went wrong" in applying the general applicability analysis in the Tuscarora and Cour d'Alene cases); Rob Roy Smith, *If You Think Tribal Casinos Have to Comply with the NLRA, Think Again*, 50 ADVOCATE (Pub. of Idaho State Bar) May 2007, No. 5, at 30 (suggesting that the Board's application is fact specific and suggesting strategies for tribes to address the attempted application of the Act to tribes); Carole Goldberg, *Critique By Comparison in Federal Indian Law*, 82 N.DAK. L. REV. 719, 731-33 (2006) (discussing teaching perspectives of teaching federal Indian law and suggesting that teachers must ask students to consider when federal laws are silent, if similar exemptions or special treatment afforded states should also be afforded Indian tribal governments). Goldberg also notes the disparate treatment by the Board of tribal governments versus state governments. *Id.*

54. NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (*en banc*).

clearly demonstrates its intent that the law should apply to tribes.[55] Other courts begin their analysis with a presumption that federal statutes of general application will apply to tribal governments and their commercial operations in spite of statutory silence, unless it is shown that the law's application would infringe on fundamental tribal sovereignty, treaty or other rights specifically recognized in other laws.[56] Commentators have called this approach the doctrine of "implicit divestiture."[57] Some commentators endorse the Board's new approach of applying the Act as a law of "general application" to tribal governments and finding no implicit divestiture.[58]

In *EEOC v. Karuk Tribe Housing Authority*,[59] the Ninth Circuit held that the Age Discrimination in Employment Act of 1967 ("ADEA")[60] applies to a tribal agency. However, the Eighth Circuit in *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*[61] and the Tenth Circuit in *EEOC v. Cherokee Nation*[62] held that tribes and their entities were exempt. While

55. *Pueblo of San Juan*, 276 F.3d at 1195.

56. *See* COHEN 2005, *supra* note 3, § 21.02[5][c] (describing the application of federal labor and employment laws to Indian tribes as employers); *see also* Singel, *supra* note 52, at 691-92 (describing the Tuscarora-Coeur d'Alene approach of presuming federal laws of general application apply to tribes unless the law "touches exclusive rights of self-government in purely intramural matters" or infringes on treaty rights, or if there is textual or legislative history reflecting Congress' intent that tribes remain exempt from coverage).

57. Singel, *supra* note 52, at 692.

58. Kelly E.W. Grez, Comment, *Stepping onto the Reservation: The National Labor Relations Board's New Approach to Asserting Jurisdiction over Indian Tribes*, 57 ADMIN. L. REV. 1153, 1162-70 (noting that the Board considers the Act to be a statute of "general applicability" and the difficulty of tribes in meeting exceptions under *Tuscarora and* progeny case law, and that the NLRB asserts jurisdiction in these matters under a discretionary jurisdictional analysis rather than a federal Indian policy analysis of respecting independent tribal sovereignty). Ms. Grez argues that the discretionary analysis better allows the NLRA to weigh and apply "its mandate to protect employees' rights to organize and bargain collectively against the unique status of Indian tribes."). *Id.* at 1170; Richard G. McCracken, *San Manuel Indian Bingo and Casino: Centrally Located in the Broad Perspective of Indian Law*, 21 THE LABOR LAW. 157, 157 (2005) (arguing that "[a]s 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; McCracken represented the charging party in *San Manuel*).

59. 260 F.3d 1071 (9th Cir. 2001).

60. *Id.* at 1078-79.

61. *See* 986 F.2d 246 (8th Cir. 1993) (declaring that the ADEA does not apply to tribal business).

62. *See* 871 F.2d 937, 939 (10th Cir. 1989) (stating that the ADEA does not apply to tribal employer; "normal rules of [statutory] construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue").

the ADEA utilizes the same definition of "employer" as Congress used in Title VII, the ADEA is silent as to tribes in both the law's text and legislative history. Title VII explicitly exempts tribes from coverage. One union lawyer has suggested that courts may follow the *San Manuel* decision to apply the ADEA and other federal labor laws as laws of general applicability to tribal governments.[63]

Other circuits have disagreed about the application of the Occupational Safety and Health Act of 1970[64] to tribes. The Ninth Circuit in *United States Department of Labor v. OSHA*[65] and the Second Circuit in *Reich v. Mashantucket Sand & Gravel*,[66] held that the law applied to tribal entities, while the Tenth Circuit held in *Donovan Navajo Nation*,[67] that it did not. Other circuits, including the Eighth in *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*,[68] the Seventh in *Smart v. State Farm Insurance Co.*,[69] and the District of Columbia in *NLRB v. Navajo Tribe*,[70] have applied federal acts of general application to tribes and found no explicit exemption and no interference with essential tribal internal governance or treaty rights.

The Seventh Circuit has held that the Fair Labor Standards Act ("FLSA")[71] does not apply to an intertribal law enforcement agency in *Reich v. Great Lakes Fish and Wildlife Commission*.[72] In refusing to apply the FLSA's overtime provisions to game wardens enforcing tribal hunting and fishing laws on treaty lands, the Seventh Circuit focused on the essential governmental functions and that overtime pay exemptions for state law enforcement officers covered the wardens in question.[73] Detailed analysis of the applicability (or exemption) of all federal employment laws to tribes and their entities is beyond the scope of this article, but excellent scholarship exists.[74] Suffice it to say, the Supreme Court

63. *See* McCracken, *supra* note 58, at 181.
64. 29 U.S.C. §§ 651-78 (2000).
65. 935 F.2d 182 (9th Cir. 1991).
66. 95 F.3d 174 (2d Cir. 1996).
67. 692 F.2d 709 (10th Cir. 1982).
68. 986 F.2d 246 (8th Cir. 1993).
69. *See* 868 F.2d 929 (7th Cir. 1989) (applying ERISA).
70. 288 F.2d 162 (D.C. Cir. 1961).
71. *See* 29 U.S.C. §§ 201-19 (2000) (regulating minimum standards for nonprofessional workers for wages and overtime, regulating employment of children and prohibiting sex discrimination for compensation decisions).
72. 4 F.3d 490 (1993).
73. *Id.* at 494-95.
74. Limas, *supra* note 52; Ann Richard, *Application of the National Labor Relations Act and the Fair Labor Standards Act to Indian Tribes: Thwarting the Economic Self-Determination of Tribes*, 20 AM. INDIAN L. REV. 203 (2006); COHEN 2005, *supra* note 3, at 129-30. *See generally* Singel, *supra* note 52 (discussing federal labor relations and tribal self-government); Buffalo & Wadzinski, *supra* note 52 (analyzing federal and state labor employment laws

has not yet settled the split in the circuits between approaches respecting reserved rights of tribes and those finding implicit divestiture of rights; the San Manuel Band of Indians chose not to appeal the D.C. Circuit decision.

However, the *San Manuel* decisions went beyond the disagreements noted above and failed to accord any weight or respect to the inherent sovereignty of the San Manuel or the effect the decisions would have on tribal self-governance. Moreover, the decisions explicitly departed from decades of NLRB precedent, namely in *Fort Apache* wherein the Board reasoned that "[i]t is clear that individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary."[75]

While the Board opined that this change was necessary to correct a "faulty" premise,[76] the decisions appear to stem more from the success of the IRA, IGRA, and other laws designed to increase tribal sovereignty and independence. Without a true understanding of the nature of a tribe's retained sovereignty, the NLRB and Court of Appeals were unduly swayed by the increasing economic success of tribal enterprises.[77]

V. ANALYSIS OF *SAN MANUEL*

In *San Manuel*, the Board abruptly abandoned almost thirty years of its own jurisprudence, departed from well-recognized judicial canons, and interpreted the definition of "employer" in NLRA section 2(2) as including "tribal commercial enterprises," including casinos. Section 2(2) excepts "the United States, any Federal Reserve Bank, or any State or political subdivision" from the definition of "employer," and the Board had previously read this section as also excepting tribal enterprises and specifically

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and Indian tribe).

75. *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976).

76. *See San Manuel*, 341 N.L.R.B. at 1057 (analyzing NLRB precedent and finding "faulty" the premises that location is the determinative factor in assessing whether a tribal enterprise is excluded from NLRA jurisdiction and that section 2(2) of the NLRA supported the geographically based distinctions).

77. The Board stated:

> For almost 30 years . . . the Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy. As tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses. This case requires the Board to accommodate Federal labor policy and Federal Indian policy in deciding whether to assert jurisdiction, under the Act, over tribal enterprises.

Id. at 1056.

"casinos."[78] The Board's historical, and now rejected, recognition of tribal commercial activities on Indian lands as being exempt "political subdivisions" under the NLRA respected the tribes' use of revenue to fund governmental activities and services for their citizens and tribal control over their territories.

In *San Manuel*, the Board now found that the NLRA is a statute of "general application" that applied to commercial enterprises[79] and noted that there was nothing in the Act or its legislative history that specifically *exempted* Indian tribes.[80] Beginning with the Marshall trilogy of cases, which first articulated the special canons of construction applicable to tribal governments rooted in the unique federal-tribal trust relationship,[81] it is a long-standing rule of statutory construction that, if a congressional act is silent, it is presumed that the act does not apply to tribes.[82] The Board blithely ignored this rule and reasoned that "Congress purposely chose not to exclude Indian tribes from the Act's jurisdiction."[83] In so doing, the Board turned accepted precedent on its head by reasoning that, if neither Section 2(2) of the Act nor the legislative history explicitly exempted tribes from the NLRA's coverage, they must be included.[84] In deciding that the Act intended to apply to tribes, the Board stated that the location of the tribal entity, whether on or

78. NLRA, § 2(2), 49 Stat. 449, 450 (1935) codified at 29 U.S.C. § 152(2); *see also San Manuel*, 341 N.L.R.B. at 1056-59 (majority opinion) and 1069-70 (Schaumber, J., dissenting) (discussing how the Board "wrestled" in determining whether or not the Act applied to the employment practices of Indian tribes).

79. *San Manuel*, 341 N.L.R.B. at 1059 (citing Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 88, 116 (1960)).

80. *San Manuel*, 341 N.L.R.B. at 1058.

81. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 515 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

82. County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 269 (1992); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); *see also* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (stating "[s]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (finding that "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured" (citation omitted)); Wildenthal, *supra* note 6, at 33-39 (discussing the treatment of tribal sovereignty in the 21st century); *see also* Singel, *supra* note 52, at 697-702 (discussing the Board's departure from previous Supreme Court precedent).

83. 341 N.L.R.B. at 1058.

84. The Board found that because Congress failed to pass an amendment to section 2(2) as a part of the Tribal-Self Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711, this was a reliable indicator of the NLRA's legislative intent and the continuing will of Congress. 341 N.L.R.B. at 1058-59.

off Indian country, was irrelevant, because "there is nothing in Section 2(2) to suggest that the exemption for 'employer' turns on *where* the entity is located."[85]

Previous NLRB decisions had respected the exclusive jurisdiction of tribal governments on reservation lands. In *Fort Apache*,[86] the Board held that tribal entities remain immune from "federal intervention, unless Congress has specifically provided to the contrary."[87] The Board reasoned that the Act's exclusion for political subdivisions included tribal governments engaging in commercial activities. In a later case, *Southern Indian Health Council*,[88] the Board excluded from the Act's definition of "employer" a consortium of tribal governments carrying out traditional governmental functions within Indian country. The Board decides whether to apply the Act to tribal governments on a case-by-case, discretionary analysis and has now repeatedly exercised jurisdiction.[89]

The Board, in recent years, has increasingly asserted its discretionary jurisdiction over tribal governments and their commercial enterprises but has struggled with whether the location of the business makes a difference in whether to include tribes as employers under the Act. In *Devil's Lake Sioux Manufacturing Corp.*,[90] the Board found jurisdiction under the Act

85. 341 N.L.R.B. at 1059. Compare this with the ultimate result in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998), which held that tribal immunity applied regardless of where a tribe signed a contract if no waiver existed. In *Kiowa*, the Supreme Court reversed at least four Oklahoma cases holding that tribal immunity to suit did not extend off of Indian country for contracts entered into away from the reservation. *See* Mike McBride III, *Your Place or Mine? Commercial Relations with Indian Tribes: New Rules for Tribal Sovereign Immunity*, 67 OKLA. B.J. 3183 (1996) (criticizing Oklahoma decisions distinguishing between commercial conduct on and off of Indian country). The Supreme Court in *Kiowa Tribe* made clear that where conduct occurs (whether it involves commercial conduct or not does not matter), tribal sovereign immunity applies. *Kiowa Tribe*, 523 U.S. at 760. The *Kiowa Tribe* Court also suggested that, even though tribal immunity to suit might be open to question from a policy perspective, it was up to Congress to change it. *Id.* at 759.

86. *See* 226 N.L.R.B. 503 (1976) (interpreting 29 U.S.C. § 152(2) ruling in case where White Mountain Apache Tribal Council operated a tribal government owned lumber mill that participated in interstate commerce).

87. *Id.* at 505-06.

88. 290 N.L.R.B. 436, 437 (1988) (holding that consortium of tribal governments engaging in the operation of a health clinic on a reservation operated as a government and thus should be exempt from the definition of employer under the Act).

89. *Soaring Eagle*, *supra* note 23, at 10 (finding "[t]hus, as in *San Manuel*, the impact on interstate commerce is such that the exercise of discretionary jurisdiction is appropriate" (citing *San Manuel*, 341 N.L.R.B. 1055, 1062-63 (2004), *aff'd.*, 475 F.3d 1306 (D.C. Cir. 2007)); *see also* McCracken, *supra* note 58, at 173-78.

90. 243 N.L.R.B. 163, 163-64 (1979).

where a tribe owned fifty-one percent of a corporation but non-Indian investors controlled and managed the business. The Board held that the enterprise was subject to the Act regardless of whether it operated within or outside of Indian country.[91] Later, in *Sac & Fox Industries*,[92] the Board adopted the Ninth Circuit's restrictive analysis in *Donovan v. Coeur d'Alene Tribal Farm*,[93] to determine whether to apply the Act to tribal government commercial activities. The case-by-case analysis adopted in *Coeur d'Alene* provided:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ." In any of these situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.[94]

In *San Manuel*, however, the Board tossed aside its long-standing respect of tribal governments by finding *Fort Apache* inconsistent with the "well established" *Federal Power Commission v. Tuscarora Indian Nation*.[95] The Board instead reasoned that Congress intended that the NLRA "have the broadest possible breadth" as a statute of general application, which superseded the special attributes of tribal sovereignty.[96] The Board further opined that "the special attributes of [tribal] sovereignty" were not implicated.[97] The real thrust behind both the Board's and the Circuit's slightly differently reasoned decision was the belief that when tribes raise government revenue in a commercial manner, regardless of its use, tribes operate more like privately held corporations than a sovereign that enters the commercial sphere. The Board and Circuit's patronizing views reflected their historic recognition of tribes' "unique" role in American history but disregarded tribes' sovereign status when

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91. *Id.*

92. 307 N.L.R.B. 241 (1992).

93. 751 F.2d 1113 (9th Cir. 1985).

94. *See* 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980)).

95. 362 U.S. 99 (1960); *San Manuel*, 341 N.L.R.B. at 1059. As will be explained later, the *Tuscarora* dicta relied on by the NLRB was thought to be dead, rarely cited and remains much maligned by scholars and other courts. Singel, *supra* note 52, at 701-19; Wildenthal, *supra* note 6, at 23-33. *See generally* Skibine, *supra* note 52 (condemning the approach favored in *Tuscarora*).

96. *San Manuel*, 341 N.L.R.B. at 1059.

97. *Id.* at 1062.

tribal governments begin to amass economic power and competitive advantage.[98]

To hold that the NLRA applies, the Board reasoned that the Tribe was an employer under the NLRA; that it was *not* exercising self-government functions by *operating* the casino; and that Congress did not mention tribes specifically when exempting state, federal and local governments from the NLRA's application.[99] The Board ignored the Casino's on-reservation location and the Tribe's essential governmental interests in having jurisdiction over its lands, regulating labor relations, and maintaining the inherent power to exclude non-members. Instead, the Board focused on the Casino's significant commercial nature; its tremendous impact on the non-Indian community, including employees, competitors, and customers; and the Casino's effect on interstate commerce, finding that these factors all required NLRB intervention.[100] Moreover, the Board thought it was unfair if it extensively regulated non-Indian casinos but not tribal casinos. Over a lone, but well-reasoned dissent, the Board asserted jurisdiction.[101]

The recent D.C. Circuit decision was broader than the underlying Board's decision it affirms. The appellate decision appeared to foreclose exceptions for "traditional" government operations. While mentioning that Indian gaming is governmental in nature, the D.C. Circuit decision concluded that imposing NLRA application to tribal government gaming will not significantly impact tribal government interests.[102] Moreover, the appellate court held that the NLRB's exercise of discretion to include tribal enterprises that generate government revenue within the NLRA's definition of "employer" was appropriate.[103]

In affirming the Board's decision, the D.C. Circuit also held that the NLRA is a statute of "general application" that applies to commercial enterprises.[104] The court, in departing from the sovereignty analysis employed by the Supreme Court in *Kiowa*

98. One could argue the Board and the D.C. Circuit paid only lip service to tribal sovereignty and the historic concept of tribes as governments and then completely ignored the Tribe's sovereign status.

99. *Id.* at 1058, 1061.

100. 341 N.L.R.B. at 1064. The Board wrote that its "interests in asserting jurisdiction is high, especially in light of the keen competition in the gaming industry – the non-Indian sector of which is subject to the Board's jurisdiction." *Id.*

101. 341 N.L.R.B. at 1064 (Schaumber, J., dissenting); *see also* Wermuth, *supra* note 53, at 92-94 (providing analysis of member Schaumber's dissent and his conclusion that it is up to Congress, not the Board, to abrogate tribal sovereign rights). *Compare* discussion of the conclusion in *Kiowa Tribe*, *supra* note 85 and accompanying text, *with* discussion of the conclusion in *Inoy Co.*, *infra* note 110 and accompanying text.

102. *San Manuel*, 475 F.3d at 1318.

103. *Id.*

104. *San Manuel*, 475 F.3d at 1312.

Tribe, another commercial law case involving a tribe,[105] instead reasoned that tribal sovereignty interests are "strongest when explicitly established by treaty . . . or when a tribal government acts within the borders of its reservation in a matter of concern only to members of the tribe."[106] The court went on to find such sovereignty interests are weakest when tribal governments engage in commercial relations off reservation with non-Indians.[107] The distinction appears to contradict *Kiowa Tribe*, where the Supreme Court held that it made no difference where a tribe entered into an agreement; the tribe remained protected by sovereign immunity unless it was specifically waived.[108]

In its conflicting view of tribal sovereignty, the D.C. Circuit reasoned, "in some cases at least, a statute of general application can constrain the actions of tribal government without at the same time impairing tribal sovereignty."[109] The court's attempt to reconcile these two concepts failed. The Supreme Court's increasing willingness to review commercial versus governmental distinctions in tribal governments presages that tribal governments and their enterprises may increasingly become subject to federal laws and regulations.[110] Commentators, tribes and the press have derided the NLRB and D.C. Circuit decisions as infringing on the inherent sovereignty of tribes to govern themselves and interfering with important federal policies of economic development ushered in by the proliferation of Indian gaming.[111] Indian gaming now accounts for approximately $25.4

105. 523 U.S. 751 (1998).

106. *San Manuel*, 475 F.3d at 1312 (citations omitted).

107. *Id.* at 1312-13.

108. 523 U.S. at 754-55.

109. *San Manuel*, 475 F.3d at 1312.

110. *Compare Kiowa Tribe*, 523 U.S. at 751 (upholding tribal immunity to a lawsuit regardless of whether the conduct occurred off of an Indian country location or the commercial nature of the dispute), *with Inyo Co. v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (holding that the tribe could not sue in federal court as a "person" under 42 U.S.C. § 1983 to vindicate an intrusion of its sovereign interest when state authorities exercised a search warrant and seized records from a tribal enterprise).

111. *See* Wermuth, *supra* note 53 (criticizing the Board's departure from decades long precedent and adherence to federal Indian policy and urging Congress to exempt tribal governments expressly from the Act's coverage); *see also* Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 651-53 (2004) (noting the "commercial" versus "governmental" distinction made by some courts when addressing questions of general applicability and explaining that "this distinction is somewhat specious given the economic and legal reality of tribes and their need to rely on commercial enterprises as a means of funding essential governmental purposes."); Joshua L. Sohn, Comment, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139 (2006) (discussing the positive economic growth of Indian gaming on one hand, but also noting that Indian gaming has reduced tribal sovereignty in several key areas as

billion in revenue according to the latest available figures from 2006, growing about 11.8 percent per year for the last decade.[112] The decisions threaten to have a potentially devastating impact on essential government services and tribal programs funded by tribal commercial enterprises, including casinos.

The NLRA was passed in 1935,[113] a short year after the Indian Reorganization Act,[114] and reflected Congress' policy at the time of protecting workers against unfair labor practices by large corporations. When Congress passed the NLRA, it did not consider Indian tribes to be formal governments. Rather, the waning Congressional policy in that era was one of assimilation of Indian people into mainstream America, shuttling tribal children away from their family and into boarding schools, disestablishing Indian reservations, allotting reservation lands to individual Indians and making the trust lands alienable to non-Indians and significantly, dismantling tribal governments and institutions.[115] Following the IRA, this view changed considerably immediately thereafter with the dawning of a new era of rebuilding tribal governments following the IRA.

The IRA was ushered in by a Congress with a wholly different policy of fostering, protecting and encouraging the development of tribal governments, which had been devastated by the impact of the allotment and forced-assimilation eras.[116] It is inconceivable that in 1935, Congress consciously intended the NLRA's definition of "employer" to *include* tribal governments and sweep these fragile institutions into the Act's coverage.[117] With the passage of

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"backlash" against that prosperity). *See generally* Singel, *supra* note 52 (discussing *San Manuel* and criticizing its effect on tribal sovereignty); Wildenthal, *supra* note 6 (criticizing the Court of Appeals decision in *San Manuel*).

112. ALAN MEISTER, CASINO CITY'S INDIAN GAMING INDUSTRY REPORT 14-16 (2007-2008 ed.) (on file with THE JOHN MARSHALL LAW REVIEW).

113. Ch. 372, 49 Stat. 449 (July 5, 1935).

114. Ch. 576, 48 Stat. 984 (June 18, 1934).

115. Brief of The National Congress of American Indians et al. as Amicus Curiae in Support of Petitioners, at 7-11, *San Manuel*, 475 F.3d 1306 (D.C. Cir. Apr. 19, 2006) (on file with the authors).

116. COHEN 2005, *supra* note 3, at 84.

117. *See, e.g.*, Brief of The National Congress of American Indians, *supra* note 115, at 7-11 (noting that "[i]n 1935, when it enacted the NLRA, Congress had just abandoned such an experiment [termination of tribal governments] and reaffirmed the model of Indian self-government—with emphasis on tribal enterprises as a means of funding tribal governments."); Morton v. Mancari, 417 U.S. 535, 442-53 (1974) (reciting history of trust obligations and congressional history and intent of the time); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973) (discussing the history of trust obligations and congressional history and intent of the time); *Merrion*, 455 U.S. at 164-65 (1982) (reciting history of trust obligations and congressional history and intent of the time).

the IRA (and the Oklahoma Indian Welfare Act),[118] Congress undertook a radical about-face in Indian policy, opting to strengthen, not destroy, tribal governments and to end the forced assimilation of Indian people. Congress did not envision that tribal governments would grow so successful under IRA policies and later self-determination[119] and economic development policies of the IGRA.[120] Rather, Congress intended at the time that the NLRA should exempt federal, state and local governments including their political subdivisions. It was an unfortunate omission that Congress neglected specifically to exempt Indian tribal governments from the NLRA, but one for which judicial precedent had an ample answer, the presumption of an exemption in case of sovereignty. Indeed, the D.C. Circuit decision appeared to acknowledge that "the NLRA was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers, and probably no member of that Congress imagined a small Indian tribe might operate like a closely held corporation."[121]

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118. Ch. 831, 49 Stat. 1967 (June 26, 1936).

119. Indian Self-Determination Act, Pub. L. No. 93-638, 88 Stat. 2206 (1975) (codified as amended at 25 U.S.C. §§ 450f-450n, 42 U.S.C. § 2004b).

120. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2727).

121. 475 F.3d at 1310. The IGRA at 2710 (b)(3) provides:

> Net Revenue from any class II gaming activities conducted pr licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if –
>
> (A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
>
> (B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);
>
> (C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardians of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent persons under a plan approved by the Secretary and the governing body of the Indian tribe; and
>
> (D) the per capita payments are subject to the Federal taxation and tribes notify members of such tax liability when payments are made.

"Revenue Allocation Plans" ("RAP") are governed by 65 Fed. Reg. 14461-69 (Mar. 17, 2000), codified at 25 C.F.R. Part 290 (4-1-07 ed.) governs. The National Indian Gaming Commission also provides guidance to such plans with NIGC Bulletin No. 05-1. NIGC Bulletin No. 05-1, *Use of Gaming Revenues* (Jan. 18, 2005), *available at* http://www.nigc.gov/ Default.aspx?tabid =215. For additional tax guidance on the tax consequences of RAPS, see www.irs.gov/tribes (last visited Jan. 24, 2008) and Campbell v. Comm'r of Internal Revenue, 164 F.3d 1140 (8th Cir. 1999) (per capita distribution of casino revenue was taxable as ordinary income). Tribes that distribute gaming revenues to members without a plan could be subject to enforcement actions by the NIGC or the Department of Justice including fines, casino closure or injunctive relief.

However, "closely held corporations" do not have the use of their revenues restricted to the following usages: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.[122]

Courts have rectified Congressional error in failing specifically to exclude other governments such as U.S. territories, possessions and "insular areas," by excluding them also from the definition of "employer." However, tribal governments have not been accorded the same respect. Rather, "the [NLRB] could reasonably conclude that Congress's decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists," according to the D.C. Circuit.[123]

Additionally, the purpose of the IGRA is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]"[124] The Board in *San Manuel* even recognized that the IGRA "does not address labor relations" and was potentially in conflict with the NLRA.[125] Of particular note is the D.C. Circuit's view that "the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly."[126] Nonetheless, the NLRA preempted all state laws that either regulate or prohibit conduct addressed under the Act.[127] The D.C. Circuit decided that the infringement on the Tribe's sovereignty is "negligible" and merely constitutes only "some unpredictable, but probably modest . . . displacement of [tribal] legislative and executive authority."[128] A sovereign is rendered impotent and severely constrained if stripped of the power to pass laws, direct tribal government resources, and be ruled by its own laws.

The D.C. Circuit misapprehended tribal sovereignty not as an inherent power to act as a government, but rather as a means to preserve tribal culture.[129] Judge Brown, writing for the *San Manuel* court, noted:

> The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs,

122. 25 U.S.C. § 2710(b)(2)(B).
123. 475 F.3d at 1317.
124. 25 U.S.C. § 2702(1).
125. 341 N.L.R.B. at 1054.
126. 475 F.3d at 1317.
127. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).
128. 475 F.3d at 1315.
129. *Id.* at 1314.

> thereby giving them latitude to maintain traditional customs and practices.
>
> But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.[130]

For now, the decision opens the door broadly to union organizers, with labor rules set by the NLRB rather than by a tribe's internal regulatory authority or pursuant to procedures mutually negotiated within tribal state gaming compacts. The decision could have significant and wide-ranging implications for interpretation of many other federal statutes of general applicability. Because under *San Manuel*, tribes are subject to the NLRA and adjudications by the NLRB, tribes and their instrumentalities are well-advised to carefully to review and revise their labor laws and to prepare for the inevitable onslaught of union organizers, as well as to modify their negotiation strategies of tribal-state compacts.

While the Board noted that it will continue to determine whether to assert jurisdiction over tribal enterprises on a case-by-case, discretionary basis,[131] it is likely that as tribes continue to participate in highly competitive industries, courts and federal agencies will continue to assert greater jurisdiction over tribal commerce, even if the revenue from such commerce is funding essential governmental purposes.

As Indian gaming continues to expand and tribes prosper, unions will covet this growing industry. It is not surprising. As labor unions decline because of dying industrial and manufacturing industries and as they face insurmountable challenges from globalization and outsourcing, the remaining jobs are in the service sector.[132]

Since the *San Manuel* decision and as this article undergoes final editing, the Board has asserted jurisdiction over two other tribal governments and their casinos including the Saginaw Chippewa Indian Tribe's Soaring Eagle Casino in Michigan[133] and

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130. *Id.*

131. 341 N.L.R.B. at 1063.

132. McClatchey, *supra* note 53, at 132-34 (noting that the "gold ring for labor unions would be to have access to [Indian gaming enterprises] labor pool . . . Lacking success in derailing NAFTA or the WTO, or even plain economic realities of globalization, organized labor now focuses on what it thinks is an easy target: enterprises run by 'a discrete and insular minorit[y],' banking (probably implicitly) on themes of fear, mistrust, and broadly accepted racism that linger just beneath the surface of the Indian gaming debate. Tribal sovereignty and the federal policy of self-determination are severely undermined by the approach taken in San Manuel." (citations omitted)).

133. *See Soaring Eagle Casino Workers May Unionize*, THE SAGINAW NEWS, Nov. 23, 2007, *available at* http://www.mlive.com/news/saginawnews/index.ssf?/base/news-24/1195831470140010.xml&coll=9; Lael R. Echo-Hawk, *Ripples*

the Mashantucket Pequot's Foxwoods Resort Casino.[134] With another 10,000 casino employees near the Foxwoods, the Mohegan Tribe's Mohegan Sun may also face an organizing campaign.[135]

Even though the Mashantucket Pequot Tribe's government derives ninety-eight percent of its operating revenue from the gaming program, the Board's Regional Director instead focused on and amplified the dramatic success and commercial nature of that Tribe's casino:[136]

> Foxwoods is the largest casino complex in the world, covering over one million square feet on the Tribe's reservation, with several hundred thousand square feet utilized solely for gaming purposes. Foxwoods is open 24 hours a day, 365 days a year, attracting 12 million customers every year and generating annual Tribal (sic) income in excess of one billion dollars. Its gaming ventures include 7,000 slot machines, about 400 gaming tables, and the world's largest bingo hall. Its non-gaming operations include three on-site hotels, about 30 eating and drinking establishments, three to four live entertainment, and many retail shops.[137]

In other cases, if there is very little money involved, the Board will likely decline jurisdiction. The Board noted that traditional tribal government functions "are less likely than commercial enterprises to involve non-Indians and to substantially affect interstate commerce."[138]

Courts have increasingly focused on the proliferation of tribal enterprises and their competition with non-Indian businesses. The NLRB is not the only agency to treat tribal government enterprises as businesses. The Internal Revenue Service has taken the position that tribal bonds used to finance the development of tribal government casinos, golf courses or public infrastructures such as roads, bridges and sewage treatment facilities that support such resorts, should not have tax exempt status.[139] The IRS made this interpretation even though it has

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from San Manuel: What's a Tribe to Do? 15 INDIAN LAW NEWSLETTER 1, vol. 4, Nov. 2007, *available at* http://www.wsba.org/lawyers/groups/indianlaw/indianlawnovember2007vol.15no.3.pdf.

134. Foxwoods Resort Casino, No. 34-RC-2230 (N.L.R.B. Region 34), *Decision and Direction of Election* (Oct. 24, 2007), *available at* http://www.nlrb.gov/shared_files/Regional%20Decisions/2007/34-RC-2230%2010-24-07.pdf.

135. Mark Peters, *More Unions Ahead? Result at Foxwoods Could Inspire Other Tribal Casino Workers*, THE HARTFORD COURANT, Dec. 4, 2007, *available at* http://www.courant.com/news/custom/topnews/hc-foxunionvote-1126,0,4817863.story.

136. *Foxwoods Resort Casino*, No. 34-RC-2230 (N.L.R.B. Region 34), at 4.

137. *Id.* at 2-3 (citations omitted).

138. *Id.* at 1063.

139. *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1045-53 (2007) (discussing the tax consequences of tribal government functions); Tribe's Use of Bond Proceeds for Other than Essential Government Function

ruled state and local government resorts, horse racing facilities and similar bond financing qualified as tax exempt.[140] Congress also recently made federal pension laws specifically applicable to the tribes.[141] Last year, Congress amended ERISA to permit tribes to provide a "government plan" for tribal employees that perform "essential government functions," while excluding employees that engage in "commercial activities."[142] *San Manuel* highlighted the increasing distinctions Congress, courts, and administrative agencies are making between tribal commercial and government activities.

Tribes and their instrumentalities should also beware of the decision's impact on other aspects of tribal government and commercial activities. The NLRA grants private parties extensive rights, and unfortunately these rights create a direct and monumental conflict with fundamental principles of tribal sovereignty. Tribes are now encountering union organizers and their aggressive tactics. The San Manuel, the Mashantucket Pequot, the Mohegan and the Saginaw Chippewa have already encountered union organizing as of late November 2007. The floodgates are open—in a short time more tribes across the country will likely face union organization efforts.[143] The impact of the decision will extend far beyond labor law in the federal Indian law context.

VI. NLRB HISTORIC TREATMENT OF TRIBES AND NLRA STRATEGIES FOR TRIBAL GOVERNMENTS AND THEIR ENTERPRISES

San Manuel leaves many unanswered questions. One of the most critical is whether the NLRA or other federal labor laws will preempt tribal laws regulating labor relations. *San Manuel* highlights the irreconcilable reasoning that, on one hand, tribes should not have a sovereign interest in regulating their own enterprises and labor relations when, on the other hand, the federal government has obviously found such regulation

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Precluded Exempt Interest, 106 J. TAX'N 252 (2007) (citing TAM 200705027); *see also* IRS Field Advice Service 20024712 (Nov. 22, 2002) (determining that a tribal owned and operated golf course resort was not an "essential function" because of its commercial nature under the Indian Tribal Tax Status Act of 1982, 26 U.S.C.A., § 7871(e)).

140. *See id.* at 1054-60 (citing scores of examples of customary use of tax-exempt bonds by non-tribal governments for commercial purposes).

141. *Id.* at n.384.

142. Pension Protection Act of 2006, § 906, Pub. L. No. 109-280, 120 Stat. 780, 1051 (amending 26 U.S.C.A. § 414(d) to include within the definition of "government plan," plans that Indian tribal governments establish and maintain and all participating employees engage in almost all of the activities). Such plans are considered governmental functions and not commercial activities. *Id.*

143. *See* Peters, *supra* note 135.

immensely important given the history and size of the NLRB bureaucracy and the federal government's decision to exclude itself (and other political entities) from the reach of the NLRA. Currently, there appears to be a split among the circuits regarding the enactment of tribal right-to-work laws or negotiated labor relations provisions within tribal state gaming compacts.[144]

An early decision from 1954 held that federal labor laws preempt any contrary tribal labor law. In *J.R. Simplot*,[145] the Board determined the NLRA applied to a tribal organization and held that the NLRA superseded a tribal labor ordinance prohibiting compelling tribal citizens from joining any organizations so that they could work on development projects on the tribe's Indian country.[146] The Board reasoned that laws of the United States stood above tribal ordinances.[147] The Board asserted jurisdiction over a mining business operating on reservation lands leased from the Navajo Nation because the uranium ore mining business shipped uranium in interstate commerce.[148] However, four decades later, in *NLRB v. San Juan Pueblo*, the Tenth Circuit held that a tribe's "right-to-work"[149] law deprived the NLRB of jurisdiction over contractors doing work for a tribe on the reservation and that a tribal government has the authority to prohibit compulsory union membership on its lands.[150]

Other Board decisions have found tribal entities not directly controlled by the tribal government as falling within the NLRA's coverage.[151] The Board has also assumed jurisdiction under the NLRA when a tribe entered into a joint venture business with non-Indians.[152] In another case, the Board enforced the NLRA over

144. *See supra* notes 127-31 and accompanying text.

145. 107 N.L.R.B. 1211 (1954).

146. *Id.*

147. *Id.* at 1220.

148. 288 F.2d 162 (D.C. Cir. 1961).

149. "Right-to-work" or "open shop" laws generally prohibit employees from being forced to join a union or pay dues to a union as a condition of employment. BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "right to work"). Currently, 22 states have right-to-work laws. *See infra* note 194 and accompanying text.

150. 276 F.3d 1186 (10th Cir. 2002). In San Juan Pueblo, the Tribal Council of the San Juan Pueblo, also known as the Ohkay Owingeh, passed Resolution 98-02 establishing a right-to-work law that would ensure the tribal citizens could work in a tribally-owned saw mill without a union forcing membership upon them. The Ohkay Owingeh right-to-work law also required labor organizations to register with the tribe (§ 4) and pay a fee, set standards for "business agents" to be granted a license (§ 5) and imposed penalties for violating the law, including fines up to $1,000 or exclusion from the Pueblo lands (§ 8). A person could also seek civil remedies, including injunctive relief, from the Tribal Court (§ 9). Ohkay Owingeh Resolution 98-02 (effective Feb. 4, 1998) (on file with the authors).

151. Sac & Fox Ind., Ltd., 307 N.L.R.B. 241 (1991).

152. *Id.*

entities created by tribes but controlled by independent or partially independent boards.[153]

There will likely be many conflicts between tribal labor laws or tribal state compact obligations and federally imposed restrictions under the Act. Section 8(a) of the NLRA, for example, provides a long list of illegal management activities that constitute "unfair labor practices."[154] Some existing tribal state compacts obligate unions under the California Tribal Labor Relations Ordinance to obtain licenses, and could violate NLRA federal prohibitions against restrictions of employee rights under section 8(a)(1). Alternatively, a tribal government that seeks to utilize NLRA rights may end up in conflict with compact obligations or tribal labor laws.

The imposition of the NLRA on unique tribal government interests creates considerable conflict. Tribal governments generally are not well diversified and rely on gaming revenue to fund essential governmental services. The IGRA prevents non-members from having a proprietary interest in Indian gaming.[155] Labor obligations arising pursuant to a negotiated compact or pursuant to a tribal law enacted in response to the development of Indian gaming arise pursuant to the IGRA. Although the IGRA is silent regarding labor relations, the IGRA does provide that nothing shall supersede tribal laws regulating gaming.[156] Such regulation of labor in the gaming context gives rise to inevitable conflicts between the NLRA and IGRA.

Several important decisions have held that one federal statute cannot preempt another and that courts should attempt to harmonize such discord by accommodating the competing interest of two statutes. In those circumstances, a more specific statute, like the IGRA, would control over a more general one such as the NLRA.[157] While the Board's decision in *San Manuel* held that the IGRA "does not address labor relations" and the NLRB as an act of general application does,[158] the holding conflicts with the Ninth Circuit's decision in *Coyote Valley Band of Pomo Indians v.*

153. NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003).

154. 29 U.S.C. § 158(a).

155. *See* 25 U.S.C. § 2710(b)(2)(a) (stating that "Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity").

156. 25 U.S.C. § 2701(5) provides "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."

157. Furnco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 228-29 (1951); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961).

158. 341 N.L.R.B. at 1064.

California,[159] which reasoned that labor obligations are not "categorically forbidden by the terms of the IGRA."[160] The *Coyote* court reasoned that the IGRA, by requiring tribal state compacts to engage in Class III casino style gaming, resulted in the imposition of state law labor obligations on tribes.[161]

Imposing the NLRA on tribal economies will elevate individual employee rights above the tribes' interests in raising government revenue. Additionally, the NLRA's collective bargaining procedures could place at risk previously confidential tribal government information. Tribal governments should be exempted just as are all other political subdivisions.

There is no doubt that in the wake of *San Manuel* tribal economies will become, and are already becoming, the targets of increased union activity. This makes the implementation of anti-labor organization activities all the more important. The threat of NLRB-sanctioned elections for casino employees, threats of corporate campaign tactics, and NLRB-related litigation against tribal governments and their enterprises is likely. Tribes should consider alternative strategies to minimize risks of losing control over the work place, giving up confidentiality of government records, and jeopardizing essential governmental revenue. Tribes should adopt new policies and procedures to address risk and train managers regarding NLRA procedures to avoid committing "unfair labor practices."

Unions have become skilled in subpoenaing private records as a part of unfair labor practices litigation under the NLRA. Sensitive tribal government financial information could be forced into the public domain. If unions obtain a sufficient foothold to establish a bargaining relationship, they could use requests to obtain this sensitive financial information. The Board has shown a willingness to disregard tribal government interests with the *San Manuel* decision. The Board would likely accord little respect to tribal governments in their case-by-case adjudication of such information requests.

The NLRA grants private parties rights that they otherwise would not have on the reservation. Those NLRA rights directly conflict with fundamental aspects of tribal sovereignty. The Board could undertake heavy-handed procedures to force employee access to reservation lands. If the Board decides that employees on the reservation are "inaccessible" the Board could compel the tribe to give union organizers and their agents access to tribal lands.[162] The application of the NLRA may well invalidate certain labor provisions in tribal state compacts and, as recently asserted

159. 331 F.3d 1094 (9th Cir. 2003).
160. *Id.* at 1110.
161. *Id.*
162. Lechmere, Inc. v. NLRB, 502 U.S. 527, 533-34 (1992).

(and rejected by the Board's Regional Director in Michigan), infringe on specific treaty rights such as the right to exclude non-Indians from the reservation.[163] The Saginaw Chippewa appealed the Regional Director's decision.[164].

Further, the NLRA may provide a handhold for the application of federal laws *that do not apply* to tribes, such as Title VII employment discrimination laws.[165] Congress specifically exempted tribes from Title VII.[166] The Board has found that discrimination or sexual harassment under Title VII could violate the NLRA.[167] Courts have found that the Americans with Disabilities Act does not apply to tribes, as Congress expressly exempted the application of the law to tribes.[168] In recent years, courts have found other labor laws apply to tribes including the FLSA,[169] the OSHA,[170] and the ERISA.[171] Although tribes

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163. *Soaring Eagle*, *supra* note 23.

164. The Tribe appealed on December 3, 2007. Telephone Interview with Sean Reed, Tribal Attorney for the Saginaw Chippewa Indian Tribe, in Tulsa, Okla. (Dec. 4, 2007).

165. *See supra* text accompanying notes 35-69; *see also* McCracken, *supra* note 58 (arguing that based on San Manuel jurisprudence, "[b]ecause the ADEA (Age Discrimination in Employment Act) 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." Again, McCracken represented the union charging unfair labor practices against San Manuel).

166. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b).

167. Olympic Steamship Co., 233 N.L.R.B. 1178 (1977).

168. Americans with Disabilities Act of 1990 (ADA) § 101, 42 U.S.C. § 12111(5)(B)(i) (2000). Courts have also found that Title III of the ADA does not apply to tribes because the statute did not unequivocally express an intent to abrogate tribal sovereign immunity. Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1131-32 (11th Cir. 1999).

169. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2000).

170. Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-78 (2000); *see also* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (finding that the OSHA applied to a tribal government which owned and operated a saw mill even though Tribe had right to exclude persons from tribal land). *But see* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 711-14 (10th Cir. 1982) (applying OSHA to the Navajo Nation's forest products business would violate the Nation's right to exclude people from Indian lands).

171. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000); *see also* Smart v. State Farm Ins. Co., 868 F.2d 929, 935-36 (7th Cir. 1989) (holding that ERISA applied to tribal government business plan because treaty provisions preserving the Tribe's "exclusive sovereignty" and right to exclude persons from Indian lands was not specific enough to preempt application of general ERISA provisions); *cf.* Smart v. Little Six, 284 F. Supp. 2d 1224 (D. Minn. 2003) (stating that ERISA plan was in effect even though a tribal appellate court held that the plan did not comply with the Tribe's corporate law and was invalid; therefore, ERISA would not apply). *But see* Colville Confederated Tribes v. Somday, 96 F. Supp. 2d 1120 (E.D. Wash.) (holding that a tribal government self-funded plan was exempt from ERISA

generally comply voluntarily with certain labor notice requirements such as COBRA or ERISA, at least one court has determined that the notice requirements are mandatory.[172] In one case, *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) the Eighth Circuit decided that whether an ERISA plan exists within a tribal operation is a question for tribal courts – not federal courts to decide, and tribal remedies had to be exhausted first.[173]

There are silver linings in the decisions' effect. Unions may try to enforce tribal compact obligations or state law imposed obligations instead of NLRA obligations, because, typically and particularly in California, those obligations are more friendly to union organization activity than the procedures found in the NLRA. Tribes may prefer the application of federal law over more restrictive compact provisions. When the NLRA applies, it preempts all state laws that regulate or prohibit labor conduct.[174] Thus, tribes could seek NLRA-imposed labor obligations instead of state law obligations as a result of the *San Manuel* decision. However, this is a two-edged sword, if a tribe tries to exercise rights under federal law it may find itself the subject of allegations of violating tribal law or compacts.

Prospectively, tribes entering into compact negotiations with states may have additional ammunition to avoid the imposition of union concessions from tribal enterprises. Aggressive union insertion of interests into tribal state compact negotiations have frustrated and slowed many agreements, particularly in California. Union interests may lose leverage in compact negotiations in the wake of *San Manuel.*

Some tribes may choose as a policy matter to embrace organized labor. These are sovereign policy decisions best exercised by tribes exercising self-government powers though, not discretionary choices of outside regulatory bodies such as the Board.

Now that tribes may find themselves subject to the NLRA and the jurisdiction of the NLRB, at least in those subjective circumstances where the Board believes large commercial conduct involving non-Indians is involved, it is important for these entities to understand the basic provisions of the Act and its practical impact.

A. The National Labor Relations Act

The NLRA gives authority to the NLRB to determine the

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when the plan applied exclusively to employees of the tribe).

172. *Smart*, 868 F.2d at 935-36.

173. Kristi Favard, *Attention Tribal Employers! Do Your ERISA Benefit Plans Exist Under Tribal Law?* 13 INDIAN L. NEWSLETTER 6, 6, 24 (Apr. 2005), *available at* http://www.nwiba.org/pdfs/04_05%20Indian%20News.pdf.

174. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

employees' choice of a collective bargaining agent.[175] Section 7[176] is the essence of the Act. It provides that employees:

> shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

Section 8 of the Act involves "unfair labor practices," which are activities that violate the Act.[177]

The unfair labor practices that can be committed by an employer are described in Section 8(a) of the Act and involve interference with the rights granted employees under Section 7.[178] Subsection 8(a)(1) reads as follows: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ."[179]

Any violation of subsection (2), (3), (4) or (5) of Section 8(a) is also a violation of subsection 8(a)(1), but subsection 8(a)(1) can be the only one violated. The general nature of the other employer unfair labor practices includes:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union;
- Domination or interference with the formation or operation of any labor organization;
- Domination or interference with the formation or operation of any labor organization;
- Discrimination in connection with hiring or terms of employment in order to encourage or discourage membership in a labor organization;
- Discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act; and
- Refusing to bargain collectively with representatives of employees.

Section 8(c) of the Act limits the application of these employer unfair labor practice provisions in conjunction with the conduct of

175. 29 U.S.C. § 159.
176. *Id.*
177. *Id.* § 157.
178. *Id.* § 158(a).
179. *Id.*

an election.[180]

Section 9 of the Act defines the power and duties of the Board in connection with its determinations regarding collective bargaining representatives.[181] Under the authority of Section 3(b), the Board has delegated to the Regional Directors of the NLRB the power to determine the appropriate bargaining unit, to order a hearing, to decide whether a representation question exists, to direct an election, and to certify the results thereof.[182] A power of review is retained in the Board itself.

B. The Union's Demand for Recognition

An awareness of union activity can come either during or at the conclusion of the initial phase of the union's organizational drive.

Often, by the time employers find out about union organizing activities, the union is well on its way to seeking an election. However, given the nature of tribal governments and that tribal citizens are members of closely connected extended families, tribal casino employers typically find out about union organizing activities before larger, non-Indian employers.

Early signs of union activity might include noticing groups of people that normally do not associate with each other gathering together, changed behavior among employees, signs of card signing activity, odd conversations among employees, use of phrases like "concerted activity," "duty to bargain," "economic pressure" or "rights of representation," pro-union graffiti and the like.[183] Employers should train managers regarding early signs of union activity and take pro-active steps to protect against union activity in the first place namely – creating and maintaining a workplace environment that instills worker satisfaction.[184] Managers should train employees to report even the smallest matters to the human resources department.

Normally, management learns of the union's claim by an unannounced visit, a letter, or a telephone call from the union representative. Sometimes the union will first file an election petition, and the initial communication will be from the NLRB. If

180. *Id.* § 158(c).

181. *Id.* § 159.

182. *Id.* § 153(b).

183. Kevin J. Allis, *The NLRB San Manuel Indian Bingo & Casino Fallout: Dealing with Union Organizational Efforts*, 17 INDIAN GAMING 28, 28-29 (May 2007), *available at* http://www.indiangaming.com/istore/May07_Allis2.pdf.

184. *See* Philip B. Wilson, The Next 52 Weeks: One Year to Transform Your Work Environment (2004) (discussing why employees choose to be union free and strategies for union avoidance, including employee surveys, employee relation strategies, orientation programs, compensation, benefits and employee satisfaction issues), *available at* http://www.lrims.com/contact-us.html.

alert management, at an earlier time, notes the behavior or activities of employees or outsiders, consultation with professional advisers should begin immediately.

This time of first contact with the union is of critical importance. Employers are invariably surprised and shocked and often feel hurt, angered, and betrayed. Tribal employers are well advised to consult with expert advisors immediately and learn as much as possible, as quickly as possible, to prepare for the potential of a union representation election and to understand the psychology of successful electioneering.[185]

While the employer should respond to the union's communication within a reasonable period of time, it is important that no hasty action be taken. A meeting with a union representative appearing unannounced should be avoided until consultation with qualified advisers and calm reflection on the situation can take place. A written request stating the nature of his business with the company should be sought from the union representative, if he appears unannounced.[186] Under no circumstances should management examine union authorization cards purportedly signed by employees or make other efforts to determine employee preferences at that early juncture.

One of the best responses tribal government managers could make if approached by a union in a representative capacity is to say "we have a good faith doubt that you represent an uncoerced majority of our employees." Tribal managers should also advise the union representative that management cannot deal directly with them and to approach the Board and seek an election. The reason is because the Act prohibits a company from dealing directly with a minority union. At this stage the tribal management will likely not know whether the union represents a majority or not.

The union usually approaches the employer with a demand for recognition based on some evidence that the union represents a majority of the company's employees. Normally, the evidence consists of cards signed by the employees, which purport to give the union either the power to act as the bargaining agent for the employees or the power to request an election on the employees' behalf. Other recognized forms of proof of majority status include check-off cards,[187] membership application cards,[188] a strike or

185. *See generally* Donald P. Wilson, Total Victory! The Complete Management Guide to a Successful NLRB Representation Election (2d Ed. LRI 1997). Wilson provides strategies for management to deal with a union representation election from the filing of a petition through the campaign, to election day.

186. James L. Hall & H. Leonard Court, *Selecting a Union Representative: Management's Role,* 26 OKLA. L. REV. 38, 45 (1973).

187. Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir. 1942).

strike vote,[189] or a union membership list.[190]

Either of two forms of authorization cards will normally be presented. First, the union may use a single purpose card, which authorizes the union to act on behalf of the employees in negotiating a collective bargaining agreement. Second, the employer may be confronted with a dual-purpose authorization card that authorizes the union to act as the employees' negotiating agent and to request a representation election.

C. Suggested Strategies for Union Avoidance in Tribal Casinos

The remainder of this Article is devoted to preemptive actions that will help avoid having to deal with a union's demand for recognition. Because of tribal sovereignty, certain strategies for discouraging union organization may be available that are not normally in the arsenal of a private business owner.

In response to the *San Manuel* case and its impact on tribal sovereignty, the Native American Rights Fund and the National Congress of American Indians has formed a Tribal Labor Ordinances Workgroup ("TLOW") to address actions tribes could take to protect their sovereign decision-making authority regarding labor and employment issues.[191] Some recommendations from those Workgroup meetings are incorporated herein.

1. Right to Work

In 1947, Congress added the first proviso to section 8(a)(3) of the Act. This provision outlawed the closed shop but allowed certain types of union-security agreements. However, Congress also enacted section 14(b), which provides "[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such

188. NLRB v. Consol. Mach. Tool Corp., 63 F.2d 376 (2d Cir. 1947); NLRB v. Somerset Shoe Co., 111 F.2d 681 (1st Cir. 1940); H. HUSBAND, MANAGEMENT FACES UNIONIZATION 72 (Management Sourcebooks 1969).

189. Arthur F. Derse, Sr., 185 N.L.R.B. 175 (1970).

190. Jeffery-DeWitt Insulator Co., 1 N.L.R.B. 618 (1936), *enforced*, 91 F.2d 134 (4th Cir. 1937); *cf.* Bethlehem Transp. Corp., 65 N.L.R.B. 605 (1946) (offering a list of members and locals, which was insufficient to allow union to participate in elections).

191. The Native American Rights Fund ("NARF") and the National Congress of American Indians ("NCAI") formed the TLOW in late Spring 2007 through the efforts of multiple organizations including the Tribal Sovereignty Protection Initiative, the National Indian Gaming Association, the Council of Tribal Employment Rights comprised of tribal attorneys and firms serving tribes and other experts to recommend policy responses to tribes. The TLOW is led by Richard Guest, staff attorney at NARF and John Dossett, General Counsel to NCAI.

execution or application is prohibited by State or Territorial law."

Legislative history[192] demonstrates that section 14(b) was passed to assure neither section 8(a)(3) of the Act nor its proviso "could be said to authorize union security arrangements . . . in States where such arrangements were contrary to the State Policy."[193] The section therefore constitutes an express congressional exemption from the general principle that the NLRA preempts the field it covers.

At the time when Congress enacted section 14(b), twelve states already had statutes or constitutional provisions that either prohibited or restricted union-security devices.[194] By 2003, twenty-two states had statutes or constitutional provisions that prohibited union-security arrangements that would otherwise be valid under the NLRA.[195] These "right-to-work" laws give employees the option of employment without having to join or contribute financial support to any union, including a union that has been selected as the employees' lawful collective bargaining representative.

As a separate sovereign, each tribe should include a "right-to-work" provision in its tribal code. If a union is choosing between a

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192. H.R. REP. No. 510, 80th Cong., 1st Sess. 60 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 564 (1948); *see also* Retail Clerks Local 1625 v. Schermerhorn (*Schermerhorn I*), 373 U.S. 746, 751, 753, 53 LRRM 2318, 2320 (1963) (stating that "Section 14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements.").

193. *See* Retail Clerks Local 1625 v. Schermerhorn (*Schermerhorn II*), 375 U.S. 96, 99-102 (1963) (quoting H.R. REP. No. 245, 80th Cong., 1st Sess. 44 (1947), *reprinted in* NLRB, *supra* note 162, at 564; H.R. REP. No. 510).

194. *Schermerhorn II*, 375 U.S. at 100 (citing "State Laws Regulating Union-Security contracts," 21 LRRM 66 (1948)).

195. These states and their provisions are as follows: Alabama: ALA. CODE §§ 25-7-30 to -36 (1992); Arizona: ARIZ. REV. STAT. ANN. §§ 23-1301 to -1307 (1995); Arkansas: ARK. CONST. amend. § 34, ARK. CODE ANN. §§ 11-3-301 to -304 (West 1996); Florida: FLA. CONST. art. 1, § 6, FLA. STAT. §§ 447.01-447.15 (1997); Georgia: GA. CODE ANN. §§ 34-6 to -28 (1998); Idaho: IDAHO CODE ANN. §§ 44-2001 to -2010 (1997); Iowa: IOWA CODE ANN. §§ 731.1-731.9 (1993); Kansas: KAN. CONST. art. 15, § 12, KAN. STAT. ANN. § 44-831 (1993); Louisiana: LA. REV. STAT. ANN. §§ 23.981-23.987 (1998) (covering agricultural workers); Mississippi: MISS. CONST. art. 7, § 198-A, MISS CODE ANN. § 71-1-47 (1989); Nebraska: NEB. CONST. art. XV, § 13, NEB. REV. STAT. §§ 48-217 to -219 (1998); Nevada: NEV. REV. STAT. §§ 613.230-613:300 (1997); North Carolina: N.C. GEN. STAT. §§ 95-78 to -84 (1999); North Dakota: N.D. CENT. CODE § 34-01-14 (1987); Oklahoma: OKLA. CONST. art. 23, § 1A; South Carolina: S.C. CODE ANN. §§ 41-7-10 to -90 (1986); South Dakota: S.D. CONST. art. VI, § 2, S.D. CODIFIED LAWS §§ 60-8-3 to -8 (1993); Tennessee: TENN. CODE ANN. §§ 50-1-201 to -204 (1999); Texas: TEX. LAB. CODE ANN. §§ 101.051-101.053 (Vernon 1996); Utah: UTAH CODE ANN. §§ 34-34-1 to -17 (1997); Virginia: VA. CODE ANN. §§ 40.1.58-40.1.69 (1999); Wyoming: WYO. STAT. ANN. §§ 27-7-108 to -115 (1999). Colorado's Labor Peace Act, COLO. REV. STAT. §§ 8-3-101 to -123 (1994), has been construed to have some of the same impact as a "right-to-work" statute.

potential employer who is protected by right to work and one with employees who could be forced to pay dues through a union security clause, the natural choice is the latter.

The NLRB, however, has recently shown a tendency to ignore tribal labor laws. The San Manuel had a tribal law that regulated labor, but it made no difference to the Board. Similarly, the Mashantucket Pequot Tribe passed the "Mashantucket Pequot Labor Law" regulating union activity.[196] The Board ignored this law. The Saginaw Chippewa had adopted a Tribal Governmental Labor Ordinance prohibiting all tribal employees from forming or joining "labor organizations for the purposes of collective bargaining and mutual aid."[197] However, the Board's Regional Director gave this Tribe's law no deference or respect and simply ignored it in his analysis.[198]

Tribes should still pass these laws as their particular circumstances require. Excellent model codes are available from the Council for Tribal Employment Rights.[199] Enacting tribal labor and employment laws may fill a vacuum where no regulation

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196. Enacted by the Mashantucket Pequot Tribe on Aug. 16, 2007 (on file with the authors). The Act's purpose is:

> to provide tribal employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between the Tribe as an employer and tribal employees, and to protect the health, safety, political integrity and economic security of the Tribe.

Mashantucket Pequot Labor Law at § 3. Section 5 of the Act defines the rights and duties of tribal employers, tribal employees and labor organizations. Section 11 regulates the relationship between tribal employers and labor organizations, including prohibiting strikes or "lockouts."

197. Saginaw Chippewa Indian Tribe, Ordinance 28, "Tribal Government Labor Ordinance," enacted on Oct. 24, 2007 at § 4 (on file with the authors).

198. *See id.* (noting that on October 24, 2007, after the filing of the instant petition, the tribal council enacted the Tribal Government Labor Ordinance, which prohibits employees from forming or joining labor organizations for purposes of collective bargaining or mutual aid).

199. Council for Tribal Employment Rights ("CTER"), was founded in 1977 by the Tribal Employment Rights Offices to create a national advocacy voice and to provide technical assistance, training and consultation. For information about tribal employment rights see www.ctertero.com (last visited Dec. 4, 2007). CTER has developed Workforce Protection Codes that could be adopted to a particular tribe's unique circumstances. According to their website,

> [t]he Council for Tribal Employment Rights (CTER) is a community based non-profit Indian organization that is comprised of and represents the interests of over three hundred (300) Tribal and Alaska Native employment rights offices. CTER is acknowledged as the premier leader in the field of tribal employment rights and is the only national Indian organization that is dedicated exclusively to protecting Tribal employment, contracting and entrepreneurial rights on and near reservations.

Id.

exists. It is a sovereign exercise of governmental powers to regulate employment relationships and working conditions. This also fulfills an important governmental function of providing and protecting jobs for tribal citizens. Applying the NLRA to tribes without regard for these important sovereign goals hurts tribal governments.

In additional to right-to-work laws, tribes should consider Indian preference or tribal preference laws. The Supreme Court in *Morton v. Mancari*[200] rejected Fifth Amendment equal protection challenges to "Indian preference" laws relative to the Bureau of Indian Affairs. The Supreme Court relied on the statute's purpose and the agency's special role in assisting tribes with self-determination and noted that the preference is a political, not racial distinction relative to federally recognized Indian tribes.[201] A number of tribes have adopted well-crafted tribal employment rights ordinances (known popularly as "TERO" laws) to protect employment of tribal citizens and Indians married to or living on or near a tribe's Indian country.[202] Such TEROs should avoid discrimination based on tribal affiliation.[203] Tribes should review existing TEROs to make sure that they will survive in the wake of *San Manuel.*

Tribes could also consider adopting tribal laws that provide "no strike" provisions because the commercial operation generates revenue for essential governmental functions. Such laws are common with non-Indian local governments, particularly with police, fire protection and sometimes schools because such strikes or walk outs could greatly jeopardize government services.[204]

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200. 417 U.S. 535 (1974).

201. 417 U.S. at 552-53; *see also supra* note 23 (discussing the aftermath of the *San Manuel* decision).

202. *See, e.g.*, Southern Ute Tribal Employment Rights Code, Ch. 17, Southern Ute Indian Tribe (on file with the authors), which defines "purpose" as to:

> promote the employment of Indians, in accordance with federal law, on or near the Southern Ute Indian Reservation; to provide for Indian preference in employment in accordance with federal law; to assist employers, contractors and subcontractors in the fair employment of Indians on or near the Reservation; to provide a preference in contracting for Indian owned business; to prevent discrimination against Indians in the employment practices of employers within the jurisdiction of the Tribe; and to establish a Tribal Employment Rights Commission and Office to further these objectives.

Id. at 17-1-102.

203. *See* Dawavendewa v. Salt Water Project Agric. Improvement and Power Dist., 154 F.3d 1117, 1123 (9th Cir. 1998) (holding that a TERO law that imposes a tribal affiliation preference, when applied to a private employer, violates Title VII of the Civil Rights Act that prohibits discrimination based on national origin).

204. *See* Michael A. DiSabatino, Annotation, *Who Are Employees Forbidden to Strike Under State Enactments or State Common-Law Rules Prohibiting*

Unlike federal, state and local governments that have broad tax bases from property, sales and income taxes to name a few, tribal governments have very limited sources of revenue. If gaming revenue stops abruptly, many tribes do not have large reserves to fall back on and could become incapacitated quickly. Congress probably did not intend for tribes to face crippling strikes when it enacted the IGRA to help build strong tribal governments.

Other options might include allowing permanent replacement of all striking employees (not just economic strikers). In an "unfair labor practice" strike under the Act, management may only allow temporary workers until the strike is over. Otherwise, management is obliged to re-hire the striking employees. Another option would be to prohibit the collection of dues for non-representational purposes.

One consideration is to review the particular tribe's election code. Unions remain quite engaged politically from the national to the local level. Labor organizations may seek to influence tribal politics or elections. Tribes may wish to consider adopting or amending existing election laws to regulate contributions, institute reporting requirements, and address and regulate campaign financing to prevent corrupt practices. Such provisions could require registration and reporting, and limit contributions and participation in election support by non tribal citizens. Regulating such political activity is a core exercise of tribal sovereignty.

Another important provision in the law would be to require licensure for all employee representatives. One of the underlying declared policies of the IGRA is

> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operators and players;[205]

It is certainly an interest of the tribe to protect the gaming operation from "undesirables." All gaming codes require licensing for casino employment.

There is an extensive history of criminal activity and corruption by many labor unions.[206] The National Legal and Policy

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Strikes by Public Employees or Stated Classes of Public Employees, 22 A.L.R. 4th 1103 (1983).

205. 25 U.S.C.A. § 2702 (2) (2001).

206. *See* Phillip B. Wilson, *Union Corruption and the Law, Toward a Unified Framework for Reform* (2006), *available at* http://www.nlpc.org/pdfs/Law_of_Union_Corruption_WilsonFINAL.pdf (arguing that laws criminalizing and regulating union corruption have developed piecemeal and that there is a need for legislative reform).

Center's[207] Organized Labor Accountability Project[208] has chronicled 110 articles detailing corruption or questionable practices by the AFL-CIO,[209] 77 articles relative to the Communication Workers of America (CWA),[210] 76 articles relative to Food and Commercial Workers,[211] 90 articles relative to the Hotel and Restaurant Workers (HERE), 363 articles relative to the Teamsters (IB), just to name a few, since 1998 when the organization began compiling information. The Independent Review Board[212] has permanently barred and expelled 325 individuals from the Teamsters for engaging in corrupt practices or associating with known members or associates of organized crime.[213] One advocacy group, The Center for Union Facts claims that "[i]n 2005 alone, federal racketeering investigations resulted in 196 convictions against union officials and employees and $187 million in fines."[214] Licensing employee representatives would assist tribal governments in controlling the spread of corruption and organized criminal activity within the casino environment.[215]

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207. The National Legal and Policy Center (NLPC) is a political organization that promotes ethics in public life and tracks corrupt activities, http://www.nlpc.org/ (last visited Dec. 2, 2007).

208. One of the NLPC's projects is the "Organized Labor Accountability Project," the NLPC claims that it "makes the case for the end of the use of compulsory union dues for political purposes by exposing abuses by Organized Labor in its political and organizing activities. Since 1997, NLPC has become a high-profile and credible source for information on union corruption . . . ." NLPC, http://www.nlpc.org/olap.asp (last visited, Dec. 2, 2007).

209. NLPC, http://www.nlpc.org/artindx.asp#ibt (last visited Dec. 2, 2007).

210. *Id.*

211. *Id.*

212. The Independent Review Board ("IRB"), successor to the Independent Administrator ("IA"), was established pursuant to a Consent Decree and Permanent Injunction entered into between the United States Government and the International Brotherhood of Teamsters ("IBT") in 1989 in a consent decree supervised by the U.S. District Court for the Southern District of New York. *See* IRB Cases, http://www.irbcases.org (last visited Dec. 2, 2007) (this website is maintained by the Teamsters pursuant to the federal decree); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, et. al., No. 88-CIV. 4486 (March 14, 1989), *available at* http://www.irbcases.org/pdfs/ConsentDecree.pdf; *see also* United States v. Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989) (referring to the Consent Decree and the Teamsters' acknowledgement that there "have been allegations, sworn testimony and judicial findings of past problems with La Cosa Nostra corruption of various elements of IBT . . ."). The Second Circuit affirmed portions of the injunction in *United States v. Teamsters, et. al.*, 907 F.2d 277 (2d Cir. 1990).

213. *Id.*

214. UnionFacts.com, http://www.unionfacts.com/aboutUs.cfm (last visited Dec. 4, 2007). The website chronicles "crime and corruption" with annotations regarding "union leader fraud," "union violence, harassment and intimidation of workers" and "discrimination." *Id.*

215. UnionFacts.com, Crime & Corruption, http://www.unionfacts.com/articles/crime.cfm (last visited Dec. 4, 2007).

Such regulatory activities represent fundamental policies underlying the IGRA.

For these reasons, tribes should consider either adopting or amending "exclusion" laws to remove or expel undesirable persons from the tribe's Indian country. Such exclusion, a basic attribute of tribal sovereignty and a frequent right included in many old treaties with the United States, could run afoul of the NLRA. The Act may require additional due process, review, appeal or arbitration including potential "reinstatement" should the exclusion be found to violate the Act.

In the end, if tribes do not exercise sovereignty[216] in regulating the work place through their own reasonable and culturally-sensitive laws that provide due process, fairness and to address worker grievances, Congress may step in—just as the NLRB has apparently done in *San Manuel* and recent cases. However, in asserting jurisdiction, the Board has run roughshod over important tribal government interests. Exercising tribal legislative powers to control the terms and conditions of employment will occupy the field. Therefore tribes could demonstrate that applying any contrary laws such as the Act would infringe on the tribe's ability make its own laws and be ruled by them. The impact on tribal self-government cannot be overstated.

2. *No Solicitation / No Distribution Rules*

To maintain efficient working conditions, employers often promulgate rules that prohibit solicitation by various organizations on company property. While these no-solicitation rules serve a legitimate business purpose, they also have been a source of constant concern for the NLRB. Because of the fear that employers will abuse these rules to discourage organizational campaigns, the Board has promulgated several standards to test the validity of such no-solicitation requirements.

No-solicitation rules generally fall into two categories. A broad no-solicitation rule is one which forbids union solicitation on company property during both working and non-working hours. A narrow no-solicitation rule is limited to company property and the working hours of the employees being solicited.

In *Republic Aviation Corp. v. NLRB*,[217] the Supreme Court stated that, if the no-solicitation standard governs non-working hours, such as rest period or lunch break, the rule is presumed to

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216. The National Congress of American Indians at their mid-year meeting in Anchorage, Alaska on June 12, 2007, held a panel aptly entitled "Sovereignty: Use It or Lose It!" that addressed tribal labor law development. Meeting Agenda *available at* Nat'l. Congress of Am. Indians, http://www.ncai.org/ncai/dcdata/2007_Mid_Year_Draft_Agenda_May_4.pdf.

217. 324 U.S. 793 (1945).

be an unreasonable impediment to self-organization.[218] If such a rule exists, the employer must show a rational business justification that supports the need for such a broad standard, or the existence of the rule itself will constitute an unfair labor practice. On the other hand, a rule prohibiting union solicitation during working hours is presumed to be valid in the absence of some evidence that the rule is adopted for a discriminatory purpose.[219]

Discriminatory enforcement of an otherwise valid no-solicitation rule can cause the rule to become invalid.[220] However, courts recognize that some exceptions to an otherwise rigid no-solicitation rule can be allowed without exposing the employer to an unfair labor practice charge when the rule is enforced against attempted unionization.[221]

No-solicitation rules are not invalid merely because they specify a charity as the sole exception to restrictions on solicitation.[222] However, frequent solicitations under such an exception can be the basis for finding that the employer applied its rule in a disparate manner.[223]

The differences between oral solicitation and the distribution of literature have caused the Board to apply somewhat different rules to employer efforts to restrict the two activities. The Board has generally allowed employers to forbid distribution of literature by employees both during working time and in working areas.[224]

The timing of a no-solicitation or no-distribution rule is an important consideration in assessing its validity.[225] Strict

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218. *Id.* at 803.

219. *Id.*

220. Serv-Air, Inc. v. NLRB, 395 F.2d 557 (10th Cir. 1968); TRW Inc. v. NLRB, 393 F.2d 771 (6th Cir. 1968); *cf.* NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949) (denying use of a meeting hall was not a violation).

221. *Serv-Air*, 395 F.2d 557; *TRW Inc.*, 393 F.2d 771.

222. *See* Hammary Mfg. Corp., 265 N.L.R.B. 57 (1982), *amending* 258 N.L.R.B. 1319 (1981).

223. *See id.* (stating that some common exceptions include United Way or similar charitable campaigns, tool, work boots sales or other work related company sales visits, etc.).

224. *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962). In the absence of a no-solicitation rule, an employer may not seize union literature placed on workers' desks prior to the start of working hours. F.W. Woolworth Co. v. NLRB, 530 F.2d 1245 (2d Cir. 1976); United Aircraft Corp., 139 N.L.R.B. 39 (1962), *enforced*, 324 F.2d 128 (2d Cir. 1963); *see also* United Parcel Serv., 327 N.L.R.B. 317 (1998) (finding that the employer was not privileged to ban distribution).

225. Gallup, Inc., 334 N.L.R.B. 366 (2001), *enforced*, 62 F. App'x 557 (5th Cir. 2003); *accord* Wild Oats Mkt., Inc., 344 N.L.R.B. No. 86 (2005) (finding that timing provided evidence of antiunion activity); *see also* Ward Mfg., 152 N.L.R.B. 1270 (1965) (discussing timing where the rule was promulgated one day after the first union meeting); Elmendorf & Fort Richardson Barber Concessions, 247 N.L.R.B. 667 (1980), *enforced*, NLRB v. Simmons, 639 F.2d

enforcement of an existing rule, or promulgation of a new one during a union organizing campaign,[226] has been regarded as evidence of illegal conduct, but may be offset if a showing is made that an objectively observable decline in productivity was caused either by solicitation or by the campaign.[227] However, implementing an otherwise lawful rule to coincide with union organizational activity can be lawful where "the surrounding context is devoid of unlawful activity."[228]

In the gaming context, though, tribal managers may have trouble dealing with non-employee solicitation. Casinos by their very nature invite members of the public to visit and game in close contact with employees. Thousands of non-employee invitees may come onto a particular large casino property daily. Discerning and denying entry to non-employee solicitors presents many challenges in the casino environment. Management must be careful to enforce non-solicitation tribal laws and policies in a non-discriminatory way.

3. Training of Supervisory Personnel (TIPS)

Many unfair labor practices occur at the first line supervisor level. These are often a result of ignorance of the rules under the Act. Therefore, it is critical that supervisors be trained in "T.I.P.S."

T.I.P.S. is an acronym for the four major prohibitions concerning employer conduct. Under the Act an employer cannot:

- *T*hreaten
- *I*nterrogate

789 (9th Cir. 1981) (timing of no-solicitation rule).

226. *See Cannondale Corp.*, 310 N.L.R.B. 845 (1993) (finding promulgation of non-solicitation rule shortly after commencement of union organizing unlawful, where accompanied by announcement of nonunion policy, no other explanation of rule was given at time, and solicitation problems prior to rule were isolated or minor); *see also* Ideal Macaroni Co., 301 N.L.R.B. 507 (1991) (finding a violation where employer issued new no-distribution policy immediately after discovering that pro-union fliers were distributed at workplace), *enforcement denied on other grounds*, 989 F.2d 880 (6th Cir. 1993).

227. *Bankers Club*, 218 N.L.R.B. 22 (1975); Whitcraft Houseboat Div., 195 N.L.R.B. 1046 (1972).

228. F.P. Adams Co., 166 N.L.R.B. 967, 968 (1967); *see also* Westinhouse Elec. Corp., 277 N.L.R.B. 136, 137 (1985) (describing how employers comments did not unlawfully impinge on employees' future job prospects); Brigadier Indus. Corp., 271 N.L.R.B. 656, 657 (1984) (stating that when an "employer has acted for legitimate business interests - rather than for union reasons - its promulgation of a rule cannot be deemed unlawful"); Cadiz Convalescent Ctr., 258 N.L.R.B. 559 (1981) (finding that no – the solicitation rule was valid); *cf.* NLRB v. Roney Plaza Apartments, 597 F.2d 1046 (5th Cir. 1979) (prohibiting after-work solicitation is a violation).

- *P*romise or
- *S*py

T-Threats: Specifically, supervisors cannot:

- Threaten employees to cause them to refrain from union activities by discontinuing existing benefits;[229]
- Threaten employees with loss of job or reduction in wages, or use threatening or intimidating language calculated to influence an employee in the exercise of his right to support a union;[230]
- Tell employees that the union will have to strike to obtain concessions from the employer;[231]
- Tell employees that if the union wins the company will close or move away;[232]
- Discriminate against an employee who is taking part in union activities by separating him from other employees or transfer with stricter work rules for their union activities.[233]

I-Interrogation: Specifically, supervisors cannot:

- Ask questions of employees about their union sentiments or activities;[234]
- Distribute "Vote No" buttons;[235]
- Require job applicants to disclose their union membership;[236]
- Ask employees their personal opinions about the union or the feelings of other employees; or
- Visit employees at their homes to urge them to vote against the union.

P-Promises: Specifically, supervisors cannot:

- Promise employees benefits to have them reject the union;[237] or
- Promise employees pay increases, promotions, improved working

229. Clematrol, Inc., 329 N.L.R.B. 946 (1999).
230. NLRB v. Neuhoff Bros., Packers, 375 F.2d 372 (5th Cir. 1967).
231. Phelps Indus., 295 N.L.R.B. 717, 733-34 (1989).
232. *Cf.* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 274 n.20 (1965) (holding "that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice").
233. Performance Friction Corp., 319 N.L.R.B. 859 (1995).
234. Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967).
235. Kurg-Kasch, Inc., 239 N.L.R.B. 1044 (1978).
236. Facchina Constr. Co., 343 N.L.R.B. 886 (2004).
237. NLRB v. Exch. Parts, 375 U.S. 405 (1964).

conditions, additional benefits, or special favors on condition that the employees refuse to join the union or vote against it.[238]

S-Spy: Specifically, supervisors cannot:

- Spy or maintain surveillance on employees in the exercise of their right to engage in union activities;[239] or
- Engage in surveillance of employees receiving union handbills or attending union meetings or give the impression that employee union activities are being watched.[240]

4. Other Helpful Actions

Any actions that encourage employee participation are helpful because many employees join labor unions because they feel that they are not viewed as important within the company. Such helpful actions can include strategies as simple as suggestion programs, or as sophisticated as focus groups. Additionally, having periodic question-and-answer sessions hosted by management can be useful.

Providing written material concerning this issue is also essential. A "Union Free Statement" should be included in employee handbooks and newsletters. Employee newsletters that highlight company benefits and recognition programs are also essential.

Tribal management may take additional positive steps to foster a positive working environment. Employers may lawfully communicate *F*acts, *O*pinions, and *E*xamples ("FOE") through an informational campaign. Tribal management should consider conducting supervisor training not only on legal requirements but also on positive employee relations best practices. Do the tribe's casino managers and employees know the tribe's position about unions? Tribal managers can inform employees about the disadvantages of unions including how destructive strikes could be to them and the tribal government, the costs of unionizing and that no guarantees exist that wages, health care or other benefits will be any better or even remain the same. Tribal managers can tell employees that they do not have to sign union cards or even talk to union organizers.

The National Indian Gaming Association estimates that of approximately 670,000 employees at tribal casinos, seventy-five percent are non-Indian.[241] Do non-citizen Indians and non-Indian

238. Coca-Cola Bottling Co., 132 N.L.R.B. 481, 483 (1961) (making payments of money in the form of bribes).

239. Consol. Edison Co. v. NLRB, 305 U.S. 197, 224-25 (1938) (describing industrial spies and undercover operatives).

240. NLRB v. Nat'l Garment Co., 614 F.2d 623 (8th Cir. 1980).

241. National Indian Gaming Association, Indian Gaming Facts, http://

employees know the tribe's unique history, its cultural practices, its treaty rights and unique status under federal law? Do they understand special tribal employment preference laws that tribes frequently adopt? Do they understand the historic struggles that the tribe has endured and federal policies that have vacillated over the centuries like a swinging pendulum? Do they understand how the tribe is structured and governed? Do they understand that the tribal government's purpose is to advance the welfare of tribal citizens? Do they know how the tribe assists the surrounding non-Indian community with donations, assistance or other specific help? Teaching cultural and tribe-specific sensitivity could go a long way in fostering understanding, acceptance and respect for the tribe and managing expectations from the beginning. Orienting employees towards tribal cultural sensitivity will prevent much misunderstanding. Tribal management could additionally pay closer attention in the hiring process and only hire those who understand and accept this cultural sensitivity. Tribal governments are not like other employers. Accordingly, tribal managers have great freedom to tell the tribe's unique story.

Simply having "union free" statements in handbook is not enough. Tribal management needs to orient employees into how they fit within the tribe. During the orientation process, tribal management can make clear that they may be targeted by union organizing activities and that an employee may be asked to sign a union card. This is the time that tribal management can make clear that the tribe does not believe in unions (or whatever that particular tribe's position is relative to union organizations). A tribe's belief towards unions should be a part of how tribal management orients employees to the tribe's business and government.

Tribal managers should consider undertaking a formal survey process before any signs of union activity. This provides an unbiased opportunity to learn from employees, to get the pulse of the organization and to improve practices that will improve employee morale and the organization's well-being.[242] Evidence probably already exists about the well-being of the tribal organization and whether it is vulnerable to union organizing activity. Such a survey should provide a framework for dealing with employee-relations issues and provide legal protection against solicitation of grievances should organizing activity occur in the future.

Last, and perhaps most important, supervisors should be required to have periodic discussion with those whom they

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www.indiangaming.org/library/indian-gaming-facts/index.shtml (last visited, Dec. 2, 2007).

242. *See, e.g.*, Wilson, supra note 206, at ch. 5.

supervise about non-work related topics such as family. Showing sincere interest in the lives of employees demonstrates respect and care. Demonstrating concern for the employee's well-being and their future with the organization is very important. Demonstrating this care shows that the supervisor is concerned about the employee as an individual, rather than as just another number in the system. Managers should take interest in the lives of employees within the organization and in whether there is any way that the particular manager could help the employee achieve goals and dreams. If a manager shows this kind of dedication and concern for employees, they in turn will do whatever it takes to reach the organization's goals.

VII. CONCLUSION

The San Manuel chose not to seek a writ of certiorari from the Supreme Court.[243] Subsequent assertions of Board jurisdiction over tribes in the wake of *San Manuel* might provide the opportunity for the Supreme Court to finally decide the differing approaches among circuits of respecting reserved rights or finding implicit divestiture. Congress could also amend the Act to clarify and add tribes to the list of governments exempted from the Act's coverage. Asserting Board authority over tribes with treaty rights to exclude non-members may present some the best facts and law for Supreme Court review. However, most commentators favoring tribes believe this is not a good time to ask the Supreme Court to decide these issues. In recent years as unions have witnessed their ranks diminish and as the Board has become more aggressive in perpetuating its existence tribal governments and their expanding casinos have become targets. The unionization of tribal casinos is part of a larger trend towards service-sector organizing away from industrial and manufacturing.[244] In the meantime, tribes should prepare for the new challenging era of labor relations within Indian country.

243. The deadline to file a petition for certiorari with the United States Supreme Court passed on Sept. 6, 2007.

244. *See* Kris Maher and Tamara Audi, *Unions, Casino Workers Seek to Improve Their Odds*, WALL ST. J., Oct. 8, 2007, at A5 (noting dwindling union ranks and the shift towards growing service industries such as gaming). This article further notes that the gaming industry has surged as an increased number of states have allowed casinos. *Id.* Therefore, gaming companies have profited significantly through this nationwide expansion. *Id.* Today, Union membership has declined to just 7.4% of private-sector employees, down from 20% in the early 1980s. *Id.* Casino employees are willing to unionize because of employment issues such as health care, job security and the growing use of part-time employees by casinos. *Id.*