

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT
Respondent

CASE 7-CA-51156

LOCAL 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
Charging Union

**BRIEF OF RESPONDENT
THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT
IN SUPPORT OF ITS MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

The Little River Band of Ottawa Indians Tribal Government (the “Band” or the “Tribe”), moves to dismiss this case or for summary judgment on the ground that the National Labor Relations Board (“NLRB” or the “Board”) lacks jurisdiction to entertain a proceeding against the Tribe under the National Labor Relations Act (“NLRA”) to strike down the Tribe’s duly enacted laws governing labor relations within its jurisdiction.

INTRODUCTION AND SUMMARY

This appears to be the first case in which the General Counsel of the Board has issued a Complaint against a government, claiming authority to strike down the duly enacted laws of the government. By its Complaint in this matter, the Acting General Counsel and the charging union seek an order requiring the Tribe to rescind its laws governing labor organizations and collective bargaining.

The Tribe has enacted and implemented a labor relations law to govern labor organizations and collective bargaining within its governmental departments, agencies, authorities, subordinate organizations, and commissions. The law affects over 1,000 employees, including enrolled members of the Band and nonmembers. The law has been operational since 2008, with labor organizing and collective bargaining proceeding in accordance with it. Union elections have been held under this law, alleged unfair labor practices have been resolved pursuant to it, bargaining impasses have been addressed and resolved under it, and a collective bargaining agreement has been executed in accordance with it.

Under longstanding decisions of the United States Supreme Court, all of this activity is firmly within the authority of the Tribe to govern. And under longstanding decisions of the Court, such authority may not be infringed by a federal agency or board under color of a federal statute in the absence of a clear directive from Congress; for Congress is presumed to protect and enhance the self-governance of Indian tribes, not to destroy it without studied consideration. There being no such directive in the NLRA, this case cannot proceed.

FACTS

The Tribe sets forth its history and the restoration of its government by Congress as well as the facts surrounding its enactment and implementation of its law in its *Statement of Undisputed Facts* (“Statement of Facts” or “SOF”), with attached affidavits and exhibits, separately filed with the Board this day. The Tribe incorporates that Statement of Facts, together with the supporting affidavits and exhibits, by reference herein. Given the novelty of this case, the Tribe respectfully provides these facts in some detail to give the Board the fullest understanding of the Indian tribal government before it, and to show (a) the exercise of tribal sovereign authority under established principles of federal Indian law at issue in this case and (b)

the infringement of that authority at issue in this case. The Tribe highlights the essential facts here.

The Little River Band of Ottawa Indians is a federally recognized Indian tribe. 25 U.S.C. § 1300k-2(a). Its nearly 4,000 members possess at least one-fourth (1/4) degree Indian blood, of which at least one-eighth (1/8) degree is Grand River Ottawa or Michigan Ottawa. LRBO Const. Art. I, § 2.¹ The Band has continued to exist as a distinct political and cultural community within its ancestral homeland in Michigan's Lower Peninsula along the shore of Lake Michigan "from treaty times to the present." Senate Report, *Reaffirming and Clarifying the Federal Relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as Distinct Federally Recognized Indian Tribes*, S. REP. NO. 103-260 at 5-6 (1994) ("Senate Report"); House Report, *Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act*, H.R. REP. NO. 103-621 at 7 (1994) ("House Report"); 25 U.S.C. §1300k(4).

While always existing as an established Indian tribal government, due to neglect (sometimes fraud) on the part of federal officials, the Band fell out of official federal recognition after the 1855 Treaty of Detroit, and it was denied the benefits of the Indian Reorganization Act of 1934 "[d]ue to a lack of Federal appropriations." 25 U.S.C. § 1300k(5). *See generally* 25 U.S.C. §§ 1300k-1300k-7 (the "Restoration Act"). Congress corrected this historic misunderstanding by restoring the Band to federal recognition in 1994, thereby allowing the Band to restore its land base and its government services to its members with the same stature enjoyed by other federally recognized tribes. In the Restoration Act, Congress confirmed that

¹ Unless otherwise indicated, the Band uses the same abbreviations in this brief as it does in its Statement of Facts without repeating them here.

the Band has all of the powers and rights of federally recognized Indian tribes established by federal law. 25 U.S.C. § 1300k-2(a).²

In the seven years since the Restoration Act, the Band has been successful in meeting Congress' Restoration Act goals. The United States, through the Secretary of the Interior, has taken over 1,200 acres of land into trust for the Band in and near its aboriginal territory (the Band's "trust lands" or "reservation"). SOF ¶ 8. *See* 25 U.S.C. §§ 1300k-4(b), 1300k(d). As importantly, the Band is revitalizing its tribal community by shoring up its governmental capabilities, providing governmental services to its members, and enacting and administering laws consistent with the unique values of its community. *See* SOF ¶¶ 3-12. *See generally* Little River Band of Ottawa Indians Tribal Code, *available at* <https://www.lrboi-nsn.gov/council/ordinances.html>.

² The Band's story of perseverance to maintain its governmental relationship with the United States is told in the Senate and House Committee Reports to the Restoration Act cited in the text. Fraud and outright crimes by federal officials placed the Band at risk of termination during one of the most destructive phases of federal Indian policy, the so-called "assimilation era" of the 1890s -- initiated by the General Allotment Act (or "Dawes Act") of 1887 -- when the federal government systematically sought to break up tribes by selling off their lands and turning their members into farmers. *See* House Report at 3-4. *See generally* *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 276-277 (1992) (Blackmun, J., dissenting) ("It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul . . .") (quotations and citation omitted). Recognizing the colossal failure of that policy, Congress reversed it in 1934 with the Indian Reorganization Act, 25 U.S.C. §§ 461, *et seq.* ("IRA"). *See generally* FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (5th ed. 2005) ("Cohen"). The purpose of the IRA, which is discussed further in the text below, was to preserve and protect the governmental status of Indian tribes and their land bases in keeping with the historic trust relationship of the United States with tribes. *See* 25 U.S.C. §§ 465, 476; *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (describing IRA). While the Band survived intact through the assimilation era, it was wrongly denied funds under the IRA. *See* Senate Report at 4; House Report at 4-5. Pursuant to the Restoration Act, Congress corrected the federal government's "arbitrary and unilateral" attempt to end the United States' trust relationship to the Band. House Report at 4, 6-7. The Restoration Act reconfirms that trust relationship and the Band's continuous existence as a political entity with a distinct, social and cultural tribal community. Senate Report at 1, 5; House Report at 7.

Pursuant to the Restoration Act, the Band has enacted a Constitution and amendments thereto in accordance the IRA, which have been approved by the Secretary of the Interior. SOF ¶ 3. *See* LRBO Const. Certificate of Approval (by Order of the Secretary of Interior); 25 U.S.C. §1300k-6(a)(1). The Constitution confirmed the Tribe’s three branches of government: a legislative branch, through the office of the Tribal Council; an Executive, through the office of the Tribal Ogema; and a judiciary, through the Band’s Tribal Court. LRBO Const. Articles IV-VI. The Constitution provides that “[t]he Tribe’s jurisdiction over its members and territory shall be exercised to the fullest extent consistent with th[e] Constitution, the sovereign powers of the Tribe, and federal law,” and it empowers the Tribal Council “[t]o exercise the inherent powers of the . . . Band by establishing laws . . . to govern the conduct of members of the Little River Band and other persons within its jurisdiction.” LRBO Const. Article I, §2; Article IV, §7(a)(1).³

Through the exercise of its governmental authority, the Band provides an array of services and programs to its members, including housing for tribal members and elders; health services; education support for its youth; counseling and support for tribal member families and children; natural resources management; a tribal judicial system and prosecutor’s office; public safety services; and reservation economic development and the provision of employment opportunities for the Band’s members through subordinate economic organizations, including its reservation gaming operations under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (“IGRA”). SOF ¶¶ 11-12, 17.

Congress’ goals under IGRA, to promote “tribal economic development, self-sufficiency, and strong tribal governments,” 25 U.S.C. § 2702(1), go hand in hand with the Band’s

³ The Band’s Constitution and laws are maintained fully up-to-date and accessible to the public through the Band’s official website: <https://www.lrboi-nsn.gov/council/ordinances.html>.

revitalization under the Restoration Act. Not only does the Band's IGRA gaming provide employment opportunities for tribal members, it generates the revenues on which the tribe's governmental services depend. SOF ¶¶ 13-17. For example, the Band's IGRA gaming revenues account for sixty-four percent of the budget for its Department of Public Safety; seventy-seven percent of the budget for its Department of Family Services; eighty percent of the budget for mental health and substance abuse services at the Band's Health Clinic; and one hundred percent of the budget for the Band's Tribal Court and Prosecutor's office. SOF ¶ 15-16.⁴

Over 1,000 employees work for the Tribe's governmental departments, agencies, commissions, and subordinate organizations. SOF ¶ 17. This includes tribal members and members of their immediate family, members of other Indian tribes, and non-Indians. SOF ¶ 17. The Band has enacted laws to govern the labor and employment relations of these employees. In 2005, the Tribal Council enacted the Band's Fair Employment Practices Code, Chapter 700, Title 3 of the Tribal Code ("FEP Code") to govern a variety of employment and labor matters within its jurisdiction, including rights and remedies for employment discrimination, family medical leave, minimum wages, and other matters. SOF ¶ 21. In 2007, the Tribal Council enacted Article XVI of the FEP Code ("Article XVI") to govern labor organizations and collective

⁴ The Band's IGRA gaming operations, known as the Little River Casino Resort ("LRCR"), a chartered instrumentality of the Band, are administered by a five member Board, established by ordinance of the Tribal Council as a subordinate organization of the Band. SOF ¶ 67-69. All of the Board members are enrolled members of the Tribe, appointed by the Tribal Ogema with the approval of the Tribal Council. SOF ¶ 70. In accordance with IGRA and the law of the Band, the Band's gaming operations are located on its trust lands; the Band retains the sole proprietary interest in its gaming operations; and the net revenues from gaming must be used to support tribal government services, tribal economic development or welfare, or for donations to local governments or charitable organizations. SOF ¶ 68.

bargaining within its governmental departments, agencies, authorities, subordinate organizations, and commissions.⁵

The Complaint in this matter seeks to strike down provisions of Article XVI. *See* Complaint (Appendix V to Statement of Facts).

In enacting Article XVI and subsequent amendments to it, the Tribal Council determined that it was in the best interests of the Band to allow collective bargaining by employees within its governmental operations, subject to regulations that would protect the integrity of those operations, the Band's governmental revenues, and the economic welfare of its members. SOF ¶ 23.⁶ To this end, the Tribal Council considered examples of public sector labor laws of the state and federal governments and enacted provisions to, amongst other things: define the rights and duties of employers, employees, and labor organizations within the Band's governmental operations with respect to collective bargaining, including the scope of the duty to bargain in good faith; require labor organizations engaged in activities within the Band's governmental

⁵ A copy of the Band's Fair Employment Practices Code is attached to the Band's Statement of Facts as Exhibit D to the Affidavit of Speaker Parsons. It is accessible at <https://www.lrboi-nsn.gov/council/ordinances.html>.

⁶ Article XVI covers the Band's "public employers," meaning any "subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band." "Governmental Operations of the Band" mean

the operations of the Little River Band of Ottawa Indians exercised pursuant to its inherent self-governing authority as a federally recognized Indian tribe or pursuant to its governmental activities expressly recognized or supported by Congress, whether through a subordinate economic organization of the Band or through a department, commission, agency, or authority of the Band including, but not limited to (1) the provision of health, housing, education, and other governmental services and programs to its members; (2) the generation of revenue to support the Band's governmental services and programs, including the operation of . . . gaming through the Little River Casino Resort; and (3) the exercise and operation of its administrative, regulatory, and police power authorities within the Band's jurisdiction.

FEP Code § 16.03.

operations to hold a license issued under tribal authority; provide a process for defining appropriate bargain units of employees, standards for union election campaigns, procedures for union elections, and methods for resolving disputes that could arise in such elections; establish procedures and remedies for alleged unfair labor practices; prohibit strikes against the Band's governmental operations, and likewise prohibit lock-outs by public employers; set forth processes for management and exclusive bargaining representatives within public employers to resolve bargaining impasses through mediation, fact finding and arbitration; provide a process for a bargaining unit of public employees to vote to decertify an exclusive bargaining representative; waive the sovereign immunity of the Band's public employers for actions in the Band's Tribal Court to enforce certain of the provisions of Article XVI and for the enforcement of collective bargaining agreements; and to establish jurisdiction within the Band's Tribal Court to enforce certain provisions of Article XVI. SOF ¶¶ 23-28, 39-40, 44-46. Upon enacting additional provisions to Article XVI, the Tribal Council excluded from the mandatory subjects of collective bargaining any policies of the Band's public employers for testing employees for alcohol or other substance abuse. SOF ¶¶ 46, 47-50.

As set forth in the Band's Statement of Facts, since 2008, the Tribal Council and its appointed commissions, officials, and boards have engaged in further substantial work related to the enactment, implementation and administration of Article XVI. To summarize, between 2008 and 2010, the Tribal Council has engaged in no less than five legislative enactments or amendments to the FEP Code concerning the Band's governance of labor relations and collective bargaining under Article XVI and FEP Code Article XVII. *See* SOF ¶¶ 22-28, 44-50. This has included drafting sessions, the posting of draft laws for public comment, work sessions to iron out policy issues, final adoption by resolution in open session, and publication. SOF ¶¶ 18-20,

33-34, 51-52. Also during this time frame, the Tribal Council has on two occasions reviewed and approved labor union licensing regulations promulgated by the Band's Gaming Commission; reviewed and approved four Band-Union Election Procedures Agreements, governing bargaining unit selection and union election procedures; and appointed a Neutral Election Official with delineated responsibilities to oversee union elections under such agreements. SOF ¶¶ 34, 37-38, 41-43. The Band's Gaming Commission has, in turn, drafted, posted for public comment, and adopted by formal resolution regulations governing the licensing of labor organizations consistent with the FEP Code; and processed licensing applications and issued three licenses pursuant to the FEP Code and its regulations. SOF ¶¶ 33-35. The Band's Neutral Election Official has overseen, and issued declarations in reference to, four bargaining units of LRCR employees and their qualification to proceed to a secret ballot election for an exclusive bargaining representative; overseen and certified the tallies of ballots in four separate elections for union representation by those bargaining units (affecting over 250 employees); and overseen and certified tallies of ballots for decertification elections in reference to an exclusive bargaining representative for two of the bargaining units. SOF ¶¶ 56, 60-61.

The on-the-ground operation of Article XVI since 2008 has had significant, practical affects upon every day labor and employment relations within the Band. Employees, management and union representatives at the Band's IGRA gaming operations have been deeply engaged in the collective bargaining process provided by the law, with tribal members and nonmembers active on all sides. SOF ¶¶ 55-66. This has included the election of union representation for four bargaining units of employees at LRCR involving over 250 employees; over 40 full days of collective bargaining sessions; the resolution of at least four asserted unfair labor practices; the implementation and use of bargaining impasse procedures, including

hearings before a fact finder and arbitrator and their respective issuance of detailed written decisions (a 39 page decision from the fact finder, and one extending over 40 pages by the arbitrator); and the execution of a collective bargaining agreement, covering the security officers bargaining unit at LRCR. SOF ¶¶ 55-66.

This extensive, carefully crafted and fully operational labor relations regime continues in full swing. SOF ¶ 66. The Tribal Council continues to review the fairness and effectiveness of Article XVI for potential improvements consistent with the unique needs of its community; the Band's Gaming Commission continues to assess its union licensing regulations for potential improvements; the Band's Neutral Election Official stands ready to execute his duties to oversee future bargaining unit initiatives for elections or the elections themselves; and collective bargaining negotiations continue apace for two bargaining units at LRCR. SOF ¶¶ 53, 66.

ARGUMENT

The Board's authority to proceed against the Band to strike down the provisions of Article XVI turns on principles of federal Indian law. It is well established under that law that an Indian tribe's exercise of inherent authority is protected from infringement by a federal agency or board under color of a federal statute absent a clear directive from Congress. This rule is longstanding and grounded in the historic trust relationship of the federal government to Indian nations. As reflected in the acts of Congress and the Executive, the federal government is firmly committed to protecting and enhancing tribal sovereignty. Thus, the federal courts will not lightly allow the exercise of federal authority to infringe upon that sovereignty. Instead, they apply a presumption against such infringement and place the burden upon those that would seek to use an act of Congress to undermine a tribe's exercise of that sovereignty to show that Congress clearly endorsed such a course.

The Little River Band of Ottawa Indians Tribal Government has enacted and is implementing its laws regulating labor and employment relations within its governmental operations pursuant to its inherent sovereign authority. By this case, the Acting General Counsel and the charging union seek an order from the Board to strike down those laws and thereby destroy the Band's sovereignty. The Board has no power to do this under the NLRA. The Acting General Counsel and the charging union can show no directive from Congress allowing it. This case should therefore be dismissed.⁷

I. THE BOARD HAS NO AUTHORITY TO STRIKE DOWN THE BAND'S LAW ABSENT A CLEAR DIRECTIVE FROM CONGRESS, AND THERE IS NO SUCH DIRECTIVE IN THE NLRA.

A. The Band Exercises Inherent Authority over Labor Relations Within Its Reservation Pursuant to Established Principles of Federal Indian Law and In Accord with Longstanding Policies of the Federal Government.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), a unanimous Supreme Court summarized almost two centuries of federal Indian law with a simple statement: "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Id.* at 509. Since the early days of the Republic, the Court consistently has declared that Indian tribes possess attributes of sovereignty, subject only to the limits that Congress may impose. *United States v. Wheeler*, 435 U.S. 313,

⁷ Anticipating the Acting General Counsel's Complaint requesting a Board order to strike down the provisions of Article XVI, the Band initially sought declaratory and injunctive relief from the U.S. District Court for the Western District of Michigan to stop the proceeding. Over a year after that request was made, the federal court decided that the agency exhaustion doctrine prevented it from exercising jurisdiction over the Band's action. It issued no decision on the merits of the Band's claim that the Board lacked authority to undermine the duly enacted laws of the Band under the NLRA. *See generally Little River Band of Ottawa Indians v. National Labor Relations Bd.*, 2010 WL 3734080 (W.D. Mich. 2010).

322-323 (1978); *Ex parte Kan-gi-shun-ca (otherwise known as Crow Dog)*, 109 U.S. 556, 572 (1883); *Worcester v. Georgia*, 31 U.S. 515, 520-521(1832).⁸

The Band exercises its sovereign authority in accordance with its Constitution. In the Restoration Act, Congress confirmed the application of the IRA to the Band and directed the Band to promulgate its Constitution in accordance with it. *See* 25 U.S.C. §§1300k-6(a)(1).⁹ The IRA reflects Congress' firm commitment to "the goal of promoting tribal self-government." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-336 & n.17 (1983) (discussing purpose of IRA and other laws). This commitment "encompasses . . . Congress' overriding goal of encouraging tribal self-sufficiency and economic development." *Id.* at 335 (citation and quotation omitted). *See also* note 2 (discussing IRA and history of the Band).

"In part as a necessary implication of this broad federal commitment," the Supreme Court has "held that tribes have the power to manage the use of [their] territory and resources by both members and nonmembers," and "to undertake and regulate economic activity within the reservation" without external interference. *Id.* (citations and footnote omitted). *See also Williams v. Lee*, 358 U.S. 218, 223 (1959) (holding that action by non-Indian reservation business to collect debt from Navajo customer is subject to the exclusive authority of the Navajo Nation). Indeed, the Court has long held that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*

⁸ Congress' authority over Indian affairs is grounded in the Constitution, principally in the Indian Commerce Clause, U.S. Const. Art I, § 8, cl 3 ("Congress shall have the Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.").

⁹ The IRA provides, in pertinent part, that "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution," subject to ratification by the tribe's members and approval by the Secretary of Interior. 25 U.S.C. § 476(a), (d).

v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982). *Accord Plains Commerce Bank v. Long Family & Cattle Co., Inc.*, 554 U.S. 316, 336 (2008).

In *Montana v. United States*, 450 U.S. 544 (1981), the Court held that even on land owned by non-Indians located within the exterior boundaries of an Indian reservation (so-called “checkerboard” reservations), tribes have power to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Id.* at 565.¹⁰

From these bedrock principles, the law is clear: within their reservations and trust lands (those lands held by the United States in trust for tribes), Indian tribes have inherent sovereign authority to govern labor and employment relations involving both members and non-members. *See, e.g., N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1189, 1192-93 (en banc) (Pueblo exercised sovereign authority in enacting right-to-work law covering non-Indian reservation business and its tribal and non-tribal employees); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990) (tribes exercised inherent authority in regulating non-Indian reservation employer, employing both Indians and non-Indians), *cert. denied*, 499 U.S. 943 (2001); *EEOC v. Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (employment dispute between tribal member and tribal employer implicated tribe’s “implicit right of self-government”); *Reich v. Great Lakes Indian Fish and Wildlife Comm’n*, 4

¹⁰ As a result of the Allotment Act described above in note 2, tribally owned lands within many of the established reservations of Indian tribes were sold to, or confiscated for, non-Indians. This left landholding configurations within the exterior boundaries of many reservations in a “checkerboard” state, with non-Indian lands held in fee mixed with original reservation lands, lands held in trust by the United States for tribes and tribal members, and other tribal landholdings. *See generally* Cohen §§ 1.04, 16.03[2]. The *Montana* case involved the “narrow” issue of whether the Crow Nation could regulate the hunting and fishing activity of non-Indians on their fee lands within the exterior boundaries of the Crow reservation. *Montana*, 450 U.S. at 557.

F.3d 490, 494-495 (7th Cir. 1993) (Posner, J.) (tribal regulation of wages and hours of game wardens involved the “sovereign functions of tribal government”).¹¹

To be sure, even in the restrictive setting of *Montana v. United States*, an employment relationship between a nonmember and a tribe or between a tribal member and a nonmember employer is a “consensual relationship” under the Supreme Court’s rule stated in that case. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 1229 (2008). Thus, when an employment relationship “exists between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation,” the tribe has inherent sovereign authority to regulate that relationship. *Id.* at 1071-72. The Supreme Court refers to just such a relationship as giving rise to the exercise of tribal authority under *Montana*. *Plains Commerce Bank*, 554 U.S. at 334-35 (“The logic of *Montana* is that . . . a business enterprise employing tribal members . . . may be regulated [by the tribe].”).

Even more obviously, within its reservation or trust lands, a tribe has inherent sovereign authority to govern the employment relationship between tribal members or nonmembers who enter into employment with the tribe itself, or with one of its departments, agencies, instrumentalities, or subordinate organizations. *See, e.g., Penobscot Nation v. Fellencer*, 164 F.3d 706, 711-12 (1st Cir. 1999); *Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d at 249; *Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 494-495; *Graham v. Applied Geo Technologies*, 593 F. Supp. 2d 915, 919-920 (S.D. Miss. 2008); *Davis v. Mille Lacs Band of Chippewa Indians*, 26 F. Supp. 2d 1175, 1179 (D. Minn. 1998), *aff’d on other grounds*, 193 F.3d 990 (8th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000); *Arizona Public Service Co. v. Office of*

¹¹ Indian reservations and trust lands together constitute the “Indian country” within which tribes exercise their inherent authority as tribal governments. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511. The employment relationships governed by Article XVI are on lands held by the United States in trust for the Band. *See* SOF ¶¶ 54-66, 68.

Navajo Labor Relations, 17 Indian L. Rptr. 6105, 6108-10 (Nav. Sup. Ct. 1990); *Rodriguez v. Wong*, 82 P.3d 263, 266-267 (Wash. Ct. App. 2004).

Thus, there can be no doubt that the Band is exercising its inherent sovereign authority through its enactment, implementation and administration of the provisions of Article XVI. Within its reservation or trust lands, the Band has inherent authority to govern its own employment relationships with its tribal members and nonmembers as well as those involving its commissions, agencies, departments, authorities, and subordinate organizations. Labor unions, which seek to do business within the reservation by inserting themselves into these consensual employment relationships as the bargaining agent for employees, fall directly within the scope of the Band's regulatory powers. *See Mescalero Apache Tribe*, 462 U.S. at 335; *Jicarilla Apache Tribe*, 455 U.S. at 144; *Montana*, 450 U.S. at 565 (citing, *inter alia*, *Williams v. Lee*, 353 U.S. at 223).

Further, the Band's on-the-ground implementation and enforcement of Article XVI at LRCR is a textbook example of the foregoing principles of tribal sovereignty at work. There can be no doubt that the Band has inherent authority to govern consensual employment relations within LRCR; for LRCR, a subordinate economic organization of the Band, is imbued with the Band's governmental status and operates, in essence, as a branch of the Band. *See Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1184, 1195 (10th Cir. 2010) (tribe's subordinate organization, similar to LRCR, has sovereign immunity from suit, given its relationship to tribal government; it is "analogous to a governmental agency"); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (same). *See also Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (college that is chartered, funded, and controlled by tribe to provide education to tribal members on Indian land is a tribal

agency imbued with tribe’s sovereign immunity). Indeed, LRCR may also be considered a tribal “member” of the Band, giving the Band inherent authority to govern its employment relations with nonmembers of the Band as well as enrolled members under *Montana*. See *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1134 (9th Cir. 2006) (tribal corporation operating college on tribal lands and administered by tribal member board of directors considered tribal member for purpose of applying *Montana*’s consensual relationship basis for the exercise of inherent tribal sovereignty).¹²

Further, the Band’s exercise of such authority at its IGRA gaming operations reflects its fundamental attributes of sovereignty: the establishment and implementation of duties, rights, and remedies for employment relations in accord with the unique values of the Band’s community, which are part and parcel to the Band’s regulation of economic activity within its reservation. See *Mescalero Apache Tribe*, 462 U.S. at 335; *Jicarilla Apache Tribe*, 455 U.S. at 141-45; *Williams*, 358 U.S. at 223. This exercise of tribal authority falls squarely within the sphere of tribal self-governance protected and endorsed by the Supreme Court’s long-standing Indian law jurisprudence. As the Supreme Court recently said – referring to one of the powers that the Acting General Counsel and charging union single out for attack in the Complaint, the Band’s law requiring labor unions to hold licenses – a “tribe’s traditional and undisputed power to exclude persons from tribal land . . . gives it the power to set conditions on entry to that land via licensing requirements”; “[r]egulatory authority goes hand in hand with the power to exclude.” *Plains Commerce Bank, Inc.*, 554 U.S. at 335 (citations and quotations omitted).

¹² The Band’s exercise of authority pursuant to Article XVI also falls within its inherent sovereign authority under a separate standard provided by the Court in *Montana*; for it protects the political integrity, the economic security, or the health or welfare of the reservation community. See *Montana*, 450 U.S. at 565-66 (describing the standard); *Rodriguez*, 82 P.3d at 267 (applying standard to tribe’s authority over employment relations).

The Band's exercise of this authority with respect to its IGRA gaming operations also falls squarely within Congress' purpose under IGRA: to proclaim the "exclusive right" of Indian nations "to regulate gaming activity on Indian lands" and to promote "strong tribal governments." *See* 25 U.S.C. §§ 2701(5), 2702(1).

Beyond this, the Band's governance of labor and employment relations comports with the Nation's overall commitment to tribal sovereignty and self-determination. Time and again, the Supreme Court has pointed to Congress' commitment to "a policy of supporting tribal self-government and self-determination," reflected in its enactments. *E.g.*, *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Mescalero Apache Tribe*, 462 U.S. at 334-336 & n.17; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 & n.5 (1987).

Congress' declarations in the Indian Tribal Justice Act exemplify this commitment:

The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.

25 U.S.C.A. § 2601(2)-(3) (2001). The Executive likewise consistently has confirmed the same commitment. President Clinton's announcement of the "fundamental principles" underlying Executive Order 13175 is exemplary:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Exec. Order No. 13,175, §2 (a)-(c), 65 Fed. Reg. 67,249 (Nov. 9, 2000)). *Accord* Presidential Documents, Memorandum of Nov. 5, 2009, Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009) (announcing President Barack Obama's commitment to the policies and directives of Executive Order 13175); Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004) (President George W. Bush's endorsement of the same principles). Everything the Band is doing with respect to its considered enactment and implementation of laws governing fair employment practices within its reservation, from its anti-discrimination provisions to its governance of collective bargaining, is consistent with the Nation's longstanding commitment to tribal self-government.

The provisions of Article XVI, moreover, are not of some trivial concern to the Band. They involve sensitive policy judgments, with implications not only for the fairness of employment relations within the Band's jurisdiction, but with important consequences for the generation and allocation of economic value generated within its territory. Article XVII, a provision that the Complaint in this matter singles out for attack, summarizes the importance of the Band's design of an integrated labor relations regime:

In providing for procedures, rights, and remedies for employers, employees, and labor organizations under this Code, including those afforded through actions in the Little River Band of Ottawa Indians Tribal Court, the Tribal Council has carefully considered (and continues to consider) the values and interests of the Band in order to establish fair processes, rights, and remedies for the parties and interests at stake. This has included careful consideration of, amongst other things, (i) the time, costs, and inconvenience of parties and witnesses involved in proceedings to resolve controversies or to establish rights and remedies under this Code; (ii) the need to protect the governmental operations of the Band from undue burdens from litigation, while according fair treatment to employees within those operations; and (iii) methods to resolve disputes through early settlement, including mediation.

FEP Code § 17.01.

The following are just a few examples of the ingredients of this carefully considered regime:

Strikes: In considering whether to prohibit strikes in its public sector, including its IGRA gaming operations, the Band's Tribal Council looked to public sector labor laws of the states and the federal government. SOF ¶¶ 24, 52. Its decision to prohibit such strikes involved not only a counter-balancing decision to prohibit lock-outs, but an overall assessment of alternative methods for resolving bargaining impasses in order to determine what was in the best interests of the Tribe, including the stability of its government operations and the protection of its government revenues. SOF ¶¶ 27, 44-45, 52. Article XVI's prohibition of strikes is fully consistent with the public policy of most states and the federal government.¹³ Strikes against governments are anathema to governmental stability.¹⁴ They directly impact the public treasury.¹⁵ These concerns are no less poignant whether they involve potential strikes by the administrative staff of a legislature, public safety or health workers, or employees at a

¹³ Compare, e.g., FEP § 16.06 and 5 U.S.C. § 7116(b)(7)(A); MICH. COMP. LAWS § 423.202; N.Y. CIV. SERV. LAW § 210(1); WASH. REV. CODE § 41.56.120; WIS. STAT. § 111.70(4)(L).

¹⁴ See *Board of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n*, 800 A.2d 286, 288 - 289 (N.J. Super. 2001) (surveying laws and history of public policy against strikes in the public sector). See generally James Duff, Jr., Annotation, *Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage*, 37 A.L.R.3d 1147 (1971 & Supp. 2007) (same). As one commentator observes: "Given the strong policy in most states against strikes by government employees, it is not surprising that the statutory penalties for strikes are numerous, varied, and often quite severe." Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector*, 38 STAN. L. REV. 1097, 1116 (1986).

¹⁵ See generally Duff, 37 A.L.R.3d at 1151-52 & n.14 (citing cases); Richard Doherty, *Review: The Politics of Public Sector Unionism*, 81 YALE L.J. 758, 767 (1972) ("[S]trikes have the potential of altering our system of public benefit conferral.").

government's institutions designed to generate the government's revenues, like the Band's IGRA gaming operations.¹⁶ Indeed, the Band's IGRA gaming revenues support over 50% of the budget for its government programs: 100% for its Tribal Court and Prosecutor's office; 80% for its mental health and substance abuse programs at its Health Clinic; and 77% for its family services. SOF ¶ 15. They support not only these critical governmental services for tribal members, but the jobs held by tribal members to provide such services. SOF ¶¶ 15-17. A strike against the Band's gaming operations, therefore, would be a strike against the supporting base of its government, a base that Congress intended to enhance through IGRA and to restore for this particular Indian tribe in the Restoration Act.

Bargaining Impasse Procedures: Like many states that permit public sector labor organizing, but prohibit strikes, the Band carefully designed a mandatory dispute resolution process to address impasses in collective bargaining.¹⁷ SOF ¶ 44-45. These procedures have the potential to implicate constitutional issues regarding the delegation of legislative power to non-governmental bodies, like arbitrators, which may be granted authority to resolve such bargaining impasses.¹⁸ The Band's law reflects precisely these sensitive public policy choices. Indeed, the

¹⁶See *New York City Off-Track Betting Corp. v. Local 2021 of Dist. Council 37*, 416 N.Y.S.2d 974 (1979) (New York's prohibition against public sector strikes applies to its off-track betting facility operated to generate state revenues). See also MASS. GEN. LAWS ch. 150E, §§ 1, 2, 3 (2009) (state law governing collective bargaining applies to employees of state lotteries); *Bennett v. Local 254, SEIU, No. 11056*, 1976 WL 19596 (Mass. Super. Apr. 8, 1976). See generally Duff, 37 A.L.R.3d at 1152.

¹⁷ Compare, e.g., FEP Code § 16.17 and MICH. COMP. LAWS § 423.207 (mediation); N.Y. CIV. SERV. LAW § 209(3)(b) (factfinding); IOWA CODE §§ 20.19-20.22 (mediation, fact finding and binding arbitration). See generally Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 155 & nn. 16-17 ("Anderson") (describing interaction of public sector strike prohibitions and interest arbitration dispute resolution process).

¹⁸ See Anderson at 169-172 (discussing cases).

Band reserved to its elected Tribal Council the final say on resolving bargaining impasses over economic terms of a collective bargaining agreement for its public employees. *See* FEP Code § 16.17(e).

In designing said mandatory bargaining impasse procedures – mediation, fact finding, and interest arbitration, with limited review of continuing impasses over economic terms before the Tribal Council – the Tribal Council sought to provide an efficient, non-disruptive procedure for the parties to come to agreement, and left Tribal Council with the ultimate role to resolve any ongoing impasse with respect to the economic terms of a collective bargaining agreement because such terms affect the treasury of the Band, its governmental revenues, and therefore its ability to provide governmental services. SOF ¶ 52.

Excluding from Collective Bargaining Public Employer Policies for Testing Employees for Alcohol or Other Substance Abuse: There may be no more destructive influence upon Native American communities than alcohol and drug addiction and abuse. Upon enacting section 16.20 of Article XVI, the Band’s Tribal Council found that:

[t]he abuse of both legal and illegal drugs within the public employers harms the health, safety and welfare of the Band and its members. Tribal Communities, including that of the Band, are particularly vulnerable to drug and alcohol abuse, and the regulation of such abuse within public employers is critical to the health, safety, and welfare of the Band and its members. FEP Code § 16.20(a).

As a result, section 16.20(b) provides that the Band’s public employers have the right to address the terms and conditions for testing public employees for alcohol and drug use, consistent with the laws of the Band, and that “such policies shall not be subject to bargaining with any labor organization.” FEP Code § 16.20(b). Such a law reflects the unique considerations of a tribal community:

In considering whether to eliminate from the mandatory subjects of bargaining any drug or alcohol testing policy of a public employer that comports with the laws of the Band, the Tribal Council considered the devastating impact that drug and alcohol abuse has had upon its tribal members and Native American communities generally and decided that it was in the best interests of the Band and its community to eliminate such policies from the mandatory subjects of bargaining, provided that such policies are consistent with the

Band's law, which includes civil rights under the Band's Constitution. SOF ¶ 52; *see also* SOF ¶¶ 44, 46.¹⁹

Prohibition Against Collective Bargaining Over Matters that Would Conflict with the Laws of the Band: As in the case of state law, the Band's law prohibits collective bargaining over matters that would conflict with tribal law.²⁰ It further provides a process to resolve disputes on that issue through tribal court adjudication.²¹ Again, the enactment of such a provision is of the utmost importance for any government, particularly an Indian tribe:

In excluding from the mandatory subjects of bargaining between management of a public employer and an exclusive bargaining representative any provisions that would conflict with the laws of the Band, the Tribal Council ensured that the public policies reflected in the body of the Band's laws would not be placed in conflict with the terms of a collective bargaining agreement entered into under Article XVI. This would cover such things as the requirements of the Band's Indian Preference in Employment Ordinance, Chapter 600, Title 2 of the Tribal Code. SOF ¶ 52.

Procedures and Remedies for Breaches of Collective Bargaining Agreements and Unfair Labor Practices. The Band's law provides for tribal court adjudication of disputes arising under collective bargaining agreements, and, as in the case of the labor relations laws of states, waives the sovereign immunity of the Band's agencies, departments, and subordinate organizations for that purpose.²² It also provides streamlined processes for the efficient resolution of alleged unfair labor practices with limited judicial review in the Tribal Court, again waiving the

¹⁹ The Band's Constitution protects individuals against unreasonable searches and seizures and is enforceable through actions for injunctive relief in the Little River Band of Ottawa Indians Tribal Court. *See* LRBO Const. Art. III, §1(b); Art. XI, §(2)(a).

²⁰ *Compare* FEP Code §§ 16.12(b), 16.21 *and* HAW. REV. STAT. § 89-9(d); IOWA CODE § 20.9; NEV. REV. STAT. § 288.150 (3)(a)-(d); WASH. REV. CODE § 41.56.100.

²¹ *See* FEP Code § 16.24(d).

²² *Compare* FEP Code §§ 16.24(d), 16.26 *and* 5 ILL. COMP. STAT. § 315/25; MICH. COMP. LAWS § 423.9d(4); KAN. STAT. § 75-4355d; IOWA CODE § 20.23.

sovereign immunity of the Band’s public employers for that purpose.²³ These provisions reflect careful considerations. For example,

[i]n requiring parties to attempt to resolve alleged unfair labor practices before commencing arbitration and then limiting judicial review of arbitration decisions on unfair labor practice charges to review for legal error or inconsistencies with the laws of the Band, the Tribal Council determined that it was in the best interests of the Band and its governmental operations to promote early resolution of such disputes by mandating early, good faith settlement discussions and to streamline any post-arbitration judicial review. SOF ¶ 52.

Balancing Employee’s Freedom of Choice with Work Place Equity in Allowing Bargaining over Fair Share Contributions. The Band’s law allows management and an exclusive bargaining representative to bargain over “fair share” contributions by union-represented employees who decide not to join the union, and, as a result, do not pay union dues. See FEP Code § 16.13. If a fair share provision is included in a collective bargaining agreement, however, the Band’s law provides a limited window for employees to petition to eliminate it. See FEP Code § 16.13(e). The Band’s law is not dissimilar to similar provisions operative under state law.²⁴ Such laws are not without controversy and require policymakers to balance a range of fairness considerations:

In deciding whether or not to allow management and exclusive bargaining representatives within the Band’s governmental operations to bargain over fair share contributions from employees who decide not to join a union, the Tribal Council considered whether or not workplace harmony would be better promoted by allowing such bargaining to occur or whether the choice of individual employees should be given more value. The Tribal Council concluded, on balance, that allowing bargaining over fair share contributions would be in the best interests of the Band and its community by furthering workplace equity. The Tribal Council then limited the time frame for employees to petition for a vote to deauthorize a fair share provision in a collective bargaining agreement to ninety (90) days after the execution of the collective bargaining agreement in order to foster workplace stability. SOF ¶ 52.

²³ See FEP Code §§ 16.16(a), 16.26.

²⁴ Compare FEP Code § 16.13 and OR. REV. STAT. § 243.650(1).

In short, the Complaint in this matter seeks to destroy this exercise of governmental authority by the Band. It requests an order from this Board requiring the Band to “rescind” laws it has enacted and implemented pursuant to its inherent sovereign authority as a federally recognized Indian tribe. Congress has given the Board no such power.

B. In the Absence of a Clear Directive From Congress, the NLRB Has No Power Under the NLRA to Strike Down the Band’s Exercise of Its Inherent Sovereign Authority to Govern Its Reservation Labor Relations

Given the federal government’s historic commitment to preserving and encouraging the exercise of tribal sovereignty, the Supreme Court will not allow that sovereignty to be undermined under color of a federal law without a clear directive from Congress. *See, e.g., Iowa Mut. Ins. Co.*, 480 U.S. at 18 (absent clear directive from Congress, the diversity jurisdiction statute, 28 U.S.C. § 1332, will not be interpreted to allow the undermining of a tribal court’s sovereign authority over reservation affairs); *Jicarilla Apache Tribe*, 455 U.S. at 146, 149 (tribe’s fundamental authority to regulate economic activity within the reservation may not be divested absent clear directive from Congress); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 72 (1976) (where tribal sovereignty is at stake the courts must “tread lightly in the absence of clear indications of legislative intent”); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1194 - 1195 (10th Cir. 2002) (en banc).

This rule derives from the federal government’s trust responsibility to Indian tribes, which includes the protection of their inherent sovereignty. *Id. See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“the canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (“ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the

federal policy of encouraging tribal independence”) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)). It was this very trust responsibility that Congress reaffirmed upon restoring the Little River Band of Ottawa Indians to federal recognition in 1994. *See* Senate Report at 1, 5; House Report at 1, 7.

As the Tenth Circuit has said, “unequivocal Supreme Court precedent,” requires Courts to invoke a presumption that Congress intended to leave tribal sovereignty unimpaired unless there is a “*clear* indication of congressional intent” showing otherwise. *Pueblo of San Juan*, 276 F.3d at 1194 (quoting *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989)). *Accord Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 493-496 (presumption against abrogation of treaty rights applies to statutes that may intrude upon tribal prerogatives); *Fond du Lac*, 986 F.2d at 250-251 (where tribe’s right of self-government could be undermined by federal statute, presumption applies “absent a clear and plain congressional intent”).

Thus, in the case at bar, where the Acting General Counsel and charging union seek to rely upon a federal statute, the National Labor Relations Act, to rescind the Band’s exercise of inherent sovereignty, they bear the burden to show that Congress, by its enactment, clearly intended such an undermining of tribal sovereignty. *See Pueblo of San Juan*, 276 F.3d at 1192; *Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 495-496 (following *Cherokee Nation*); *Cherokee Nation*, 871 F.2d at 939.

This burden cannot be met in this case. Congress has given no indication anywhere in the NLRA that the Board is empowered to infringe upon the exercise of tribal sovereignty by issuing an order that would strike down the laws of the Band. The NLRA is completely silent on the subject, and Congress’ silence can never be implied to condone the undermining of tribal sovereignty. *See Iowa Mut. Ins. Co.* 480 U.S. at 18 (“[T]he proper inference from silence . . . is

that the sovereign power . . . remains intact.”); *Santa Clara Pueblo*, 436 U.S. at 60 (Court must “tread lightly in the absence of clear indications of legislative intent”); *Pueblo of San Juan*, 276 F.3d at 1196 (“The correct presumption is that silence does not work a divestiture of tribal power.”).

In sum, pursuant to the decisions of the Supreme Court, through its enactment and implementation of the labor relations laws that the Acting General Counsel and charging union ask this Board to strike down in this case, the Band is exercising its inherent authority as a tribal government. In the absence of a clear directive from Congress, that authority is protected from infringement by the Board. Such a directive is utterly lacking in the NLRA. Thus, this case must be dismissed.²⁵

II. CONGRESS’ EXCLUSION OF INDIAN TRIBES FROM SECTION 8(A)(1) OF THE NLRA SHOWS THAT CONGRESS INTENDED NOT TO GIVE THE BOARD POWER OVER TRIBES THROUGH OTHER PROVISIONS OF THE ACT.

This Board’s lack of authority to issue an order that would undermine the Band’s exercise of sovereign authority is reinforced by Congress’ failure to include Indian tribes within section 301 of the NLRA.

The NLRA is a unified statutory scheme with an overarching goal of promoting workplace harmony within the Nation’s private sector through collective bargaining. Both section 8(a)(1) (29 U.S.C. §158 (a)(1)), the provision that the Complaint seeks to enforce against

²⁵ The Band’s position in this case is consistent with that of the United States Department of the Interior, the department of the federal government charged with administering Indian affairs. At an early stage in this case, the Interior Department, through its Solicitor’s Office, wrote to the Board’s General Counsel and Deputy General Counsel, stating that, as a matter of federal Indian law “the Band has authority to govern labor relations within its jurisdiction” and “the NLRB cannot charge the Band with an unfair labor practice for its exercise of its sovereign authority in . . . enacting tribal labor laws.” Letter from Edith R. Blackwell, Associate Solicitor, United States Department of the Interior, to General Counsel, Ronald Meisburg and its Deputy General Counsel, John E. John E. Higgins, Jr., National Labor Relations Board, dated January 15, 2009, copy of which is attached to the Band’s Statement of Facts as Appendix VII.

the Band to strike down its laws as “unfair labor practices,” and section 301 (29 U.S.C. §185), which establishes a private right of action for parties to bring suit in federal court to enforce collective bargaining agreements entered into pursuant to the NLRA, are part of Congress’ design to achieve that end. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179-180 (1967). Section 301 is a lynchpin provision of this unified scheme. Indeed, the Supreme Court describes it as having preemptive force “so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization” as well as “claims substantially dependent on analysis of a collective-bargaining agreement.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987).

Congress, however, has left tribes completely out of section 301 because it has not waived their sovereign immunity from suit.

It has been long established that Indian tribal governments have immunity from suit absent an unequivocal waiver of that immunity by the affected tribe or by Congress. *E.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). This immunity was firmly in place in 1947 when Congress enacted section 301, *see United States Fid. & Guar. Co.*, 309 U.S. at 512, and while Congress “has always been at liberty to dispense with [] tribal immunity or to limit it,” Congress has “consistently reiterated its approval of the immunity doctrine,” *Citizen Band Potawatomi Tribe*, 498 U.S. at 51. Congress is presumed to know the law when it enacts legislation. *See Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005). Thus, it is presumed to have acted intentionally in leaving tribes out of section 301.

In an integrated statutory scheme such as the NLRA, it would have been absurd for Congress to have left tribes out of section 301 while, at the same time, intending to include them under any other provision. *See Smith v. Babcock*, 19 F.3d 257, 263 (6th Cir. 1994) (interpretations which yield internal inconsistencies are to be avoided). Courts must construe the provisions of a statute to render them consistent; again, it must be presumed that Congress acted intentionally in excluding tribes from section 301. *Id.*; *United States v. Perry*, 360 F.3d 519, 537 (6th Cir. 2004) (courts may not construe a statute in a manner that renders part of the law superfluous). Congress could not have intended the Board to have some sort of piecemeal authority over tribes (let alone the power to strike down their laws in contravention of the federal government's trust responsibility to tribes). Such a result would make Indian tribes the only entities subject to some parts of the NLRA, while leaving them out of its centerpiece provision, section 301. This would destroy the uniformity that is so central to the NLRA. Congress would not act in such an absurd manner upon crafting this uniform law. In short, Congress' exclusion of tribes from section 301 flags their exclusion from the rest of the Act.

Thus, not only is there no evidence to suggest that Congress granted power to the Board to undermine the Band's exercise of inherent authority by means of the order requested in this case, but, if anything, the evidence points the other way. By virtue of Congress' exclusion of tribes from section 301, Congress must be deemed to have intended the Board not to have such power.

III. DISMISSAL OF THIS CASE IS CONSISTENT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN *SAN MANUEL INDIAN BINGO AND CASINO V. N.L.R.B.*

As stated at the outset, this appears to be the first case in which this Board has been asked to strike down the laws of a government. The Tribe anticipates, however, that the Board's

Acting General Counsel and the charging union will point to the decision of the federal court of appeals in *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1308 (D.C. Cir. 2007) as providing a basis for their claim to proceed. This would be erroneous.

San Manuel did not involve an attempt to invoke the NLRA to strike down the provisions of an Indian tribe's labor relations law, enacted and implemented pursuant to its inherent sovereignty. The Court had no moment to consider such a case. On the contrary, the *San Manuel* Court recognized the very rule that applies here. It pointed out the Supreme Court's directive that, in the absence of a "clear expression of Congressional intent," courts must refrain from imposing a federal statute upon a tribe to impair tribal sovereignty. *San Manuel*, 475 F.3d at 1312. The unfair labor practice charges at issue in *San Manuel* involved assertions that the tribe's gaming facility discriminated against one union in favor of another in the context of a labor organization campaign. *See id.* at 1309. In that setting, the D.C. Circuit did not find that there was an impairment of tribal sovereignty to warrant application of the Supreme Court's established rule. *See id.* at 1315.

This case could not be more different. It involves a direct attack on the Band's carefully crafted labor relations laws, enacted and implemented pursuant to its inherent sovereign authority. Here, as the *San Manuel* decision readily points out, the Supreme Court imposes a presumption against such a course unless the NLRB can show that Congress clearly made such a route available to it. *See San Manuel*, 475 F.3d at 1312 (citing *Santa Clara Pueblo* rule), 1317 (referencing "presumption" against undermining tribal sovereignty). For all of the reasons

previously stated, applying this rule, this case must be dismissed because the Board has no power to proceed.²⁶

Beyond this, the *San Manuel* Court had no opportunity to consider the point set forth in section II above: that by excluding Indian tribes from section 301 of the NLRA, Congress revealed its intent not to give the Board authority to proceed against them through other provisions of the NLRA. In this light, *San Manuel* is an incomplete guide to resolving the issues squarely presented here.

CONCLUSION

For all of the above reasons, the Tribe respectfully asks this Board to grant its motion and dismiss this case or to enter summary judgment in its favor.

Dated: March 4, 2011

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.
Elek A. Miller
Counsel for the Little River Band of
Ottawa Indians Tribal Government
Drummond Woodsum MacMahon
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
Tel: (207) 253-0559
Email: ksmith@dwmlaw.com

²⁶ A reading of *San Manuel* to condone the undermining of the Band's sovereign authority as requested by the Acting General Counsel and the charging union in this case would have to be considered erroneous; for it would be far afield from the root principles of federal Indian law established by the Supreme Court.

STATEMENT OF SERVICE

Copies of this Brief of Respondent Little River Band of Ottawa Indians Tribal Government in Support of its Motion to Dismiss or for Summary Judgment have this day been served upon the following by electronic mail to the email addresses shown:

- Brad Howell, Esq., National Labor Relations Board (brad.howell@nlrb.gov)
- Dennis Boren, Esq., National Labor Relations Board (Dennis.Boren@nlrb.gov)
- Local 406, International Brotherhood of Teamsters c/o its counsel Ted M. Iorio, Esq. (titorchmi@aol.com)
- Ted M. Iorio, Esq. (titorchmi@aol.com)

This motion has this day been electronically filed with the Executive Secretary of the National Labor Relations Board.

Dated: March 4, 2011

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.
Counsel for the Little River Band of
Ottawa Indians Tribal Government
Drummond Woodsum MacMahon
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
Tel: (207) 253-0559
Email: ksmith@dwmlaw.com