

**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**

The Little River Band of Ottawa Indians Tribal Government (the “Band” or the “Tribe”) submits this brief pursuant to the Board’s *Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board* dated December 20, 2011 and the Board’s Order of December 28, 2011, extending the due date for the parties’ briefs to February 24, 2012. For the reasons set forth herein, the Board lacks subject matter jurisdiction over this case.

INTRODUCTION AND SUMMARY

By their Complaint in this matter, the Acting General Counsel (“AGC”) and the Charging Union invoke the National Labor Relations Act (“NLRA”) to strike down the Tribe’s laws governing labor organizations and collective bargaining within the Tribe’s agencies, commissions, and subordinate organizations. While they now focus only on striking laws as they pertain to the Tribe’s gaming operations under the Indian Gaming Regulatory Act (“IGRA”), such a narrowing does not change the fact that the Complaint asks the Board to proceed against

an Indian tribal government to destroy tribal law. As fully set forth below, the Board has no such power. Thus, the Complaint must be dismissed.

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 2007, 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 undermined by a federal agency or board under color of a federal statute in the absence of a clear indication of intent 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 indication of any such intent in the NLRA, this case cannot proceed.

FACTS

The parties' have stipulated to the pertinent facts. The Tribe sets forth, in some detail, its history and the reaffirmation of its government by Congress as well as the facts surrounding its enactment and implementation of its law to give the Board a full understanding of the Indian tribal government before it.

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. Stip. 4; JE 1 (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 (“IRA”) 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 “Reaffirmation Act”). Congress corrected this historic misunderstanding by reaffirming the Band’s status as a recognized tribe 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 Reaffirmation Act, Congress

¹ Unless otherwise indicated, the Band uses the same abbreviations in this brief as are in the parties’ stipulated facts. The Band refers to those stipulated facts in accordance with their respective paragraph numbers as “Stip. ___.” The Band refers to the parties’ Joint Exhibits in accordance with their respective numbers as “JE ___.”

confirmed that 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 eighteen years since the Reaffirmation Act, the Band has been successful in meeting Congress' Reaffirmation 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"). Stip. 7. *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* Stip. 3-8, 13-14.

Pursuant to the Reaffirmation Act, the Band enacted a Constitution and amendments thereto in accordance with the IRA, approved by the Secretary of the Interior. Stip. 3. *See* JE 1

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 Reaffirmation 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, 276-77 (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.* *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 the 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 Reaffirmation 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 Reaffirmation 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.

(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. Stip. 5; JE 1 (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." Stip. 6, 20; JE 1 (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 organizations, including its reservation gaming operations under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* Stip. 13-14, 19.

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 revitalization under the Reaffirmation Act. Not only does the Band's IGRA gaming provide employment opportunities for tribal members, it generates the revenues on which the tribe'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/> See Stip. 6 n. 1.

governmental services depend. Stip. 15-19. For example, the Band's gaming revenues account for 100% of the budget for the Band's Tribal Court and for its prosecutor's office; 80% of the budget for mental health and substance abuse services at the Band's Health Clinic; 77% of the budget for its Department of Family Services; and 64% of the budget for its Department of Public Safety. Stip. 17-18.⁴

Over 1,000 employees work for the Tribe's governmental departments, agencies, commissions, and subordinate organizations. Stip. 19. This includes tribal members and members of their immediate family, members of other Indian tribes, and non-Indians. Stip. 19. 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. Stip. 35. In 2007, the Tribal Council enacted Article XVI of the FEP Code ("Article XVI") to govern labor organizations and collective bargaining within its governmental departments, agencies, authorities, subordinate organizations, and commissions. Stip. 36. Later amendments included Article XVII to protect the integrity of the

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. Stip. 9-10, 24. *See also* Stip. 25 and JE 5 in the parties' pending Joint Motion for Substitution. 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. Stip. 10.

FEP Code by requiring the exhaustion of tribal remedies and preventing certain interferences with the Band's processes from outside authorities. Stip. 61-62.⁵

The Complaint in this matter seeks to strike down provisions of Articles XVI and XVII. *See* Complaint (GC Exhibit 1(b)).

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. Stip. 37.⁶ 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 The Band's Fair Employment Practices Code is made part of the record as the parties' Joint Exhibit 4. It is also attached as Exhibit 1 to the Complaint (GC Exhibit 1(b)).

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.

Stip. 39; FEP Code (JE 4) § 16.03.

operations to hold a license issued under tribal authority; provide a process for defining appropriate bargaining 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. Stip. 37-42, 53, 57-59; JE 10 (Tribal Council Resolution *Approving and Adopting Model Band-Union Election Procedures Agreement* and Model Band-Union Election Procedures Agreement). 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. Stip. 59, 60-63.

As the parties' have stipulated, the Tribal Council and its appointed commissions, officials, and boards have engaged in further substantial work related to the enactment, implementation and administration of Articles XVI and XVII. To summarize, between 2008 and 2010, alone, the Tribal Council 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 Articles XVI and XVII. *See* Stip. 36-42, 57-63. 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. Stip. 20-22, 47-48, 64-65. Also during this time frame, the Tribal Council, 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. Stip. 48, 51-52, 54-56; JE 13 (Neutral Election Official Duties with Respect to Elections). The Band's Gaming Commission, 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. Stip. 47-49. The Band's Neutral Election Official has overseen, and issued declarations in reference to, the qualifications of four bargaining units at LRCR to proceed to secret ballot elections 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. Stip. 69,78.

The on-the-ground operation of Article XVI has had significant, practical affects upon every day labor and employment relations at the Band. Employees, management and union representatives at the Band's IGRA gaming operations have been engaged in the collective bargaining process provided by the law, with tribal members and nonmembers active on all sides. Stip. 68-76. 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. Stip. 68-79; JE 24 (Collective Bargaining Agreement for Security Officers).

This extensive, carefully crafted and fully operational labor relations regime continues in full swing. Stip. 79. 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. Stip. 66, 79.⁷

PROCEDURAL BACKGROUND

The case has its origins in a "Charge Against Employer" filed by the Charging Union, the International Brotherhood of Teamsters, Local No. 406 (the "Teamsters") on March 28, 2008. GC Exhibit 1(a). The Teamsters' Charge asserted that the Band committed an unfair labor practice by promulgating its Constitution and reserving "authority to govern labor relations including but not limited to regulating terms and conditions under which collective bargaining may or may not occur." *Id.* It claimed that "among other illegal articles" the Band's

⁷ More has occurred with respect to the administration and on-the-ground operation of Article XVI since the parties submitted their stipulated record to the Board last August. It is impractical for the Band to regularly update these facts for the record in this case; for it would require ongoing stipulations and motions to approve them. However, when the Band's law changes or other facts emerge affecting any existing record facts, the Band will call such developments to the attention of the parties and the Board.

Constitution “denies employees the right to strike” and that “[b]y this and other conduct” the Band used its Constitution to “deny employees the right to organize” under the NLRA. *Id.*

Between March, 2008 and January, 2009, the Band, the Regional Director for the Board, the Solicitor’s Office for the Department of the Interior, and the General Counsel’s Office for the Board corresponded with regard to the Regional Director’s intent to proceed against the Band on the Charge, the Band’s assertion that the Board lacked jurisdiction, and DOI’s agreement with that view. *See Little River Band of Ottawa Indians v. NLRB*, 747 F.Supp.2d 872, 878-81 (W.D. Mich. 2010). When the Band received no confirmation that the General Counsel and Regional Director would refrain from moving forward on the Charge, it sought declaratory and injunctive relief from the U.S. District Court for the Western District of Michigan. *See id.* Over a year after that request was made, by decision dated September 20, 2010, the federal court decided that the agency exhaustion doctrine prevented it from proceeding on the Band’s action. *See id.* at 890.

While in the briefing before the federal court, counsel for the AGC’s office represented that disposition of the jurisdictional question before this Board could proceed with relative ease by means of “a motion to dismiss with the Board on jurisdictional grounds,” that has hardly been the case. The AGC and Charging Union filed the Complaint before the Board on December 13, 2010. The Band timely filed a motion to dismiss for want of subject matter jurisdiction on March 3, 2010. However, the Board took no action on the motion; it issued no notice to the AGC to respond pursuant to 29 C.F.R. § 102.24(b). It became readily apparent that the Board would not proceed without a stipulated record. Thus, the parties worked on the submission of the case to the Board on stipulated facts pursuant to 29 C.F.R. § 102.35(a)(9), and filed their *Joint Motion to Transfer Proceeding to the Board on Stipulate Record* on August 3, 2011.

Nearly five months later, on December 20, 2011, the Board granted that motion. It initially set a deadline of January 10, 2012 for the parties' briefs, but extended that deadline to February 24, 2012 pursuant to an unopposed motion of the AGC.

This five year controversy has lingered far too long and should be summarily put to rest by the Board.

ARGUMENT

This case is governed by unequivocal Supreme Court authority establishing that absent clear Congressional intent, a federal statute cannot be used to undermine an Indian tribal government's exercise of inherent sovereign authority. Thus, the only question presented is whether the NLRA is being invoked to undermine the inherent sovereign authority of the Band; for there is no dispute that Congress gave no indication of intent in the NLRA to allow the undermining of tribal sovereignty. There can be no doubt whatsoever that the AGC and Charging Union seek to use the NLRA to destroy the Band's exercise of inherent sovereign authority. Further, as set forth below, because the Respondent is an Indian tribal government with sovereign immunity from suit, Congress could not possibly have intended the NLRA to apply to it. This case should be summarily dismissed.

I. IN THE ABSENCE OF A CLEAR INDICATION OF INTENT FROM CONGRESS, THE NLRA CANNOT BE USED TO STRIKE DOWN THE BAND'S EXERCISE OF INHERENT SOVEREIGNTY, REFLECTED IN ITS ENACTMENT AND IMPLEMENTATION OF ARTICLES XVI AND XVII, AND THERE IS NO SUCH INTENT IN THE NLRA.

The Board's jurisdiction to proceed in this case turns on principles of federal Indian law. Again, the principle applicable to this case is well-established: if the Band has enacted and implemented Articles XVI and XVII pursuant to its sovereign authority as a federally recognized Indian tribe, then such an exercise of tribal sovereignty cannot be denigrated pursuant to the

NLRA absent a clear indication of intent by Congress. The Tribe proceeds directly to the first part of this formulation: its exercise of inherent sovereignty.

A. By Enacting and Implementing Articles XVI and XVII, the Band is Engaged in the Exercise of Its Inherent Sovereign Authority as an Indian Tribal 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 confirmed that Indian tribes possess attributes of inherent sovereignty, which remain intact unless “divested by Congress or by necessary implication of the tribe’s dependent status.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982); *United States v. Wheeler*, 435 U.S. 313, 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, 520-21 (1832). “Until Congress acts, the tribes retain their existing sovereign powers,” powers which have “never been extinguished.” *Wheeler*, 435 U.S. at 322-23.⁸

The Band exercises its inherent attributes of sovereign authority in accordance with its Constitution. In the Reaffirmation 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.

⁸ To date, the Court has found only three attributes of tribal sovereignty to have been divested “by necessary implication of [a] tribe’s dependent status”: (a) criminal jurisdiction over non-Indians, (b) the exercise of foreign relations with other nations, and (c) the sale of Indian lands to non-Indians without federal oversight. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980); *Wheeler*, 435 U.S. at 326.

§§ 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, 334-36 & 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. *Mescalero Apache Tribe*, 462 U.S. at 335 (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). This inherent authority of Indian tribes to govern their reservation economies is grounded in another established attribute of tribal sovereignty. As the Supreme Court explains, "[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." *Jicarilla Apache Tribe*, 455 U.S. at 144. *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

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).

“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 (10th Cir. 2002) (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”).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

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.

¹¹ The employment relationships governed by Article XVI are on lands held by the United States in trust for the Band. *See* Stip. 10, 67-79. It is well-established the Indian tribal governments exercise inherent sovereign authority over such lands. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511.

employer is a “consensual relationship” over which tribes exercise inherent authority even on fee lands owned by non-Indians. *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 recently referred to just such a relationship as giving rise to the exercise of tribal authority under *Montana*. *See 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 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. Fellenner*, 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 494-95; *Graham v. Applied Geo Technologies*, 593 F. Supp. 2d 915, 919-20 (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 Navajo Labor Relations*, 17 Indian L. Rptr. 6105, 6108-10 (Nav. Sup. Ct. 1990); *Rodriguez v. Wong*, 82 P.3d 263, 266-67 (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 Articles XVI and XVII. 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, including the LRCR. 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*, 353 U.S. at 223).

The Band's on-the-ground implementation and enforcement of Articles XVI and XVII at LRCR is a textbook example of the foregoing principles of tribal sovereignty at work. Clearly, the Band has inherent authority to govern consensual employment relations within LRCR; for LRCR, a subordinate 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, is imbued with sovereign status of the tribe and 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 status). 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 with respect to LRCR reflects its fundamental attributes of sovereignty: the Band's regulation of economic activity within its reservation in accordance with its own public policy decisions. *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 Court recently said – referring to one of the powers that the AGC 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*, 554 U.S. at 335 (citations and quotations omitted).

The Band's exercise of this authority with respect to its IGRA gaming operations at LRCR also falls squarely within Congress' clear endorsement of tribal sovereignty under IGRA, declaring the “exclusive right” of Indian nations “to regulate gaming activity on Indian lands” with a goal to promote “strong tribal governments.” *See* 25 U.S.C. §§ 2701(5), 2702(1).

* * *

¹² The Band's exercise of authority pursuant to Articles XVI and XVII 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).

Not only is the Band's enactment and implementation of Articles XVI and XVII an exemplary exercise of its inherent sovereign authority in accordance with venerable Supreme Court precedent, Congress' Reaffirmation Act goals, the IRA, and IGRA, but it is fully consistent with the federal government's longstanding policy commitment to support tribal self-government. Further, the provisions of Articles XVI and XVII under attack in this case reflect quintessential, sensitive policy judgments present for any government that allows union organizing and collective bargaining within its agencies or entities.

1. The Band's Enactment and Implementation of Articles XVI and XVII is Consistent with the Federal Government's Commitment to Tribal Self-Government.

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 334-36 & n.17; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 & n.5 (1987). Congress confirms that "[t]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," and "through statutes, treaties, and the exercise of administrative authorities, [Congress] has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes." 25 U.S.C. § 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, which President Obama has fully endorsed, 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 the FEP Code, from its anti-discrimination provisions to its governance of collective bargaining, is consistent with the Nation's longstanding commitment to tribal self-government. The AGC and the Charging Union would use the NLRA to jettison the Band's act of governing. The NLRA cannot be used in such a destructive manner; Congress gave no signal in the NLRA to condone it.

2. The Complaint Targets Provisions of the FEP Code Reflecting Significant Policy Judgments in the Exercise of the Band's Sovereign Authority.

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 derived from its territory. Article XVII, which the

Complaint in this case 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 (JE 4) § 17.01.

The following are just a few examples of the ingredients of this carefully considered regime, each of which the Complaint seeks to strike down by order of this Board:

Strikes: In considering whether to prohibit strikes in its public sector, including its IGRA gaming operations at LRCR, the Band's Tribal Council looked to public sector labor laws of the states and the federal government. Stip. 38, 65. 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. Stip. 41, 57-58, 65. 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

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 - 89 (N.J. Super. 2001) (surveying laws and history of public policy against strikes in the public

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 government's institutions designed to generate the government's revenues, like the Band's IGRA gaming operations at LRCR.¹⁶ Indeed, the Band's IGRA gaming revenues support over 50% of the Band's total budget. Stip. 16. Examples of just some of the budget categories are telling. Gaming revenues account for 100% of the budget for the Band's 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. Stip. 17. They support not only these critical governmental services for tribal members, but the jobs held by tribal members to provide such services. Stip. 17-19. 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 Reaffirmation Act.

Bargaining Impasse Procedures: Like many states that permit public sector labor organizing, but prohibit strikes, the Band carefully designed a mandatory dispute resolution

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.").

¹⁶ *See 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.

process to address impasses in collective bargaining.¹⁷ Stip. 57-58. 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 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 (JE 4) § 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.

Stip. 65.

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.

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 169-72 (discussing cases).

FEP Code (JE 4) § 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 (JE 4) § 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.

Stip. 65; *see also* Stip. 57, 59.¹⁹

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. FEP Code (JE 4) § 16.12(b).²⁰ It further provides a process to resolve disputes on that issue through tribal court adjudication. FEP Code (JE 4) § 16.24(d).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

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. (JE 1) Art. III, §1(b); Art. XI, §(2)(a).

²⁰ *Compare* FEP Code (JE 4) §§ 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 (JE 4) § 16.24(d).

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.

Stip. 65.

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. FEP Code (JE 4) § 16.26.²² 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 sovereign immunity of the Band's public employers for that purpose. FEP Code (JE 4) §§ 16.16; 16.26.²³ 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.

Stip. 65.

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.

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.

²³ See FEP Code §§ 16.16(a), 16.26.

See FEP Code (JE 4) § 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 (JE 4) § 16.13(e). The Band's law is not dissimilar to 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.

Stip. 65.

The AGC and Charging Union seek to invoke the NLRA to destroy these and other exercises of governmental authority by the Band: an order to 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 no such power to the Board.

B. In the Absence of a Clear Indication of Intent From Congress, the Board Has No Power to Interfere with the Band's Exercise of Its Inherent Sovereign Authority.

As stated at the outset, this case is governed by the established rule of federal Indian law: the Band's exercise of sovereign governmental authority cannot be thwarted pursuant to the NLRA absent a clear indication of intent from Congress. Given the federal government's historic commitment to preserving and encouraging the exercise of tribal sovereignty, the

²⁴ Compare FEP Code § 16.13 and Or. Rev. Stat. § 243.650(1).

Supreme Court will not allow that sovereignty to be undermined under color of a federal law unless Congress has made its intentions perfectly clear. *See, e.g., Iowa Mut. Ins. Co.*, 480 U.S. at 18 (absent clear intent 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 indication of intent 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"); *Pueblo of San Juan*, 276 F.3d at 1194 -95.

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"); *Jicarilla Apache Tribe*, 455 U.S. at 152 ("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, under "unequivocal Supreme Court precedent," it must be presumed that Congress intends 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 Reich v. Great*

Lakes Indian Fish and Wildlife Comm'n, 4 F.3d 490, 493-96 (7th Cir. 1993) (presumption against abrogation of treaty rights applies to statutes that may intrude upon tribal prerogatives); *Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d at 250-51 (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 AGC and Charging Union seek to rely upon a federal statute, the NLRA, to "rescind" the Band's exercise of inherent sovereignty, they bear the burden to show that Congress, by its enactment, clearly intended to allow 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 495-96 (following *Cherokee Nation*); *Cherokee Nation*, 871 F.2d at 939. They cannot meet that burden.

C. Congress Gave No Indication of Intent in the NLRA to Undermine the Inherent Sovereign Authority of Indian Tribal Governments, and, If Anything, Showed an Intent to Exclude Tribes from the Act.

Congress has given no indication anywhere in the NLRA that the Board is empowered to entertain this case, let alone infringe upon the exercise of tribal sovereignty by issuing an order that would strike down the laws of the Band. Congress failed to address Indian tribes upon defining "employers" that may be subject to an unfair labor practice case under the NLRA. And the Supreme Court has made perfectly clear that 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.”).²⁵

If anything, Congress expressed an intent to exclude Indian tribal governments from the NLRA by excluding them from section 301 of the Act.

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 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, 179-80 (1967). Section 301 is a lynchpin provision of the Act; 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). But Congress left Indian tribal governments completely out of section 301 by failing to waive their sovereign immunity from suit.

²⁵ The Complaint asserts that Band is in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158 (a)(1). *See* Complaint (GC Exhibit 1(b)) at ¶ 9. In section 158(a)(1), Congress provided that “it shall be an unfair labor practice for an employer to . . . interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” Congress did not in any way suggest that this provision may be invoked to attack the exercise of sovereign authority by Indian tribes. Tribes are not mentioned in the definition of “employer.” *See* 29 U.S.C. § 152(1)-(2) (defining employers as “persons,” including, *inter alia*, individuals and corporations, but not “the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof”).

Congress is deemed to know the law affecting the scope and force of its enactments and to act intentionally in light of that knowledge. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005); *U.S. v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995); *Blitz v. Donovan*, 740 F.2d 1241, 1245 (D.C. Cir. 1984). As of 1947, when Congress enacted section 301, it was well-established that Indian tribal governments have immunity from suit absent an unequivocal waiver of that immunity by Congress. *U.S. v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). Thus, Congress, knowing the constraint of sovereign immunity, must be presumed to have acted intentionally in leaving Indian tribal governments out of section 301 by not waiving their sovereign immunity from suit. Congress is “always . . . at liberty to dispense with [] tribal immunity or to limit it.” *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 510.

Congress’ intent to leave Indian tribes out of section 301 can only mean that Congress intended to treat tribal governments in the same manner as states and the federal government, and exclude them from the NLRA. Otherwise, it would have created an intractable anomaly: Indian tribes would be the only “employers” in the country excluded from section 301 while also subject to other provisions of the Act. Congress would never act in such an absurd manner. *See, e.g., U.S. v. Turkette*, 452 U.S. 576, 580 (1981) (interpretations which yield “absurd results” are to be avoided); *Smith v. Babcock*, 19 F.3d 257, 263 (6th Cir. 1994) (interpretations which yield internal inconsistencies are to be avoided); *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). It would destroy the uniformity that is so central to the NLRA. Congress left Indian tribes free

from the NLRA just as it left the other domestic sovereigns free from it; the NLRA governs private sector, not public sector, employment.²⁶

In short, not only is there no evidence to suggest that Congress granted power to the Board to destroy the Band's exercise of inherent authority as requested by the Acting General Counsel's and Charging Union's Complaint, but, if anything, the evidence points the other way: by excluding tribes from section 301, Congress revealed its intent that the Board would have no such power. This case must be dismissed for want of subject matter jurisdiction.

II. THERE IS NO TENABLE LEGAL AUTHORITY FOR THE ASSERTION OF BOARD JURISDICTION OVER THIS CASE

The Band anticipates that the Acting General Counsel will argue that certain lines of authority and theories support the Board's jurisdiction to proceed against the Band. The Band addresses each in turn.

A. The So-Called *Tuscarora/Coeur d'Alene* Framework is Inapposite, and, In Any Event, Supports the Band's Position that the Board Lacks Subject Matter Jurisdiction.

In *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), the Board reversed its view that Indian tribes and their wholly-owned, reservation-based subordinate economic organizations are excluded from the NLRA in the same manner as states and the federal government. It allowed an unfair labor practice case to proceed against the San Manuel Indian Bingo and Casino on a charge that the casino favored one union over another in violation of the NLRA. In so doing, it quoted *dictum* from the Supreme Court's decision in *Federal*

²⁶ This is fully consistent with Congress' contemporaneous enactment of the IRA. It is inconceivable that the same Congress that enacted the IRA in 1934 to reverse the assimilationist policies of the allotment era, reconfirm the sovereign status of Indian tribes, and vitalize economic development in Indian country, *see Morton v. Mancari*, 417 U.S. 535, 542 (1974) (describing IRA), would, one year later, treat Indian tribal governments as private enterprises under the NLRA with all the intrusions into their self-determination that would entail.

Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960): that “a general statute in terms applying to all persons includes Indians and their property interests.” *See id.* at 1059 (quoting and citing *Tuscarora*; quotations omitted). It then adopted a modified rule based on this *dictum* developed in a Ninth Circuit decision, *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), which held that the Occupational Safety and Health Act could be applied to an on-reservation farm owned and operated by the Coeur d’Alene Tribe. *See id.* (citing *Coeur d’Alene Tribal Farm*, 751 F.2d at 1115.) Under that so-called *Tuscarora/Coeur d’Alene* framework, a federal labor or employment law of general application will apply to tribes and their reservation entities unless (1) the law “touches exclusive rights of self-government in purely intramural matters”; (2) the application of the law would abrogate treaty rights; or (3) the statutory language or legislative history shows “that Congress did not intend the law to apply to Indian tribes.” *Coeur d’Alene Tribal Farm*, 751 F.2d at 1115. The Board found that none of these exceptions applied to the San Manuel Indian Bingo and Casino. *San Manuel Indian Bingo & Casino*, 341 NLRB at 1062.

The AGC and Charging Union cannot rely on this authority to support the Board’s jurisdiction over the instant unfair labor practice case.

First, the Court’s *Tuscarora dictum* is of questionable authority because it is inconsistent with the Court’s subsequent decision in *Merrion v. Jicarilla Apache Tribe*. *See Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 713 (10th Cir. 1982). *See also San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) (*Tuscarora* statement is in tension with “longstanding principles” of federal Indian law and of “uncertain significance”); *Cherokee Nation*, 871 F.2d at 938, n.3 (*Tuscarora* statement is *dictum*).

Second, whether the *Tuscarora/Coeur d'Alene* framework is properly grounded in Supreme Court precedent or not, it has no application whatsoever in a case such as this where the NLRA is being invoked to interfere directly with the deliberative process of governing by an Indian tribal government. That is, to strike down the Band's laws, exemplifying its exercise of inherent sovereignty. The *Tuscarora/Coeur d'Alene* framework has never been employed to strike down a tribal law. Indeed, in the only case to date in which the NLRB (or any federal agency) has taken aim at an Indian tribe for "enacting a labor regulation," the Tenth Circuit, sitting en banc, flatly rejected that framework because "it does not apply where an Indian tribe has exercised its authority as a sovereign." *Pueblo of San Juan*, 276 F.3d at 1199. The Court observed, in language fully apt here: "[i]n spite of the Board's attempts to bring to our attention multiple cases where the [*Tuscarora/Coeur d'Alene*] rule was applied to a tribe *qua* sovereign, no citations were found to be apposite." *Id.* (emphasis added). For all of the reasons set forth in Section I(A), there can be no doubt that the Band's enactment and implementation of Articles XVI and XVII in reference to LRCR and its other agencies constitute the acts of an Indian tribal government, *qua* sovereign²⁷

Third, the *Tuscarora/Coeur d'Alene* framework cannot apply to the instant case because the NLRA is not a law of general application. *Pueblo of San Juan*, 276 F.3d at 1199.

²⁷ Any attempt by the Acting General Counsel or the Charging Union to suggest otherwise runs headlong into the Supreme Court's admonition that it "denigrates Indian sovereignty" to suggest that the sovereign acts of an Indian tribal government may be treated as those of a mere "private, voluntary organization." *Jicarilla Apache Tribe*, 455 U.S. at 146 (citing and quoting *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)). The Band's laws governing labor relations are the sovereign acts of a government, *qua* government, whether they apply to its gaming operations at LRCR or to its Public Safety Department or Housing Authority. To attempt to characterize them in any other way is a charade. *Id.*; *Mazurie*, 419 U.S. at 557 (when exercising their sovereign authority, tribes cannot be treated as mere "private, voluntary organizations"); *Wheeler*, 435 U.S. at 323 (same); *Bryan v. Itasca County*, 426 U.S. 373, 388 (1987) (same). This point is addressed in more detail in Section II(C), below.

Finally, even if the *Tuscarora/Coeur d'Alene* framework were applied in this case, it would require a conclusion that the Board lacks authority to proceed; for there is clear evidence that Congress intended to exclude Indian tribes from the provisions of the NLRA. As explained above, by excluding Indian tribes from section 301, Congress revealed its intent to exclude tribes from the Act, consistent with its exclusion of states and the federal government. So even if the *Tuscarora/Coeur d'Alene* framework applied to this case, the third prong of that framework would be met.

B. 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.*

The Band anticipates the AGC and Charging Union to assert that the D.C. Circuit's decision in *San Manuel* establishes that the NLRA can be applied to the Band in this case. *San Manuel*, however, 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 D.C. Circuit had no moment to consider such a case. On the contrary, the *San Manuel* Court recognized the very rule that applies here: the Supreme Court's directive that, in the absence of a "clear expression of Congressional intent," courts (and this Board) 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.

While the D.C. Circuit made note of “some” collateral impingement upon the San Manuel Band’s tribal labor ordinance, it was characterized as “unpredictable” and “probably modest.” *See id.* Not so here. The NLRA is invoked in this case to destroy tribal laws reflecting a careful, deliberative process of an Indian tribal government. *See* Stip. 35-66. Application of the NLRA in this case not only would strike at the heart of this exercise of tribal sovereignty, it would displace a labor law regime upon which parties have relied and staked out positions in accordance with the Band’s regulatory policy priorities. *See* Stip. 67-79. The impact upon tribal sovereignty is direct and severe, not modest or unpredictable. In the end, by this case, the Acting General Council and the Charging Union seek nothing less than to preempt any tribal law that is not consistent with the NLRA. Doing so would directly infringe upon the sovereign authority of the Band. This is nothing like *San Manuel*.

Indeed, in this setting, as the *San Manuel* decision makes clear, the Supreme Court imposes a presumption against the displacement of tribal sovereignty unless Congress clearly allowed it. *See San Manuel*, 475 F.3d at 1312 (citing *Santa Clara Pueblo* rule), 1317 (referencing “presumption” against undermining tribal sovereignty). *Accord Pueblo of San Juan*, 276 F.3d at 1195 (assertion that NLRA preempts tribal law requires clear indication of intent by Congress). For all of the reasons previously set forth in Section I, under this “clear intent rule” of the Supreme Court, the Board lacks subject matter jurisdiction to proceed.

Beyond this, the *San Manuel* Court had no opportunity to consider the point set forth in Section I(C) above: that by excluding Indian tribes from section 301 of the NLRA, Congress revealed its intent not to include Indian nations within the NLRA. In this light, *San Manuel* is an incomplete guide to resolving the issues squarely presented here. So too is this Board’s decision in *San Manuel*.

Finally, insofar as the *San Manuel* decisions, whether by the Board or by the D.C. Circuit, can be read to allow this case to proceed, they must be considered wrongly decided in light of the Supreme Court authority governing this case.

C. The AGC’s Theory that the *San Manuel Indian Bingo & Casino* Case Provides a Platform For Striking Down the Band’s Enactment and Implementation of Articles XVI and XVII As “Unfair Labor Practices” Has No Merit.

In the face of a request by the Department of the Interior “to put an end to this enforcement action as soon as possible,” the AGC defended its decision to proceed with the Teamsters’ “Charge Against Employer” with an assertion that “if the Band and its IGRA gaming operations at the LRCR could be considered a ‘single employer’ or a ‘joint employer’ of employees who work at the LRCR . . . Board jurisdiction is appropriate under the principles of *San Manuel Indian Bingo & Casino*, 341 NLRB 1055.” *Little River Band of Ottawa Indians v. NLRB*, 747 F.Supp.2d at 880 (quotations omitted).

The AGC’s logic is as follows: (a) under *San Manuel*, LRCR should be covered by the NLRA because it is “commercial in nature – not governmental,” and because it “employs significant numbers of non-Indians and . . . caters to a non-Indian clientele,” *see San Manuel Indian Bingo & Casino*, 341 N.L.R.B. at 1061, (b) if the Band exercises control over LRCR or is integrated into its operations in such manner that the Band and LRCR may be deemed a “single” or “joint” employer under tests for discerning whether private enterprises share liability with respect to labor or employment matters, then the Band’s laws can be treated as the “work rules” of the LRCR, and (c) once treated as such “work rules,” they may be stricken as unfair labor practices if they vary from the NLRA.

Such logic is divorced from fundamental principles of federal Indian law.

First, the Band's IGRA gaming operations at LRCR exist only because they involve the exercise of a critical attribute of tribal sovereignty: the "power to govern and to raise revenues to pay for the costs of government." *Jicarilla Apache Tribe*, 455 U.S. at 144. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1986), the Supreme Court confirmed in no uncertain terms that tribes have the inherent sovereign authority, *qua* governments, to generate revenues through gaming within their territorial jurisdictions, and that such authority is free from state regulation in states that do not prohibit such gaming as a matter of criminal law and public policy. In so doing the Court made note of the fact that the Cabazon Band, like the Little River Band of Ottawa Indians Tribal Government, lacked a tax base on which to raise governmental revenues and gaming fulfilled that function for tribal government. *See Cabazon*, 480 U.S. at 218; *compare* Stip. 15 ("The Band has no significant base within its jurisdiction to levy taxes.") In IGRA, Congress codified *Cabazon's* holding, that Indian tribes engage in gaming on Indian lands "as a means of generating governmental revenue" and "have the exclusive right to regulate" such gaming if it is conducted "within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701. The very purpose of IGRA is to promote "strong tribal governments." 25 U.S.C. § 2701(1). Further solidifying the nature of Indian gaming as a governmental activity, IGRA mandates that Indian gaming be conducted under a tribal law that requires the Indian tribe to "have the sole proprietary interest and responsibility for the conduct of any gaming activity" and the net revenues from tribal gaming to be used "to fund tribal government operations or programs, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development," or to donate to charity or help fund local government. 25 U.S.C. §§ 2710(b)(2)(A); 2710(b)(2)(B);

2710(d)(2)(A). The Band's Gaming Ordinance tracks these requirements. Stip. 10; JE 20 (Gaming Ordinance) §§ 5.01, 6.01.

And the Band's gaming revenues precisely fulfill Congress' purpose under IGRA by providing critical funds for governmental services. Stip. 16-18. Indeed, the Band's gaming revenues offset the Band's dependence on federal funding under such programs as the Indian Self-Determination and Education Assistance Act, the Indian Health Care Improvement Act, and the Native American Housing Assistance and Self-Determination Act. Stip. 16-17. The Band's revenues from gaming provide 62% of the funds to support its Department of Public Safety, 80% of the funds to support the Band's provision of behavioral health services (known as *Bedabin*) to its members and 77% of the funds to support its Department of Family Services. These are just few example of the essential role that IGRA gaming plays for the Band's self-government, but there is much more, including the critical provision of services to tribal members and the employment of tribal members within the LRRCR and the Band's other operations and departments. *See* Stip. 15-19.

In light of the Supreme Court's holding in *Cabazon*, Congress' design of IGRA, and the very nature of Indian gaming as a substitute for a tax base to generate the revenues for tribal governments to function, it is nothing short of a legal farce to describe the Band's IGRA gaming operations at the LRRCR as "commercial in nature – not governmental." The Band exercises its sovereign authority by operating LRRCR no less than the federal government does in operating the Internal Revenue Service or states do in raising governmental revenues through their own taxing authorities, lotteries, state liquor stores, even harness race tracks.²⁸ Raising revenue through

²⁸ *See, e.g., New York City Off-Track Betting Corp.*, 416 N.Y.S.2d 974 (governmental off-track betting facility); Mass. Gen. Laws ch. 150E, §§ 1, 2, 3 (state lottery).

gaming “for the welfare of a sovereign [Indian] nation is manifestly a governmental purpose.” *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 379 (Minn. 1996), *cert. denied*, 118 S.Ct. 2059. This Board’s decision in *San Manuel* is wrong to state otherwise.²⁹

Second, the Band’s exercise of tribal sovereignty, and the need for its protection, is no less present just because LRRCR “employs a significant numbers of non-Indians” or “caters to a non-Indian clientele.” (Stipulations 11 and 12 are irrelevant.) In the history of the Supreme Court’s Indian law jurisprudence, the presence or absence of non-Indian involvement in a tribe’s reservation economy has never been a marker for the level of protection afforded to tribal sovereignty. Just the opposite is true. Non-Indians who voluntarily enter tribal lands to partake of economic activity therein – whether to take up employment or purchase goods or services (including entertainment in the form of gambling) – trigger a fundamental attribute of tribal sovereignty: the right of the tribe to exclude them and to condition their presence while they remain on tribal land. *E.g. Mescalero Apache Tribe*, 462 U.S. at 336 (“[T]ribes have the power to manage the use of their territory and resources by both members and nonmembers.”) (citations omitted); *Jicarilla Apache Tribe*, 455 U.S. at 144, 147; *Williams*, 358 U.S. at 223.

²⁹ At the appeal level in *San Manuel*, the D.C. Circuit described the San Manuel Band’s IGRA gaming operations as “not a traditional attribute of self-government.” *San Manuel*, 475 F.3d at 1315. Insofar as the Acting General Counsel or Charging Union cite to this description as a holding or to treat the Band’s gaming operations at LRRCR as something other than the exercise of tribal sovereignty, it must be considered erroneous. The Supreme Court and Congress’ protection of the attributes of tribal sovereignty do not turn on whether they may be considered “traditional” or not. *See Wheeler*, 435 U.S. at 323. To place tribal sovereignty on a continuum where Indian “traditions” or “customs” are given more protection than modern forms of government is to reduce Indian nations to a stereotype, a practice that the Supreme Court and Congress have never condoned. Tribes are not culture clubs. *See Bryan*, 426 U.S. at 388 (tribes may not be converted into “private, voluntary organizations”) (quoting *Mazurie*, 419 U.S. at 577). They are governments with sovereign powers that encompass the laws at stake in this case.

To suggest that the presence of non-Indian employees or non-Indian clientele at LRCR “waters down” the sovereignty at stake in the Band’s governance of labor relations at the LRCR turns the Supreme Court’s established Indian law jurisprudence on its head.

Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember’s presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.

Jicarilla Apache Tribe, 455 U.S. at 147. The AGC, relying on *San Manuel*, would “deposit in the hands of the excludable non-Indian the source of the tribe’s power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe’s exercise of its sovereign authority.” *Id.* As already fully explained, the Federal Government has done no such thing in the NLRA.

The third step in the AGC’s logic, which goes even beyond anything suggested in *San Manuel*, is as unmoored from basic principles of federal Indian law as the first two. The AGC would assert that the Band and its IGRA gaming operations may be deemed a “joint” or “single” employer under the NLRB’s test for asserting authority over private businesses.³⁰ With this sleight of hand, the AGC seeks to reduce the Little River Band of Ottawa Indians Tribal Government to some sort of amorphous appendage to the AGC’s already erroneous depiction of LRCR as a “commercial” venture, thereby characterizing the Band’s laws as the mere “work rules” of an NLRA “employer.” Setting to one side the erroneous premise that LRCR may be

³⁰ The “single employer” test considers whether two nominally separate business enterprises “are so interrelated that they may be considered a ‘single employer’ or an ‘integrated enterprise.’” *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94 (6th Cir. 1997). Four criteria are considered, although none is conclusive: (1) common ownership and financial control, (2) common management, common directors and boards, (3) interrelationship of operations (e.g. common offices, record keeping, shared bank accounts), and (4) centralized control of labor relations. *Id.* at 994. *Accord NLRB v. Palmer Donavin Manufacturing Co.*, 369 F.3d 954, 957 (6th Cir. 2004). The “joint employer” concept considers whether a business “has control over another company’s employees sufficient to show that the two companies are acting as a ‘joint employer’ of those employees.” *Swallows*, 128 F.3d at 993.

considered “commercial,” rather than governmental, the notion that the Little River Band of Indians Tribal Government may be reduced to something other than a sovereign Indian tribal government in the enactment and implementation of Articles XVI and XVII – whether applied to LRRCR or any other agency, commission, department, or subordinate organization of the Band – is at complete odds with Supreme Court mandates.

The Band touched on this in note 27, above. The AGC “denigrates Indian sovereignty” by suggesting that the Band may be reduced to a mere appendage of a private, voluntary organization and its laws thereby reduced to the mere work rules of the same. *Jicarilla Apache Tribe*, 455 U.S. at 146; *Mazurie*, 419 U.S. at 557; *Wheeler*, 435 U.S. at 323; *Bryan*, 426 U.S. at 388. As fully explained in Section I(A), the Band’s regulation of labor relations at LRRCR pursuant to the provisions of Articles XVI and XVII involves the textbook exercise of its fundamental attributes tribal sovereignty: the “power to place conditions on entry, on continued presence, or on reservation conduct” by employees and unions engaged in pursuing economic self-interest within the reservation. *See Jicarilla Apache Tribe*, 455 U.S. at 144; *Pueblo San Juan*, 276 F.3d at 1192-93. More specifically, the provisions the AGC seeks to strike down as the “work rules” of a putative “commercial” venture reflect the critical public policy choices of a sovereign, including decisions about resource allocations and dispute resolution methods that affect the very machinery of an Indian tribal government. *See Section I(A)(2)*, above; Stip. 35-66 (and Joint Exhibits referred to therein). This is the essence of tribal sovereignty. *See Mescalero Apache Tribe*, 462 U.S. at 335; *Merrion*, 455 U.S. at 137, 144-47; *Pueblo of San Juan*, 276 F.3d at 1192-93, 1200. As previously noted, the Supreme Court prohibits the mischaracterization of the Band perpetrated by the AGC’s argument. Indeed, it reflects an “assimilationist” view of tribal authority, *see Bryan*, 426 U.S. at 388 n.14 (quotations and

citation omitted) – a view that has been long-rejected by the Federal Government; indeed, one that Congress repudiated upon reaffirming the Band’s sovereign authority in 1994. *See* note 2, above.

In sum, the AGC’s argument for imposing the NLRA on the basis of the Board’s decision in *San Manuel* is without merit; to the extent *San Manuel* supports that argument, it should be overruled.

CONCLUSION

For all of the above reasons, the Board lacks subject matter jurisdiction and this case must be dismissed.

Dated: February 24, 2012

/s/ Kaighn Smith, Jr.

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STATEMENT OF SERVICE

Copies of this Brief of Respondent Little River Band of Ottawa Indians Tribal Government 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)
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This Brief has this day been electronically filed with the Executive Secretary of the National Labor Relations Board.

Dated: February 24, 2012

/s/ Kaighn Smith, Jr. _____

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