

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

Soaring Eagle Casino and Resort,
An Enterprise of the Saginaw
Chippewa Indian Tribe of Michigan

Respondent,

and

Case No. 07-CA-053586

International Union, United
Automobile, Aerospace and
Agricultural Implement
Workers of America (UAW)

Charging Party.

**REPLY IN SUPPORT OF SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Respondent Saginaw Chippewa Tribe of Indians (“Saginaw Tribe” or “the Tribe”) submits, pursuant to 29 C.F.R. § 102.46(h), this Reply in Support of the Tribe’s Exceptions filed with the National Labor Relations Board (“NLRB” or “the Board”), and in reply to the General Counsel’s brief in response to the Tribe’s Exceptions. The General Counsel’s briefing before the Board reveals an utter lack of appreciation or understanding of the respect and deference given by courts to treaties between the United States and Indian Tribes that is truly alarming.

The arguments and analysis presented by the Board’s counsel turn black letter Indian Treaty interpretation law on its head in an attempt to justify application of the National Labor Relations Act¹ to the Tribe’s gaming facilities in direct abrogation of the Tribe’s Treaty protected rights.

II. ARGUMENT

A. **Indian Law Canons of Construction Require that Treaties, Agreements, Statutes and Executive Orders Involving Indian Tribes be Liberally Construed in Favor of Indians.**

Federal Indian law differs from that of other fields of law regarding the methodology of interpretation and its practical implications. The Supreme Court has stated: “[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law.”² The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians;³ and all ambiguities are to be

¹ 29 U.S.C. §§ 151-169

² *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766.

³ *See, e.g., Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943) (*quoting Tulee v. Washington*, 315 U.S. 681, 684-685 (1942)) (“treaties are construed more liberally than private agreements...Especially is this true in interpreting treaties and agreements with the Indians [which are to be construed] ‘in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians]’”); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (“in

resolved in favor of the Indians.⁴ In addition, treaties and agreements are to be construed as the Indians would have understood them,⁵ and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.⁶ The canons apply to statutes that do not mention Indians at all, and requires that Congress make plain its intent to abrogate tribal treaty rights before such an abrogation will be found.⁷ The Supreme Court has held that a statute that is silent with respect to Indians does not divest a tribe of its sovereign authority.⁸

expressions, instead of being resolved in favor of the United States, are to be resolved in favor" of the Indians); *Worcester v. Georgia*, 31 U.S. 515, 551-557 (1832) (interpreting Treaty of Hopewell in light of congressional policy to "treat tribes as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate").

⁴ See, e.g., *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor"); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("any doubtful expressions in treaties should be resolved in the Indians' favor"); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("doubtful expressions are to be resolved in favor of [the Indians]"); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) ("[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.

⁵ See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("this Court has often held that treaties with the Indians must be interpreted as they would have understood them"); *Choctaw Nation v. United States*, 381 U.S. 423, 432 (1943) (treaties "are to be construed, so far as possible, in the sense in which the Indians understood them"); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them"); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) ("we have said we will construe a treaty as [the Indians] understood it"); *Worcester v. Georgia*, 31 U.S. 515, 551-554 (1832) (interpreting Treaty of Hopewell as Cherokees would have understood its meaning).

⁶ *United States v. Dion*, 476 U.S. 734, 739-40 (1986) ("[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("[a]mbiguities in federal law have been construed generously in order to comport with...traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) federal statutes will not be interpreted to "interfere [] with tribal autonomy and self-government...in the absence of clear indications of legislative intent").

⁷ *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1198-99 (10th Cir. 2002).

⁸ *Iowa Mut. Ins. Co. v. LaPlante*, 107 S.Ct. 971, 977-78 (1987).

The cases relied on by the ALJ and the General Counsel are unpersuasive in establishing a one-sided result driven interpretation of Indian treaty rights. The canons of construction require that each individual treaty be examined in its own historical context and viewed from the perspective of the Indian signatories to the treaty. In this case, the central focus is what the Saginaw Chippewa understood they were receiving from the United States in the treaties of the 1855 and 1864. These Treaties provide specific treaty based rights to the Isabella Reservation as a permanent home for the Saginaw. Their rights go far beyond the transfer of lands at issues in the cases like *United States v. Farris*.⁹ The Isabella Reservation was set aside for Indian purposes and specific rights for use, occupancy, and inherent rights of self-government were included. The Saginaw Tribe's experts in this case provided undisputed and un rebutted expert testimony regarding the Saginaw Chippewa's understanding of these treaties and the rights pursuant thereto. The treaty language of other cases relied on by General Counsel for other tribe's is simply not relevant to understanding and interpreting the Saginaw Chippewa treaties. There is no evidence in the record to substantiate the characterization of a general treaty right as argued by the General Counsel and used as a basis for the ALJ's decision. To do so is a fundamental misapplication of the canons of construction and the Supreme Court precedent requiring their application in this case.

B. The Tribe's Treaty of 1864 Contains Clear Language Creating a Permanent Homeland for the Tribe Reserving to the Tribe the Right and Authority to Exclude Non-Members.

The Supremacy Clause of the United States Constitution states: "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the

⁹ 624 F.2d 890 (9th Cir. 1980).

land.”¹⁰ The Tribe’s Treaty of 1864 states: “In consideration of the foregoing relinquishments, the United States hereby agree to set apart for the exclusive use, ownership, and occupancy of the said Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella County, reserved to said Indians by the treaty of August 2, 1855.”¹¹ The Tribe’s right of self-government and right to exclude non-members are protected by the 1864 Treaty and the U.S. Constitution. The Tribe conducts gaming at Soaring Eagle Casino & Resort (“SECR”) in the exercise of this right at licensed gaming locations, one of which is SECR.

Pursuant to its Treaties, the Tribe has the right to determine who may enter the Tribe’s reservation, the right to condition the presence of those permitted to enter, and the power to exclude. As the Court held in *Morris v. Hitchcock*:¹²

While it is unquestioned that, by the Constitution of the United States, Congress is vested with paramount power to regulate commerce with the Indian tribes, yet it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, and the duty of the United States is to protect the Indians ‘from aggression by other Indians and white persons, not subject to their jurisdiction and laws,’ has also been recognized.¹³

Applying the NLRA to require the Tribe to grant access on the terms sought by the Board would abrogate these rights.

Counsel for the Board concedes that the Saginaw treaties and historic facts in this proceeding are “not in dispute,” but then erroneously concludes that this “demonstrate no more

¹⁰ U.S. Constitution, Art. VI, Cl. 2.

¹¹ Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, Oct. 18, 1864, 14 Stat. 657 (1864 Treaty).

¹² 194 U.S. 384 (1904).

¹³ *Id.* at 388-89; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (reaffirming *Morris*); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-42 (1982) (same).

than the treaties with the United States guaranteed the Tribe a general right of possession and exclusion, which, as discussed, is insufficient to bar application of the NLRA to the Tribe's casino.¹⁴ The undisputed evidence presented by the Tribe's expert witness proves the exact opposite. Professor Bowes testified at the December 15, 2011 hearing that "It [the Tribe's current power to pass a no-solicitation policy and right to exclude ordinance] is certainly something that I see as coming out of that...same line of sovereign rights [the Tribe's treaties of 1855 and 1864 with the United States]."¹⁵ Professor Bowes further testified that the sovereign rights of self-government and the right to exclude are specific treaty protected rights that are manifested by the current Tribal constitution and laws of the Tribe. Professor Bowes summarized his conclusions supporting the specific treaty rights provided in the Saginaw Treaties of 1855 and 1864 in an affidavit filed in the district court proceedings as follows:

In conclusion, the treaties of 1855 and 1864 and the Executive Order of 1855 make it clear that the Saginaw Chippewa Indian Tribe of Michigan has lands reserved to them for their exclusive use, ownership, and occupancy. The wording of each document is clear about the intentions of the federal government in setting apart the land for Indian purposes. Therefore, over the course of several decades the federal government consistently confirmed the right for the Saginaw Chippewa to the exclusive use of tribal lands set apart for their use in Isabella County in Michigan. Because this land was set apart for the exclusive use of the Saginaw Chippewa, the government of the Tribe has certain rights and powers. The Band's sovereign authority over its reservation lands contains the full range of governmental powers flowing from that sovereignty, combined with the specific, treaty-based rights that came with the establishment of their Reservation. In particular, the Saginaw Chippewa Tribal Council has the authority to exclude non-Indians based on its status as a sovereign government. This right and power is in accord with the intentions of federal policy, as made

¹⁴ Counsel for Acting General Counsel Brief, p. 27.

¹⁵ Transcript of Record at 84:14-22, *Soaring Eagle Casino and Resort v. UAW*, (Case No. 07-CA-053586, Dec. 15, 2011).

apparent in the treaties of 1855 and 1864, and the larger content of federal Indian policy.¹⁶

As the Supreme Court has stated, this right to exclude “necessarily includes the power to place conditions on entry, on continued presence, or on reservation conduct[,]” so “[w]hen a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.”¹⁷ The Board’s Counsel’s cursory treatment of the Tribe’s treaties and other historic evidence memorializing its right to self-government and right of exclusion is not surprising given that not one shred of contrary evidence was entered into the record by the Board’s attorneys.

Counsel for the Acting General Counsel’s reliance on several cases to craft a strained rule of Treaty interpretation¹⁸ is likewise misplaced and driven by its desire to apply the NLRA to the Tribe by any means necessary. *United States v. Farris* is cited by the Acting General Counsel for the proposition that “general treaty language raised by a tribe, which devotes land to its exclusive use is not sufficient to generally preclude application of any otherwise generally applicable federal law.”¹⁹ The Tribe argues that *Farris* is a pre-Coeur d’Alene case decided before the passage of the Indian Gaming Regulatory Act, thus providing limited interpretation

¹⁶ Bowes Aff., Ex. 13 to Pl. Motion and Memo. of Law in Support of Motion for a Temporary Restraining Order and Preliminary Injunction (“Tribe’s Mot.”), *Saginaw Chippewa Indian Tribe of Michigan v. NLRB*, Case No. 11-14652, 2011 WL 6754102, (E.D. Mich., Dec. 23, 2011), Dkt. 6 at ¶ 26, Pg ID 244.

¹⁷ *Merrion*, 455 U.S. at 144. See also generally Kaighn Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation*, 2008 Mich. St. L. Rev. 505, 527 (2008) (“The Court’s modern precedents in *Williams*, *Merrion*, and *New Mexico* should leave no doubt that tribes have inherent authority to regulate the conduct of nonmembers who voluntarily enter the reservation to exploit reservation resources or otherwise attain economic gain.”).

¹⁸ *U.S. v. Farris*, 624 F.2d 890 (9th Cir. 1980); *U.S. v. Sohappay*, 770 F.2d 816 (9th Cir. 1985); *United States Dep’t of Labor v. Occupational Safety & Health Rev. Comm’n (DOL v. OSHRC)*, 935 F.2d 182 (9th Cir. 1991); *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010).

¹⁹ Acting General Counsel Answer Brief, p. 22. [internal quotations omitted].

value in this case. The Ninth Circuit held that a provision of the 1970 Organized Crime Control Act proscribing gambling applied to Indian defendants' conduct in operating large-scale gaming businesses in Indian country, yet IGRA now controls this area making *Farris* inapplicable. The Acting General Counsel relies on *Farris* and *DOL v. OSHRC* for the proposition that courts "presume that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws," however, these Ninth Circuit cases clearly do not square with the Supreme Court's canons of construction that a treaty cannot be abrogated through implication, but only through affirmative express action by Congress.²⁰

C. The Sixth Circuit has Extensive Experience in Cases involving Treaty Rights and the Necessity for Applying the Indian Canons of Construction.

The Sixth Circuit has consistently ruled that the Indian canons of construction control and that the abrogation of a treaty right has to be clear. In *United States v. Michigan*,²¹ the district court explicitly followed the Indian canons of construction in interpreting whether the 1836 Treaty of Washington provided for reserved hunting and fishing rights for tribes in Michigan. In its thorough consideration of the canons, the district court held: "Certain axioms of treaty construction must be applied when interpreting Indian treaties to determine the extent of the rights reserved thereunder."²² On appeal, the Sixth Circuit acknowledged the significant role the

²⁰ See cases cited *supra* note 4.

²¹ 471 F.Supp. 192 (W.D. Mich. 1979).

²² *United States v. Michigan*, 471 F.Supp. 192, 249 (W.D. Mich. 1979); citing *Worcester v. Georgia*, 31 U.S. 515 (1832) and *Jones v. Meehan*, 175 U.S. 1 (1889) ("First, the courts have held that treaties with Indians must be interpreted as the Indians would have understood them." *Michigan*, 471 F. Supp. at 249;); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174 (1973) and *Winters v. United States*, 207 U.S. 564, 576-77 (1908) ("A second principle of Indian treaty construction is that doubtful expressions are to be resolved in favor of the Indian parties." *Michigan*, 471 F. Supp. at 251); *Choctaw Nation v. U.S.*, 318 U.S. 423, 431-32 (1943) ("Finally, the courts have prescribed that treaties should be construed liberally in favor of the Indians." 471 F. Supp. at 251) *Menominee Tribe v. U.S.*, 391 U.S. 404, 413 (1968) ("Only the clearest

canons of construction played in the district court's ruling affirming the tribal treaty rights. In its 1981 decision, the court soundly approved of the district court's reliance on the canons: "The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty . . . continue to the present day as federally created and federally protected rights."²³

In *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Department of Natural Resources*,²⁴ the court interpreted treaty rights to fish commercially in an area of the Great Lakes to also include a right to transient mooring of fishing vessels at municipal marinas because without such mooring, tribal members could not fish commercially. In addition to recognizing the rule of sympathetic construction cited by the *U.S. v. Michigan* court, this court also highlighted the need to look at the purpose of a Treaty. The court did not limit its analysis to the literal text of the treaty provision, but appropriately looked to surrounding circumstances such as the purpose of the provision, as the canons required it to do. The court provided: "it is well settled that Native American treaties must be liberally construed in favor of Native Americans." Then it continued: "courts are bound to construe treaties, not only liberally in favor of Native Americans, but in a way to 'reserve to the Tribes all rights necessary to effectuate the purpose of the Treaty.'" The court grounded its decision in established Supreme Court Indian law precedent, relying on the very same cases the Saginaw Tribe has relied on in the present case. In recognizing and returning to these seminal decisions, the Sixth Circuit in *Grand Traverse* continued to build on the foundation established in earlier Michigan treaty cases.

The Sixth Circuit consistently employs the Indian canons of construction when it interprets the rights of Indians arising under treaties. This precedent necessitates that the Board

language depriving Indians of the rights which they had prior to the treaties will limit their rights today." *Michigan*, 471 F. Supp. at 252.).

²³ 653 F.2d at 278.

²⁴ 141 F.3d 635 (6th Cir. 1998)

consider the application of the canons to the Saginaw's treaty rights. The Board in this case should follow its own standards set out in *San Manuel Indian Bingo & Casino* and acknowledge that the Saginaw Tribe's Treaty rights would be abrogated by application of the NLRA to the Tribe's gaming facility.

III. CONCLUSION

Throughout these proceedings the Saginaw Tribe has repeatedly asserted that the National Labor Relations Act does not apply to its tribally owned and operated gaming facilities because Congress has not expressly authorized that application.²⁵ The Tribe has further asserted that the NLRB's decision in *San Manuel* was wrongly decided when the board chose to abandon 30 years of prior policy and the substantial weight of federal court Indian law precedent recognizing the importance of treaties and tribal sovereignty within the framework of our federal system. But even under its own analysis, the Board must give substantial consideration to Congressional and Executive policy and the impact of application of the NLRA would have on the Saginaw Tribe's treaty protected rights of self-government and the right to exclude included within the treaties of 1855 in 1864 that established the Isabella Indian Reservation. As demonstrated in the sections above, the Saginaw Tribe has established through expert testimony in these proceedings the undisputed existence of treaty rights that cannot be abrogated by the Boards application of the NLRA. For the reasons stated above, the Saginaw Tribe respectfully requests that the Board refrain from asserting jurisdiction over the Saginaw Tribe and that these proceedings be dismissed.

²⁵ The Saginaw Tribe continues to take exception to the ALJ's finding that Susan Lewis was terminated from employment solely for her union-related activities; *see* Tribe's Exception No. 23. The Tribe continues to maintain that Susan Lewis was terminated for violating the Tribe's Solicitation Policy.

Dated: June 8, 2011

s/ William A. Szotkowski

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