UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CHICKASAW NATION operating WINSTAR WORLD CASINO Respondent and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 886, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS Charging Party	)	Case 17-CA-025031 17-CA-025121

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF

The Board should assert jurisdiction over the Chickasaw Nation's Winstar World Casino pursuant to *San Manuel Indian Bingo and Casino*, the Board precedent setting forth the standards for whether the Board may assert jurisdiction over a tribal casino. 341 NLRB 1055 (2004), *enf'd.* 475 F.3d 1306 (D.C. Cir. 2007). There is no merit to any contention by Respondent or amicus curiae that application of the NLRA would violate the Chickasaw Nation's sovereignty or abrogate its treaty rights. The employees who work at Respondent's casino, most of whom are non-tribal members, should therefore be entitled to the protections of the National Labor Relations Act.

1. The Chickasaw Nation ("Respondent" or "the Nation") argues that its operation of the WinStar World Casino is an exercise of self-government, raising revenue to operate its government and provide essential governmental services, thereby precluding application of the

NLRA (CN Br. 9-13).[1] The Acting General Counsel submits that WinStar World Casino is a commercial venture, notwithstanding the level of financial support it provides to the Chickasaw Nation's government. There is no dispute that the gaming activities at WinStar World Casino have successfully generated substantial revenue for the Nation, as the Nation's brief repeatedly emphasizes.[2] But by focusing so narrowly on the relationship between gaming revenues and the Nation's fiscal health, the Nation refuses to acknowledge a simple truth that the D.C. Circuit aptly noted—namely, that operating a profitable class III casino is a "primarily commercial" economic activity, even if the casino is a major source of revenue for an Indian tribe. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007). This is particularly the case where, as here, a majority of both the casino's employees and its patrons are non-Indian. *Compare id.* at 1315 ("[T]he vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation."), *with* Statement of Stipulated Facts ¶¶ 8-9 (acknowledging the same).

Therefore, Respondent misses the point by directing the Board's attention to cases where courts have suggested that tribes have a traditional sovereign interest in raising revenue through activities such as gaming. (CN Br. 9-10.) To say that such an interest exists does not decide the matter because an activity can have both commercial and governmental features. *See, e.g., San Manuel*, 475 F.3d a 1310-11 ("[T]he casino at issue here, though certainly exhibiting

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[1] This brief abbreviates the Acting General Counsel's opening brief as "AGC Br.", the Chickasaw Nation's brief as "CN Br.", National Congress of American Indian's brief as "NCAI Br.", and the Choctaw Nation of Oklahoma's brief as "Choctaw Br.".

[2] It is possible that gaming and other activities at WinStar World Casino also generate substantial income for enrolled members of the Chickasaw Nation. *See* 25 C.F.R. pt. 290 (2012) (describing tribal per capita payments that are permissible under the IGRA (25 U.S.C. § 2710(b)(2)(B)(ii)) from class II and class III gaming revenues). The stipulated record does not disclose whether or not the Nation distributes per capita payments.

characteristics that are strongly commercial (non-Indian employees and non-Indian patrons), is also in some sense governmental (the casino is the primary source of revenue for the tribal government)."). The relevant question is which one predominates. *See id.* at 1313 ("The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, . . . then application of the law might not impinge on tribal sovereignty."). Under the facts of this case and in accord with *San Manuel*, the WinStar World Casino's substantial economic activity, which primarily involves employees and customers who are not members of the Chickasaw Nation, is more reasonably characterized as commercial in nature.

That this activity is appropriately considered commercial and thus within the Board's jurisdiction is buttressed by the IRS categorization of similar activity as not an "essential government function." The IRS determined an Indian tribe could not use tax-exempt bonds to construct and operate conference hotels located near privately-funded casinos because it was "not customarily performed by State and local governments[.]" 16 I.R.C. § 7871 (e); I.R.S. Tech. Advice Mem. *Indian Tribal Governments Treated as States For Certain Purposes*, No. 146957-05 (Jan. 26, 2007), *available at* http://www.irs.gov/pub/irs-tege/tam_200704019.pdf.[3]

[3] An Indian Tribe may issue tax-exempt bonds like a State if the proceeds are used for an "essential government function," 16 I.R.C. § 7871 (a)(4) & (c)(2), which "shall not include any function which is not customarily performed by State and local governments[.]" *Id.* § 7871 (e). A function qualifies if (1) the activity is one conducted by a requisite number of State or local governments, (2) the activity has been conducted by States or local governments for a requisite period of time and (3) the activity is not a commercial or industrial activity. I.R.S. Tech. Advice

Similarly, in the context of excise taxes, "exemptions are to be granted only when 'the transaction involves the exercise of an essential governmental function of Indian tribal government' . . . [and] [t]ribal gaming is not such a function." *United States v. Little Six, Inc.*, 43 Fed. Cl. 80, 83 (1999), *reversed by* 210 F.3d 1361, *vacated and remanded in light of Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001) (IGRA does not exempt Tribes from paying gambling-related excise and occupational taxes) *by* 534 U.S. 1052 (2001); *Cook v. United States*, 32 Fed. Cl. 170, 173 (Fed. Cl. 1994) (I.R.C. 7871 does not exempt tribes from paying sales tax on the sale of fuel because it is not "an essential governmental function").

There also is no merit to the contention that the Board's distinction between governmental and commercial functions is unworkable (CN Br. 29-31, NCAI Br. 20-25). It is telling that no explanation is provided as to why the distinction is unworkable. In any event, both the Tenth Circuit and the Board have made this distinction. The Tenth Circuit embraced the governmental versus commercial function distinction in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1198-99 (10th Cir. 2002): "Proprietary interests and sovereign interests are separate: One can own land without having the power to govern it by policy determinations as a sovereign, and a government may exercise sovereign authority over land it does not own."[4] The Tenth Circuit there further observed that when an Indian tribe is acting in its proprietary capacity, the Circuit follows *Tuscarora*, 362 U.S. 99 (1960) (*see Pueblo of San Juan*, 276 F.3d at 1199), and applies

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Mem. *Indian Tribal Governments Treated As States For Certain Purposes*, No. 146957-05 (Jan. 26, 2007), *available at* http://www.irs.gov/pub/irs-tege/tam_200704019.pdf. .

[4] When an Indian tribe is acting in its proprietary capacity, the Tenth Circuit follows *Tuscarora*, 362 U.S. 99 (1960) (*see Pueblo of San Juan*, 276 F.3d at 1199), and applies general statutes to Indians unless an exception applies, such as where the application of the law to the tribe would abrogate treaty rights. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984 (10th Cir. 2005) (Lucero, J., concurring) (quoting *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462-63 (10th Cir.1989)).

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Of course, in *San Manuel,* the Board carefully considered the commercial nature of the casino in order to accommodate the "special status accorded Indian tribes" and to ensure that asserting jurisdiction effectuates the purposes of the Act. *San Manuel*, 341 NLRB 1055, 1062 (2004). The Board conducted a fact-specific inquiry to determine whether tribes are "fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes" or are "participat[ing] in the national economy in commercial enterprises." *Id.* at 1062, 1063. In this analysis, the Board considered whether the entity was commercial, whether the majority of patrons were Native American, whether the services were provided for free or to earn a profit, and the location of the entity. It also evaluated the entity's impact on interstate commerce, including the percentage of in-state patrons and the level of competition in the marketplace for the employer's services. *San Manuel*, 341 NLRB at 1063-64; *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075, 1076-77 (2004). As previously set forth in the Acting General Counsel's opening brief (AGC Br. 14), under this test, the WinStar World Casino run by the Chickasaw Nation is primarily a commercial enterprise and not a sovereign undertaking. Thus, although this casino is controlled by tribal leaders and is located on land held in trust for the Nation, the overall operation is quite similar to the casino in *San Manuel*, 341 NLRB at 1063-64, and dissimilar to the hospital in *Yukon Kuskokwim Health Corp.*, 341 NLRB at 1076-77, and accordingly the Board should assert jurisdiction.

Respondent and amicus National Congress of American Indians (CN Br. 29-31; NCAI Br. 22) gain no support from their reliance on the Supreme Court's opinion in *Garcia*, which examined whether the Tenth Amendment prohibited application of the federal Fair Labor Standards Act to a municipal (non-tribal) government. The Court noted that various difficulties exist in distinguishing between essential and non-essential government functions. However, the Court nonetheless decided the application of the FLSA to the local government in that case premised upon a distinction between generally applicable federal laws, and laws which require states themselves to regulate. As the Tenth Circuit subsequently concluded, when applied to local government,

> [g]enerally applicable laws, such as the FLSA, do not violate the Tenth Amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (holding that the application of the FLSA to state and local governments is constitutional because it is a generally applicable law). However, laws which require the states to regulate, see *New York v. United States*, [505 U.S. 144 (1992)], or force the participation of a state's executive officers in the actual administration of a federal program, . . . violate the Tenth Amendment.

Robertson v. Morgan County, Bd. Of County Com'rs, 166 F.3d 122 (Table), 1999 WL 17787 (10th Cir. 1999). Accordingly, to the extent *Garcia* is relevant here, where a Tribe can claim no Tenth Amendment protection, *Garcia* supports application of the generally applicable NLRA to Respondent's casino.

An additional problem highlighted in *Garcia*—the lack of a clear organizing principle among federal court decisions —does not apply to the Board, which has a centralized decision-making process and has provided a robust analytical framework. *See Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004) (holding that policy considerations do not favor the assertion of the Board's discretionary jurisdiction over a hospital that provides free health care to Indians because such care is a traditionally tribal or governmental function that it unique to the tribe's

status); *Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino*, 353 NLRB No. 32 n.5 (2008) (asserting jurisdiction over a casino).[5]

2. Contrary to Respondent's contention, *Catholic Bishop* did not heighten the jurisdictional bar for application of the NLRA to a tribal casino (CN Br. 31-32). To the extent that opinion created a threshold test for application of the NLRA, it did so because the issue was one involving the constitutionality of a federal statute. The Court stated: because the "Board's exercise of its jurisdiction here *would give rise to serious constitutional questions*[,]" the Court "must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that the Act grants jurisdiction." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (emphasis added). The instant case raises no such constitutional issues, nor any potential conflict between two equal sovereigns.[6] On the question of whether federal laws apply to Indian Tribes, the Board and the vast majority of courts have reasonably adopted the

[5] Moreover, in reviewing its own tax-immunity jurisprudence, the Court in *Garcia* was frustrated about the lack of a "constitutional basis" for the distinction between governmental and proprietary programs. *Garcia*, 469 U.S. at 542-43 ("Even in the heyday . . . the Court never explained *the constitutional basis* for that distinction") (emphasis added). The Board's analysis, by contrast, is a function of its discretionary jurisdiction and does not require constitutional analysis. *San Manuel*, 341 NLRB 1055, 1062 (2004) ("the final step in the Board's analysis is to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction").

[6] Compare *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), also relied upon by the Chickasaw Nation (CN Br. 32), raising serious concerns of a potential international conflict as a result of the Board's application of the NLRA to maritime operations of foreign flagships employing alien seamen. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (explaining the additional separation of powers constitutional issue in *Marineros*).

Tuscarora/Coeur d'Alene test, which sufficiently takes into account the unique status Indian tribes occupy in our country.[7]

3. Respondent's erroneous assertion that Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, "confirms that Congress never intended to bring Indian tribes under the NLRA" (CN Br. 39-40) glosses over the stark difference between Section 301, which provides federal court jurisdiction for private union and employer contract disputes, and the provisions at issue in this case, including Sections 8 and 10 of the NLRA, 29 U.S.C. §§ 158, 160, pertaining to the Board's elimination of unfair labor practices and its authority to do so. Congress provided these separate enforcement schemes with different policies and protections. Section 10 of the NLRA designates the NLRB as the exclusive forum to prevent unfair labor practices, defined in Section 8, and thus to protect "the right of employ to organize and bargain collectively" and "safeguard[] commerce from injury[.]" 29 U.S.C. §§ 151, 160(a); *id.* at § 153(d). Section 301 permits private parties to enforce their contractual rights, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509, 513 (1962), and the private contract enforcement scheme in Section 301 does not affect the Board's authority to remedy unfair labor practices. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 197-98 (1962). There is no law or logic requiring application of sovereign immunity rules that might bar private claims against Indian tribes to also bar the United States government from enforcing generally applicable federal law. *NLRB v. San Manuel Indian Bingo and Casino*, 475 F.3d 1306 (D.C. Cir. 2007) ("Indian tribes have no sovereign immunity against the United States"). Accordingly, citations to cases interpreting Section 301 have no relevance here.

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[7] *E.g.*, *Fla. Paraplegic Assn. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129-30 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); *Fond de Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249, 251 (8th Cir. 1993) (holding ADEA did not apply to "strictly internal" employment); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113-15 (9th Cir. 1985) (OSHA).

4. Respondent errs in asserting that the NLRB is not a general federal law (CN Br. 25). Respondent relies on a cramped reading of *Pueblo*, a case that explicitly disavowed any consideration of the applicability of Federal statutes to a tribe's proprietary interests. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) ("We begin by noting what the district court also took pains to point out, namely, that the general applicability of federal labor law is not at issue"). Rather, the court in *Pueblo* was considering a unique provision of the NLRA, Section 14(b), which explicitly permits states to prohibit union security agreements between employers and labor organizations, although such agreements are otherwise specifically permitted by the NLRA. So in that limited context, the Tenth Circuit concluded that – as to the legality of union security agreements which Congress permitted each state to decide – the NLRA was not a law of general application. Red herrings aside, it is undisputable that the NLRA is a general statute with extremely broad application. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) ("Congress intended the NLRA to have the broadest possible breadth permitted under the Constitution") (internal citation omitted); *Navajo Tribe v. NLRB*, 288 F.2d 162, 165 n.4 (D.C. Cir. 1961) ("The National Labor Relations Act is a general statute. Its jurisdictional provisions, and its definitions of 'employer,' 'employee,' and 'commerce' are of broad and comprehensive scope"); *Sac & Fox Indus.*, 307 NLRB 241, 243 (1992) ("[T]here is little question that the NLRA is a statute of general applicability").

5. Contrary to Respondent's arguments (CN Br. 25-26), *Tuscarora* is applied to treaty-holding tribes in the Tenth Circuit. *Tuscarora*, 362 U.S. at 116, 118 (stating the "well settled" principle that "a general statute in terms applying to all persons includes Indians and their property interests"). Federal appellate courts, including the Tenth Circuit, have applied *Tuscarora* unless application of the relevant federal statute to a tribe triggers one of three *Coeur*

d'Alene exceptions. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462-63 (10th Cir. 1989) (applying the *Coeur d'Alene* exceptions); *see Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). The most relevant of these three exceptions bars application of a federal law to a tribe when it "*would abrogate rights guaranteed by Indian treaties*[.]" *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984 (10th Cir. 2005) (Lucero, J., concurring) (quoting *Nero*, 892 F.2d at 1462-63 (emphasis added)).

To determine whether *Tuscarora* applies where a tribe has a treaty with the United States, the operative question is whether the federal law in dispute abrogates specific treaty rights, not whether a tribe is merely signatory to a treaty. The inquiry is one of substance, not form. In *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d at 1462-63, for example, the Tenth Circuit dismissed claims against a treaty-holding tribe by applying *Tuscarora* and *Coeur d'Alene*. Descendants of slaves formerly owned by tribal members sued a tribe pursuant to Section 1981 and 2000d for the right to vote in tribal elections and participate in federal Indian benefit programs. The Court applied *Tuscarora* and found the former slaves' statutory claims fell into the *Coeur d'Alene* exception which pertains to purely intramural matters because the claims impacted the tribe's right to define its own membership and maintain a distinct cultural and political identity. *Id.* at 1462-63; *see also Shivwits Band of Paiute Indians*, 428 F.3d at 984-85 (applying the *Tuscarora/Coeur d'Alene* test and finding the Highway Beautification Act applicable to Indian land because none of the *Coeur d'Alene* exceptions apply).[8]

[8] The cases cited by the Chickasaw Nation further illustrate that the mere existence of a treaty is insufficient (CN Br. 26). In *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 938 n.3 (10th Cir. 1989), the Tenth Circuit refused to apply the Age Discrimination in Employment Act to tribal members because that treaty abrogated *"a specific right under a treaty*[,]*" id.*, not merely because the tribe signed a treaty. Emphasizing the point, the Tenth Circuit cited to *Coeur d'Alene* and the language it used to create the exceptions to the *Tuscarora* test. *Cherokee Nation*, 871 F.2d at 938 n.3 ("Although *Tuscarora* represents the general rule, there is an

To the extent that any court would preclude application of the *Tuscarora/Coeur d'Alene* test based on the mere existence of a tribal treaty, it is out of step with precedent set by the Supreme Court and federal appellate courts and should not be followed.[9] It defies logic to grant a *Coeur d'Alene* exception such an expansive reading so as to reduce the carefully nuanced analysis to a litmus test.

6. Throughout their briefs, Respondent and Amicus Choctaw Nation of Oklahoma ("the Choctaw") misrepresent Respondent's treaty rights by blurring the distinction between their treaties' treatment of state and Federal law; they argue that their express treaty right to be free from state and territorial laws, which is clear and undisputed, somehow also gives them the right to be free from Federal law, a right that no treaty ever expressly or implicitly gave them. For example, Respondent relies on *Choctaw Nation* v. *Oklahoma,* 391 U.S. 620, 625 (1970) (CN Br. 6), a case that is irrelevant to the Federal law issue presented here as it involved solely the treaty right not to "be embraced in any state or territory."[10] Respondent's citation of *Ex parte*

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exception when the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties." (internal citations omitted), citing *Coeur d'Alene*, 751 F.2d at 1116)). The Tenth Circuit similarly analyzed OSHA in *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). The court found OSHA inapplicable because it derogated enforcement of tribal restrictions limiting non-Indian entry upon the reservation to those specifically "authorized to enter upon Indian reservations in discharge of duties imposed by law, or the order of the President." *Id.* at 711, 713; *see Secretary of Labor v. Navajo Forest Products Industries*, 8 O.S.H. Cas. (BNA) 2094 at *3 (1980) (distinguishing *Tuscarora* because it did not involve any impairment of Indian treaty rights). Although Respondent's citation to *Dobbs* purports to use broader language (CN Br. 26), that statement in the opinion relies on *Cherokee Nation*, 871 F.2d at 938, and *Navajo Forest Products Industries*, 692 F.2d at 710, both of which require more than the mere existence of treaties.

[9] *See infra* note 7.

[10] Respondent also cites *Atl. & Pac. R. Co.* v. *Mingus,* 165 U.S. 413 (1897) (CN Br. 6-7). *Mingus* involved a property dispute that arose between third parties over the effect of successive Federal statutes that first provided, and then forfeited, a grant of land to build a railroad line on land that was the subject of the Treaty of Dancing Rabbit Creek and other treaties. If *Mingus* has

Crow Dog, 109 U.S. 556 (1883), is similarly inapposite, as that case involved a different treaty made by a different Indian Nation, and held that the treaty at issue in fact did *not* overcome Federal law; the Court concluded that, "[t]o give to the clauses in [the treaties] effect . . . would be to reverse in this instance the general policy of the government towards the Indians . . ." Likewise, the Choctaw relies on *United States v. John*, 437 U.S. 634 (1978), which found state criminal law inapplicable to a Mississippi Choctaw residing on land that had been ceded by the Choctaws in the Treaty of Dancing Rabbit Creek precisely because of the application of a contrary Federal statute.[11] None of the cases cited by Respondent or Amicus Choctaw clearly address any immunity of Respondent to federal laws of general application; if anything, they support the applicability of such laws. More specifically, neither Respondent nor Amici have cited *any* case that has held that the Treaty of Dancing Rabbit Creek or any other treaty has given Respondent the right to be free from Federal laws of general application, and we are not aware of any such case.

As discussed in the Acting General Counsel's opening brief (AGC Br. 11), however, there is one case involving state law (i.e., collection of certain state taxes) that actually sheds light on the meaning of Respondent's treaty right vis-à-vis the Federal government. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465, 469 (1995), the Court

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any relevance at all, it is merely to further show the continuing presence of Federal authority over such treaty lands.

[11] The Choctaw suggests that its position has support from a stray line of text in *United States v. John*, which stated, in relating the history of the Treaty of Dancing Rabbit Creek, "[the Choctaws] were to remove to lands west of the river, where they would remain perpetually free of federal or state control, by the fall of 1833." This dictum, however, merely signifies that the Choctaws and Chickasaws would retain the right of self-government, which is undisputed. There is no indication that the Court intended its statement to immunize Respondent from Federal law.

interpreted the Treaty of Dancing Rabbit Creek to find that "the purpose of the Treaty was to put distance between the Tribe and the States" and restated the relevant section of the Treaty with the addition of the word "such" so as to explicitly limit its reach to territorial or state laws. *Id.* at 465 ("no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . .but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [*such*] laws . . ." (bracketed text in original, emphasis added)). Moreover, the minority opinion in that case, which would have given the Chickasaw Nation greater protection against state law than did the Court majority, noted that the treaty promised to secure the Choctaw Nation from all laws, "except those the Nation made itself or that Congress made." The minority opinion also recounted the history leading up to the treaty, including President Jackson's statement to Congress in 1829 that "if the Indians remained east of the Mississippi River, they would be subject to the laws of the several states," but if they accepted the Treaty and moved west, they would not. *Id.* at 469 (Breyer, J., concurring in part, dissenting in part).

As further discussed in the Acting General Counsel's opening brief (AGC Br. 10-14), the Treaty of Dancing Rabbit Creek and other treaties simply do not support the argument that Respondent is entitled to be free of Federal, as opposed to state, regulation. Indeed, that treaty and others make clear that no such right exists. The treaties themselves repeatedly provide for the supremacy of Federal law and anticipate Federal regulation of tribal activities by, for example, stating specifically that the treaties only secured the Choctaw and Chickasaw Nations from all state and territorial laws except such as from time to time may be enacted in their own National Councils, "*not inconsistent with the Constitution, Treaties, and Laws of the United States*" (Treaty of Dancing Rabbit Creek (emphasis added)). Similarly, "[*n*]*o law shall be*

enacted inconsistent with the Constitution of the United States or the laws of Congress . . ." (1866 Treaty of Washington (emphasis added)). If the treaties were to be read as Respondent argues, it would require writing these provisions out of the treaties altogether.

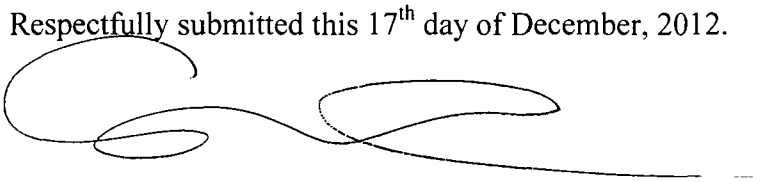
Respondent also argues that the Treaty of Dancing Rabbit Creek immunizes it from Federal laws of general applicability by stating that "the U. S. shall forever secure said Choctaw Nation from, and against, all laws . . . except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs." But this language merely restates the primacy of Federal law, albeit somewhat inartfully, taking into account the extremely limited role of the Federal Government in 1830. At that time, it had been less than a decade since the Supreme Court first authorized the Federal Government to exercise exclusive authority over any aspect of commerce (there, interstate navigation), noting at the time that Congress' power under the Commerce Clause was "limited, not extending to the internal trade of a State." *Gibbons v. Ogden*, 22 U.S. 1, 27 (1824). It would be more than 50 years before Congress attempted any comprehensive regulation of commerce (Interstate Commerce Act of 1887) or antitrust matters (Sherman Antitrust Act of 1890), more than 85 years before Congress first enacted a child labor law (Keating-Owens Child Labor Act of 1916, later held to be an unconstitutional exercise of the Commerce Clause in *Hammer v. Dagenhart*, 247 U.S. 251 (1918)), and more than 100 years before Congress passed the New Deal legislation that truly began the consistent exercise of Federal law throughout the United States. It is in this context that the language of the 1830 treaty must be construed and, consistent with the extremely infrequent exercise of any Federal legislative authority at that time, "the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs" means the extent to which Congress enacts legislation that would in any way affect the

Choctaws and other Indians. Such a reading is the most reasonable one, taking into account the historical period in which this phrase was written, as well as the totality of the language of all the treaties, as set forth above. As previously noted, any other reading of this language would render meaningless the treaty's earlier language prohibiting Respondent from itself enacting any law inconsistent with laws of Congress. Thus, the Treaty of Dancing Rabbit Creek itself acknowledges the right of the Federal Government to apply laws to Respondent. For all these reasons, it is clear that the application of the NLRA to Respondent's casino does not abrogate any treaty rights.

CONCLUSION

For the reasons stated above, the Board should assert jurisdiction over the Chickasaw Nation's Winstar World Casino.

Respectfully submitted this 17th day of December, 2012.



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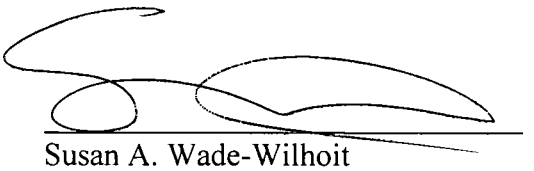
STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the Acting General Counsel's Reply Brief on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary of the National Labor Relations Board and by electronic mail to counsel for Respondent, Counsel for the Charging Party Union, Respondent, Charging Party and Counsel for Amicus.

Dated: December 17, 2012



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