

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

SAN MANUEL INDIAN BINGO AND CASINO,

Employer,

and

LAW ENFORCEMENT EMPLOYEES
BENEVOLENT ASSOCIATION,

Case 31-RC-114638

Petitioner.

**SAN MANUEL BAND OF MISSION INDIANS'
OPPOSITION TO REQUEST FOR REVIEW**

LINDA AUERBACH ALLDERDICE
HOLLAND & KNIGHT LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
213.896.2422

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I. INTRODUCTION

The San Manuel Band of Mission Indians (“Tribe”) hereby opposes the Law Enforcement Employees Benevolent Association’s (“Union”) Request for Review (“Request”) of the Acting Regional Director’s Decision & Order (“Decision”), issued November 14, 2013, following a hearing on the petition herein held on October 30-31, 2013.

The NLRB’s Rules and Regulations provide that “[t]he Board will grant a request for review only where compelling reasons exist therefor,” and set forth four narrow bases for granting a request for review. Rules and Regulations § 102.67(c). The Request does not meet these standards. The Board’s standards for exercising jurisdiction over Indian tribes and their on-reservation tribal business are clearly set forth in numerous recent decisions, and the Decision correctly identifies and applies those standards.

Specifically, the Decision properly concludes that the petitioned-for Public Safety Officers (“PSOs”) in the Tribe’s Department of Public Safety (“DPS”) are employed solely by the Tribal government and are not employed by the Tribe’s Casino, San Manuel Indian Bingo & Casino. The Decision then properly concludes that the Tribe, as “employer of the PSOs, is *not* similar to a traditional commercial enterprise and [instead] is fulfilling the unique governmental function of providing law enforcement services to the reservation and protecting the tribal members and their assets individually as well as the assets of the Tribe as a whole.” Decision, p. 23 (emphasis added). The PSOs’ “principal purpose” of protecting tribal members and their assets “militate[s] against the Board’s assertion of jurisdiction,” the Decision concludes. *Id.* Based on these findings, the Regional Director properly declined to exercise jurisdiction and dismissed the petition.

The Request provides no basis to review these conclusions. It does not establish an absence of Board precedent, nor does it establish that the Regional Director departed from Board

precedent. *See* 29 C.F.R. § 102.67(c)(1). The Request does not even take issue with the principal factual findings on which the Regional Director’s conclusions are based, let alone show that any finding on a substantial issue was clearly erroneous and that the error prejudiced the Union. *See id.* at § 102.67(c)(2). Further, the Request does not assert, let alone establish, that the conduct of the hearing or any ruling made therein resulted in prejudicial error. *See id.* at § 102.67(c)(3). Finally, the Request does not assert any reasons, let alone compelling reasons, for reconsideration of an important Board rule. *See id.* at § 102.67(c)(4).

In addition to failing to satisfy the Board’s standards for granting review, the Request violates the Board’s Rules and Regulations in at least three significant ways. First, the Union has attached two affidavits and six exhibits to its Request. None of these documents or the facts in them were presented at the hearing or timely asserted before the Regional Director. This directly violates 29 C.F.R. section 102.67(d) which provides that a request for review “may not raise any issue or allege any facts not timely presented to the Regional Director.” The Union provides no excuse for failing to comply with the Rules and to present all of its evidence at the hearing, a date triggered by the Union’s unilateral choice of when to file the petition.

Second, the Request also violates the Board’s requirement that “[a]ny request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record” 29 C.F.R. § 102.67(d). Third, the Request violates the Board’s rule that “[w]ith respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of the argument.” *Id.*

Unable to meet the Board’s standards for review, the Union resorts to attacking the Tribe’s sovereignty. But these attacks are utterly without support.

The Regional Director applied settled Board precedent and made factual findings that are not challenged. The Union fails to show any compelling reason for the Board to review the Decision.

For the reasons set forth herein, and for those articulated in the Casino's Opposition in which the Tribe joins, the Tribe respectfully requests that the Board deny review.

II. PROCEDURAL HISTORY AND DECISION BELOW

A. Procedural Background

On October 17, 2013, the Union filed a petition seeking to represent "all full time and regular part time Public Safety Officers performing guard duties as defined in Section 9(b)(3) of the act" employed by "San Manuel Indian Bingo and Casino" (sic) at "its facility in Highland, CA." The petition named the Casino as the PSOs' employer. The Regional Director first set the hearing for October 24, 2013, and then rescheduled the hearing to October 30, 2013.

On October 29, 2013, the Tribe filed a pre-hearing motion to dismiss the petition in which the Casino joined. The Tribe then made a special appearance at the hearing, held on October 30 and 31, to provide an evidentiary basis for its motion to dismiss the petition for lack of jurisdiction and to establish that the NLRB should decline to assert jurisdiction. On October 30, 2013, at the hearing's outset, the Union amended its petition to add the Tribe as an employer.

The Tribe made two principal showings at the hearing. First it showed that the Tribe's Public Safety Officers are solely employed by the Tribe, not the Casino. Second, the Tribe showed that the PSOs perform core Tribal governmental functions of enforcing Tribal law and protecting the Tribe's assets and people on the Tribe's reservation.¹

¹ As the Decision recognizes, Decision, pp. 21 and 23 n.7, and the Transcript reflects, Tr. p. 6 lines 14 - 22, p. 8 line 23 - p. 9 line 4, the Tribe asserted that its sovereign immunity precludes the assertion of jurisdiction over the Tribe at the insistence of a private party such as the Union. The Tribe specifically noted that by appearing specially, it was not waiving its sovereign

The parties filed post-hearing briefs. On November, 14, 2013, the Acting Regional Director issued the Decision at issue here declining to exercise jurisdiction over the Tribe with respect to the PSOs and dismissing the petition. The Union's deadline for requesting review was originally November 29, 2013, which was extended to December 13, 2013, and then extended once again to December 20, 2013. The Tribe's time to oppose was extended to January 10, 2014 by order of Associate Executive Secretary Henry S. Breiteneicher on December 23, 2013.

B. The Decision

The Regional Director reached two principal conclusions in the Decision. First, applying long-standing and settled precedent, the Regional Director concluded that “[t]he evidence is clear that the employing entity is not the Casino,” and that there “is literally no evidence supporting a finding that the Casino employs the PSOs.” Decision, p. 20. The Regional Director further found that the Tribe and the Casino are not single or joint employers of the PSOs. *Id.* The Regional Director found that the Tribe and the Casino operate through separate governing bodies: the Tribal Business Committee manages the Tribal government and all its employees, including the PSOs, while the San Manuel Entertainment Authority (“EA”) operates the Casino. The Regional Director found that “[t]here is no evidence of common management,” in that “both organizations have separate management from the top of the organization . . . to the first-line supervisor level.” *Id.* The Regional Director found that there is no evidence of functional integration: “there is no evidence that the PSOs in the patrol division have any functional integration with employees employed by the Casino,” and that the work of the PSOs assigned to the Casino is “functionally distinct” from the work of the employees employed by the Casino. *Id.* The Regional Director found there is “no evidence of centralized control of labor relations”

immunity objection. The Tribe reserves all rights, including the right to assert this defense to any other Board action or other action by the Union.

because there is no evidence that members of the Business Committee make “critical decisions in labor relations for the Casino,” and no evidence that the EA makes critical decisions in labor relations for the Tribe. *Id.* Based on these findings, the Regional Director found that the PSOs are employed solely by the Tribe. Decision, p. 20; *and see also* p. 19 n.5.

Second, applying the Board’s decision in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enfd.* 475 F.3d 1306 (D.C. Cir. 2007) (*San Manuel I*) and its progeny, the Regional Director concluded that the NLRB should decline to exercise jurisdiction over the PSOs employed by the Tribe. The Regional Director first set out the *San Manuel I* test, referencing both prongs of the analysis: (1) the *Coeur d’Alene* 3-factor test and (2) the Board’s “discretionary jurisdictional standard.” Decision, pp. 4-5. The Regional Director also discussed the *Yukon Kuskokwim* case decided the same day as *San Manuel I*, but which reached the opposite conclusion. *See* Decision, pp. 5-6.

The Regional Director concluded that “none of the *Coeur d’Alene* exceptions apply” in this case. Decision, p. 21.² The Regional Director then proceeded to the second prong of the Board’s *San Manuel I* analysis, finding that “[i]n this case, the Tribe’s employment of PSOs does fulfill a governmental function – providing a level of law enforcement on the reservation.” *Id.* The Regional Director found that PSOs in the patrol division “do not provide services of an arguably commercial nature. Rather, they enforce tribal ordinances, fulfill certain functions for the tribal court, protect the reservation from trespassers, provide enhanced security to the residences of tribal members as well as to some tribal government buildings, and patrol the roads

² While the Tribe wholly agrees with the Regional Director’s findings and conclusion declining to exercise jurisdiction over the petition filed by LEEBA, the Tribe respectfully disagrees with this particular and narrow aspect of the Decision, specifically the aspect relating to touching on exclusive rights of self-governance in purely intramural matters, which the Tribe submits exist here, and reserves all rights with respect thereto.

within the reservation. These are similar to the services provided by governmental law enforcement agencies.” Decision, p. 22. The Regional Director further found that the Tribe, as “employer of the PSOs, is *not* similar to a traditional commercial enterprise and is fulfilling the unique governmental function of providing law enforcement services to the reservation and protecting the tribal members and their assets individually as well as the assets of the Tribe as a whole.” Decision, p. 23 (emphasis added). The PSOs’ “principal purpose” of protecting tribal members and their assets “militate[s] against the Board’s assertion of jurisdiction.” *Id.* (quoting *Yukon Kuskokwim*, 341 NLRB at 1076). The Regional Director also noted that “the Tribe, as the employer of PSOs (as opposed to as an operator of the Casino), exerts little impact on interstate commerce.” *Id.* (parenthetical in original). As a result, the Regional Director determined that the NLRB should decline to exercise jurisdiction and dismissed the petition.

III. DISCUSSION

A. The Decision Properly Sets Out and Applies the Board’s Current Standard for the Exercise of Jurisdiction Over Indian Tribes

1. The Board’s Standard Is Well-Established

The NLRB has repeatedly and clearly set out its test for exercising jurisdiction over Indian tribes and their on-reservation businesses.³ In *San Manuel I*, the Board reconsidered

³ Respectfully, the Tribe does not waive its argument that the Board’s standard in *San Manuel I* conflicts with controlling federal Indian law principles established by Congress and the Supreme Court. Specifically, the Board’s reliance on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), as interpreted in *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985), ignores decades of Supreme Court precedent holding that federal statutes that are silent with respect to Indian tribes cannot be applied to diminish tribal sovereignty, and ignores the fact that the Supreme Court and Congress have stated that gaming is a governmental, sovereign act of Indian tribes. See *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 757-58 (1998) (rejecting a purported distinction between commercial and governmental activities); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (tribal gaming is a governmental act free from state regulation); and Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2700, 2702(1) (providing “a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development,

whether to exercise jurisdiction over a tribally owned and operated on-reservation business. Reversing its long-established precedent, the Board concluded that nothing in the National Labor Relations Act (“Act”) precluded it from asserting jurisdiction over a tribal business. The Board took a two-pronged approach to analyzing whether or not to assert jurisdiction over an on-reservation tribal business.

First, it examined the three exceptions articulated in *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985), looking to whether applying the Act will: (1) touch on exclusive rights of self governance in purely intramural matters; (2) abrogate treaty rights; or (3) contravene statutory language or legislative history suggesting that Congress did not intend the law to apply to tribes.

Second, the Board applied a discretionary, jurisdictional balancing test, weighing the Board’s interest in effectuating the Act’s policies against the need to accommodate the unique legal status of federally recognized Indian tribes. *Id.* at 1062. Specifically, the Board stated that it would ask if the assertion of jurisdiction would “effectuate the purposes of the [NLRA],” *id.*, and noted that when a tribe “is fulfilling traditionally tribal or governmental functions, the Board’s interest in effectuating the policies of the [NLRA] is likely to be lower.” *Id.* at 1063. Thus, the Board recognized that “when the Indian tribes are acting with regard to this particularized sphere of traditional tribal or governmental functions, the Board should take cognizance of its lessened interest in regulation and the tribe’s increased interest in its autonomy” and decline to assert its discretionary jurisdiction. *Id.* at 1063. Applying that

self-sufficiency, and strong tribal governments”). To the extent that the Board denies the Request for Review, this argument is academic given the Regional Director’s conclusion that the NLRB will not exercise jurisdiction in this case.

balancing test, the Board concluded that it would assert jurisdiction over a petition involving employees working in the Tribe's Casino.

The Board has reiterated that same approach in a number of other cases. For example, in *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004), the Board declined to assert jurisdiction over a tribal health corporation. After declining to revisit its prior determination (*see Yukon Kuskoswim Health Corp.*, 329 NLRB 86 (1999)) that the *Coeur d'Alene* analysis was not a barrier to the Board's assertion of jurisdiction, the Board noted that it also needed to "consider whether policy considerations favor the assertion of the Board's discretionary jurisdiction." 341 NLRB at 1076. In making that determination, the Board balanced its "interest in effectuating the policies of the Act with the need to accommodate the unique status of Indians in our society and legal culture." *Id.* It found that these policy considerations weighed against the Board asserting its discretionary jurisdiction in that case. "As articulated in *San Manuel*, when an Indian tribe is fulfilling a traditionally tribal or governmental function that is unique to its status, the Board's interest in asserting jurisdiction is lower than when the tribe is acting in a typically commercial manner. Here, the Respondent is fulfilling just such a unique governmental function." *Id.*

In *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013), the Board recognized that matters involving "employment relationships between the Tribe and its governmental employees, such as employees of the Tribal Court system or Tribal police personnel," are fundamentally different from matters involving casino employees. *Id.* In this regard, *Little River Band* cited the Seventh Circuit's decision in *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495 (7th Cir. 1993), which exempted "law enforcement employees of Indian agencies from the Fair Labor Standards Act." The Board has also applied the *San Manuel I* analysis exercising jurisdiction in recent cases involving undisputedly casino

employees. See *Chickasaw Nation Operating WinStar World Casino & Int'l Bhd. of Teamsters Local 886, Affiliated with the Int'l Bhd. of Teamsters*, 359 NLRB No. 163 at *7 (July 12, 2013) (“the Nation offers no basis to distinguish the policy considerations discussed in *San Manuel*, and we find that those considerations weigh in favor of the Board asserting its discretionary jurisdiction in this case”); *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 at *12 (2013) (“The last factor in the jurisdictional analysis is determining whether policy considerations favor application of the Board’s discretionary jurisdiction. *San Manuel I* at 1062”).

2. The Regional Director Properly Applied The Board’s Standard

As shown above in Section II(B) of this Opposition, the Regional Director properly set out and applied the Board’s standard. After finding that the Tribe did not satisfy the *Coeur D’Alene* factors, the Regional Director then proceeded to the second prong of the Board’s *San Manuel I* analysis. The Regional Director concluded that “the Tribe’s employment of PSOs does fulfill a governmental function – providing a level of law enforcement on the reservation.” Decision, p. 21. The Regional Director further concluded that, as in *Yukon Kuskokwim*, the PSOs do not generally act in commerce, but rather act to protect the Tribe. Decision, pp. 22-23. The Regional Director concluded that the Tribe, as “employer of the PSOs, is *not* similar to a traditional commercial enterprise and is fulfilling the unique governmental function of providing law enforcement services to the reservation and protecting the tribal members and their assets individually as well as the assets of the Tribe as a whole.” Decision, p. 23 (emphasis added). The PSOs’ “principal purpose” of protecting tribal members and their assets “‘militate[s] against the Board’s assertion of jurisdiction.’” *Id.* (quoting *Yukon Kuskokwim*, 341 NLRB at 1076).

The record amply supports the Regional Director’s Decision in all respects, and the Union’s Request fails to identify any aspect of the Decision that is clearly erroneous. The Union’s Request also fails to establish any prejudicial error whatsoever.

B. The Union Conceded Below that PSOs are employed by the Tribal Government

The Union's Request seeks to revive its abandoned argument that the PSOs are employed by the Casino rather than the Tribe. Any such effort is foreclosed by the absence of any evidence in the record, *see* Decision at p. 20, and also by the Union's admission in its post-hearing brief that the Tribe employs the PSOs. Indeed, Petitioner expressly referred to "PSOs employed by San Manuel Band of Serrano Mission Indians ('Band')." Decision, p. 19 n.5. The Regional Director found that "Petitioner has reached the same conclusion that I ultimately reach, which is that the only employer entity of the PSOs is the Tribe." Decision, p. 19 n.5. Moreover, the Union failed to raise this argument before the Region. As the Decision correctly notes, "Petitioner's post-hearing brief does not address" the issue of which entity employs the PSOs. Decision, p. 19 n.5. The Union may not raise on a request for review an "issue or allege any facts not timely presented to the regional director." 29 C.F.R. § 102.67(d).

C. Each of the Union's Arguments Is Without Merit

1. This Case Is Controlled By *San Manuel I*

The Union's principal argument seems to be that the result here should follow the result in *San Manuel I*, and that the Regional Director disregarded *San Manuel I*. Both contentions are simply wrong.

Here, the Regional Director properly analyzed and applied *San Manuel I* and its progeny, but arrived at a different result than in *San Manuel I* based on the different record facts in this case. This Decision is firmly in line with Board precedent, as in each of the cases it has addressed to date the Board has applied the same test, but has reached different results depending on the facts before it. In *San Manuel I*, itself, the Board stated that it was faced with whether to assert jurisdiction over "a commercial enterprise" on the reservation, namely, the casino. 341

NLRB at 1055. In *Chickasaw Nation d/b/a WinStar World Casino*, 359 NLRB No. 163 (2013), the Board expressly stated that it was taking jurisdiction over an Indian tribe “**in its capacity as operator of the WinStar World Casino,**” *id.* at 1 (emphasis added), with respect to employees at the casino. *Id.* at 2. The Board further stated that “we recently asserted jurisdiction over tribally owned and operated *casinos* on Indian lands in *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013), and *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 (2013). *Id.* at 2 (emphasis added). In *Yukon Kuskokwim*, on the other hand, the Board applied the same test but declined to exercise jurisdiction. *See* 341 NLRB 1075.

Here, the petition does not seek to assert jurisdiction over the Tribe in its capacity as operator of a casino with respect to Casino employees. Rather, as the Regional Director found, it seeks to assert jurisdiction over the sovereign Tribal Government and its Department of Public Safety with respect to employees of the Tribal Government and Department of Public Safety who perform core, sovereign law enforcement functions on the Tribe’s Reservation.

As shown above at Section II (B), the Regional Director did not ignore *San Manuel I*, but rather applied it. Again, the Regional Director concluded, applying *San Manuel I*, that the Tribe acts in a governmental capacity in employing the PSOs and that “the Tribe, as employer of the PSOs, is run by managers and supervisors who are employed by the Tribe, with the ultimate authority over the operation of the Department of Public Safety resting with the Tribe’s business committee. The members of this business committee are elected by members of the Tribe.” *Decision*, p. 22.

The Union notes that the Tribe’s PSOs provide security services at the Casino as well as to tribal government offices, tribal member residences and private tribal reservation roads. But the Regional Director’s application of the *San Manuel I* analysis took that into account. In

contrast to *San Manuel I* where the Board’s focus was on the non-tribal member customer base, the Regional Director found that “[h]ere however, the focus of the responsibility of the PSOs is protecting the Tribe’s assets. Arguably, one of those assets is the goodwill and well-being of the Casino’s customers. Thus, while the PSOs ensure the well-being of customers of the Casino and while the vast majority of those customers are not Tribe members, the PSOs do so not as part of the Casino’s commercial enterprise but rather on behalf of the Tribe to protect the value of the Tribe’s sole commercial source of revenue.” *Id.* The Union fails to dispute this conclusion, which is fully supported by the record. *See, e.g.*, Hearing Transcript (“Tr.”), Vol. I, p. 127; pp. 130-131; p. 137; Vol. II, pp. 283- 284; p. 381-382.

In sum, the Regional Director’s decision considers and properly applies Board precedent.

2. The Union’s Attack on The Tribe’s Sovereignty Does Not Provide a Basis to Review The Decision

The Union seeks to undermine the Decision by claiming that the Tribe is not really a sovereign. Its attack simply misstates federal Indian law.

a. The Scope of Tribal Criminal Jurisdiction Does Not Provide a Basis to Review the Decision

The Union contends that Public Law 280, 18 U.S.C. § 1162 (“P.L. 280”), divests the Tribe of criminal jurisdiction, that this divestment means that the Tribe is not a sovereign and, therefore, that the Board should take jurisdiction. The Union fundamentally misunderstands federal Indian law and tribal sovereignty.

In *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195 (C.D. Cal. 1998), the court faced the question of whether Public Law 280, 18 U.S.C. § 1162, “divested the Cabazon Band of the authority to maintain a tribal police force for the purpose of enforcing its internal tribal criminal laws against members of the tribe, as well as detaining non-members of the tribe for the offenses committed on the reservation in order to turn them over to state or local law

enforcement officials for prosecution.” *Id.* at 1196. Like the Union here, the defendants - a County, its Sheriff and other officials - “contend[ed] that P.L. 280 completely divested the Cabazon Band of any authority to establish and operate a police force on the reservation” *Id.* The court rejected the County’s argument as “contradicted by controlling case law.” *Id.* at 1199.

The court noted that “Public Law 280 was designed not to supplant tribal institutions, but to supplement them.” *Id.* (quoting *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991), *cert. granted on other grounds*, 521 U.S. 1103 (1997)). Tribes have the right “to maintain tribal police forces ... to exclude trespassers from tribal lands ... [and] to restrain persons who breach the peace on the reservations” *Id.* (citing *Duro v. Reina*, 495 U.S. 676 (1990); *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976); *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975)). See also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (tribes may exclude persons from the reservation who violated tribal or other law). The court noted that the Eighth Circuit has “also rejected the notion that P.L. 280 divested the tribes of their inherent law enforcement jurisdiction.” *Id.* at 1199-1200 (citing *Walker v. Rushing* 898 F.2d 672 (8th Cir. 1990)). Thus the court concluded that it “must reject defendants’ argument that P.L. 280 should be read as divesting the Cabazon Band of its inherent authority to establish a police force with jurisdiction to enforce tribal criminal law against Indians and to detain and turn over to state or local authorities non-Indians who commit suspected offenses on the reservation.” *Id.* at 1200.

The Tribe has not chosen to delegate any of its criminal jurisdiction to the State or its political subdivisions. Rather, Congress has made that decision for all Indian tribes in California. In P.L. 280, Congress expressly extended to the State of California criminal

jurisdiction with respect to the offenses covered by specified federal statutes: the Major Crimes Act, 18 U.S.C. sections 1153, 3242; and the Indian Country Crimes Act, 18 U.S.C. section 1152.

As noted above, the courts, including the Supreme Court, have expressly held that P.L. 280 did *not* terminate tribal sovereignty. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court held that although P.L. 280 grants certain states jurisdiction over private civil litigation involving reservation Indians in state court, it does not grant states general civil regulatory authority over Tribes. 426 U.S. at 385, 388-390. The Court held that P.L. 280 was not intended to effect total assimilation of Indian tribes into mainstream American society. *Id.*, at 387.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court held, after the passage of P.L. 280 and grant of state criminal jurisdiction over Indian lands in California for purposes of enforcing the enumerated federal criminal statutes, that a California Indian tribe's retained sovereignty nevertheless precluded the application of state law to tribal gaming operations catering mainly to non-Indians from off the reservation. 480 U.S. at 205. The Court declared that "[i]n light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *id.* at 216-17, state regulation of the gaming facilities "*would impermissibly infringe on tribal government....*" *Id.* at 221-22 (emphasis added). Thus, the fact that the State exercises some criminal jurisdiction over Tribal lands for certain purposes does not change the fact that the Tribe is a sovereign or otherwise impact the Decision's correct application of the settled discretionary jurisdictional principles the NLRB set down in *San Manuel I* and *Yukon Kuskokwim*.

Most importantly, the exercise of state criminal jurisdiction also does not change the fact that the petitioned-for PSOs enforce the Tribal laws that the Tribe is entitled to enforce and that they perform for the Tribe the core governmental function of providing safety, security and law enforcement throughout the Reservation. Indeed, the regular interaction between PSOs and state law enforcement officers confirms that they perform core sovereign law enforcement functions.

b. The IGRA Compact Requirement Does Not Provide a Basis to Review The Decision

Contrary to the Union's assertion, the requirement of the federal Indian Gaming Regulatory Act ("IGRA") that Tribes enter a tribal-state gaming compact as a prerequisite to engaging in class III Tribal gaming does not divest the Tribe of its sovereignty or undermine the Decision's well-supported conclusion that the Board should not exercise jurisdiction. Initially, the petition does not implicate the Tribe's operation of Indian gaming. It implicates the *Tribal government's* operation of a *Department of Public Safety* and the work of the PSOs in that Department. As shown above, the Tribe's authority to operate a public safety department is an attribute of its inherent sovereignty, and is not merely granted through IGRA.

In any event, IGRA's compacting requirement does not establish an absence of sovereignty. Rather, in IGRA, Congress confirmed the Supreme Court's decision in *Cabazon Band* that tribal gaming is sovereign, governmental activity by providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting *tribal economic development, self-sufficiency, and strong tribal governments.*" 25 U.S.C. § 2702(1) (emphasis added). IGRA's core purpose is to strengthen tribal government, not weaken it. Further demonstrating its conclusion that tribal gaming is sovereign activity, Congress decreed that tribal casinos must be wholly owned by the tribal government, situated on land over which the tribe exercises governmental authority, operated under an intergovernmental tribal-state compact, and that their

revenues must be used exclusively for governmental purposes. 25 U.S.C. § 2710(b)(2)(A), § 2703(4), § 2710(d), § 2710(b)(2)(B). The Ninth Circuit recognizes that “gaming helps generate jobs and revenues *to support the governmental services and programs of the tribes that enter into compacts.*” *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 741 (9th Cir. 2003) (emphasis added). And it later underscored that in light of the congressional purpose to promote “tribal economic development, self-sufficiency, and strong tribal governments, ... the [Tribal] Casino is not a mere revenue-producing tribal business.” *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

3. Tribes Do Not Have to Structure Their Governments to Mirror States or the Federal Government

The Union’s claim that the Tribe is not sovereign because it does not have a “fully-developed” three-branch government that mirrors the federal government also betrays a fundamental misunderstanding of Indian sovereignty and Indian law. “A quintessential attribute of sovereignty is the power to constitute and regulate its form of government. An Indian nation is free to maintain or establish its own form of government, unless Congress has passed a statute dictating the matter of choosing tribal officials or other aspects of a tribe’s form of government.” *Cohen’s Handbook of Federal Indian Law*, § 4.01[2][a], p. 212 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978)). Put another way, “Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority.” *Id.* (citing *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896)). “Constitutional provisions such as the requirement of a republican form of government, U.S. Const. art. IV, § 4, separation of powers, and the prohibition against the establishment of religion, U.S. Const. Amend I, do not apply to tribes and have not been imposed on them by Congress.” Note, *The Indian Bill of Rights and the Constitutional Status of Tribal governments*, 82 Harv. L. Rev. 1343

(1969)). Indeed, the Supreme Court has specifically recognized tribal sovereignty even though tribes “by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)). More specifically, courts have recognized that tribes are not required to have a tripartite government that mirrors the federal government and that its courts need not have all the powers of U.S. courts. *See Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 240 (9th Cir. 1976) (Indian Civil Rights Act enables Indians to vest constitutional interpretation authorities in the tribal council); *Dodge v. Nakai*, 298 F. Supp. 26, 33 n.2 (D. Ariz. 1969) (stating that the Navajo Tribe is not required to establish distinct branches of government).

4. The Tribe’s Entry Into A Separate Collective Bargaining Agreement Does Not Warrant Review

The Union’s argument that the Tribe has waived an objection to NLRB jurisdiction by signing a collective bargaining agreement (the “CBA”) is wrong and unavailing for several reasons.

First, as a procedural matter, the Union cannot rely on the collective bargaining agreement or this argument in support of its Request because the collective bargaining agreement was not part of the record presented to the Regional Director and the Union did not make this argument before the Regional Director. *See* Rules and Regulations § 102.67(d) (a request for review “may not raise any issue or allege any facts not timely presented to the Regional Director.”).

Second, the CBA covers only individuals employed by the casino to perform casino-only functions and expressly excludes any security employees. It cannot and does not constitute a

waiver with respect to an entirely different group of employees employed solely by the Tribal government to perform law enforcement functions throughout the reservation.

Third, and perhaps most importantly, even if the Union had made the CBA part of the record below, its plain language bars the Union's argument. The CBA expressly states that it is not a waiver of tribal sovereignty. Article IV, Section 3 of the collective bargaining agreement expressly states that:

Nothing herein shall constitute a waiver of the sovereignty of the Tribe as an independent governmental entity, except as directly related to the recognition by the Tribe of the Union as the collective bargaining representative of employees covered by this agreement as explicitly provided in the San Manuel Tribal Labor Relations Ordinance. This Agreement shall not constitute or be interpreted as a waiver of sovereignty or a consent to the jurisdiction of any state, federal or local government agency, court or authority with respect to any statute, law, regulation or ordinance to which the Tribe is not currently subject by applicable law. In the event of any dispute concerning any alleged waiver of Tribal sovereignty, or the applicability to the Tribe or any state, federal or local law, statute, ordinance or regulation, there shall be a presumption that no such waiver was intended, and any such waiver must clearly appear from the face of the agreement.

CBA, Article 4, Section 3, Request, p. 20.

In short, the Tribe has not waived its objections to the NLRB's exercise of jurisdiction.

5. The Claim That PSOs Assigned To The Casino Perform Customer Service Functions Does not Provide a Basis for Review

The Union's assertion that some PSO's are assigned to the Casino and that they perform customer service functions does not provide a basis for review. The Regional Director correctly found, based on the undisputed evidence, that the Department of Public Safety is a Department of the Tribal Government performing a core traditional governmental function. Decision, pp. 21 - 23. It is undisputed that all decisions about the number and deployment of PSOs to provide for the safety and security of the Reservation and the enforcement of Tribal law, including the number assigned to the Facilities Division, are made by DPS Director John Klein, a Tribal government employee, based upon his assessment of the staffing needed to provide for all of the

Tribe's security, safety and law enforcement needs. *See* Tr., Vol. I, p. 136. There is no evidence that any employee of the Casino plays any role in these decisions.

The Union apparently seeks, belatedly, to assert that PSOs who are assigned to the Facilities Division have different terms and conditions of employment than PSOs assigned to the Patrol Division. At the outset, such a contention is immaterial to deciding the issue of the PSOs' employer.⁴ In addition, any differences between the duties of the PSOs assigned to different Divisions have been determined and assigned solely by the Tribal government, not the Casino, and simply reflect the different duties that are necessary to provide safety, security and law enforcement with respect to the different types of property within the Reservation. *See, e.g.,* Tr., Vol. I, pp. 29-30; p. 44; p. 51; p. 56; pp. 126- 27; pp. 130-131; pp. 136-137; pp. 156-157; pp. 173-174.

Moreover, there really are no significant differences among the terms and conditions of employment of the PSOs assigned to the different Divisions. *See* Decision, pp. 11 - 13. All are employed and paid by the Tribal government through the Tribal government's Federal Employer Identification number. Decision, pp. 9, 12, 20; *see* Tr. Vol. I, pp. 55-56, 138. All are subject to the same job descriptions and prerequisites for hire, the same hiring process, and the same pre-employment training covering both Facilities and Patrol Division duties. Decision, pp. 11, 12; *see* Tr. Vol. I, pp. 139-141, 144-147 and Independent Party Exhibit 10; Vol. II, p. 292. All are

⁴ As the petitioned-for unit included all PSOs, the issues at the hearing did not concern unit composition, rather, they concerned who is the employer of the PSOs and whether the Board would have jurisdiction over the employer. As to the first issue, it is settled that "the only employer entity of the PSOs is the Tribe." Decision at 19 n.5. As to the second issue, the Regional Director's decision finding no jurisdiction over the Tribe is the subject of this request for review. Accordingly, the Union now cannot raise issues that were not properly raised before the Regional Director. *See* 29 C.F.R. § 102.67(d) ("such request may not raise any issue or allege any facts not timely presented to the Regional Director"). However, for the reasons discussed above, the Union's belated challenge to the commonality of interest among the PSOs is meritless.

subject to the same pay scale, benefits, overtime policies and Policy Manual. Decision, p. 12; *see* Tr. Vol. I, pp. 156-157, 161; Vol. II, p. 256. All wear the same uniforms and carry the same equipment. Decision, p. 13; *see* Tr. Vol. I, p. 152. All have the same basic duties to enforce safety, security and Tribal law throughout the reservation. Decision, pp. 9, 13-15; *see* Tr. Vol. I, pp. 137, 168-170. All have the same authority to arrest, eject individuals from the reservation and use force. Decision, pp. 14 - 18; *see* Tr. Vol. I, pp. 174, 176; Vol. II, pp. 196-197. All investigate incidents, gather evidence, prepare reports and interact with State law enforcement with respect to prosecutions. Decision, pp. 15 - 16, 17 -18; *see* Tr. Vol. I, pp. 168-169, 174-175. All are able to transfer to other Divisions every six months on the same terms. Decision, p. 17; *see* Tr. Vol. I, pp. 157-158. All are able to work throughout the reservation, and have been assigned to other Divisions as needed. Decision, p. 11; *see* Tr. 243. In sum, the Tribe has chosen, as a government, to have one Department of Public Safety to operate throughout its jurisdiction. The Union, and this Board, cannot undo that sovereign governmental decision and carve up that unified department in an effort to assert jurisdiction over it.

The Union's effort to assert that the PSOs are used as customer service employees in the Casino does not provide a basis for review for multiple reasons. First, all of the materials on which the Union relies for this argument - the Affidavits of Mickey Martines and Angela Clark and the six exhibits attached to the Request - were not presented at the hearing and are outside the record presented to the Regional Director. Accordingly, these materials must be disregarded. *See* Rules and Regulations Section 102.67(d).⁵ Further, both Mr. Martines' and Ms. Clark's

⁵ The Union's claims that it was denied a continuance and that its witnesses were "called on short notice and not given all of the details about questions [they] would be asked because there was a very short time frame for scheduling the hearing" (Affidavit of Witness Mickey Martines at ¶ 1; *see also* Affidavit of Witness Angela Clark at ¶ 1) do not justify reference to matters outside the record before the Region in blatant violation of the Board's rules. First, the Union

affidavits contradict their sworn testimony at the hearing.⁶ And, finally, both Mr. Martines' and Ms. Clark's affidavits demonstrate that they actually perform the kinds of traditional governmental functions that the Regional Director found PSOs perform in declining to assert jurisdiction.⁷

In sum, although the submission of the affidavits blatantly violates the Board's Rules and Regulations and should not be considered at all, they do not undermine any of the Regional Director's factual or legal conclusions or provide a basis for the Board to review the Decision.

triggered the hearing date by its unilateral choice of when to file the petition, and had two weeks after the petition was filed (from October 17 to October 30) to prepare for hearing. Second, the Tribe put the Union on notice more than a week before the hearing started that the Tribe was the sole employer of the PSOs and that the NLRB lacked or should not exercise jurisdiction. *See* Tr. 7-8. The Union's now-stated failure to be prepared and to present its evidence is solely attributable to the Union.

⁶ For example, Mr. Martines' statement that the "San Manuel Band Indian Casino" hired him, Affidavit ¶ 2, contradicts his sworn testimony in which he admitted that the Tribe, not the Casino, employed him. *See* Tr. 346. Union witness Clark admitted that she reported to a DPS corporal who makes her assignments on a daily basis, *see* Tr. 336, 344, and that she does not report to anyone who has a position with the Casino on a regular basis. If she is asked to do something by a Casino manager that is consistent with DPS policy or procedure she may do it, but such requests are casual and very rare. *See* Tr. 336, 344. Martines similarly admitted his chain of command is within DPS. *See* Tr. 370. He conceded that Casino supervisors merely alerted him to issues within his DPS responsibilities rather than giving him instructions. *See* Tr. 381.

⁷ Both admit that their "job functions inside the casino have primarily involved the safety and security of patrons in the casino." Martines Affidavit ¶ 5; Clark Affidavit ¶ 5. Furthermore, the principal examples they give of alleged "customer relations" functions are actually law enforcement functions. These include "observ[ing] patrons as they enter the casino to determine if their age is 21 years or older" (Martines Affidavit ¶ 5; Clark Affidavit ¶ 5); and ejecting from the Casino and tribal property customers who are caught cheating, engaging in annoying behavior or are intoxicated (Martines Affidavit ¶¶ 10-11; Clark Affidavit ¶¶ 10-11).

IV. Conclusion

For all of these reasons, the Tribe respectfully requests that the Board deny the Union's Request for Review.

Respectfully submitted,

Dated: January 10, 2013

LINDA AUERBACH ALLDERDICE
HOLLAND & KNIGHT LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
213.896.242
email: linda.allderdice@hklaw.com

CERTIFICATE OF SERVICE

I, Linda Auerbach Allderdice, certify that a true and correct copy of the foregoing document titled **SAN MANUEL BAND OF MISSION INDIANS' OPPOSITION TO REQUEST FOR REVIEW** was served upon the following via email this 10th day of January, 2014 at the email addresses set forth below.

Peter C. Luck, Membership Coordinator
Law Enforcement Employees Benevolent Association
18 North 7th Street, Suite 100
Stroudsburg, PA 19380
pluck@leeba.org

Richard Merritt, Esq.
c/o Peter C. Luck, Membership Coordinator
Law Enforcement Employees Benevolent
Association
18 North 7th Street, Suite 100
Stroudsburg, PA 19380
rmerritl@optonline.net

Frank Lawrence, Esq.
LAW OFFICE OF FRANK LAWRENCE
578 Sutton Way, No. 246
Grass Valley, California 95945
530,478.0703
frank@franklawrence.com

Executed this 10th day of January, 2014, at Los Angeles, California.

/S/ _____
Linda Auerbach Allderdice