

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 . . .⁴

In his Decision and Direction of Election ("DD&E") the Regional Director found Board jurisdiction proper. The DD&E applied the Board's reasoning from *San Manuel*, using the *Tuscarora-Coeur d'Alene* analytical framework to determine if application of the Act abrogated the Tribe's treaty rights.⁵ The Director found that the Tribe's treaty confers only a general right of possession and exclusion, thus application of the Act did not abrogate a specific treaty right.⁶ The Tribe petitioned the Board for review of the Director's DD&E. The Board denied review because the Tribe raised no substantial issues warranting review.

In the second representation case, *Soaring Eagle Casino and Resort, a Wholly Owned Governmental Subdivision of the Saginaw Tribe*⁷ ("*Soaring Eagle II*"), the International Union, Security, Police and Fire Professionals of America sought to represent a unit of security guards at the Casino. The Tribe again argued that the Board did not have jurisdiction, relying primarily on the record of *Soaring Eagle I*. However, the Tribe introduced four new documents that were not in the record in *Soaring Eagle I*. The Tribe claimed that the documents demonstrated that their treaty rights would be abrogated by application of the Act: (1) the 1855 report of the Commissioner of Indian Affairs to the President of the United States; (2) an 1864 letter from the Tribe to the President of the United States asking to renegotiate the Tribe's 1855 treaty; (3) an 1871 letter from the Tribe to the U.S. Indian Agent in Detroit, Michigan requesting the removal of John Iron from the reservation; and (4) minutes of an 1889 meeting of the Tribal Chiefs recounting their decision to petition the federal government for the removal of trespassing white men from their reservation.

In *Soaring Eagle II* the Regional Director again concluded that the Tribe was subject to the Board's

⁴ Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 1864 art. 2, Oct. 18, 1864, 14 Stat. 657.

⁵ See Decision and Direction of Election, Before the National Labor Relations Board, Case GR-7-RC-23147 at 7-8 (Nov. 20, 2007).

⁶ See *id.* at 8.

⁷ Case 07-RC-23163 (Jan. 17, 2008).

jurisdiction.⁸ The Tribe then requested Board review of the Regional Director's DD&E. In its brief to the Board the Tribe argued, among other things, that the Regional Director did not appropriately analyze the new Documents.⁹ The Tribe argued that the Documents demonstrated that application of the Act abrogated the Tribe's treaty rights.¹⁰ The Tribe ultimately withdrew its request for review and the Board never considered the new documents.

II. The New Documents

The 1855 Commissioner's Report outlined the United States' efforts to establish Indian Reservations to curb the nomadic situation facing Indian tribes as white settlers moved farther west, displacing Indians already settled there. The Commissioner stated that Indians should not be interfered with in the "peaceful possession" and "undisturbed enjoyment" of their established reservation land.

In the 1864 letter to the President, the Tribe petitioned the government to purchase more land for their reservation to provide for future generations and to prevent the "disruptive influx of white settlers." The letter ultimately lead to the signing of the 1864 Treaty.

In the 1871 letter to the Indian Agent in Detroit, Michigan, the Tribe requested the removal of a missionary, John Iron, from the Tribe's reservation. According to the letter, the Tribe had given Iron permission to settle on their land but later he defrauded several members of the Tribe. Accordingly, the Tribe's Chiefs petitioned the Indian Agent to remove Iron from their reservation.

The minutes of the Chiefs meeting in 1889 outlined their intention to petition the Secretary of the Interior and the Commissioner of Indian Affairs to protect their treaty rights by requesting the removal of individuals trespassing on their reservation. The minutes stated that their desire was to determine "what steps to take to check and prevent white men . . . [from] trespassing upon our Reservation in Isabella County."

⁸ See Decision and Direction of Election, Before the National Labor Relations Board, Case GR-7-RC-23163 at 7-9 (Jan. 17, 2008).

⁹ See Saginaw Chippewa Indian Tribe's Request for Review of Regional Director's Decision and to Stay Direction of Election, Before the National Labor Relations Board, Case GR-7-RC-23163 at 34 (Jan. 28, 2008).

¹⁰ See *id.* at 5-8, 27-28.

ANALYSIS

We conclude that the Tribe's Documents show no more than a general right of possession and exclusion. Therefore, the Board should assert jurisdiction over the Casino because the Act is a statute of general application and would not abrogate a specific treaty right.

In *San Manuel*, the Board adopted a new standard for determining whether it has jurisdiction over enterprises associated with Indian tribes.¹¹ The Board first held that the NLRA is a statute of general application that applies to Indian tribes because, as the Supreme Court stated in *Federal Power Commission v. Tuscarora Indian Nation*,¹² "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."¹³ The Board then held that there are certain exceptions, set forth in *Donovan v. Coeur d'Alene Tribal Farm*,¹⁴ that dictate when a statute of general application should not apply to the conduct of Indian tribes.¹⁵ Those exceptions are when:

(1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) *the application of the law would abrogate treaty rights*; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.¹⁶

The Tribe claims that Board jurisdiction is not proper because, under the second *Coeur d'Alene* exception, application of the Act abrogates their right to the "exclusive use, ownership, and occupancy" of the reservation land guaranteed in the 1864 Treaty. However, to avoid federal regulation, application of a statute must jeopardize a *specific* exclusionary right that is secured by the treaty, rather than a *general* right of possession and exclusion.¹⁷ If the claim is not based in a specific treaty

¹¹ 341 NLRB at 1060.

¹² 362 U.S. 99 (1960).

¹³ *Id.* at 116; 341 NLRB at 1059.

¹⁴ 751 F.2d 1113 (9th Cir. 1985).

¹⁵ 341 NLRB at 1059

¹⁶ *Id.* (quoting *Coeur d'Alene*, 751 F.2d at 1115) (emphasis added).

¹⁷ See *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 934-35 (7th Cir. 1989) (holding treaty only conveyed land to tribe

right then it will be considered only a general right of possession and exclusion and accordingly is not sufficient to trigger the second *Coeur d'Alene* exception.¹⁸ A general right of possession and exclusion is analogous to the inherent sovereign right that was insufficient to bar application of OSHA in *Coeur d'Alene*.¹⁹ In *San Manuel*, where there was no treaty at issue, the Board similarly found that an Indian tribe's sovereign right to exclude non-tribal members from its reservation was insufficient to preclude the Board's exercise of jurisdiction.²⁰ Thus, a treaty that confers only a general right of possession and exclusion of non-Indians from tribal land is not abrogated by federal regulation.

In its brief to the Board in *Soaring Eagle II*, the Tribe argued that the four Documents demonstrate that the 1864 Treaty gave it the right to exclude white men from its land. The Tribe relied on the 1855 Report of the Commissioner of Indian Affairs and the 1864 letter to the President to show that one of the Chiefs' primary concerns when they negotiated the 1864 treaty was to prevent "white settlers" from living on the reservation.²¹ The Tribe relied on the 1864 letter and the 1871 petition for removal of John Iron to show that in the years following the 1864 treaty, the Tribe was "vigilant" in enforcing its right to exclude "white settlers" from the reservation.²² Furthermore, the minutes of the 1889 Chiefs meeting demonstrate that the Chiefs wanted to prevent all "white men" from "trespassing" on tribal land. In sum, the Tribe

and neither tribe nor court could find a single specific treaty right that would be abrogated by application of ERISA); *United States Dep't of Labor v. Occupational Safety & Health Rev. Comm'n (OSHRC)*, 935 F.2d 182, 186-87 (9th Cir. 1991) (holding conflict between statute and treaty right must be "direct" rather than attenuated to prevent the application of a general federal statute to Indian tribes); *Phillips Petroleum Co. v. U.S. E.P.A.*, 803 F.2d 545, 556 (10th Cir. 1986) ("[*Tuscarora*] rule of construction can be rescinded where a tribe raises a specific right under a treaty or statute which is in conflict with the general law to be applied").

¹⁸ See OSHRC, 935 F.2d at 186.

¹⁹ See *id.* ("[t]he identical right should not have a different effect because it arises from general treaty language rather than recognized, inherent sovereign rights").

²⁰ 341 NLRB at 1061.

²¹ See *Saginaw Chippewa Indian Tribe*, *supra* note 9, at 27.

²² See *Saginaw Chippewa Indian Tribe*, *supra* note 9, at 28.

asserted that, "[the] [D]ocuments clearly indicate that the [Tribe] understood the 1864 Treaty guaranteed to them 'exclusive use, ownership, and occupancy' of the [Reservation] and permitted them to exclude *non-Indians* from their trust lands" (emphasis added).²³

We conclude that the Documents do not prove that the treaty guaranteed the Tribe anything more than a general right of possession and exclusion. Indian treaties must be construed as Indians would have understood them at the time they were negotiated.²⁴ However, Indian tribes cannot rewrite their treaty beyond its clear terms "to remedy a claimed injustice or to achieve the asserted understanding of the parties."²⁵ We agree that the Documents do show that, at the time the treaty was negotiated, the Tribe understood that the treaty allowed them to prevent white men from settling on their reservation. They further show that the Tribe was vigilant in enforcing that right. However, we reject the Tribe's contention that their right to prevent white men from settling on their land extends to them the right to avoid federal regulation of commercial enterprises operated on that land. The Documents do not demonstrate that the 1864 Treaty gave them that specific right; nor does the Tribe rely on them to prove anything more than a general right of possession and exclusion. The fact that the Tribe was vigilant in enforcing that right in the years after the 1864 Treaty does not make the right any more specific. Under *Choctaw*, the Tribe cannot rewrite a treaty provision to expand it beyond a general right of possession and exclusion. They thus fail to show that their right to exclude white settlers also gives them the specific right to avoid federal regulations. Therefore, the Board's jurisdiction over the Tribe is proper because, among other things, it does not abrogate any specific right guaranteed in the 1864 Treaty.

Accordingly, the Tribe's four documents show nothing more than a general right of possession and exclusion. The

²³ See *Saginaw Chippewa Indian Tribe*, *supra* note 9, at 28.

²⁴ *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

²⁵ *Id.*

Documents therefore fail to prove that the Board's assertion of jurisdiction is not proper under the *Tuscarora-Coeur d'Alene* analysis set forth in *San Manuel*.

B.J.K.

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