

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ELAINE L. CHAO, Secretary of	)	
Labor, United States	)	No. CV-07-0354-CI
Department of Labor,	)	
	)	
Petitioner,	)	REPORT AND RECOMMENDATION
	)	FOR ORDER GRANTING
v.	)	RESPONDENT'S MOTION TO
	)	QUASH, DENYING PETITION FOR
SPOKANE TRIBE OF INDIANS	)	ENFORCEMENT OF SUBPOENA, AND
d/b/a/Chewelah Casino,	)	DISMISSING PETITION
	)	
Respondent.	)	

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Before the court is the United States Secretary of Labor's (Petitioner) Petition for Enforcement of an Administrative Subpoena (Ct. Rec. 1) and the Spokane Tribe of Indians' (Respondent) Motion to Quash (Ct. Rec. 19). A hearing with telephonic oral argument took place on November 30, 2007. Evan H. Nordby, United States Office of the Solicitor, represented Petitioner; Lewis M. Schrawyer represented Respondent. The parties have not consented to proceed before a magistrate judge.

After the hearing, the court requested additional information and briefing. Respondent filed a copy of the 2007 Gaming Compact between the Spokane Tribe of Indians and the State of Washington; relevant portions of policy and procedure manuals for the Chewelah

1 Casino; the Spokane Tribal Employment Rights Ordinance of 1995; a  
2 1993 Resolution authorizing the Spokane Tribal Business Council to  
3 assume the role as Tribal Gaming Commission; and a full description  
4 of the nature of the land on which the Casino is located. (Ct. Rec.  
5 35-39.) In addition, Respondent filed a supplemental brief. (Ct.  
6 Rec. 56.)

7 Petitioner submitted supplemental briefing regarding the  
8 penalties authorized by the Fair Labor Standards Act (29 U.S.C. §§  
9 201, *et seq.*) and their applicability to an Indian tribe. (Ct. Rec.  
10 60, 58.)

11 Having reviewed the file and considered the parties arguments,  
12 **IT IS RECOMMENDED** that Respondent's Motion to Quash be **GRANTED**, and  
13 Petitioner's Petition for Enforcement of an Administrative Subpoena  
14 be **DENIED and DISMISSED** for lack of jurisdiction.

#### 15 BACKGROUND

16 The Department of Labor (DOL) filed its Petition for Enforcement  
17 of an Administrative Subpoena after the Spokane Tribe of Indians  
18 (Tribe) refused to provide requested wage and hour records for  
19 employees working at the Chewelah Casino (Casino). The subpoena is  
20 part of an investigation launched as a result of alleged violations  
21 of the Fair Labor Standards Act (FLSA) in a complaint forwarded to  
22 the Washington State Department of Labor and Industries in August  
23 2007.

24 The Tribe responded to the subpoena with a Motion to Quash, in  
25 which it contends that as a sovereign nation, it is not subject to  
26 the provisions of the FLSA. The Tribe asserts that because DOL  
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jurisdiction is lacking, it is not subject to the subpoena.

DOL argues that even as a sovereign nation, the Tribe is subject to federal suit. It contends that FLSA is a statute of general applicability, and therefore applies to Indian tribes unless they are expressly excluded.

#### FACTS

##### A. The DOL Administrative Subpoena

No details of the complaint, or complainant(s), that triggered the DOL investigation have been provided. DOL asserted at the hearing that the complainant is entitled to confidentiality. The subpoena directs the Tribe to provide wage records and books, documents, and other tangible things regarding "all other conditions and practices of employment" from June 15, 2005, until the present. The subpoena includes requests for copies of W-2 forms for all employees, phone numbers of all employees, annual gross sales for the past three years, names of three suppliers/vendors from outside the state of Washington, and copies of all employment contracts, pay stubs, etc. (Ct. Rec. 1, Ex. D, Att. 1.)

##### B. The Casino<sup>1</sup>

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<sup>1</sup> Petitioner, citing *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1077 (9<sup>th</sup> Cir. 2001), contends a fact-based inquiry by the court is barred at the subpoena enforcement stage. (Ct. Rec. 23 at 14.) However, the court's inquiry into facts in this matter is necessary to assess whether the Casino is an essential governmental function excepted from federal regulation, and is not for the

1 The Casino is owned and operated by the Tribe and is open for  
2 business to tribal members and non-members. The Tribal Business  
3 Council oversees the operation of the Casino. Although the Casino is  
4 not within the boundaries of the Tribe reservation, it is on the  
5 Mistequa Allotment deeded to the federal government to be held in  
6 trust for the Tribe. (Ct. Rec. 37 at 17.) A letter from the U.S.  
7 Department of Interior, Bureau of Indian Affairs in Portland, Oregon,  
8 dated June 12, 1989, submitted by Respondent states: "[I]t is the  
9 position of this office that the subject land [Allotment No. CH2,  
10 allotted to Mistequa pursuant to the Act of July 4, 1884] falls  
11 within the definition of Indian Country and the restrictions against  
12 alienation without the approval of the Secretary continues [sic] in  
13 force and effect." (Ct. Rec. 37 at 16.)

14 The Tribe operates two casinos. Unlike other Tribe enterprises  
15 that are managed by an Enterprise Board, the two casinos are under  
16 direct control of the Tribal Business Council. The income from these  
17 two enterprises funds Tribal programs such as the Senior Citizen  
18 programs, programs for developmentally disabled adults, a fire  
19 department and EMT program, general food distribution program, social  
20 service programs for families involved in dependency proceedings,  
21 drug programs, mental health programs, a culture program, Tribal  
22 college, as well as government and administrative programs, natural  
23 resource programs, including park rangers, and Lake Roosevelt

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26 purposes of identifying a defense to allegations of FLSA violations.  
27 See discussion *infra* at 9-11.

1 recreational activities. (Ct. Rec. 21, Declaration of Carol Evans,  
2 Chief Financial Officer of the Tribe.)

3 Chief Financial Officer Evans represents that the two casinos  
4 generate most of the enterprise income. She states that "the  
5 majority of the income beyond operating expenses from the two Tribal  
6 casinos goes into the general fund," and "casino income is  
7 inseparable from government activities." (Ct. Rec. 21 at 2.)

8 C. Casino Employees

9 At the November 30, 2007, hearing, counsel for both parties  
10 represented that the Casino employs non-members as well as Tribe  
11 members. The Chewelah Casino Policy Manual (Manual) includes  
12 provisions regarding Casino employee wages, overtime, performance and  
13 grievance procedures, among other topics. (Ct. Rec. 39.) There is  
14 no minimum wage guarantee; rather, the Manual provides that the  
15 Casino will "make every effort to pay wages and salaries which are  
16 competitive with those rates being paid to similar positions within  
17 this geographic region." (Ct. Rec. 39 at 4-5.) A casino employee  
18 must grieve any objections to pay or employment conditions through  
19 the Tribal grievance process. (Ct. Rec. 39 at 8-10.)

20 The Manual expressly provides that wage policies "may be  
21 unilaterally modified or revoked at any time." (Ct. Rec. 39 at 5.)  
22 Modification of wages, including the minimum wage, are at the  
23 Casino's "sole discretion." The Manual specifically states,  
24 "[s]alaried employees are exempt from the overtime provisions of the  
25 Federal Wage and Hour Law and do not receive overtime." (*Id.*)  
26 Hourly employees are paid overtime at time and a half of regular pay  
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1 for more than forty hours in a week and work on holidays. (*Id.* at 5-  
2 6.)

3 The Spokane Tribal Employment Rights Ordinance of 1995 (TERO)  
4 (Ct. Rec. 36) appears to regulate employment relations between Tribe  
5 members "on or near" the Reservation and on-Reservation employers.  
6 (Ct. Rec. 36 at 6, 36.) "Reservation" is defined as land "within the  
7 boundaries of the Spokane Indian Reservation and any trust lands  
8 under jurisdiction of the Spokane Tribe, wherever they are located."  
9 (*Id.* at 9.) The TERO's stated purpose is to require fair employment  
10 of, and prevent discrimination against, Indians by Reservation  
11 employers. The Tribe, the state of Washington and the Federal  
12 Government are excluded from the TERO provisions, unless they engage  
13 in a "business for profit" as defined in the TERO, *i.e.*, "any  
14 business, enterprise, or operation which is not considered a non-  
15 profit or not-for-profit organization by the IRS." (*Id.* at 6-7.)<sup>2</sup>

16 The Commission that governs TERO provisions expressly retains  
17 "all rights and privileges of Sovereign Immunity of the Spokane Tribe  
18 of Indians." (*Id.* at 11.) The Commission is granted specific  
19 authority to adopt EEOC guidelines, and enter into cooperative  
20 agreements with federal agencies such as EEOC and Office of Federal  
21 Contract Compliance Programs of the U.S. (OFCCP). (*Id.*) The  
22 Commission may require Reservation employers to "give preference to  
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24 <sup>2</sup> As discussed above, the Casino is on allotment land which is  
25 considered Indian Country. Under the current record, it is assumed  
26 that the Casino is a business for profit.  
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1 Tribal and other Indian-owned businesses in the award of contracts  
2 and subcontracts." (*Id.*) Employers subject to the TERO are required  
3 to "give preference to local Indians in hiring, promotion, training  
4 and all other aspects of employment, contracting or subcontracting,  
5 and must comply with this Ordinance and the Rules, Regulations and  
6 orders" of the Commission. (*Id.* at 13.)

7 Labor unions with collective bargaining agreements with  
8 employers working on the Reservation are required to comply with  
9 TERO, including the filing of a "written agreement stating that the  
10 union will comply with this Ordinance and the rules, regulations and  
11 orders of the Commission." Absent this written agreement, union  
12 employees may not begin work on the Reservation. (*Id.* at 20-21.)  
13 There are provisions for grievances, enforcement of provisions,  
14 penalties, appeals, confiscation and sale of a non-compliant party's  
15 property by Tribal police. (*Id.* at 22-31.)

16 Section 14.0 of the TERO deals with Wage and Hour Standards, and  
17 requires the employer to pay the highest rate of pay when "Federal,  
18 State and local wage, rates and guidelines are used." It also allows  
19 the Commission to use federal, state or local agencies in resolving  
20 wage and hour issues.<sup>3</sup> (*Id.* at 33.) If an employer does not comply  
21 with these wage provisions, it is subject to the sanctions mentioned  
22 above.

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23  
24 <sup>3</sup> Section 14.3 provides: "The Commission or the Director may use  
25 Federal, State, local or Tribal agencies in resolving a discrepancy  
26 concerning wages and hours worked."  
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1 D. The 2007 Gaming Compact

2 After two years of negotiations,<sup>4</sup> the Tribe signed a Gaming  
3 Compact with the state of Washington in 2007 (Compact), as authorized  
4 in the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721  
5 (IGRA).<sup>5</sup> (Ct. Rec. 35.) According to the Compact, the principal goal  
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7 <sup>4</sup> The Tribe has a history of conflict regarding its right to run  
8 casinos. The Resolution authorizing the Tribe to sign the Compact  
9 states, "[F]or over 16 years, the Tribe has been involved in  
10 negotiations and litigation with the United States and with the State  
11 of Washington concerning the Tribe's inherent right to engage in  
12 Class III Gaming, as that term is defined in the Indian Gaming  
13 Regulatory Act." (Ct. Rec. 35 at 3.)  
14

15 <sup>5</sup> IGRA was passed in 1988 to regulate Indian gaming. The stated  
16 purpose of the IGRA is "to promote tribal economic development,  
17 tribal self-sufficiency and strong tribal government." 25 U.S.C. §  
18 2701(4). It also provides that the Tribe has "the exclusive right to  
19 regulate gaming activity on Indian Land if the gaming activity is not  
20 specifically prohibited by Federal Law and is conducted within a  
21 State which does not . . . prohibit such gaming activity." *Id.* §  
22 2701 (5). The statute provides that "[n]othing in this chapter  
23 precludes an Indian tribe from exercising regulatory authority  
24 provided under tribal law over a gaming establishment within the  
25 Indian tribe's jurisdiction if such regulation is not inconsistent  
26 with this chapter or with rules or regulations adopted by the  
27 [National Indian Gaming] Commission." 25 U.S.C. § 2713(d); (Ct. Rec.



of federal Indian policy is "to promote tribal economic development, tribal self-determination and a strong government to government relationship." (*Id.* at 11.) The Tribe specifically agreed, under 25 U.S.C. § 2710 (b)(2)(B), to use net revenues from gaming "to fund tribal government operations or programs, to provide for the general welfare of the Tribe and its members, to promote tribal economic development, to donate to charitable organizations, or to help fund operations of local government agencies." (Ct. Rec. 35 at 11.)

The Compact requires every Casino employee to be licensed by the Tribal Gaming Commission, which is, in fact, the Tribal Business Council. The Tribal government has primary responsibility for investigating and approving all applicants. After a temporary license is issued by the Tribe, eligibility is verified by the State Gaming Agency. (Ct. Rec. 35 at 19-22.) The Tribe is authorized to enact regulations for the operation and management of gaming operation. (Ct. Rec. 35 at 18, 31.) The Compact expressly states the Tribe does not waive its sovereign immunity except as set forth in the terms of the Compact. (Ct. Rec. 35 at 29-30.)

#### ISSUES

1. Is the issue before the court a pure question of jurisdiction that should be resolved at the subpoena-enforcement stage?
2. Is the FLSA a statute of general applicability that applies to Indian tribes, even though the statute is silent regarding Indian tribes?
3. Assuming FLSA applies generally, does DOL jurisdiction extend to the regulation of employees at the Casino?

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20 at 24.)



1 ADEA did not apply to the tribe under the circumstances of the case,  
2 enforcement of the subpoena should be denied. *Id.* at 1082.

3 The *Karuk* court distinguished between challenges to an agency's  
4 subpoena based on "coverage" and those based on "jurisdiction,"  
5 stating:

6 [C]ourts should not refuse to enforce an administrative  
7 subpoena when confronted by a fact-based claim regarding  
coverage or compliance with the law . . . .

8 . . . .

9 . . . . There is a difference, particularly in the case of  
10 Indian tribes, between the determination whether an agency  
has regulatory jurisdiction to enforce a subpoena in the  
11 first instance, and the very different question whether a  
subpoena recipient has a defense to liability under the  
12 applicable statute.

13 *Id.* at 1076-1077. Once the distinction is made, the court must  
14 determine if the question of jurisdiction is ripe for determination.  
15 *Id.* at 1077. The *Karuk* court reasoned that if an agency does not  
16 have jurisdiction, and the Indian tribe is not subject to the federal  
17 laws that authorized the administrative investigations, the court's  
18 enforcement of a subpoena would result in a burden and "irreparable  
19 injury vis-a-vis the tribe's sovereignty." It also found EEOC did  
20 not have any special expertise that would be helpful in interpreting  
21 the statute "with respect to Indians." Therefore, the *Karuk* tribe's  
22 challenge to the ADEA's jurisdiction was held to be properly  
23 addressed at the subpoena-enforcement stage. *Id.* at 1078.

24 Here, both parties appear to agree that *Karuk* is dispositive on  
25 the issue of whether court intervention is appropriate at this stage.  
26 The Tribe contests jurisdiction of the federal agency over Tribal  
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employees and DOL does not allege special expertise over this Indian matter. The court is not asked to determine if the Tribe has defenses to allegations of wage violations. If jurisdiction is lacking, to require compliance at this stage would be injurious to the Tribe's sovereignty; therefore, it is appropriate to resolve the issue at the subpoena enforcement stage.

B. Federal Regulation of Indian Tribe Activities

Although Indian tribes enjoy a unique sovereign immunity status from private law suits, they are not immune from suits brought by the federal government. *Karuk*, 260 F.3d at 1075. Further, Congress's authority over tribal matters "is extraordinarily broad," and Congress has the power to divest Indian tribes of their sovereign authority by explicit legislation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). However, this plenary power is tempered by a traditional recognition that Indian tribes have an inherent power to regulate matters of local self government and "make their own substantive law in internal matters." *Id.* at 55. Although *Santa Clara Pueblo* addressed the issue of a private individual's right to sue an Indian tribe in federal court under the Indian Civil Rights Act, the Court was clear in its holding that Congressional intent to intrude on tribal sovereignty must be explicit: "[U]nless and until Congress makes it clear its intention to permit the additional intrusion on tribal sovereignty that adjudication . . . in a federal forum would represent, we are constrained to find that [ICRA], does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id.* at 72.

1       Against the backdrop of Congressional plenary power and an  
2 Indian tribe's sovereignty, the Supreme Court addressed an Indian  
3 tribe's power to regulate activities of nonmembers on lands within  
4 its reservation in *Montana v. United States*, 450 U.S. 544, 565-66  
5 (1981):

6       A tribe may regulate, through taxation, licensing, or other  
7 means, the activities of nonmembers who enter consensual  
8 relationships with the tribe or its members, through  
9 commercial dealing, contracts, leases, or other  
10 arrangements. . . . A tribe may also retain inherent  
11 power to exercise civil authority over the conduct of non-  
Indians on fee lands within its reservation when that  
conduct threatens or has some direct effect on the  
political integrity, the economic security, or the health  
or welfare of the tribe.

12 *Id.* (Citations omitted.)

13       In a more recent case, *Nevada v. Hicks*, 533 U.S. 353 (2001), the  
14 Court held "Indian tribes' regulatory authority over nonmembers is  
15 governed by the principles set forth in [*Montana*], which we have  
16 called the 'pathmaking case' on the subject." *Id.* at 358. The Court  
17 also found "[t]he ownership status of the land . . . is only one  
18 factor to consider in determining whether regulation of the  
19 activities of nonmembers is 'necessary to protect tribal self-  
20 government or to control internal relations.'" *Id.* at 359-60  
21 (*quoting Montana*, 450 U.S. at 564-65).

22       Although *Montana* and *Hicks* dealt with tribal court jurisdiction  
23 in civil matters, the holdings are instructive regarding consensual  
24 economic relationships between members and nonmembers and an Indian

1 tribe on tribal land.<sup>6</sup> The general rule gleaned from these Supreme  
2 Court cases is that tribal power over nonmembers "is inconsistent  
3 with the dependent status of the tribes," and cannot be exercised  
4 without express congressional delegation, except where that power is  
5 "necessary to protect tribal self-government or to control internal  
6 relations.'" *Hicks*, 533 U.S. at 359-60 (quoting *Montana*, 450 U.S. at  
7 564). It is that exception that is relevant to the case before the  
8 court here.

9 Consistent with the *Montana* rule, in *Smith v. Salish Kootenai*  
10 *College*, 434 F.3d 1127, 1138 (9<sup>th</sup> Cir. 2006), also a challenge to  
11 tribal court jurisdiction, the Ninth Circuit stated "Nonmembers of a  
12 tribe who choose to affiliate with the Indians or their tribes  
13 [through a consensual relationship] may anticipate tribal  
14 jurisdiction when their contracts affect the tribe or its members."  
15 *Id.* Although the issue in *Montana* and *Smith* was tribal court  
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17 <sup>6</sup> Under IGRA, tribal gaming activities must be on Indian land.  
18 25 U.S.C. § 2701(5); see also Ct. Rec. 35 at 10 (Compact). Further,  
19 25 U.S.C. § 2703(4) defines Indian lands to include land held in  
20 trust by the United States for the benefit an a tribe and "over which  
21 an Indian tribe exercises governmental power," and documentation  
22 submitted by the Tribe establishes the land on which the Casino is  
23 located was deeded to the United States in 1982, to be held in trust  
24 for the benefit of the Tribe. (Ct. Rec. 37 at 17.) DOL appears to  
25 concede that the location of the Casino is not dispositive. (Ct.  
26 Rec. 58 at 21.)  
27

1 jurisdiction, the holding in *Montana* is important here because Casino  
2 employees are on Tribal land in a consensual economic relationship  
3 with the Tribal government. Casino employees are subject to  
4 background checks and licensing by the Tribe, and their employment  
5 relationship is governed by detailed tribal ordinances regulating  
6 employees and employers. According to *Montana*, the Tribe may  
7 regulate the consensual relationships with Casino employees if their  
8 activities have some "direct effect on the political integrity, the  
9 economic security, or the health or welfare of the tribe direct."

10 Further, in determining the application of a federal statute to  
11 the activities of an Indian tribe, the normal rules of statutory  
12 construction do not apply, even where non-treaty rights and issues  
13 are involved. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759,  
14 766 (1985) (canons of statutory construction "do not have their usual  
15 force in cases involving Indian law"); *Oneida County, N.Y. v. Oneida*  
16 *Indian Nation of New York State*, 470 U.S. 226, 247 (1985) (liberal  
17 construction of federal statutes in favor of the Indians in non-  
18 treaty matters); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152  
19 (1982) (consistent with policy of encouraging tribal self-sufficiency  
20 and traditional notions of sovereignty, ambiguities in federal law  
21 are "construed generously" in favor of Indian tribes) (quoting *White*  
22 *Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

23 In a Seventh Circuit decision, Judge Posner held that FLSA did  
24 not apply to the regulation of tribal law enforcement officers, and  
25 reasoned as follows:

26 The courts have spoken of the "inherent sovereignty" of  
27 Indian tribes and have held that it extends to the kind of

1 regulatory functions exercised by the [tribal] Commission  
2 with respect to both Indians and non- Indians. . . . The  
3 idea of comity-of treating sovereigns, including such  
4 quasi-sovereigns as states and Indian tribes, with greater  
respect than other litigants-counsels us to exercise  
forbearance in construing legislation as having invaded the  
central regulatory functions of a sovereign entity.

5 *Reich v. Great Lakes Indian Fish and Wildlife Com'n*, 4 F.3d 490, 494-  
6 95 (7<sup>th</sup> Cir. 1993) (citations omitted). Addressing the DOL's  
7 argument that application of FLSA to Indian employees would benefit  
8 those individuals by imposing minimum wage and overtime regulation,  
9 the court stated, "[t]he relevant comity is a duty of forbearance not  
10 to individual Indians but to Indian governments, and it would be a  
11 conspicuous breach of comity to accuse the latter . . . of not being  
12 guided by a sincere concern for the best interests of the former."  
13 *Id.* at 495.

14 Thus, in determining whether a federal statute regulates the  
15 activities of quasi-sovereign Indian tribes, a court must be guided  
16 by the Indian canons of statutory construction, as well as "the idea  
17 of comity," while considering the relationship between the Indian  
18 tribe and the individuals being regulated and to what extent the  
19 tribal activity is a "central regulatory function."

20 C. Federal Statutes of General Applicability

21 It is well settled that the Ninth Circuit "has not adopted the  
22 proposition that Indian tribes are subject only to those laws of the  
23 United States expressly made applicable to them." *Donovan v. Coeur*  
24 *d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9<sup>th</sup> Cir. 1985). The  
25 general rule in the Ninth Circuit is that "federal laws generally  
26 applicable throughout the United States apply with equal force to  
27



1 Indians on reservation." *Id.* at 1115 (quoting *United States v.*  
2 *Farris*, 624 F.2d 890 (9<sup>th</sup> Cir. 1980), *cert. denied*, 449 U.S. 1111  
3 (1981)).

4 As noted by the D.C. Circuit, "a statute of general  
5 applicability can constrain the actions of a tribal government  
6 without at the same time impairing tribal sovereignty." *San Manuel*  
7 *Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1312 (D.C. Cir.  
8 2007). In *Coeur d'Alene Tribal Farm*, the Ninth Circuit reconciled  
9 the competing principles of the rule of general applicability of  
10 federal law to Indians and the quasi-sovereign status of Indian  
11 tribes by establishing exceptions to the general rule. In that case,  
12 an Indian tribe challenged Occupational Safety and Health  
13 Administration inspection and regulation of its commercial farm,  
14 which was similar to other farms in the area, employed tribe members  
15 and non-members and sold its products to the open market in and out  
16 of Idaho. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1114-15. The over-  
17 riding issue was whether a federal regulatory agency created by  
18 federal statute, had jurisdiction over the federally recognized  
19 Indian tribe's enterprise.

20 The court reiterated the undisputed principle that Congress "has  
21 the power to modify or extinguish that right," and explicitly  
22 rejected the tribe's argument that silence in a general federal  
23 statute regarding application to Indians should be interpreted as  
24 excluding Indians. *Id.* at 1115 (citing *Rice v. Rehner*, 463 U.S. 713,  
25 718 (1983)). However, recognizing traditional deference to an  
26 Indian tribe's quasi-sovereign status and power to regulate internal

1 affairs essential to self-government, the *Coeur d'Alene* court  
2 articulated exceptions to the general rule: a federal statute of  
3 general applicability applies to an Indian tribe unless one of three  
4 exceptions is established by the record: (1) the law touches on  
5 "exclusive rights of self-governance in purely intramural matters";  
6 (2) the application of the law to the tribe would "abrogate rights  
7 guaranteed by Indian treaties"; or (3) there is proof "by legislative  
8 history or some other means that Congress intended [the law] not to  
9 apply to Indians on their reservations" *Id.* at 1116 (*citing Farris*,  
10 624 F.2d at 893-94). If any of these three situations exist,  
11 Congress must apply a statute expressly to Indians before the court  
12 will hold that the statute reaches them. *Id.*

13 The court reasoned that the tribal farm was not an arm of the  
14 government; rather it was like other commercial enterprises that  
15 competed with the tribal farm, there was no treaty involved, and the  
16 tribe did not argue the legislative history exception. Thus, the  
17 tribal farm did not meet any of the exceptions in the *Coeur d'Alene*  
18 test, and was not exempt from the provisions of the Occupational  
19 Safety and Health Act, even though the Act was silent as to  
20 applicability to enterprises owned and operated by Indian tribes.  
21 *Id.* at 1116.

22 Because the *Coeur d'Alene Tribal Farm* decision is binding upon  
23 this court, the analysis of FLSA applicability to Casino employees  
24 necessarily is based on that test. See *N.L.R.B. v. Chapa De Indian*  
25 *Health Program, Inc.*, 316 F.3d 995, 999 (9<sup>th</sup> Cir. 2003).

1 D. Application of FLSA to the Regulation of Casino Employees

2 The Tribe argues that the statute does not apply to Indian  
3 tribes because, (1) "employer" as defined by FLSA does not include  
4 Indian tribes, and (2) FLSA is not a statute of general applicability  
5 and Indian tribes are not expressly included in its provisions. (Ct.  
6 Rec. 20 at 19.) Neither argument is persuasive or supported by Ninth  
7 Circuit case law.

8 It is settled law in the Ninth Circuit that FLSA is a statute of  
9 general applicability that generally applies to Indians unless one of  
10 the *Coeur d'Alene* exceptions applies. *Snyder v. Navajo Nation*, 382  
11 F.3d 892, 894-95 (9<sup>th</sup> Cir. 2004). In *Snyder*, plaintiffs were Indian  
12 tribe law enforcement officers suing the Navajo tribe and the United  
13 States for violations of FLSA. The district court determined FLSA  
14 did not apply to the tribe, and dismissed the tribe. On appeal, the  
15 Ninth Circuit applied the *Coeur d'Alene* test to affirm the lower  
16 court's determination that FLSA did not apply to tribal law  
17 enforcement employees, because tribal law enforcement "was a  
18 traditional governmental function," that was intramural. *Snyder*, 382  
19 F.3d at 895-96. The court summarized Ninth Circuit law succinctly in  
20 this 2004 case involving alleged violations of FLSA overtime pay  
21 provisions:

22 The FLSA is a statute of general applicability. *Rutherford*  
23 *Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). Such  
24 generally applicable statutes typically apply to Indian  
25 tribes. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362  
26 U.S. 99 (1960). There is an exemption, however, where the  
27 law would interfere with tribal self-government. The  
exemption protects "exclusive rights of self governance in  
purely intramural matters." *Donovan v. Coeur d'Alene*  
*Tribal Farm*, 751 F.2d at 1116; *E.E.O.C. v. Karuk Tribe*  
*Housing Auth.*, 260 F.3d 1071, 1078 (9<sup>th</sup> Cir. 2001) . . .;

1 See also *E.E.O.C. v. Fond du Lac Heavy Equipment and*  
2 *Construction Co., Inc.*, 986 F.2d 246, 249-51 (8<sup>th</sup> Cir. 1993)  
3 (holding that the ADEA was not applicable because the  
4 tribe's right of self-government would be affected in the  
5 intramural matter of on reservation tribal employment);  
*Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1463 (10<sup>th</sup>  
Cir. 1989) (holding that race discrimination statutes did  
not apply to a tribe's designation of tribal membership  
criteria).

6 In *Coeur d'Alene Tribal Farm*, we explained that the tribal  
7 self-government exception applied to intramural matters and  
8 we specifically mentioned, as examples, conditions of  
9 tribal membership, inheritance rules, and domestic  
10 relations. 751 F.2d at 1116. In *Karuk*, we followed *Coeur*  
11 *d'Alene Tribal Farm* and held that the employment of tribal  
12 members by the tribe's housing authority on the reservation  
13 was an intramural matter and that federal age  
14 discrimination statutes did not apply. 260 F.3d at 1079-  
80. While we have not cabined the intramural exception to  
those listed in *Coeur d'Alene Tribal Farm*, we have been  
careful to allow such exemptions only in those rare  
circumstances where the immediate ramifications of the  
conduct are felt primarily within the reservation by  
members of the tribe and where self-government is clearly  
implicated.

15 *Snyder*, 382 F.3d at 894-95.

16 In response to arguments that some of the plaintiffs were  
17 nonmember law enforcement officers, the *Snyder* court held tribal  
18 membership did not affect the analysis; the important factor in its  
19 analysis was that the officers served "the interests of the tribe and  
20 reservation governance." *Id.* at 896.

21 Based on this precedent, FLSA applies to the Tribe unless one of  
22 the *Coeur d'Alene Tribal Farm* exceptions applies to the facts before  
23 the court.

24 E. The Coeur d'Alene Test

25 The Tribe argues that even if FLSA is generally applicable, and  
26 the Tribe is an employer as defined by FLSA, the Tribe's operation of  
27

1 the Casino implicates its inherent rights of self-governance and,  
2 thus, fits into the first *Coeur d'Alene* "self-governance" exception.<sup>7</sup>  
3 Petitioner cites cases from other Circuits in support of her argument  
4 that the Casino is merely a commercial enterprise, similar to the  
5 farm in *Coeur d'Alene Tribal Farm*. (Ct. Rec. 23 at 11). Specifically  
6 Petitioner relies on the D.C. Circuit's holding in *San Manuel Indian*  
7 *Bingo and Casino*, in her argument that the Casino does not fit into  
8 the "self governance" exception. (Ct. Rec. 23 at 11.) However, *San*  
9 *Manuel Indian Bingo* is distinguishable. The case was a dispute  
10 involving competing labor unions and allegations of unfair labor  
11 practices by a tribal casino located on the reservations.

12 Finding that the National Labor Relations Act (NLRA) applied to  
13 tribal casino employees, the D.C. Circuit noted that NLRB involvement  
14 would have little impact on the tribe's revenue and "negligible"  
15 impairment of the tribe's sovereignty, and concluded, "[w]e do not  
16

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17 <sup>7</sup> The Tribe also argues FLSA does not apply because the remedies  
18 authorized by the FLSA include a private action, criminal sanctions  
19 and monetary damages, and these cannot be enforced against a  
20 sovereign tribe without an express waiver of immunity. (Ct. Rec. 20  
21 at 11-12.) Petitioner replies that the Occupational Safety and  
22 Health Act includes criminal penalties, but was held to apply to the  
23 tribe in *Coeur d'Alene Tribal Farm*. (Ct. Rec. 60 at 5.) Because the  
24 *Coeur d'Alene* test applies to the facts before this court, to make  
25 its determination, the court need not and, therefore, declines to  
26 address the issue of permissible remedies.  
27

1 think this limited impact is sufficient to demand a restrictive  
2 construction of the N.L.R.A." *San Manuel Indian Bingo*, 475 F.3d at  
3 1314-15. Further, the court applied tribal sovereignty principles,  
4 and expressly declined to use the *Coeur d'Alene Tribal Farm* framework  
5 in its decision, noting, "[o]ut-of-circuit precedent is inconsistent  
6 as to the applicability of general federal laws to Indian tribes."  
7 The court stated, "[w]e do not decide how the framework we employ  
8 would apply to the facts" in cases from other circuits applying the  
9 *Coeur d'Alene* test. *Id.* at 1315.

10 DOL also argues that the Occupational Safety and Health Act  
11 (OSHA), ERISA and the National Labor Relations Act (NLRA) have been  
12 applied to Indian tribes, specifically where, as here, no treaty  
13 rights were involved. See *Coeur d'Alene Tribal Farm*, 751 F.2d at  
14 1115; *Lumber Industry Pension Fund v. Warm Springs Forest Products*  
15 *Industries*, 939 F.2d 683 (9th Cir. 1991). In those cases, however,  
16 the tribe's decision-making power and power to regulate consensual  
17 economic relationships with tribal government were not usurped by the  
18 disputed regulation; and the economic relationships at issue in those  
19 cases did not directly effect the economic security of the tribe.  
20 Further, in *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d  
21 995, 997 (9<sup>th</sup> Cir. 2003), cited by Petitioner, (Ct. Rec. 58 at 10),  
22 where the court held the tribal organization was not excepted from  
23 the NRLA, the employer (Chapa De) was not a tribe. It was a non-  
24 profit tribal organization, financially independent from the Indian  
25 tribe, that served members and non-members outside the reservation.  
26 Therefore, no issues of self-governance were implicated. *Id.*

1 In a more recent Ninth Circuit case, *Allen v. Gold Country*  
2 *Casino*, 464 F.3d 1044 (9<sup>th</sup> Cir. 2006), the court examined a tribal  
3 casino's relationship vis-a-vis essential governmental functions.  
4 *Allen* is distinguishable from the instant case because it involved a  
5 suit by a private party against a tribal casino, and tribal sovereign  
6 immunity was extended to the casino because it was an "arm of the  
7 tribe." *Allen*, 464 F.3d at 1047. Although the court did not use  
8 the *Coeur d'Alene* test, its analysis of the tribal casino's  
9 relationship with tribal government is instructive here.

10 The Gold Country Casino was similar to the Casino: It was owned  
11 and operated by the Indian tribe, was created pursuant to IGRA and a  
12 gaming compact with the state of California, "on a government-to-  
13 government basis," and provided significant income to the Tribe. *Id.*  
14 at 1046. A former casino employee sued the Indian tribe doing  
15 business as a casino for alleged retaliatory discharge. The court  
16 held the tribal casino (unlike the *Coeur d'Alene* tribal farm which  
17 was characterized as a commercial enterprise like other farms in the  
18 area) was an "arm of the Tribe"; therefore, it was immune from suit  
19 by a private party.

20 In its discussion of the creation and function of the tribal  
21 casino, the court stated:

22 These extraordinary steps [*i.e.*, various levels of  
23 government approval] were necessary because the Casino is  
24 not a mere revenue-producing tribal business (although it  
25 is certainly that). The IGRA provides for the creation and  
26 operation of Indian casinos to promote "tribal economic  
27 development, self-sufficiency, and strong tribal  
28 governments." 24 U.S.C. § 2702(1). One of the principal  
purposes of the IGRA is "to insure that the Indian tribe is  
the primary beneficiary of the gaming operation." *Id.* §  
2702(2). The compact that created the Gold Country Casino

1 provides that the Casino will "enable the Tribe to develop  
2 self-sufficiency, promote tribal economic development and  
3 generate jobs and revenues to support the Tribes's  
4 government and governmental services and programs."

5 . . .

6 . . . In light of the purposes for which the Tribe founded  
7 this Casino and the Tribe's ownership and control of its  
8 operations, there can be little doubt that the Casino  
9 functions as an arm of the Tribe.

10 *Id.* at 1046-47. (Emphasis added.)

11 Here, Petitioner argues the Casino operation is not a  
12 traditional governmental function; rather, it is a commercial  
13 enterprise which is not located on reservation land.<sup>8</sup> The Tribe  
14 asserts that the Casino is at the heart of its intramural matters,  
15 because the income derived from the Casino funds the majority of its  
16 Tribal programs. The issue, therefore, is whether the regulation of  
17 Casino employees clearly implicates the Tribe's inherent powers of  
18 self-government and regulation of intramural matters.

19 Examples of "intramural matters" given by the *Coeur d'Alene*  
20 *Tribal Farm* court were those affecting "conditions of tribal  
21 membership, inheritance rules, and domestic relations." *Id.* at 1116.  
22 However, as explained by the *Snyder* court, "intramural matters" are  
23 not confined to those examples given in the *Coeur d'Alene* decision.  
24 Rather, laws that usurp a tribal government's decision-making power  
25

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26 <sup>8</sup> Although the Casino is not on the reservation, it is located  
27 indisputably on Indian trust land, and the Supreme Court has held  
28 that ownership status, alone, is not dispositive in jurisdiction  
issues. *Hicks*, 533 U.S. at 359.



1 and are "felt primarily within the reservation by members of the  
2 tribe" are considered "aspects of self-government" and should be  
3 excepted from the general rule. *Snyder*, 382 F.3d at 894-95 (FLSA  
4 does not apply to regulation of tribal police); see also *Karuk*, 260  
5 F.3d at 1081 (ADEA does not apply to tribal housing authority  
6 employee); *E.E.O.C. v. Fond du Lac Heavy Equipment and Construction*  
7 *Co., Inc.*, 986 F.2d 246, 249-51 (8<sup>th</sup> Cir. 1993)(application of ADEA  
8 affects the tribe's right of self-government in the intramural matter  
9 of on reservation tribal employment). "The term 'tribal self-  
10 government,' or a similar term, encompasses a tribe's ability to make  
11 at least certain employment decisions without interference from other  
12 sovereigns." *Karuk*, 260 F.3d at 1082 (citing *Penobscot Nation v.*  
13 *Fellencer*, 164 F.3d 706, 709-11 (1<sup>st</sup> Cir. 1999), *cert denied*, 527 U.S.  
14 1022, (1999); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d  
15 1185, 1188 (9<sup>th</sup> Cir. 1998); *Reich*, 4 F.3d at 494-96 ("it has been  
16 traditional to leave the administration of Indian affairs for the  
17 most part to the Indians themselves"). Thus, "intramural" matters  
18 encompass those activities that implicate the Tribe's right of self-  
19 government and impact primarily the members of the tribe.

20 The holdings cited by Petitioner are not inconsistent with a  
21 holding that FLSA does not apply to the Tribe's regulation of Casino  
22 employees under the circumstances before the court. Casino employees  
23 are hired and licensed by the Tribal governing body and regulated by  
24 Tribal and state law. Tribe members and nonmembers have a consensual  
25 economic agreement with a Tribal enterprise on Tribal land that (1)  
26 would not exist but for express authorization by federal law (IGRA),  
27

(2) is regulated by a combination of tribal, state and federal law, (3) is wholly owned and operated by the Tribal government, and (4) supports the economic viability of the Tribe, including the majority of intramural programs sponsored by the Tribe, as evidenced by the express pledge of net revenues to Tribal programs. The application of FLSA would cause significantly more impact on Tribal revenue and, therefore the members of the Tribe who depend on the intramural programs, than NLRB intrusion into tribal activities described in *San Manuel Bingo*, OSHA's inspection of workplace safety in *Coeur d'Alene Tribal Farm*, or the application of ERISA to tribal pension plans in *Warm Springs Forest Products*. Like the casino in *Allen*, the Casino is not "a mere revenue producing tribal business." It is created and operated for the primary purpose of supporting the Tribe's government and governmental services. The employees serve the economic interests of the Tribe, and interference with the Tribe's ability to regulate these employees impermissibly interferes with the Tribe's administration of internal affairs and would have a direct effect on the "political integrity, the economic security . . . and welfare" of the Tribe. *Montana*, 450 U.S. at 566.

#### CONCLUSION

The Casino is the major source of income for Tribal intramural functions, and is an arm of the Tribal government. Casino employees are in a consensual, economic relationship, traditionally left to the Tribe to regulate. The Casino is formed and regulated by tribal, state and federal law. DOL's description of the Casino as "simply a business entity that happens to be run by a tribe" does not extend

1 the comity that the Supreme Court has deemed due a quasi-sovereign  
2 federally recognized Indian tribe. Under the narrow and undisputed  
3 facts before the court, FLSA does not apply to the Casino employees  
4 under the "matters of self-governance" exception of the *Coeur d'Alene*  
5 test. Because Petitioner is without regulatory jurisdiction over the  
6 Tribe with respect to Casino employees, the subpoena should not be  
7 enforced. Accordingly,

8 **IT IS RECOMMENDED** that:

- 9 1. Respondent's Motion to Quash be **GRANTED**.  
10 2. Petitioner's Petition for Enforcement of an Administrative  
11 Subpoena be **DENIED AND DISMISSED** for lack of jurisdiction.

12 **OBJECTIONS**

13 Any party may object to a magistrate judge's proposed findings,  
14 recommendations or report within ten (10) days following service with  
15 a copy thereof. Such party shall file written objections with the  
16 Clerk of the Court and serve objections on all parties, specifically  
17 identifying any the portions to which objection is being made, and  
18 the basis therefor. Any response to the objection shall be filed  
19 within ten (10) days after receipt of the objection. Attention is  
20 directed to Fed. R. Civ. P. 6(e), which adds another three (3) days  
21 from the date of mailing if service is by mail.

22 A district judge will make a de novo determination of those  
23 portions to which objection is made and may accept, reject, or modify  
24 the magistrate judge's determination. The judge need not conduct a  
25 new hearing or hear arguments and may consider the magistrate judge's  
26 record and make an independent determination thereon. The judge may,  
27

1 but is not required to, accept or consider additional evidence, or  
2 may recommit the matter to the magistrate judge with instructions.  
3 *United States v. Howell*, 231 F.3d 615, 621 (9<sup>th</sup> Cir. 2000); 28 U.S.C.  
4 § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73; LMR 4, Local Rules for  
5 the Eastern District of Washington.

6 A magistrate judge's recommendation cannot be appealed to a  
7 court of appeals; only the district judge's order or judgment can be  
8 appealed.

9 The District Court Executive is directed to file this Report and  
10 Recommendation and provide copies to counsel and the referring  
11 district judge.

12 DATED March 5, 2008.

13  
14 S/ CYNTHIA IMBROGNO  
15 UNITED STATES MAGISTRATE JUDGE  
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