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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ELAINE L. CHAO, Secretary of Labor, United States Department of Labor, Petitioner, v. SPOKANE TRIBE OF INDIANS d/b/a Chewelah Casino, Respondents.	CASE NO.: CS-07-354-CI OBJECTION OF THE SECRETARY TO REPORT AND RECOMMENDATION FOR ORDER GRANTING RESPONDENT'S MOTION TO QUASH, DENYING PETITION FOR ENFORCEMENT OF SUBPOENA, AND DISMISSING PETITION

PETITIONER ELAINE L. CHAO, Secretary of Labor, United States Department of Labor, (the "Secretary"), hereby submits her Objection to the March 5, 2008, Report and Recommendation for Order Granting Respondent's Motion to Quash, Denying Petition for Enforcement of Subpoena, and Dismissing Petition (hereinafter "Report"). The Secretary concurs with the Report that Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), and its progeny control, but objects to the conclusion that on the facts before this court, Respondent's commercial casino is an aspect of purely intramural tribal self-governance exempting it from the Fair Labor Standards Act ("FLSA").

I. FACTS

In addition to the facts as related in the Report and Recommendation, this Court should consider the following. The Chewelah Casino is open for business to both members of the general public as well as members of the Spokane Tribe. The casino is located near Chewelah, on tribal allotment land many miles from the main Spokane Reservation. And, the Tribe at the casino employs members of the general public as well as members of the Spokane Tribe.

Contrary to the facts before this court prior to the issuance of the Report, employees of the Chewelah Casino would not be protected by any wage and hour standards in the absence of the FLSA. On March 7, Respondent corrected the record by filing the version of its Tribal Employment Rights Ordinance ("TERO") that is currently in force. (Ct. Rec. 64, 71). The prior TERO covered Spokane Tribe-owned "business[es] for profit." (Ct. Rec. 36 at § 2.11). The current TERO completely exempts the Spokane Tribe. (Ct. Rec. 72 at § 2.11).

And relatedly, the Gaming Compact between Respondent and the State of Washington, (Ct. Rec. 35), is narrowly focused on regulation of gaming, as envisioned by Congress in the Indian Gaming Regulatory Act ("IGRA"). See 25 U.S.C. § 2710(d) (providing for negotiation of tribe-state gaming compacts); see generally 25 U.S.C. §§ 2701-2721; 18 U.S.C. § 1166-68 (IGRA). The Compact does not establish wage and hour requirements for casino employees, or provide a means of enforcement of any wage and hour standards in the Tribe's casinos. Furthermore, the Compact states that "[n]othing contained herein shall be deemed to modify or limit existing federal, criminal or tribal jurisdiction over the gaming operation negotiated under this Compact . . . ." (Ct. Rec. 35 at 30.)

II. ARGUMENT

The Secretary incorporates by reference her prior pleadings, see Fed. R. Civ. P. 10, and draws this Court's attention to her prior legal memoranda. (Ct. Rec. 2, 23, 58, 60.)

A. The FLSA Requires an Employer to Comply with the Secretary's Administrative Subpoena *Duces Tecum*

The FLSA is a broad statute of general applicability, passed by Congress to protect workers against substandard labor conditions. E.g. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1946). Congress authorized the Secretary to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act." 29 U.S.C. § 211. The Supreme Court "has consistently construed the FLSA liberally, . . . recognizing that broad coverage is essential to" the goals of the FLSA. Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (citations omitted).

The Secretary has the right to have her administrative subpoena enforced if the investigation is for a lawfully authorized purpose, the documents sought are relevant to the inquiry, and the demand for the production of records is reasonable. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946). The Secretary need not prove that the subpoenaed party is covered by the FLSA; rather, subpoenas have been consistently enforced where the information requested is relevant to whether the subpoenaed party is subject to the FLSA. See, e.g., Donovan v. Mehlenbacher, 652 F.2d 228 (2d Cir. 1981).

If the party upon whom a subpoena is issued is not covered by the FLSA as a legal matter, and there is no set of facts upon which coverage may be established, the court need not enforce the subpoena. See EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1078 (9th Cir. 2001) (citing cases). However, "[a]s long as the evidence sought is relevant, material and there is some 'plausible'

ground for jurisdiction, or to phrase it another way, unless jurisdiction is 'plainly lacking,' the court should enforce the subpoena." Karuk, 260 F.3d at 1077 (quoting EEOC v. Children's Hospital Medical Center, 719 F.2d 1426, 1430 (9th Cir. 1983) (quoting Marshall v. Burlington Northern, Inc., 595 F.2d 511, 513 (9th Cir. 1979) (OSHA jurisdiction over railroad yard))). An administrative subpoena may only be quashed where "(1) there is clear evidence that exhaustion of administrative remedies will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise will be of no help on the question of its jurisdiction." Id. at 1077 (emphasis added). The Court "should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law." Id. at 1076.

The instant subpoena seeks information concerning Respondent's wage and hour practices with regard to employees of the Chewelah Casino. The information is both necessary for a lawful investigative purpose and appropriately limited to a review of payroll and other records for a two-year period, to ensure Respondent is in compliance with the FLSA. The Report, however, states that the Secretary has no jurisdiction to enforce the FLSA against Respondent, which is error.

B. Respondent's Operation of A Commercial Casino Is Not An Aspect of Purely Intramural Tribal Self-Governance under *Coeur d'Alene*

Respondent argues that the FLSA does not apply to its employees at the Chewelah Casino for reasons of tribal sovereignty, and that therefore it should not have to comply with the subpoena, the ruling proposed in the Report. However, case law binding on this Court establishes that the Chewelah Casino, which employs both Indians and non-Indians and is open to both Indians and non-Indians, is subject to the FLSA, and therefore must comply with the subpoena.

The Report states correctly that under Karuk, this Court must evaluate the Secretary's jurisdiction to subject an Indian tribe to an administrative subpoena

under the standard set out in Coeur d'Alene. Coeur d'Alene established exceptions to the rule that general federal statutes apply to tribes unless Congress intended otherwise, see Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960), so as to allow Indian tribes to retain more sovereignty, not less. Coeur d'Alene balances the federal interest in enforcing regulatory statutes as directed by Congress, while allowing tribes to retain a core of sovereignty over, inter alia, "purely intramural" "self-governance." 751 F.2d at 1116.[1]

i. Tribal intramural self-governance is well-defined, and does not include commercial businesses operated by tribes, open to and employing non-Indians, regardless of the tribe's use of commercial profits to support governance.

Tribal exclusive rights of self-governance in purely intramural matters involve "tribal membership, inheritance rules, and domestic relations." Coeur d'Alene, 751 F.2d at 1116, and other "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." Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004). Whether a law inappropriately interferes with these "exclusive rights of self-governance" depends on the extent to which enforcement of the law "will constrain the tribe with respect to its governmental functions." San Manuel Indian Bingo and Casino v. N.L.R.B., 475

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[1] Congress has plenary authority to limit, modify or eliminate the powers of tribal self-government. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Neither Congress nor the Supreme Court has refuted the Coeur d'Alene test, and Coeur d'Alene has been followed in, or influenced the reasoning of, every other circuit to address this issue. (See Ct. Rec. 23 at 15.)

F.3d 1306, 1312 (D.C. Cir. 2007).[2] If the general law relates only to the extra-governmental activities of the tribe, and in particular to activities involving non-Indians, then application of the law does not impinge on tribal sovereignty. Id.

Reviewing courts look primarily at the nature of the enterprise in question, the day-to-day duties of the employees at issue, and whether those employees are exclusively members of the tribe or include non-tribe members as well. Courts also consider the location of the enterprise, and whether it does business exclusively with members of the tribe or with the general public.

The Ninth Circuit has consistently found that in operating commercial enterprises, Indian tribes are not exercising "self-governance in purely intramural matters," and are therefore are not exempt from general federal laws at those enterprises. See, e.g., Karuk, 260 F.3d at 1080. In Coeur d'Alene, the tribally owned farm at issue was a commercial enterprise wholly owned and operated by the tribe, which sold goods on the open market and employed non-Native Americans as well as Native Americans. The Court ruled that the farm was not an aspect of tribal self-government, and was subject to the Occupational Safety and Health Act ("OSH Act"). Coeur d'Alene, 751 F.2d at 1116.

Courts including the Ninth Circuit have not exempted tribal commercial businesses from federal law, even though the businesses' profits are used to support tribal government programs. In U.S. Department of Labor v. Occupational Safety & Health Review Commission (Warm Springs Forest Products Industries), 935 F.2d 182 (9th Cir. 1991) ("Warm Springs"), the Court reviewed whether the OSH Act applied to a tribally owned timber mill. The mill employed 146 non-Indians out of 327 total employees and "had total sales of $33,595,361, virtually

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[2] Cases defining coverage of the National Labor Relations Act ("NLRA") are considered persuasive in FLSA cases, as both statutes are remedial New Deal labor legislation. Rutherford Food, 331 U.S. at 727.

all of which were to buyers located outside the reservation." Id. at 183. The Court added that "payments made by the mill to the Tribe are the largest source of income for the tribal government." Id. The Court ruled that "[a]lthough revenue from the mill is critical to the tribal government" and the mill was on reservation property, id. at 184, operating the mill was not an aspect of intramural tribal self-governance because the mill employed non-Native Americans and did business with non-Native Americans. Id. The OSH Act was held to apply. Id.

In Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683, 685 (9th Cir. 1991) ("Lumber Industry"), superseded by statute on other grounds as recognized in Dobbs v. Anthem Blue Cross & Blue Shield, 475 F.3d 1176, 1178 (10th Cir. 2007), the Warm Springs tribe stopped contributions into a timber industry pension fund on behalf of sawmill employees and began contributions to the tribal plan, following a new tribal ordinance. 939 F.2d at 684.[3] When the pension fund sued for unpaid contributions, the district court held that ERISA could not "contravene the tribal attempt to govern its own pension system." 730 F. Supp. 324, 328 (E.D. Cal. 1990). The Ninth Circuit disagreed, holding that the sawmill was not exempt from ERISA; as a commercial enterprise, it was not an aspect of self-governance. 939 F.2d at 685 (citing Coeur d'Alene, 751 F.2d at 1116). That the tribe might have to pay damages to the pension fund to change funds did not usurp the tribe's authority to decide to change pension funds. Id. The tribe was not foreclosed from joining the tribal plan; it would simply cost more to do it. Id.

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[3] This was the same sawmill as was at issue in Warm Springs. The OSH Act and ERISA disputes were contemporaneous. Compare 935 F.2d at 183 with 939 F.2d at 684 ("seeking recovery of pension contributions for the period between December 1987 and June 30, 1988").

In N.L.R.B. v. Chapa De Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003), the Court held that the NLRA applied to a tribal health clinic. The fact that the health clinic was open to and employing non-Indians "cut[] against [the] claim that its activities touch[ed] rights of self-governance on a purely intramural matter." 316 F.3d at 1000. Even though the tribally owned non-profit was engaged in a government function, public health, the "commercial nature of the labor relations involved left the activity outside the ambit of the intramural matters exception." Snyder, 382 F.3d at 895 (citing Chapa De, 316 F.3d at 999-1000).

Other circuits have drawn the distinction between commercial activities of a tribe and its governmental functions, holding commercial activities – including a casino – covered by federal labor laws. See, e.g., San Manuel Indian Bingo, 475 F.3d at 1313, 1315 ("[O]peration of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country."); Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1129 (11th Cir. 1999); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180 (2d Cir. 1996); Smart v. State Farm Ins. Co., 868 F.2d 929, 936 (7th Cir. 1989).

The bulk of the cases denying federal agencies jurisdiction to enforce labor laws address employees engaged directly in tribal governance by performing traditional government functions such as law enforcement, Reich v. Great Lakes Indian Fish and Wildlife Commission, 4 F.3d 490 (7th Cir. 1993), cf. Snyder, 382 F.3d 395 (private suit), or operation of public housing. Karuk, 260 F.3d at 1080.

In Karuk, the subpoena respondent was a tribal housing authority. The housing authority was acting in a governmental role, serving an almost entirely Indian clientele on the tribe's reservation pursuant to a federally chartered Indian housing program. See id. at 1080-81 (citing 25 U.S.C. § 4101). The sole EEOC complainant was a tribal member, id. at 1081, and ninety-nine of the one hundred housing units operated by the housing authority were occupied by Indian families.

Id. at 1074. The units were located on tribal trust land. Id. at 1073-74. As the dispute was intramural, and the housing authority "occupies a role quintessentially related to self-governance," the ADEA did not apply. Id. at 1080; see also Great Lakes, 4 F.3d at 495 ("We do not hold that employees of Indian agencies are exempt from the Fair Labor Standards Act. We hold only that those agencies' law-enforcement employees, and any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act, are exempt.")

In Snyder, the court distinguished law enforcement from commercial functions as "an appropriate activity to exempt as intramural." Snyder, 382 F.3d at 895; but see EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc., 986 F.2d 246, 249-51 (8th Cir. 1993) (ADEA did not apply to tribe's construction company, but because "[t]he consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions.").

Other cases rejecting federal jurisdiction, including those that the Karuk court (and the Report) cited for the principle of "general acceptance" of a "tribe's ability to make at least certain employment decisions without interference from other sovereigns," 260 F.3d at 1081, were similarly intramural disputes directly connected to tribal self-governance. See id. (citing Great Lakes, 4 F.3d at 494-496; Penobscot Nation v. Fellencer, 164 F.3d 706, 709-11 (1st Cir. 1999) (state employment statute does not apply to tribal health center); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1998); see also EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (ADEA; Cherokee Nation's Director of Health and Human Services was subject of EEOC subpoena, following complaint by former tribal government employee); United States v. White, 508 F.2d 453 (8th Cir. 1974) (federal criminal statute prohibiting hunting implicated treaty rights). In Pink, the Health Project was created as an arm of two tribal

governments specifically to serve "tribe members" by performing a governmental function – public health. Pink, 157 F.3d at 1187-88. [4]

The physical location of the tribally owned employer – on the tribe's land, or off of it – is of lesser importance than other factors. See Karuk, 260 F.3d at 1081 (quoting Fond du Lac, 986 F.2d at 249). The Warm Springs sawmill was located on the reservation, but that fact did not defeat OSHA's jurisdiction over the mill or ERISA coverage given its non-Indian employees and sales off of the reservation. See Warm Springs, 935 F.2d at 183; Lumber Industry, 939 F.2d at 683. By contrast, in Chapa De, the Court examined a lengthy paragraph's worth of facts regarding the health clinics, of which the clinics' locations off the reservation was only once mentioned in passing. The fact that the clinics employed a significant number of non-Indians, see 316 F.3d at 997, was the most significant factor in favor of federal agency jurisdiction. See id. at 1000.

ii. The FLSA applies to the Chewelah Casino, a commercial business open to and employing non-Indians, regardless of Respondent's use of its profits to support governance.

There is no aspect of tribal self-governance involved in operating the Chewelah Casino. Requiring Respondent to comply with the Secretary's FLSA administrative subpoena will not interfere with purely intramural matters of self-governance.

It is undisputed that the Chewelah Casino employs non-Indians and is open to non-Indians. As the Chewelah Casino is a commercial casino, indistinguishable from other commercial casinos, its operation is not a traditional government

[4] In addition, Title VII exempts tribes from the definition of employer, see Pink, 157 F.3d at 1188 (citing 42 U.S.C. § 2000-e(b)); the FLSA does not.

function. Accord San Manuel Indian Bingo, 475 F.3d at 1315. As discussed above, the employees exempted from FLSA coverage in Great Lakes and Snyder were law enforcement officers working for tribal law enforcement agencies, a quintessential government function. The employee at issue in Karuk was a maintenance supervisor for the tribal housing authority, 260 F.3d at 1074, indispensable to the government function of that government agency. By contrast, the factual record here indicates that Respondent's employees at its casino may operate "1. Baccarat; 2. Beat My Shake; 3. Beat the Dealer; 4. Blackjack; 5. Caribbean Stud; 6. Chemen De Fer; 7. Chuck-a-luck; 8. Craps; 9. 4-5-6; 10. Horses (stop dice); 11. Horse Race; 12. Let it Ride," a dozen more listed games, and certain other forms of gambling. (Ct. Rec. 35 at 6-7.) Under no meaningful definition of "tribal self-governance" can blackjack dealers as such be said to be engaging in "tribal self-governance." Where some of those blackjack dealers and their co-workers are non-Indians, dealing cards and serving food to both Indians and non-Indians, the "immediate ramifications" of the casino's labor relations are not "felt primarily within the reservation by members of the tribe," Snyder, 382 F.3d at 895 (emphasis added), and are thus not "purely intramural." Even a non-profit tribal public health clinic was held to be covered by federal labor laws, because it employed and served non-Indians. See Chapa De, 316 F.3d at 997-1000; see also Mashantucket Sand & Gravel, 95 F.3d at 181 (tribal construction company, employing non-Indians to build Foxwoods Casino); Warm Springs, 935 F.2d at 183 (tribal sawmill, employing and selling to non-Indians).

Respondent argues for bootstrapping its commercial casino employees into the tribal self-governance exception by arguing that casino revenues support tribal government programs, the position adopted by the Report. (Report at 26-27.) This position has been repeatedly rejected. In Warm Springs, the sawmill was the "largest source of income to the tribal government." 935 F.2d at 183. Though compliance with the OSH Act necessarily entails some cost, as does the payment

of penalties for noncompliance, operating the sawmill was not tribal self-governance, and the OSH Act applied. Id. at 183-87. The D.C. Circuit, in San Manuel Indian Bingo, discussed that revenue from the tribally owned casino supported that tribe's government operations, 475 F.3d at 1308, 1310-11, 1313, but rejected the position that operating the casino was governmental, 475 F.3d at 1313, and found federal agency jurisdiction. 475 F.3d at 1318-19. In Mashantucket Sand & Gravel, the Tribal Council directed the tribe-owned construction company's work on development of the Foxwoods Casino, to generate revenue for the tribe, see 95 F.3d at 175, 179-81, yet because the work was construction, the company employed non-Indians, and the casino was open to non-Indians, the OSH Act applied. See 95 F.3d at 179-82; see also Great Lakes, 4 F.3d at 500 (Coffey, J., dissenting) (tribal employer's "creative allegation that the FLSA will have a negative financial impact is insufficient to refuse enforcement of the administrative subpoena because financial impact alone is not one of the [Coeur d'Alene/Smart] factors").

The revenue argument also must fail, as the self-government exception would completely swallow the rule of Coeur d'Alene; the very reason that tribal governments engage in commercial activities such as casinos is to support their programs. As the Coeur d'Alene Court wrote, "[i]f the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to reservation activities even without a 'clear' expression of congressional intent." 751 F.2d at 1116 (citing Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz, 691 F.2d 878 (9th Cir.1982) (applying Internal Revenue Code provisions to Indian tribe-owned business), cert. denied, 460 U.S. 1040 (1983)); see also id. (collecting cases). Analogously, if a tribe's choice to use revenue from a tribal business to support tribal government activities

brings that business into the "tribal self-government" exception, then all tribal government businesses would be free of not only the "potentially ruinous burden of federal taxes," id., which directly affect tribal revenues, but also all federal government regulation under both civil and criminal statutes that are silent as to tribes. It would make little sense for Respondent to be exempt from FLSA coverage, to protect its self-government from paying the minimum wage and overtime wages to its casino employees, yet subject to federal taxation of its revenue directly.

Here, Respondent and the Report advance a similar argument as the tribally owned business in Mashantucket Sand & Gravel: "MSG argues that we should start with a presumption that, because it affects tribal sovereignty, [the OSH Act] does not apply unless Congress expressed its specific intent to abrogate tribal sovereignty." 95 F.3d at 177. "Almost every federal statute, however, no matter how innocuous on its face, affects tribal sovereignty as broadly interpreted by MSG. This is too grandiose a concept of tribal sovereignty. Tribal sovereignty is 'dependent on, and subordinate to,' the federal government[, . . . and] of such a "unique and limited" character that it exists only 'at the sufferance of Congress.'" 95 F.3d at 178-79 (citations omitted). The Court "reject[ed] MSG's approach as unworkable" and followed Coeur d'Alene. Id. at 177-181. Similarly, in San Manuel Indian Bingo, the D.C. Circuit recognized that "a statute of general applicability can constrain the actions of a tribal government without at the same time impairing tribal sovereignty." 475 F.3d at 1312. The Coeur d'Alene framework balances these competing interests.

The revenue argument must also be rejected, as it relates to the ultimate question of compliance with the FLSA, which is not ripe at the subpoena enforcement stage. The Report speculates that enforcing the Secretary's FLSA subpoena, and therefore requiring Respondent to comply with the FLSA, "would cause significant[] . . . impact on Tribal revenue." (Report at 26.) This is contrary

to the factual record, in which Respondent claims to already be in full compliance with the FLSA. (See Ct. Rec. 21.) Respondent cannot credibly claim to be in FLSA compliance, but benefit from speculation about injury should it be subjected to the FLSA. The only circumstance under which it would cost Respondent to come into compliance is if the Secretary determines that Respondent is out of compliance. This is just one example of why, in subpoena enforcement, compliance questions are not ripe, and courts enforce subpoenas unless jurisdiction is "plainly lacking." See Karuk, 260 F.3d at 1075-77.

Furthermore, far from usurping tribal self-government, the FLSA leaves the employment decisionmaking in the hands of Respondent. The Tribe chose to enter into the commercial casino business, opening a casino "virtually identical to scores of purely commercial casinos across the country," San Manuel Indian Bingo, 475 F.3d at 1315, which is "not a traditional attribute of self-government," id., thereby subjecting itself to having to comply with the FLSA. Should it wish to have its casino employees work overtime, the Tribe may choose to do so each work week. As in Lumber Industry, the fact that it may cost more and thereby affect profits does not bring the casino within the self-governance exception.

In sum, the Chewelah Casino is "simply a business entity that happens to be run by a tribe." Karuk, 260 F.3d at 1080. There is no aspect of tribal self-governance directly involved in operating the Chewelah Casino, and requiring Respondent to comply with an investigation under the FLSA will not interfere with purely intramural matters of self-governance.

C. Other Cases Addressing Tribal Regulation of Non-Indians, IGRA, Indian Law Canons, and Tribal Sovereign Immunity Do Not Apply Here

i. The cases on tribal regulation of non-Indians do not apply to federal government law enforcement.

The cases addressing the relationships between tribal governments and non-tribe members are not applicable here; none preclude the right of the federal government to regulate tribes' commercial businesses. First, the Report reads the holding of Santa Clara Pueblo far too broadly. Santa Clara Pueblo interpreted the Indian Civil Rights Act ("ICRA"), which "imposes certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." Santa Clara Pueblo, 436 U.S. at 57; see 25 U.S.C. § 1302, and provides habeas corpus as the sole remedy for violations. Id. at 58 (citing 25 U.S.C. § 1303). The case addressed whether a private individual, who wished to be a member of the tribe, could sue the tribe or tribal officers in federal court under the equal protection provision of ICRA. Id. at 51-55. The Court found that ICRA did not abrogate the tribe's sovereign immunity as to private suit, id. at 59, and refused to create a private cause of action against tribal officers to enforce ICRA where habeas had been specified in ICRA as the only remedy. Id. at 69-72. This decision was informed by the fact that the private plaintiff was seeking tribal membership; the Court recognized that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Id. at 72 n.32. But the Court emphasized the decision's narrow scope in its conclusion:

> Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."

436 U.S. at 72 (emphasis added).

The Report quotes the second sentence of this passage and omits the phrase "of such actions," referring to private ICRA suits in federal court, in order to cite Santa Clara Pueblo for the far more broad – and thus, incorrect – proposition that

"Congressional intent to intrude on tribal sovereignty must be explicit." (Report at 12.) Santa Clara Pueblo was a suit to gain tribal membership. Coeur d'Alene recognizes that tribal membership is a purely intramural matter of tribal self-governance, 751 F.2d at 1116, a subject that Congress would have to clearly intend to regulate. Tribes' commercial businesses that employ non-Indians and do business with non-Indians are not purely intramural aspects of tribal self-governance. Santa Clara Pueblo was also a private suit asking the courts to create a private right of action in the face of the language of ICRA. In Coeur d'Alene, the plaintiff was the Secretary of Labor, carrying out his duty delegated by Congress to enforce the OSH Act against covered commercial businesses. The holding of Coeur d'Alene is thus perfectly consistent with Santa Clara Pueblo, if Santa Clara Pueblo and "tribal sovereignty" are properly confined in scope. See also, e.g., San Manuel Indian Bingo, 475 F.3d at 1314 (regarding casino employees, "impairment of tribal sovereignty is negligible in this context, as the Tribe's activity was primarily commercial").

Similarly, allowing the Secretary to enforce the federal labor laws assigned to her by Congress against tribes' commercial businesses, under Coeur d'Alene, is not inconsistent with a tribe's self-governmental rights, and its limited right to govern consensual economic relationships with private individuals, under Montana v. United States, 450 U.S. 544 (1981), and Nevada v. Hicks, 533 U.S. 353 (2001). The Montana line of cases limits tribal civil jurisdiction over non-members, see Nevada, 533 U.S. at 380 (Souter, J., concurring), to "what is necessary to protect tribal self-government or to control internal relations," Montana, 450 U.S. at 564, and what arises under "other 'private consensual' arrangements." Nevada, 533 U.S. at 371 (citing Montana, 450 U.S. at 565).

As for tribal jurisdiction over non-tribe members in private consensual economic relationships with the tribe, the Supreme Court itself, in Nevada, recognized its narrow limits. "The Court . . . obviously did not have in mind States

or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction . . . ." 533 U.S. at 372. If state officers may not be regulated by tribes under Montana, then Montana must also not be read to affect the Secretary of Labor's regulatory jurisdiction over tribes' commercial businesses. The employment arrangement between an employee and his or her employer does not affect the Secretary of Labor's jurisdiction to enforce the FLSA. See, e.g. Donovan v. University of Texas at El Paso, 643 F.2d 1201, 1206-08 (5th Cir. 1981); Wirtz v. Malthor, Inc., 391 F.2d 1, 3 (9th Cir. 1968). Employees may not even contract out of their own FLSA rights, Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 740 (1981) (citing cases); even if Respondent conditioned employment at its casino on a waiver of FLSA rights, the Secretary could still bring suit.

As for the scope of tribal self-government under Montana, "tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." Nevada, 533 U.S. at 360-61 (citations omitted). These subjects are remarkably similar to those set out in Coeur d'Alene into which Congress must explicitly intend to extend federal regulation. See 751 F.2d at 1116. None of these are implicated by requiring Respondent to comply with the FLSA at its commercial casino.

The Report states that the holdings in Montana and Nevada are instructive. (Report at 13.) The Secretary agrees: neither case establishes law governing or limiting the unique power that the federal government has to enforce laws of general applicability against Indian tribes, within limits, which Coeur d'Alene specifically addresses. And the cases may be read together to find that a tribe's right to self-government does not extend to a right to ignore federal labor law in operating its commercial businesses. Neither Montana, Nevada, or Santa Clara Pueblo preclude or even counsel against applying Coeur d'Alene to find federal

agency jurisdiction to regulate a tribe's commercial business employing non-Indians and doing business with non-Indians. Nor is Coeur d'Alene inconsistent with the ideas of tribal-federal comity and Indian self-governance addressed in Santa Clara Pueblo and Montana.

ii. IGRA does not amend, preempt or preclude enforcement of the FLSA.

The Tribe has also contended that IGRA, 25 U.S.C. §§ 2701-2721; 18 U.S.C. § 1166-68, indicates Congressional intent that the FLSA not apply to employees of tribal casinos, which influenced the Report. (See Report at 25-26.) This is error. The Secretary of the Interior may disapprove gaming compacts reached between state and tribal authorities if such agreements violate "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(B); see also Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997) ("IGRA prescribes the permissible scope of the Compacts."). The Gaming Compact here is consistent with this limited understanding of IGRA. It does not establish wage and hour requirements for casino employees, or provide a means of enforcement of any wage and hour standards. Instead, it states that "[n]othing contained herein shall be deemed to modify or limit existing federal, criminal or tribal jurisdiction over the gaming operation negotiated under this Compact . . . ." (Ct. Rec. 35 at 30.)

The IGRA implicitly recognizes that other federal laws, and the realities of business, will affect the financial returns from a tribe's gaming operations. The IGRA directs that "net revenues" of gaming be used to support tribes. 25 U.S.C. § 2710(b)(2)(B). By directing "net revenues" to the benefit of tribes, Congress recognized that business expenses, such as wages, would have to be paid in the same manner as any other business. General language cannot establish that Congress intended for an tribal business to maximize profit in lieu of compliance with other laws. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 177-

80 (1989); id. at 180 ("[A] purpose of the 1938 Act is to provide Indian tribes with badly needed revenue, but find no evidence for the further supposition that Congress intended to remove all barriers to profit maximization.").

Finally, Congress has frequently amended the FLSA throughout its history; had it intended to exempt tribal casinos or other commercial operations from the FLSA, it would have done so explicitly. Amendment by implication, particularly of the "broad[ly] remedial" FLSA, is disfavored, Citicorp Industrial Credit, Inc. v. Brock, 483 U.S. 27, 35 (1987); the argument that IGRA amended the NLRA by implication was rejected in San Manuel Indian Bingo. See 475 F.3d at 1318.

iii. Indian law canons of construction do not supersede *Coeur d'Alene*.

Respondent has extensively cited Indian law canons of construction in its favor throughout its filings, which influenced the Report. (Report at 15.) In Chapa De, a Ninth Circuit panel addressed these canons: "Chapa-De also relies on special canons of construction, which require that statutes be construed for the benefit of Indian interests, in support of its position that even a statute that is generally applicable does not apply to Indian tribes when the statute is silent on the subject. This reliance is misplaced for the same reason. To accept Chapa-De's position would be effectively to overrule Coeur d'Alene, which, of course, this panel cannot do." Chapa-De, 316 F.3d at 999. Chapa-De thus reinforced that the Coeur d'Alene framework is the binding law under which to resolve this matter.

iv. Tribal sovereign immunity does not apply to the federal government.

Tribes have no sovereign immunity as against the federal government. Karuk, 260 F.3d at 1075 (citing cases). Reliance on Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006), is therefore misplaced. Allen was decided on grounds of tribal sovereign immunity against a private pro se Title VII suit, 464 F.3d at 1046-47, and has no application within the Coeur d'Alene line of cases.

III. CONCLUSION

The Secretary's jurisdiction is plainly evident. The Secretary has only requested records for employees who work for the Chewelah Casino, who are not engaged in governmental functions of the Tribe. This Court should enter an order enforcing the Secretary's administrative subpoena.[5]

Dated: March 28, 2008

Respectfully submitted,

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[5] As this Objection relates to a filing dispositive of this action, it is submitted in compliance with the 20-page limit contained in Local Rule 7.1(f).