UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LITTLE RIVER BAND OF OTTAWA INDIANS,

Case No. 1:09-cv-141

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant.
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REPLY OF THE LITTLE RIVER BAND OF OTTAWA INDIANS TO THE NATIONAL LABOR RELATIONS BOARD'S RESPONSE TO ITS MOTION FOR SUMMARY JUDGMENT

THE FACTS AND THE CONTROVERSY

The Little River Band of Ottawa Indians has invoked this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1362 and 28 U.S.C. § 1331 to protect its status as a federally recognized Indian tribe in the face of imminent action by the National Labor Relations Board that would undermine that status. The issue presented by the Tribe's action is whether, under principles of federal Indian law, the Board may seek to challenge the Band's reservation labor relations law as an "unfair labor practice" pursuant to section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)), or whether it must instead challenge that law (as it would the law of a state government) on the grounds of preemption by means of an original action in this Court. It is the Band's position that, as an Indian tribal government, it is protected from the

Board's current chosen course and that by pursuing that course, the Board does fundamental harm to the Band's stature as a government.

By its Motion for Summary Judgment and related Statement of Undisputed Material Facts, the Band has shown, and the Board, by its Responses, has left unanswered (or undisputed), the following:

- Pursuant to its IRA[1] Constitution and consistent with its inherent authority as a federally recognized Indian tribe, the Band governs labor relations within its reservation, including within its IGRA gaming operations. *See* Motion of the Little River Band of Ottawa Indians for Summary Judgment with Incorporated Memorandum of Law (the "Band's Summary Judgment Brief" or "opening brief") at 8-15.
- Under unequivocal Supreme Court precedent, in the absence of a clear Congressional directive, neither the federal courts nor the federal agencies may construe or apply the acts of Congress to undermine such inherent tribal authority, or in such a manner that would "denigrate" the status of tribes by treating them as mere "private, voluntary organizations." *Id*. at 15-22.
- The NLRA contains no such directive, and under established principles of federal Indian law and statutory construction, Congress's failure to make tribes subject to suit under section 301 of the NLRA must be construed as evidence that Congress gave no power to the NLRB to proceed against them pursuant to section 8(a)(1) of the NLRA as if their laws could be treated as the "unfair labor practices" of a private employer. *Id*. at 22-24.
- The NLRB is proceeding against the Band on the Teamsters' Charge with pending subpoenas on a theory that it can treat the Band's enactment and implementation of its

[1] In this Reply Brief, the Band uses the same acronyms that it used in its Summary Judgment Brief.

law as the "unfair labor practices" of a private NLRA employer, and the facts supporting its theory are part of the undisputed record now before the Court. *Id*. at 5-6, 25-26, n. 23.

- Both the Band and the Interior Department have urged the NLRB to alter its course on the ground that it poses a serious affront to the Tribe's status as an Indian tribal government. They have pointed out that the NLRB's proper course is to challenge the Band's law on the ground that it is preempted by the NLRA, just as it would if it claimed that the laws of a state government were in conflict with the NLRA. Notwithstanding requests from the Interior Department and the Band, however, the NLRB has refused to put an end to its agency proceeding on the Teamsters' Charge. *Id*. at 6. *See* AVC Exhibits K-M.

The only dispute that the Board has registered in response to the Band's Statement of Material Facts is a legal one: it denies that the Band has "regulatory jurisdiction" over its reservation labor relations. *See* Response of the NLRB to the Plaintiff's Statement of Undisputed Material Facts ¶¶ 13-18. That issue is governed, in the first instance, by principles of federal Indian law. *See* Band's Summary Judgment Brief at 8-15. The NLRB has no expertise in that field, and the department of government that holds such expertise, the Department of Interior, has opined that the Band "exercise[s] . . . its sovereign authority in . . . enacting tribal labor laws." AVC Exhibit L at 1. The NLRB's claim is that the Band's law cannot stand insofar as it conflicts with the NLRA. *See* AVC Exhibit M at 2 (complaint "would likely issue" against the Band's "unlawful tribal regulation"); *see also* Response of the National Labor Relations Board to the Plaintiff's Motion for Summary Judgment ("NLRB's Response") at 3 & n. 3, 5-6 n.6.

In sum, the essence of the controversy on the record before the Court is this: the Band (supported by the Interior Department's plea that the NLRB "put an end" to its action) maintains that the NLRB's course, in proceeding against the Band as if its law could be treated as the mere "work rule" of a private employer, is an affront to the Band's legal status as an Indian tribal government (whether such law is applied to the Band's IGRA gaming operations or any other department or sub-organization of tribal government). Facing the Board's unrelenting efforts to proceed on the Teamsters' Charge, the Band commenced this action for declaratory and injunctive relief, invoking subject matter jurisdiction pursuant to 28 U.S.C. § 1362 and 28 U.S.C. § 1331.

SUMMARY OF REPLY ARGUMENT

By its Response, the Board claims that this Court's jurisdiction is destroyed by the exhaustion doctrine. The Board fails to understand that, pursuant to 28 U.S.C. § 1362, Congress granted this Court subject matter jurisdiction to protect the Band's status as an Indian tribal government, and the exercise of that unique jurisdiction cannot be overwhelmed by that doctrine. The Board also fails to appreciate the irreparable injury that the Band, by this action, seeks to prevent; the Board would call the Band to answer and appear before it, not as an Indian tribal government enacting law, but as a fictitious entity: a mere appendage to a purported NLRA employer. The very act of doing so, which the Interior Department and the Band have explicitly urged the Board to abandon, would eviscerate the stature and dignity of the Band in the exercise of its sovereign authority as recognized and restored by Congress and in accord with unequivocal principles of federal Indian law. That is the stature that Congress, by section 1362, gave this Court the power to protect.

The exhaustion doctrine has no place in this case. The Band properly has invoked not only the "sweeping jurisdiction" that Congress granted to this Court under section 1362, but the Court's general federal question jurisdiction under 28 U.S.C. § 1331. The Band invokes section 1331 to protect itself in this case, just as any sovereign could do. The Board could never seek to undermine the exercise of a sovereign's lawmaking authority -- be it that of a state, a foreign government, or an Indian tribe -- by means of an unfair labor practice proceeding. Any such sovereign, including the Band, properly can proceed under this Court's federal question jurisdiction to check such an abusive use of agency power; the exhaustion doctrine does not prevent this Court from vindicating sovereign rights.

For these reasons, as more fully set forth below, this Court may proceed on the Band's Amended Verified Complaint and Motion for Summary Judgment to enjoin the NLRB from proceeding further against the Band and to declare any continuing effort to do so a violation of federal law.

REPLY ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1362

1. The NLRB improperly casts 28 U.S.C. § 1362 as a "general" statute that must bend to the review procedure in the federal courts of appeals made available by the NLRA, which it claims is more "specific" to the matter at hand. NLRB's Response at 22-23. Congress, however, enacted section 1362 specifically to allow Indian tribes to proceed to federal court for relief in controversies unique to them. The statute "grant[s] sweeping federal-court jurisdiction where an Indian tribe [is] a party." *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 828 (1997).[2] Thus, in *Moe v. Confederated Salish and Kootenai Tribes of Flathead*

[2] Section 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of Interior, wherein

Reservation, 425 U.S. 463 (1976), a unanimous Supreme Court held that a tribe's action under section 1362 to enjoin a state tax proceeding that would undermine tribal prerogatives was not subject to the express statutory barrier against such actions found in the Tax Injunction Act, 28 U.S.C. § 1341.[3] In any other setting, with sole exception of state tax proceedings against the United States or its affiliated bodies "with interests indistinguishable from those of the sovereign," this "broad jurisdictional barrier," would have deprived the federal district courts of "subject-matter jurisdiction." *Farm Credit Services*, 520 U.S. at 825-831 (quotations and citations omitted). Thus, *Moe* clearly establishes that section 1362 uniquely protects Indian tribes as sovereigns. The NLRB is flatly incorrect to classify section 1362 as a mere "general" jurisdictional statute. On the contrary, the statute specifically opens the doors of the federal district courts to protect the particular federal interests of tribes. Thus, this Court's jurisdiction pursuant to section 1362 is not thwarted by section 10(f) of the NLRA (29 U.S.C. § 160(f)) under the rule of construction that "specific" grants of jurisdiction must control over "general" ones.

It should be observed, moreover, that in attempting to impose such a rule of construction upon section 1362, the NLRB "fails to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Id.* (quotations and citation omitted). The federal courts must, therefore, "be guided by that eminently sound and vital canon, that statutes passed for the benefit of . . . Indian tribes . . . are to

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the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. The tribal government of the Little River Band of Ottawa Indians is duly recognized by the Secretary of Interior. *See, e.g.*, AVC Exhibit A (Secretary's certified approval appended to the Band's Constitution); 74 Fed. Reg. 40,220 (Aug. 11, 2009).

[3] The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of the State." 28 U.S.C. § 1341.

be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quotations and citations omitted). *Accord Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 971 (6th Cir. 2004). The Supreme Court and courts of appeals, therefore, readily reject the kind of statutory construction argument made by the NLRB here. *See, e.g., Montana v. Blackfeet Tribe*, 471 U.S. at 766 (rejecting "strong presumption against repeals by implication" in favor of Indian law canon); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (rejecting statutory construction argument that Congress's exclusion of tribes from Title VII compared to its silence on that subject in the Age Discrimination in Employment Act must mean that it intended to impose the ADEA upon tribes). Upon enacting section 1362, Congress can be presumed to have known that the federal courts would apply it in accord with this robust body of law giving paramount protection to tribal interests, consistent with the federal government's obligation of trust to the Indians. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988); *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 554 (9th Cir. 1991).

2. Contrary to the NLRB's position, the injury faced by the Band – the Board's failure to respect its sovereign status as an Indian tribal government – is not "ill-defined." Rather, it is precisely the type of injury Congress provided the federal courts with jurisdiction to protect under section 1362. At issue in *Moe,* for example, was the injury faced by the tribe as a result of a state's failure to respect its sovereign status in a state tax proceeding. The Court declared there that "the Tribe, *Qua Tribe*, has a discrete claim of injury with respect to these forms of state taxation[:] . . . the substantive interest which Congress sought to protect [under §

1362] is tribal self-government." *Moe*, 425 U.S. at 469 n.7 (emphasis added).[4] This Court, again, need go no further than *Moe* to reject the NLRB's assertion that the Band can claim no injury in this case. The Band seeks to protect its very status as a "Tribe *Qua Tribe*." It is this status that the NLRB would undermine by its very proceeding; for in that proceeding, the Band would be forced to appear and defend as if to put on the mask of some amorphous appendage to an NLRA employer. Indeed, the Board would treat the Band's promulgation of Article XVI, an act of tribal government involving significant and "politically sensitive" public policy considerations (*see* Band's opening brief at 13-14), as the mere "work rule" of such employer.

Tribes are not two-headed monsters or Jekyll and Hyde-type characters. The Supreme Court has, in no uncertain terms, admonished precisely what the Board intends by its proceeding, stating that it "*denigrates*" Indian tribes to ignore their sovereign status and attempt to treat them as mere "private, voluntary organizations." *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130, 146-147 (1982) (quotations and citation omitted) (emphasis added). And the Interior Department has made the same quite clear to the Board, stating, "[t]he NLRB cannot challenge the sovereign acts of the Band in adopting its constitution and promulgating its labor ordinances as if those acts were merely those of a private employer." AVC Exhibit L at 2. The Band thoroughly explained, in its opening brief, why the NLRB's chosen course harms its protected status, and dignity, as a federally recognized Indian tribe under established principles of federal Indian law, *see* Band's Summary Judgment Brief at 18-20, 24 n.22. The Board's attempt to ignore that harm should be soundly rejected.[5]

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[4] The Court's conclusion is supported by the legislative history of section 1362. The House Committee Report on the provision states that it would allow tribes to bring actions in federal court "for the protection of powers of tribal self-government." 1966 U.S.C.C.A.N. at 3147, 3149.

[5] The Board's claim that the Band should not now be heard because it has not yet issued a complaint is really a ripeness challenge and does not check this Court's ability, and obligation, to exercise the jurisdiction granted it by section 1362. The NLRB's pending subpoenas and its refusal to heed the

2a. The Board not only overlooks this bedrock law, but it fails to grasp that the very manner in which it is proceeding, rather than the outcome or the enforcement of any final order by a circuit court of appeals, is the cause of the harm generating the Band's call for protection from this Court. Contrary to the NLRB's assertion, the Band is not "off the mark" in citing to subpoena enforcement cases as examples. Indeed, in *Karuk Tribe Housing Authority*, the Ninth Circuit found that the exhaustion of administrative remedies itself would cause irreparable harm "vis-a-vis the Tribe's sovereignty" when the agency lacked jurisdiction to proceed. *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1077 (9th Cir. 2001) (finding "clear evidence that exhaustion of administrative remedies will result in irreparable harm"). The Board's further claim that such harm is present only when a tribe claims sovereign immunity is likewise undermined by *Karuk*, where the Court found such irreparable harm even while holding that sovereign immunity was not at issue, *see id*. at 1075, and by *Moe*, where sovereign immunity was again not at issue, but where the Supreme Court recognized the injury posed to the tribe's sovereignty by the state tax proceeding, *see Moe*, 425 U.S. at 469 n.7. As shown by these cases, injury to tribal sovereignty -- which, at base, means the prerogative to act, and to be treated as, a government -- does not always take the form of a proceeding in violation of sovereign immunity. Indeed, in dressing up what should be an original action to claim NLRA preemption as an unfair labor practice proceeding, the NLRB would force this Tribe to "dress up" as something it is not, only to claim that the Tribe suffers no harm in the process because it can later ask a court of appeals to take the costume off. By that time, the substantial harm to the Band will have been

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Interior Department's plea to stand back show the imminent harm the Board's actions pose to the Band. Thus, as fully explained in the Band's opening brief, the issues are fully joined with regard to the Band's entitlement to declaratory and injunctive relief. *See* Band's Summary Judgment Brief at 24-26 & ns. 22-23. *See also Lipscomb v. FLRA*, 200 F. Supp.2d 650, 657 (S.D. Miss. 2001) (addressing, and rejecting, argument similar to that of the Board), *aff'd*, 333 F.3d 611 (5th Cir. 2003), *cert. denied*, *Cross v. FLRA*, 541 U.S. 935 (2004).

done. The Board simply fails to understand the harm that its very proceeding portends for this Tribe.[6]

3. The central issue is not, therefore, whether the Band faces irreparable injury from the Board's proceeding (it plainly does) or whether it has properly invoked section 1362 to seek the protection of this Court from that injury (it plainly has), but whether this Court's subject matter jurisdiction to entertain the Band's action is thwarted by the exhaustion doctrine. *Cf. Leedom v. Kyne*, 358 U.S. 184, 187 (1958) (district court had jurisdiction under 28 U.S.C. § 1337; issue was whether exhaustion under the NLRA "destroyed it"). The exhaustion doctrine does not destroy this Court's section 1362 subject matter jurisdiction. Section 1362 fully sustains this Court's jurisdiction to proceed to protect the unique interests of an Indian tribe in the face of an exhaustion challenge, just as it does in the face of similar common law barriers designed generally for efficient judicial administration, or statutory mandates designed to prevent federal courts from interfering with the processes of other forums.

The Tax Injunction Act is not the only significant barrier to a federal court's authority that gives way when section 1362 jurisdiction is at stake. As discussed in the Band's opening brief, the abstention doctrine, which ordinarily strips federal courts of authority to enjoin state court proceedings in the absence of "extraordinary circumstance[s]," *see Squire v. Coughlan*, 469 F.3d 551, 555 (6th Cir. 2006), does not trump a federal court's power, under section 1362, to

[6] The Board oddly claims that the exhaustion doctrine works directly here but not in the context of a subpoena enforcement action. Response at 18. The Board is mistaken. The exhaustion problem is the same in either context. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 212 & n.51 (1946) (employing the rule of *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41(1938) in subpoena enforcement case). Indeed, as the Tribe pointed out in its opening brief, the Board made just that argument to the Ninth Circuit in *NLRB v. Chapa De Health Program, Inc.*, 316 F.3d 995, 998 n.1 (9th Cir. 2003). Further, the standards used by the federal courts, including the Sixth Circuit, to decide whether a federal district court is constrained by the exhaustion doctrine from addressing the power of an agency to proceed prior to the agency's final determination of that issue are the same in both the subpoena enforcement context and in an original action brought by a party to prevent an agency from commencing or continuing its action. *See infra* note 13.

protect Indian tribes from such proceedings because of their status as sovereigns. *See, e.g.*, *Tohono O'Odham Nation v. Schwartz*, 837 F.Supp. 1024, 1028-29 (D. Ariz. 1993); *Bowen v. Doyle*, 880 F.Supp. 99, 131-133 (W.D.N.Y. 1995), *aff'd*, 200 F.3d 525 (2nd Cir. 2000). *See also Chippewa Trading Co. v. Cox*, 365 F.3d 538, 544-546 (6th Cir. 2004) (discussing section 1362, and noting that abstention doctrine of *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), would not likely trump action by tribe under section 1362), *cert. denied*, 543 U.S. 988 (2004).[7] Likewise, the Anti-Injunction Act, which stands as similar barrier to a federal district court's jurisdiction to enjoin state court proceedings cannot undermine the court's authority, under section 1362, to proceed on a tribe's request to enjoin such a proceeding when it harms the tribe's sovereignty under established principles of federal Indian law. *See, e.g.*, *Tohono O'Odham Nation*, 837 F.Supp. at 1028; *Bowen v. Doyle*, 880 F.Supp. at 130 n.39; *Cayuga Indian Nation of New York v. Fox*, 544 F. Supp. 542, 551 n.5 (N.D.N.Y. 1982). *See also Sac and Fox Nation v. Hanson*, 47 F.3d 1062, 1063 n.1 (10th Cir.) (dictum on same), *cert. denied*, 516 U.S. 810 (1995).[8]

The Board seeks to endow the exhaustion doctrine with an exalted status over and above these other barriers to federal court jurisdiction. In fact, however, the exhaustion doctrine is not a magic wand that the Board can wave to gut section 1362 of its force in order that the Board can

[7] In the unique setting of *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Supreme Court did find abstention proper in a section 1362 case, but only because, under the McCarran Amendment, Congress expressly granted authority to state courts to adjudicate Indian water rights. The Court explained that, unlike the instant case, the propriety of the pending proceedings did not turn on the Court's established Indian law doctrines protecting tribal sovereignty. *See San Carlos Apache Tribe*, 463 U.S. at 564, 570-571. Rather, "a virtually unique federal statute" – the McCarran Amendment – applied to a "virtually unique type of proceeding" -- complex water rights adjudication. *Id*. at 571. Thus, the Court's abstention decision in *San Carlos Apache Tribe* has no bearing on cases, like this one, where tribes invoke section 1362 to protect themselves from a proceeding that itself violates tribal prerogatives under established federal Indian law.

[8] The Anti-Injunction Act provides that the federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

ignore tribal sovereignty with impunity. It instead must take its place next to these barriers, which ordinarily obstruct federal court authority, but do not work such obstruction in the face of a federal district court's jurisdiction under section 1362.

The exhaustion doctrine is a rule of "judicial administration," *Myers*, 303 U.S. at 51 n.9. While described by the courts as a jurisdictional obstacle, like most common law rules, changing times have tested the rule and demanded exceptions to it. *See, e.g., McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963) (finding exception when Board sought to apply NLRA to owner of foreign flag vessel, operating under collective bargaining agreement entered into with Honduran union and governed by Honduran law). *See generally McKart v. United States*, 395 U.S. 185, 193 (1969) (the doctrine "is applied in a number of different settings and is, like most judicial doctrines, subject to numerous exceptions."). As the seminal treatise on Administrative Law states: "the 'rule' is neither as unequivocal nor as long settled as the Court's oft-quoted statement in *Myers* suggests. . . . The cases suggest a more malleable 'rule.'" 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 at 967 (4th ed. 2002) ("Pierce").

Such a rule can hardly thwart a tribe's action under section 1362 when the far stauncher barrier to federal court jurisdiction that Congress expressly laid down in the Tax Injunction Act cannot. Nor can such a rule of "judicial administration" overwhelm section 1362 jurisdiction when the similar abstention rules cannot. Certainly, the "rule" exemplified by *Myers* and its progeny cannot be elevated to the status of a *constitutional* barrier to federal court jurisdiction, and, thus far, in the section 1362 jurisprudence of the Supreme Court, only that firm a barrier has overcome a federal district court's obligation to proceed when section 1362, as here, is properly invoked by an Indian tribe. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

In short, the exhaustion doctrine, no more than the Tax Injunction Act, the Anti-Injunction Act, or the abstention doctrine can thwart this Court's subject matter jurisdiction to proceed with the Tribe's action to protect its status as an Indian tribal government from mistreatment by the Board pursuant to 28 U.S.C. § 1362. To hold otherwise would subject the Tribe to the very injury that section 1362 gives tribes a vehicle to prevent. Such a result would also be at war with the "vital" canon that section 1362 must be "liberally construed" in furtherance of the federal government's trust obligation to protect the status of tribes *qua* governments.[9]

4. In this setting, it is clear that the array of exhaustion doctrine cases cited by the NLRB are readily distinguishable from the case before this Court. Not one involves a sovereign Indian tribe, let alone a state or other foreign sovereign faced with an unfair labor practice for enacting a law. Not one involves an attempt by a federal agency to invoke the exhaustion doctrine to thwart a federal district court's subject matter jurisdiction under a statute, like 28 U.S.C. § 1362, specifically designed to give a sovereign access to federal court to protect its status as a government.[10]

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[9]The Board's asserts that the exhaustion doctrine is not comparable to abstention rules for the purpose of evaluating section 1362's force in this case because Congress designed section 1362 to ensure that tribes would have a federal forum to resolve their controversies (as opposed to historically hostile state forums), and the NLRB is a "*federal*" agency. Response at 25 n.12 (emphasis in original). In fact, *this* agency, like state forums, is wholly lacking in expertise in the field of federal Indian law and is at loggerheads with the Interior Department, the federal department with such expertise, over the harm that its very proceeding portends to the stature of the Band as an Indian tribal government. *See* AVC Exhibits L and M.

[10] A further, and telling, aspect of this case is that none of the policies that support the exhaustion rule derived from *Myers* are present. *See McKart v. United States*, 395 U.S. at 193 ("Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved."). There are no factual disputes or findings to be made by the Board: as the Court requested at the pre-motion conference on May 22, 2009, the Band has provided all of the facts that the Board considers relevant to its proceeding; second, the Board has no expertise with regard to federal Indian law, the body of law that governs the Board's asserted power to proceed; third, there is no dispute that the Band's law, conflicts with the NLRA and, therefore, no need for any Board adjudication on that

Of all the Supreme Court cases addressing the application of the exhaustion doctrine in the NLRA context, the one that is closest to the case at bar, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), is overlooked by the Board. In that case, a unanimous Supreme Court upheld the district court's jurisdiction to enjoin the NLRB from asserting authority over foreign flag vessels. As in the instant case, a separate sovereign, the Honduran government (like the Band here), had enacted, and was implementing, a law governing the collective bargaining agreement between seamen and the owner of the vessels. As in the instant case, the Honduran Labor Code (like the Band's Article XVI here) conflicted with the NLRA.[11] The vessel owner sued to stop the NLRB from proceeding against it, and the NLRB, as here, claimed that the exhaustion doctrine destroyed the federal court's jurisdiction. The Supreme Court disagreed. It stated: "the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." *Id*. at 17.

The case for setting aside the exhaustion doctrine in *McCulloch* would, no doubt, have been all the *more* compelling if, as in the instant case, the NLRB asserted its power directly against the Honduran government, claiming that its enactment and implementation of the Honduran Labor Code could be challenged as an "unfair labor practice" pursuant to section 8(a)(1) of the NLRA; and *even more so* if, in such a setting, the Honduran government had invoked a statute (like section 1362) that granted the federal district courts subject matter jurisdiction to hear cases brought by foreign governments to protect their unique status *qua*

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point. Exhaustion in this case would, therefore, serve none of the policy purpose for the doctrine. *Compare McKart*, 395 U.S. at 193-194 (listing purposes).

[11] In *McCulloch*, under the Honduran law governing labor relations on the foreign vessels at issue, "only a union whose 'juridic personality' [was] recognized by Honduras and which [was] composed of at least 90% of Honduran citizens c[ould] represent seamen on the Honduran-registered ships." *McCulloch*, 372 U.S. at 13.

governments. *McCulloch*, therefore, squarely supports the maintenance of jurisdiction in this case.

Section 1362, of course, reflects the federal government's trust obligation to protect the governmental status of Indian tribes. *See, e.g.*, *San Carlos Apache Tribe*, 463 U.S. at 576 (Section 1362 exemplifies "one important aspect of" the "distinctive obligation of trust incumbent upon the Government in its dealings with" the "sometimes exploited" Indian tribes) (Stevens, J., with whom Blackmun, J., dissenting). The threatened injury to that status posed by the Board's proceeding in this case is no less important than the foreign relations concerns at issue in *McCulloch*. Any suggestion to the contrary ignores not only the Board's imminent mistreatment of the Band's sovereign status, but the "solemn commitment of the Government toward the Indians." *See Morton v. Mancari*, 417 U.S. 535, 555 (1974).

II. THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1331

While 28 U.S.C. § 1362 is sufficient for this Court to maintain subject matter jurisdiction in the face of the Board's assertion of the exhaustion doctrine, the Court also has jurisdiction under section 1331.

The case most closely on point is *Florida Board of Business Regulation v. NLRB*, 686 F.2d 1362 (11th Cir. 1982), which involved an original action, by a sovereign authority, the State of Florida, seeking, *inter alia*, a declaratory judgment that, under the Tenth Amendment, the NLRB had no authority to govern labor relations in the state-regulated jai alai gaming industry. The Board was asserting authority to proceed with an union election governing that industry. *See id*. at 1367. In its Response, the Board asserts that the Eleventh Circuit affirmed subject matter jurisdiction under section 1331 only because it fit an exception to the exhaustion rule, allowing a party who cannot attain judicial review of an election order to proceed to federal

court. *See* Board's Response at 26-27. The Band reads the Eleventh Circuit's decision differently. The Eleventh Circuit issued a clear holding that the federal district court had jurisdiction to proceed on the State's request for declaratory judgment under section 1331 to prevent the NLRB from intruding into an industry over which it claimed to exercise substantial regulatory authority. *See Florida Board*, 686 F.2d at 1370. *See also Florida Board of Business Regulation v. NLRB*, 605 F.2d 916, 920 (9th Cir. 1979) (rejecting NLRB claim that state's declaratory judgment claim moot because, although no union election pending, Board's future assertion of jurisdiction and election order could allow state means for judicial review).[12]

In this case, the Band has a freestanding claim, arising under the federal law governing Indian affairs, that the Board has no power to proceed against it on the Teamsters' Charge in an attempt to treat its enactment and implementation of Article XVI as the mere "work rule" of a NLRA employer. While that is not what the State of Florida claimed by way of its request for a declaratory judgment in *Florida Board*, for the purposes of applying the exhaustion doctrine in a case where the NLRB threatens the prerogatives of a sovereign, it is analogous. It can hardly be doubted that if any state or foreign government were beset with the kind of claim asserted by the Board against the Tribe here, a federal district court could sustain its subject jurisdiction pursuant to section 1331 in the face of an exhaustion doctrine challenge by the Board. The NLRB's position is tantamount to a claim that it could treat a state legislature as the "joint employer" of a state instrumentality that the NLRB claims to be within its authority and thereby commence an unfair labor practice against state legislators by calling a state's labor code the "work rules" of that entity.

[12] The federal district court in *Lipscomb v. FLRA*, 200 F.Supp.2d 650 rejected arguments identical to those made by the Board in its Response, attempting to cabin *Florida Board*. *See Lipscomb*, 200 F.Supp. 2d at 655-656 & ns. 8-9.

Perhaps the closest analogy would be if the NLRB proceeded against the New York State Legislature for an "unfair labor practice" for enacting and implementing the state law prohibiting strikes at the state-owned horse racing facility in *New York City Off-Track Betting Corp. v. Local 2021 of the Dist. Council 37,* 416 N.Y.S.2d 974 (1979), referenced by the Tribe in its opening brief at page 13 n. 7. There is little doubt that if New York legislators filed an action for declaratory and injunctive relief in the federal district court to stop the NLRB from proceeding, the court would have had subject matter jurisdiction under section 1331, which would not be thwarted by the exhaustion doctrine. While the NLRB might assert that this would never happen because states are expressly excluded from the NLRA, if it did happen, it is clear that its exhaustion argument – premised on the view that there is "no injury" and, therefore, no means for relief from a federal court until after the exhaustion of the full administrative process – would fail. Here, under unequivocal principles of Indian law, the Board's claim to proceed against the Band on the Teamsters' Charge is equally lacking in merit.

In short, this court has jurisdiction under section 1331 just as the federal district court had in *Florida Board* and just as any federal district court would have in any hypothetical case where a sovereign faces the kind of mistreatment to its status that the Band faces here. This is not an ordinary case and no ordinary application of the exhaustion doctrine can prevent this Court from proceeding to grant the Band the relief it seeks.

III. THE THREE FACTOR TEST ADOPTED BY THE SIXTH CIRCUIT IN *SHAWNEE COAL COMPANY V. ANDRUS* ESTABLISHES AN EXCEPTION TO THE EXHAUSTION DOCTRINE IN THIS CASE

Even if this Court's subject matter jurisdiction under either section 1362 or section 1331 were not comfortably sustained in the face of the exhaustion doctrine as outlined above, the three part test adopted by the Sixth Circuit for determining whether a given case fits within the narrow

range of cases warranting and an exception to that doctrine would establish just such an exception here. This test, as the Band pointed out in is opening brief, considers the following:

(1) is the agency's jurisdiction conspicuously lacking;

(2) will the agency's expertise assist in resolving the jurisdictional dispute; and

(3) will exhaustion of administrative remedies result in irreparable harm to the claimant.

Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981).[13]

On the premise that *Myers* and its progeny foreclose any debate about the application of the exhaustion rule to this case, the NLRB asserts that the Court should not address these standards. *See* NLRB's Response at 26 n.13. But, as pointed out above, no case within that progeny, with the sole exception of *McCulloch*, has anything to teach with respect to the unique circumstance presented here. While it is true, as the NLRB points out, that the Sixth Circuit decided not to apply the *Shawnee Coal* standards in *Detroit Newspaper Agency v. National Labor Relations Board*, 286 F.3d 391 (6th Cir. 2001), *Detroit Newspaper* is a good example of why the cases within the *Myers* progeny, apart from *McCulloch*, are inapposite.

Setting to one side the force of section 1362 as a basis for distinguishing *Detroit Newspapers*, it bears repeating why that case (like the other exhaustion cases on which the Board relies) provides no guidance with respect to the issues presented here. It did not involve an attempt by the Board to impose an unfair labor practice charge upon the sovereign acts of a government. It involved no consideration of a body of law, reflecting a "solemn commitment" on the part of the federal government, to protect such a sovereign from being "denigrated" by

[13] This test was first articulated by Professor Kenneth Culp Davis to reconcile the Supreme Court's varying opinions applying *Myers* exhaustion, including the principal cases cited by the NLRB. *See generally* Pierce at 973-975. It was first adopted by the Ninth Circuit in the context of an original action against an agency, like the instant case, *see Lone Star Cement Corp. v. F.T.C.*, 339 F.2d 505, 510 (9th Cir. 1964), but it is also used to test whether a federal district court, in a subpoena enforcement action, is barred by the exhaustion doctrine from addressing agency jurisdiction prior to final agency action, *see Karuk Tribe Housing*, 260 F.3d at 1077.

having its sensitive enactments treated as the mere acts of a private, voluntary organization. There is a significant difference between the issues presented by this case, involving an attempt by the NLRB to challenge the acts of a sovereign government through its proceedings, and the far more standard labor disputes that populate the body of law that *Myers* and its progeny address. Indeed, this case will be resolved by principles of federal Indian law, not by the NLRA.

As the Tribe thoroughly explained in its opening brief, in accordance with those principles, the NLRB's jurisdiction to treat the Band's law as the "unfair labor practice" of a private NLRB employer is "conspicuously lacking." *See* Band's Summary Judgment Brief at 7-24. Indeed, as pointed out at the beginning of this Reply, the Board has made no effort to contest this.[14] Further, there is no doubt that the NLRB lacks expertise in the field of federal Indian law. Finally, as also spelled out it in the Band's opening brief and fully elaborated upon above, the Band faces irreparable injury to its status as an Indian tribal government from the Board's unfair labor practice proceeding.

[14] The NLRB gains nothing from its oblique assertion that its jurisdiction is not "plainly lacking," by citing *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) and, by parenthetical, referring to the so-called "*Tuscarora*/*Coeur d'Alene* framework," which it says (without any further citation or discussion) "several circuits have adopted." *See* Board's Response at 18-19. *Chapa De Indian Health*, unlike the instant case, did not involve a direct attack by a federal agency on an Indian tribe's enactment and implementation of a tribal law. Nor did any of the cases employing the so-called "*Tuscarora*/*Coeur d'Alene* framework," including the Ninth Circuit's *Karuk Tribe Housing Authority* case. Indeed, in the *only* case to date in which the NLRB (or any federal agency) has taken aim at an Indian tribe for "enacting a labor regulation," the Tenth Circuit, sitting en banc, flatly rejected that framework because "it does not apply where an Indian tribe has exercised its authority as a sovereign." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (en banc). The Court observed, in language is fully apt here to the cases that the Board would seek to reference: "*[i]n spite of the Board's attempts to bring to our attention multiple cases where the* [Tuscarora/Coeur d'Alene] *rule was applied to a tribe* qua *sovereign, no citations were found to be apposite.*" *Id*. (emphasis added). Further, the NLRB gets no "*Chevron* deference" with respect to the application of the federal Indian law doctrines that govern this case, and the D.C. Circuit specifically refused to give it such deference when, in *San Manuel Indian Bingo*, the Board promoted, and the D.C. Circuit rejected, the application of the *Tuscarora/Coeur d'Alene* framework. *See San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007). *See also* the Band's Summary Judgment Brief at 21 n.20 (addressing *San Manuel Indian Bingo*).

Thus, even if questions remained about the sustenance of this Court's jurisdiction under either section 1362 or section 1331 in the face of the exhaustion doctrine, the Band would satisfy the *Shawnee Coal* test for establishing that the exhaustion doctrine does not apply in this case.

CONCLUSION

For the foregoing reasons, together with those set forth in its opening brief, the Band is entitled to summary judgment against the Board. The Band, therefore, respectfully asks that the Court enter judgment in its favor upon its Amended Verified Complaint; issue an order enjoining the Board, its agents, officers and representatives from proceeding further, by any means, on the Teamsters' Charge; and declare that the Board has no power to proceed, by any means, against the Band, on that Charge.

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s/Kaighn Smith Jr.
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