UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL LABOR RELATIONS BOARD Applicant and FORTUNE BAY RESORT CASINO Respondent.	Case No. 08-mc-65 JRT-JJG **BOIS FORTE BAND OF CHIPPEWA INDIANS D/B/A FORTUNE BAY CASINO'S OBJECTION TO REPORT AND RECOMMENDATION** **ORAL ARGUMENT REQUESTED**

The fundamental error of the Report and Recommendation[1] is that it begins from the wrong starting point. Because it applies law from outside the circuit—which conflicts with Eighth Circuit law—and answers questions not at issue, the R&R is not useful in determining the issues before this Court: (1) may the National Labor Relations Act be applied to the Band, in violation of its inherent sovereign and treaty-protected rights to self-governance, territorial sovereignty, and perpetual use and occupancy; and (2) is the Bois Forte Band of Chippewa Indians immune from the underlying proceeding, which was brought by a private party? Under the law of *this* circuit, the National Labor Relations Board lacked jurisdiction to issue the subpoena, and it may not be enforced. This Court reviews the R&R *de novo*.[2]

[1] Doc. 14 (the "R&R"). The Band will send a tabbed courtesy copy of its filed Response and Surreply to this Court's chambers.
[2] Fed. R. Civ. P. 72(b)(3).

A. Application of the NLRA

The cornerstone of the R&R is whether the NLRA—a statute silent as to tribes—applies to the Band.[3] Under longstanding canons of Indian law,

> the power "to abrogate the provisions of an Indian treaty . . . will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . ." We do not construe statutes as abrogating treaty rights in "a backhanded way,"; in the absence of explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Indian treaty rights are too fundamental to be easily cast aside.[4]

The Supreme Court has repeated this requirement of "clear and plain" intent to abrogate sovereign rights time and again.[5]

In a single case from 1960, the Court stated in dictum that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[6] The *Tuscarora* Court went on to *decide* the case by following the "clear and

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[3] Whether the statute applies to the Band *at all* is separate from the question of whether (if the statute applies) the Band is covered by the statute's definition of employer. Resp. at 6-7; Surreply at 2-3. The distinction is important for two reasons. First, *courts* determine questions of applicability in the first instance, but the *Board* determines questions of coverage. If this were a coverage case, this Court could not decide it. Second, the information sought by the Board's subpoena (such as "[i]nformation concerning the nature of the casino's business, the composition of its workforce and revenues and sales[,]" R&R at 14) bears on coverage, which is bounded by the employer's size and effect on interstate commerce. It is immaterial to applicability, which turns on questions of Indian law, not labor law.

[4] *U.S. v. Dion*, 476 U.S. 734, 738-39 (1986) (internal citation omitted).

[5] *E.g. Mille Lacs Band of Chippewa*, 526 U.S. 172, 202 (1999) (internal citation omitted).

[6] *Federal Power Commission v. Tuscarora Indian* Nation, 362 U.S. 99, 120 (1960).

plain" intent canon, and the Supreme Court has *not once* followed the *Tuscarora* dictum.[7] But in *San Manuel Indian Bingo & Casino v. NLRB*, the Board elevated this dictum,[8] and the R&R adopted this analysis without qualification.[9] This Court need not follow the *Tuscarora* dictum because: (1) it is not binding on this Court; (2) it addresses statutes of general application—and the NLRA is not one;[10] and (3) it cannot trump longstanding Indian-law canons. The R&R did not resolve any of these issues before applying the *Tuscarora* dictum.[11]

Various lower courts have approached *Tuscarora* differently.[12] In *Donovan v. Coeur d'Alene Tribal Farm*, the Ninth Circuit adopted the *Tuscarora* dictum as its rule, but invented three "exceptions" to realign it with the Indian-law canons.[13] But neither the Supreme Court nor the Eighth Circuit have adopted the *Tuscarora* dictum or *Coeur d'Alene* as controlling law.[14] The starting point for this analysis must be the controlling law of *this* circuit: *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*[15]

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[7] Resp. at 30-32.
[8] 226 N.L.R.B. 1055 (2004) ("*San Manuel I*").
[9] *Id.* at 12.
[10] Resp. at 31. *See also* R&R at 11 n.6 (recognizing that the NLRA does not treat all employers equally).
[11] *See* R&R at 16-18.
[12] Resp. at 32-34.
[13] 751 F.2d 1113, 1116 (9th Cir 1985); Resp. at 33-34.
[14] The single District of Minnesota case to rely on the *Coeur d'Alene* analysis —*Prescott v. Little Six. Inc*., 284 F. Supp. 2d 1224 (D. Minn. 2003)—was reversed in a decision that did not reach the *Coeur d'Alene* issue. 387 F.3d 753 (8th Cir. 2004). Even *Prescott*, though, distinguished *Fond du Lac* as an employment claim "brought by a tribal member against a tribal entity." 284 F. Supp. 2d at 1227.
[15] 986 F.2d 246 (8th Cir. 1993). Even the *Prescott* Court distinguished *Fond du Lac* as an employment claim "brought by a tribal member against a tribal entity." 284 F. Supp. 2d at 1227.

In the Eighth Circuit, the *Tuscarora* dictum "does not apply when the interest sought to be affected is a specific right reserved to the Indians."[16] *Fond du Lac* addressed whether the Age Discrimination in Employment Act applies to tribes. It began by doing what the R&R does not: reconciling the *Tuscarora* dictum with the more relevant "'clear and plain' rule of congressional intent."[17] And the *Fond du Lac* Court was clear: though "specific Indian rights" are typically rooted in treaties, "such rights may also be based upon statutes, executive agreements, and federal common law."[18]

The R&R recognized that *Fond du Lac* "clarified the clear-congressional-intent canon in the Eight Circuit[,]"[19] but refused to follow *Fond du Lac* because it addressed the ADEA, not the NLRA, and because it was a fully litigated case.[20] This rationale is curious. The ADEA and the NLRA are identical in the respects that the *Fond du Lac* Court found important—both concern federal regulation of the employment relationship, and are both silent as to tribes.[21] *Fond du Lac* did not otherwise address the ADEA's scope, language, purpose, or enforceability.[22] And the first two pages of the R&R show that we have here all the record we need to determine whether *Fond du Lac* applies—this

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[16] *Fond du Lac*, 986 F.2d at 248..
[17] *Id.*
[18] *Id.* (describing the inherent tribal sovereign rights of self-governance, territorial management, and regulation of internal matters).
[19] R&R at 16-17.
[20] *Id.* at 17.
[21] *Fond du Lac*, 986 F.2d at 249-250.
[22] *Compare* R&R at 17 *with Fond du Lac*, 986 F.2d at 250-51.

dispute, too, is between "a member of the tribe, the tribe as an employer, and on the reservation employment[.]" [23]

Rather than apply the controlling *Fond du Lac* case, the R&R *assumes* that the Board's *San Manuel I* analysis (and its reliance on *Coeur d'Alene*) applies. But it does not say *why* this Court "must consider"[24] or even should[25] follow either of those decisions. *Coeur d'Alene* is fundamentally at odds with *Fond du Lac*:

- In the Ninth Circuit, a statute that is silent as to tribes is presumed to *apply unless* Congress says it doesn't, or unless it fits in one of two judicially narrowed exceptions. [26] In the Eighth Circuit, a statute that is silent as to tribes is presumed not to apply "when the interest sought to be affected is a specific right reserved to the Indians."[27] That is, when a statute touches these specific rights, a statute *does not apply unless* Congress says it does.

- In the Ninth Circuit, a statute of general applicability may abrogate sovereign rights that are not grounded in a treaty.[28] But the Eighth Circuit protects *all* specific Indian rights from statutory abrogation. These rights may be created by treaty *or* by statute, executive order, or federal common law, and include rights integral to sovereign status: self-governance, territorial management, and regulation of internal matters.[29]

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[23] *Compare* R&R at 2 *with Fond du Lac*, 986 F.2d at 251. The R&R is incorrect that Fortune Bay Casino "transacts business . . . from its place of business in Tower, Minnesota." R&R at 7. The Casino's place of business is on the Lake Vermilion Reservation. Resp. 3. The Reservation is entirely held in trust by the United States for the Band and its members. Aff. of J. Bowes ¶ 17, Resp. Ex. 1. The City of Tower is *near* the Reservation, but not on the Reservation, which is governed by the Band.

[24] R&R at 12.

[25] The R&R ignores entirely the circuit split on the issue presented here. While the D.C. Circuit has upheld the *San Manuel* analysis, *San Manuel II*, 475 F.3d 1306 (D.C. Cir. 2007), the Tenth Circuit has rejected the position taken by the Board. *National Labor Relations Board v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000). The R&R similarly ignores the split of authority regarding the propriety of the *Coeur d'Alene* analysis itself. *See* Resp. at 32-34.

[26] *See Coeur d'Alene*, 751 F.2d at 1116.

[27] *Fond du Lac*, 986 F.2d at 248.

[28] *Coeur d'Alene*, 751 F.2d at 1117.

[29] *Fond du Lac*, 986 F.2d at 248.

- In the Ninth Circuit, "purely intramural matters" are limited to "tribal membership, inheritance rules, and domestic relations."[30] But in the Eighth Circuit, the tribal employee-tribal employer relationship is "an intramural matter that has traditionally been left to the tribe's self-government."[31]

If the R&R is correct, (1) this Court need no longer consider the inherent sovereign rights of tribes, but may limit its inquiry to explicit treaty rights, (2) "intramural matters" are limited not by what is internal to the tribe, but by a Ninth Circuit list of particulars, (3) *Fond du Lac* applies only to ADEA cases or to cases that develop a complete record of those matters the NLRB deems relevant, and (4) a tribal enterprise is just another private employer divorced of any governmental attribute. But that is not the law of this Circuit, and such a sea change is not the province of this Court. It is Congress's job to balance the Board's interests in effectuating federal labor policy against the Band's sovereign interest in self-governance.[32]

Under the law of the Eighth Circuit, this case most certainly does involve specific Indian rights. As the Band detailed, federal Indian law recognizes the Band's inherent sovereign rights to govern itself, regulate its internal matters, and manage its own economic resources.[33] The Band's operation of the Fortune Bay Casino is *directly* tied to its provision of governmental programs and services to its members—matters so intramural that the R&R agrees "there is no dispute[.]"[34] The R&R, though, protests that "to infer that the means by which Respondent generates its revenue to support such

[30] *Coeur d'Alene*, 751 F.2d at 1116.
[31] *Fond du Lac*, 986 F.2d at 249.
[32] *Cf.* R&R at 15.
[33] Resp. at 14-16.
[34] R&R at 13.

services constitute 'purely intramural matters' under *Coeur d'Alene* would swallow the *Tuscarora* analysis."[35] Again, neither *Coeur d'Alene* nor the *Tuscarora* dictum is the law of this circuit. But more importantly, the Band did not *infer* the importance of revenue generation to its governmental services. Congress,[36] the Supreme Court,[37] and the Eighth Circuit[38] did. The Band's operation of the Casino is not mere "corporate behavior[.]"[39] It is the very heart of its governmental activity. It *is* "its youth programs, elderly assistance programs, emergency services, [and] health care services[.]"[40]

The Band enacted grievance procedures and employment ordinances governing its own commercial activities as an exercise of its sovereign right to govern itself.[41] It has regulated an internal matter—its relationship with its employees—in order to best manage its own economic resources. The Band's treaty rights to the perpetual use and occupancy of the Lake Vermilion Reservation and to condition the entrance of nonmembers onto the Reservation buttress this exercise of self-governance.[42] And each of these sovereign rights would be abrogated by the application of the NLRA. If the Board has jurisdiction to issue this subpoena:

- it can allow the Band's employees to leap-frog the Band's legislated employment-grievance process;[43]

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[35] *Id.*
[36] Resp. at 18-19 (citing the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*.).
[37] *Id.* at 20 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).
[38] *Id.* at 21 (citing *In re. Otter Tail Power Co.*, 116 F.3d 1207, 1216 n.9 (8th Cir. 1997)).
[39] R&R. at 8 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).
[40] *Id.* at 13. *See also* Resp. at 19.
[41] *See* Resp. at 26.
[42] *Id*. at 24 n.93, 25-26.
[43] Aff. of N. Adams ¶¶ 4-5, Resp. Ex. 4.

- it can interfere with the Band's recognized authority to require Indian preference in employment;

- it can protect a strike by tribal employees that could seriously threaten the Band's ability to provide essential governmental services; and

- it could compel unconsented disbursement from the Band's treasury in the form of back pay—in direct contravention of both the Band's authority to control its treasury and its tribal sovereign immunity.[44]

These are not "policy considerations" to be weighed against "the Board's interest in effectuating federal labor policy[.]"[45] They are "specific Indian rights [that] may not be deemed to have been abrogated or limited absent a clear and plain congressional intent."[46] Because neither the text nor legislative history of the NLRA mentions tribes,[47] the statute may not be applied to the Band.[48]

Finally, it is important to address the R&R's treaty analysis. To be sure, this case is easily decided under *Fond du Lac* without even referencing the Band's treaty rights because the Eighth Circuit recognizes the importance of *all* aspects of tribal

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[44] *See id.* at ¶ 4, Resp. at 22-23.
[45] R&R at 15.
[46] *Fond du Lac*, 986 F.2d at 248 (quotations omitted).
[47] Resp. at 26-29. The Board has not suggested otherwise. And the R&R's observation that a decision in 2000 to amend an unrelated statute without including a proposed amendment specifically exempting tribes from the coverage of the NLRA, R&R at 15, has little weight. First, "'[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Second, the Court "generally is reluctant to draw inferences from Congress' failure to act[.]" *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). Third, years-later legislative history of an unrelated statute is not the clear and plain "affirmative evidence of congressional intent" required by *Fond du Lac*. 986 F.2d at 250 (citing *Dion*, 476 U.S. at 738-39). Though the R&R interprets Congress' decision not to adopt the 2000 amendment to "suggest[] that Congress intended to include Indian tribes within the NLRA's reach[,]" R&R at 15, it could as easily suggest that Congress disregarded the proposed amendment because it understood that tribes were already outside the NLRA's reach.
[48] *Dion*, 476 U.S. at 738-39; *Fond du Lac*, 986 F.2d at 249-50.

sovereignty—whether grounded in treaty or inherent sovereign rights. But the Band also described those provisions of the 1866 Treaty (and related executive orders of 1881 and 1883) that would be abrogated by application of the NLRA.[49] The R&R is correct that the Band did not point to "a particular treaty provision [that] expressly permits the Band to create a system to enforce employment rights or expressly refers to terms of employment."[50] Of course, the law does not require one. "It is axiomatic that Indian treaty rights are to be afforded a broad construction and, indeed, are to be interpreted as the Indians understood them [.]"[51] For example, the Supreme Court found a right to impose a severance tax on oil and gas in a treaty that didn't mention oil, gas, or taxation,[52] and riparian rights in a treaty that didn't mention water,[53] and this Court found the right to sell dream catchers containing molted feathers in a treaty right to hunt and fish.[54]

The extensive historical materials provided with the Band's Response detail the history of the Band's reservation and the significance of the phrase "perpetual use and occupancy" as it was used in the 1866 Treaty, [55] and confirm that "the Band's ability to exercise governmental authority over the lands includes the full range [of] powers

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[49] Resp. at 25 (describing the Band's treaty right to the "perpetual use and occupancy" of the Reservation, and the effect the NLRA would have on this right) and 24 n.93 and 35 (describing the Band's treaty right to exclude nonmembers, and the effect the NLRA would have on this right).

[50] R&R at 14.

[51] *United States v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991) (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)).

[52] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-47 (1982).

[53] *Winans v. United States*, 207 U.S. 564 (1908).

[54] *Bresette*, 761 F. Supp. at 662.

[55] Aff. of J. Bowes ¶¶ 14, 17, 19, Resp. Ex. 1.

associated with tribal sovereignty, combined with the specific treaty-based rights that came with their Reservation. This broad range of sovereign and governmental powers includes the right to exclude."[56] The Board has not challenged these conclusions, and has provided no contrary historical evidence of the Treaty's meaning. It is an affront to tribal sovereignty and to the trust doctrine itself[57] to impose unrealistic modern-day expectations on the language of treaties drafted centuries ago. The Supreme Court does not allow this and neither should this Court.

B. Sovereign Immunity

But a second separate basis prohibits enforcement of the subpoena: the Band is immune from the proceeding in which the subpoena issued. That the Band's immunity may block enforcement of the NLRA[58] is immaterial. Sovereign immunity often gives litigants "a right without any remedy."[59]

The sovereign-immunity question resolved by the R&R is "whether the Board's *subpoena enforcement action* is brought by the United States."[60] But this was not the immunity asserted by the Band. In *Federal Maritime Commission v. South Carolina State Ports Authority*,[61] the Supreme Court distinguished between cases *by* a federal agency and those *before* a federal agency. Here, the Band does not claim that it is

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[56] *Id.* at 5-6 ¶ 19.
[57] *See* Resp. at 15.
[58] *See* R&R at 6.
[59] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).
[60] R&R at 3 (emphasis added). *See also id.* at 4, 6.
[61] 535 U.S. 743 (2002).

immune from *the subpoena-enforcement action* (an action *by* the Board),[62] but from the underlying action *before* the Board, which is where the subpoena issued.[63] That underlying action was brought by a private litigant.[64] The Board, acting through its delegated authority, has not issued a complaint against the Band.[65] Without *any* mention of *Federal Maritime*, the R&R avoided this issue. But this Court must decide whether the Band is immune from a subpoena issued in an action commenced *before* the Board *by* the United Steelworkers, an undisputedly private complainant.[66]

Conclusion

Courts across the country grapple with how to reconcile the Supreme Court's *Tuscarora* dictum with its oft-stated and still-relied-on cannons of Indian law. But in the Eighth Circuit, this question is settled: specific Indian rights like the rights of self-governance, perpetual use, and exclusion at issue here *cannot* be abrogated by silence. Applying the law of *this* circuit *de novo*, the NLRA may not be applied to the Band, and

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[62] Accordingly, *United States v. Juvenile Male 1*, 431 F. Supp. 2d 1012 (D. Ariz. 2006) and *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994) are inapposite. Neither questioned the propriety of the subpoena itself.

[63] Resp. at 8-11.

[64] *Id.* at 9-10; Surreply at 1-2.

[65] Assuming *arguendo* that the Board *had* filed a complaint against the Band, converting the underlying action to one by the Board, it is an open question whether that enforcement action would be one by the *United States*, sufficient to abrogate immunity. *See, e.g. , Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 91-98 (1994) (distinguishing between the agency's authority to bring suit in its own name pursuant to express statutory delegation of authority and its ability to file on behalf of the United States). That the Board serves a public interest, R&R at 5-6, does not end the inquiry. In this case, the interest represented by the Board conflicts with the public interest represented by the Department of Interior, which has alerted the Board that, "[a]s a sovereign entity, [tribes have] authority to govern labor relations within their jurisdictions." Letter from E. R. Blackwell to R. Meisburg, Jan. 15, 2009, attached as Exhibit A.

[66] Resp. at 9-10; Surreply at 1-2.

the Band's sovereign immunity stands as an independent bar to the underlying action. The Board lacked jurisdiction to issue the subpoena and it must be quashed.

Dated: June 12, 2009

BOIS FORTE BAND OF CHIPPEWA INDIANS

s/ Mark A. Anderson
Mark A. Anderson (MN # 0002203)
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CERTIFICATE OF SERVICE

I certify that on June 12, 2009, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of the filing to the following:

Joseph H. Borong
National Labor Relations Board
330 S 2nd Ave Ste 790
Mpls , MN 55401
612-348-1772
Fax: 612-348-1785
Email: joe.bornong@nlrb.gov

and I certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

s/Jessica Intermill
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL LABOR RELATIONS BOARD Applicant and FORTUNE BAY RESORT CASINO Respondent.	Case No. 08-00065 **LR 7.1(c) AND LR 72.2(b) WORD COUNT COMPLIANCE CERTIFICATION REGARDING BOIS FORTE BAND OF CHIPPEWA INDIANS D/B/A FORTUNE BAY CASINO'S OBJECTION TO REPORT AND RECOMMENDATION**

I, Jessica Intermill, certify that the Bois Forte Band of Chippewa Indians d/b/a/ Fortune Bay Casino's Objection to Report and Recommendation complies with Local Rule 7.1(c).

I further certify that, in preparing this memorandum, I used the 2007 version of Microsoft Word, and that I applied this word processing program to include all relevant text (including headings, footnotes, and quotations) in the following word count.

I further certify that the above-referenced Objection contains 3,498 words.

Dated: June 12, 2009

BOIS FORTE BAND OF CHIPPEWA INDIANS

s/ Jessica Intermill
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Exhibit A

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

In reply, please address to:
Main Interior, Room 6513

Ronald Meisburg, General Counsel
John E. Higgins, Jr., Deputy General Counsel
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

JAN 15 2009

Dear Messrs. Meisburg and Higgins:

At the request of the Little River Band of Ottawa Indians (Band) and in response to the expressed interest of the Regional Counsel in hearing the views of the Department of the Interior (DOI), I write to express DOI's disagreement with the position taken by the National Labor Relations Board's (NLRB or Board) Regional Director in Grand Rapids, Michigan in the matter of the Little River Band of Ottawa Indians (GR-7-CA-5116). In this matter the Board has issued subpoenas to the Band as part of an enforcement action which attacks the Band's constitution and labor ordinances as unfair labor practices. DOI takes the position that, as a matter of Federal Indian law, the NLRB cannot charge the Band with an unfair labor practice for its exercise of its sovereign authority in adopting a constitution and enacting tribal labor laws. The proper avenue for challenging the Band's constitution and labor ordinances is a direct preemption case brought by the Board in Federal district court, not an unfair labor practice charge.

The Little River Band of Ottawa Indians is a federally recognized Indian tribe, restored to federal recognition by Congress pursuant to 25 U.S.C. §§ 1300k-1300k-7. The Little River Band of Ottawa Indians Tribal Government (the "Tribal Government") is established pursuant to the Band's Constitution, which was promulgated under 25 U.S.C. § 1300k-6 and approved by the United States Department of the Interior, as provided by the Indian Reorganization Act, 25 U.S.C. § 476 ("IRA"). As a sovereign entity, the Band has authority to govern labor relations within its jurisdiction. Like any other sovereign, it cannot be charged with an unfair labor practice simply for the act of establishing labor laws. But that is exactly what has happened in this matter. The NLRB seeks to enforce the National Labor Relations Act (NLRA) against the Band solely on the basis of its constitution and labor ordinances. This fact is made clear by the words of the Charge against the Band.

Since on or about January 1, 2008, and prior thereto, the respondent the Little River Band of Ottawa Indians Tribal Government has promulgated the Constitution of the Little River Band of Ottawa Indians which on its face preempts the National Labor Relations Act jurisdiction. Said Constitution of the Little River Band of Ottawa Indians among its articles reserves authority to govern labor relations including but not limited to regulating terms and conditions under which collective bargaining agreements may or may not occur. The Constitution of the Little River Band of Ottawa Indians among other illegal articles denies employees the right to strike. By this and other conduct the respondent has intimated [sic] employees and utilized the Constitution of the Little River Band of Ottawa Indians as a means to deny employees the right to organize as protected by Section 7 of the Act.

The NLRB has a direct means to seek to establish that the Band's laws are preempted by the NLRA in an original action in the Federal court. *See, e.g., NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002); *NLRB v. State of Illinois Dept. of Emp. Security*, 988 F.2d 735 (7th Cir. 1993); *NLRB v. State of North Dakota*, 504 F. Supp.2d 750 (D.N.D. 2007); *NLRB v. State of New York*, 436 F.Supp. 335 (E.D.N.Y.1977), *aff'd*, 591 F.2d 1331 (2nd Cir.1978). The 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. Just as the NLRB cannot charge a state government with an unfair labor practice for promulgating state labor laws, it cannot charge a tribal government for promulgating tribal labor laws.

I urge you to contact the Grand Rapids Field Office to put an end to this enforcement action as soon as possible. Please feel free to contact Jane Smith (202-208-5808), the person on my staff handling this matter, should you have any questions or need additional information.

Sincerely,

Edith R. Blackwell
Associate Solicitor

cc: Hon. Don Koon, Tribal Council Speaker
Stephen M. Glasser, Regional Director, NLRB
Steven Carlson, Attorney NLRB