UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL LABOR RELATIONS BOARD Applicant and FORTUNE BAY RESORT CASINO Respondent.	Case No. 08-00065 **BOIS FORTE BAND OF CHIPPEWA INDIANS D/B/A FORTUNE BAY CASINO'S RESPONSE TO ORDER TO SHOW CAUSE WHY APPLICATION FOR AN ORDER REQUIRING OBEDIENCE TO SUBPOENA DUCES TECUM SHOULD NOT BE GRANTED**

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INTRODUCTION

When the National Labor Relations Board served this subpoena on the Bois Forte Band of Chippewa Indians, the Band did not hide the ball. It stated clearly (for the second time) that "'the Band does not believe that the National Labor Relations Act applies to its business on the Lake Vermilion Indian Reservation[, and so] will not submit to the jurisdiction of the National Labor Relations Board.'"[1] It was clear that the Band is immune from unconsented actions before the Board. And it was clear that even if the Band were not immune from the Board action, the Board nevertheless lacks jurisdiction over the Band because applying the National Labor Relations Act would interfere with the Band's sovereign rights of self-governance, self-determination, and economic independence, and Congress has not authorized this interference.

[1] Memorandum in Support of Application for an Order Requiring Obedience to Subpoena Duces Tecum ("Board's Memorandum"), Dec. 9, 2008, Dkt. 2, Ex. 3 (quoting Aug. 29. 2008 Letter from Kevin Leecy).

Yet in this enforcement action, the Board hardly addresses any of these issues. It discusses issues of "coverage," but those were not raised by the Band and are not before the court. And it avoids entirely the Eighth Circuit decision that even as to statutes of general applicability, "[s]pecific Indian rights will not be deemed to have been abrogated absent a 'clear and plain' congressional intent."[2] Looking to the controlling law of *this* circuit, it is clear that the Band is immune from the underlying action before the Board, and that even if it weren't, the NLRA may not be applied to the Band. Either way, because the Board lacked the jurisdiction to issue this subpoena, it may not be enforced.

ARGUMENT

I. Factual Background

The Bois Forte Band of Chippewa Indians has resided in far northern Minnesota, near the Canadian border, for centuries. Their name derives from a French phrase meaning "strong wood," and reflects the Band's origin in these northern forests. Beginning in 1854, the United States government promised the Band, by treaty and executive order, the right to remain in their ancestral homeland, and secured three separate reservations on which the Band now resides.[3]

Politically, the Bois Forte Band is one of the six Bands that comprise the Minnesota Chippewa Tribe (MCT). The MCT is organized under the Indian Reorganization Act of 1934[4] and its first Constitution was adopted by its members and

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[2] *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 248 (8th Cir. 1993) (quoting *United States v. Dion*, 476 U.S. 734, 738 (1986).

[3] Aff. of J. Bowes, Ex. 1 at ¶¶ 3 *et seq.*

[4] 25 U.S.C. §§ 461 – 479, 48 Stat. 984.

approved by the Secretary of the Interior in 1936. The initial Constitution was replaced by the Revised Constitution and Bylaws, approved by the Assistant Secretary of the Interior on March 3, 1964.[5]

Each of the Bands is governed by a Reservation Business Committee (also referred to at Bois Forte as the Reservation Tribal Council) and each governing body is authorized "to engage in any business that will further the economic well being of members of the Reservation."[6] Although the Band's first Constitution authorized the tribal governing body to issue charters for economic purposes, those charters were expressly superseded in the later revision. In addition, a corporate charter was initially issued to the Minnesota Chippewa Tribe under the Indian Reorganization Act, but was revoked by Congress in 1996.[7] So the Bois Forte Band now operates all its business activities directly—not through a federally or tribally chartered entity.

As a matter of tribal constitutional law, the Bois Forte Reservation Tribal Council provides services and conducts its programs, activities, and businesses in a governmental capacity.[8] Operation of the Fortune Bay Resort Casino—located on the Band's Lake Vermilion Reservation— is one of these delegated powers. The accurate description of the respondent should be the "Bois Forte Band of Chippewa d/b/a Fortune Bay Resort Casino" because the respondent is the alter ego of the federally recognized Bois Forte

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[5] Revised Const. and Bylaws of the Minnesota Chippewa Tribe, Ex. 2.
[6] *Id*. at art. VI, § 1(c).
[7] Pub. L. No. 104-109 § 13, 110 Stat. 763, 765 (February 12, 1996).
[8] Revised Const. and Bylaws of the Minnesota Chippewa Tribe, Ex. 2, art. V, §1(i). (authorizing the Tribal Council to delegate its authorities to "committees, officers, employees or cooperative associations reserving the right to review any action taken by virtue of such delegated powers.").

Band. All of the Band's activities through the Casino, including management of its employment relationships, are required by Federal and Tribal law to be governmental activity, and are integral to the Band's rights of self-governance and self-determination.

For decades, the Board declined to exercise jurisdiction over "a tribal commercial enterprise on the tribe's own reservation[.]"[9] But just five years ago, the Board reversed course. It adopted a "new approach" that "better accommodates the need to balance the Board's interest in furthering Federal labor policy with its responsibility to respect Federal Indian policy."[10] And though that decision announced a case-by-case test of the applicability of the NLRA to tribes,[11] the Board has consistently applied the Act to tribes ever since.[12]

Recently, the United Steelworkers' Union began efforts to organize employees at the Casino. When Rorie Farr, a member of the Band, was terminated from her employment, she did not follow the grievance process established by the Band to appeal termination decisions.[13] Instead the Union filed an unfair labor practice charge with the Board, charging that Ms. Farr's firing was related to unionizing activity—a charge that was later withdrawn.[14] But when the Casino refused to reinstate Ms. Farr, she again

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[9] *E.g. Fort Apache*, 226 NLRB 503, 504 (NLRB 1976).
[10] *San Manuel Indian Bingo & Casino and Hotel Employees & Restaurant Employees Int'l Union*, 341 NLRB 1055, 1057 (NLRB 2004).
[11] *Id.* at 1062.
[12] *E.g. Mashantucket Pequot Gaming Ent. D/B/A Foxwoods Resort Casino and Int'l Union, UAW, AFL-CIO*, 353 NLRB No. 32, 2008 WL 4492585 (NLRB September 30, 2008), Ex. 3.
[13] Aff. of N. Adams, Ex. 4 at ¶¶ 4-5.
[14] Memorandum in Support of Application for an Order Requiring Obedience to Subpoena Duces Tecum ("NRLB's Memorandum"), Dec. 9, 2008, Dkt. 2, at 4.

forsook the Band's established grievance process, and the Union again filed an unfair labor practice charge against the Band—this time arguing that the refused reinstatement was related to unionizing activity.[15] It is this underlying charge that is pending before the Board. On October 31, 2008, the Board issued a subpoena to the Band as part of its investigation of the charge.[16] The Band informed the Board that it would not comply with the subpoena because the Board lacks jurisdiction in this matter,[17] and this enforcement action followed.

II. Standard of Review

An administrative subpoena may only be enforced if it is "(1) issued pursuant to lawful authority, (2) for a lawful purpose, (3) requesting information relevant to the lawful purpose, and (4) the information sought is not unreasonable."[18] The Board lacks lawful authority to issue the subpoena here because the Band is immune from Board proceedings, and because the Band is not subject to the NLRA, so there is no statutory jurisdiction for the Board's action. Where the agency lacks jurisdiction to issue a subpoena, its subpoena may not be enforced.[19]

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[15] *Id.* at 4, Ex. 1.
[16] *Id.* at Ex. 2.
[17] *Id.* at Ex. 3.
[18] *Fresenius Medical Care v. United States*, 526 F.3d 372, 375 (8th Cir. 2008). *See also EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) (stating an administrative subpoena should be quashed if "(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 jurisdiction.").
[19] *Karuk Tribe Housing Authority*, 260 F.3d at 1082-83 (reversing district court's enforcement of administrative subpoena because the ADEA did not apply to the tribal employer, so the EEOC was without regulatory jurisdiction over the Tribe).

The Band here does not challenge the statutory "coverage" of the statute, i.e. whether the Band is an "employer" covered by the NLRA. Instead, it challenges the applicability of the statute, i.e. whether the NLRA, whatever its terms, can apply to the Band at all. Unlike statutory coverage questions, statutory *applicability* is a legal question that requires no factual development in a Board administrative proceeding. It depends upon the legal principles of treaty interpretation and sovereign immunity—matters with which the Board has no particular expertise. In these circumstances, "[q]uestions of regulatory jurisdiction are properly addressed at the subpoena-enforcement stage if, as here, they are ripe for determination at that stage."[20]

Resolving this threshold applicability issue at the outset is necessary because the Band "should not be burdened with having to comply with a subpoena if, as the district court believed, the agency issuing it had no jurisdiction to regulate [the Band's activities]."[21] This compliance burden is not merely economic. In this case, requiring the Band to comply with the directives of a regulatory agency with no jurisdiction over the Band is an irreparable infringement of the Band's sovereignty.

So the Board correctly states that this Court should not determine issues of coverage at this subpoena-enforcement stage. But the Band does not ask it to. The Band

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[20] *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490, 492 (7th Cir. 1993) (citing *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989)). *See also Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162, 165-66 (4th Cir. 1988); *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378 (4th Cir. 1987); *FTC v. Shaffner*, 626 F.2d 32, 36 (7th Cir. 1980); *United States v. Frontier Airlines, Inc.*, 563 F.2d 1008, 1009 (10th Cir. 1977).

[21] *Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d at 492.

seeks a decision regarding the statutory jurisdiction of the Board, and despite the Board's protestations,[22] it is perfectly appropriate—and indeed necessary—for the Court to determine now whether the Band may be called before the Board in unconsented private proceedings, and whether the NLRA applies to the Bois Forte Band.

III. Because sovereign immunity bars the Board proceeding, the Board lacked jurisdiction over the Band, and the subpoena was improper.

A. The Band has sovereign immunity from private proceedings unless it is waived by Congress or the Band.

Repeatedly and consistently, the Supreme Court has reaffirmed the existence and importance of tribal sovereign immunity from unconsented suit.[23] This immunity is a "necessary corollary to Indian sovereignty and self-governance."[24] It preserves the autonomous political existence of Indian tribes, protects tribal treasuries, and promotes the federal policy of tribal self-determination.[25] Tribal sovereign immunity does not preclude an action brought against a tribe by the United States,[26] but protects the tribe from all other unconsented claims— including claims arising from a tribe's

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[22] Board's Memorandum, Dkt. 2, at 5-6.

[23] *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

[24] *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo*, 436 U.S. 49.

[25] *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1986).

[26] *See, e.g., Karuk Tribe Housing Authority*, 260 F.3d at 1075.

"commercial" activities.[27] Tribal sovereign immunity is jurisdictional and precludes a court considering the merits of a barred claim.[28] Because it is jurisdictional, the Band's immunity from the underlying NLRB proceeding must be addressed before this matter may proceed.

B. The Band's sovereign immunity bars the underlying Board proceeding.

1. Judicial administrative proceedings are subject to sovereign immunity.

Sovereign immunity bars private claims before a federal administrative agency, just as it would bar claims in federal court.[29] In *Federal Maritime Commission v. South*

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[27] *Kiowa Tribe*, 523 U.S. at 758-60 ("declin[ing] to draw th[e] distinction" between a tribe's commercial and noncommercial activities, and holding that "[t]ribes enjoy immunity from suit on contracts, whether those contracts involve governmental or commercial activities. . . .").

[28] *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1974); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) ("Sovereign immunity is a jurisdictional question: if the Tribe possessed sovereign immunity, then the district court had no jurisdiction to hear the counterclaims."). Because it is jurisdictional, the denial of tribal immunity is an immediately appealable collateral order. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755-56 (8th Cir. 2004).

[29] *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760-61 (2002) (holding that state sovereign immunity bars a federal administrative agency from adjudicating a private citizen's claim against a state agency). *See also Rhode Island Dept. of Entl. Mgmt. v. U.S.*, 304 F.3d 31, 45-46 (1st Cir. 2002) (same); *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558 (9th Cir. 2002) (concluding that sovereign immunity divested a county of jurisdiction to execute a warrant against the tribe to investigate welfare fraud because "the execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'"), *rev'd on other grounds*, 538 U.S. 701. Though the conceptual underpinnings of state sovereign immunity and tribal sovereign immunity differ somewhat, *Kiowa Tribe*, 523 U.S. at 755-56, courts routinely use the same standards for both types of immunity, particularly as to waiver. *Seminole Tribe of Florida. v. Florida.*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996). *See also Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999); *Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1131 (11th Cir. 1999).

Carolina State Ports Authority, a private cruise-ship company filed an administrative complaint alleging that a state agency violated the Shipping Act by not allowing the company to berth its ships at a particular port. The Supreme Court acknowledged that the administrative process was not the same as the judicial processes under Article III, but concluded that private recourse against the government was nevertheless barred by sovereign immunity.[30]

The *Federal Maritime Commission* Court reasoned that when an impartial federal decision-maker responds to a complaint by a private party by taking evidence, ordering briefs, and issuing a decision, the administrative process is adjudicative and is barred by sovereign immunity.[31] "Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency . . . ."[32] Neither can tribes be so compelled.[33]

2. The Board proceeding is a private proceeding barred by the Band's sovereign immunity.

The Band is not immune from this instant enforcement proceeding because it was brought by the Board as an agent of the United States, to enforce its federal subpoena

[30] *Federal Maritime Comm'n*, 535 U.S. at 754.
[31] *Id.*
[32] *Id.* at 760.
[33] *Bishop Paiute Tribe*, 291 F.3d at 558.

power. But the Board does not seek to enforce a subpoena issued in *this* proceeding.[34] Rather, it seeks enforcement of a subpoena issued in an underlying action— one brought by a private party. It is that underlying private action from which the Band is immune. The Union initiated that underlying action, not the United States. The petition identifies the Union as the petitioning party, and is signed by the Union Organizing Coordinator, not a representative of the United States.[35] That underlying action seeks a private, not a public remedy— the reinstatement of a particular employee and payment of lost wages. And at base, the underlying action seeks to advance the private interest of the Union to organize workers to become Union members.

In a case following *Federal Maritime Commission*, the First Circuit carefully delineated the distinction between suits *by* U.S. agencies and those *before* U.S. agencies. In *Rhode Island Department of Environmental Management v. United States*, several whistleblowers filed complaints with the United States Department of Labor to seek relief from a state agency's allegedly retaliatory employment practices.[36] The First Circuit held that the employees' complaints in the underlying action were private ones barred by sovereign immunity under *Federal Maritime Commission.*[37] The court contrasted this

[34] Of course, it could not. In *this* proceeding, the Board is a party, not the adjudicator, and so has no authority to issue a subpoena. Though the Band is the defendant in both this enforcement proceeding and the underlying action, the Board's role prosecuting this enforcement proceeding is fundamentally different than its role as adjudicator of the underlying action.
[35] Board's Memorandum, Dkt. 2, Ex. 1.
[36] *Rhode Island Dept. of Envtl. Mgmt.*, 304 F.3d at 37.
[37] *Id.* at 53-54.

with what may have been a different result had the Secretary of Labor instead brought the complaints in the underlying action on behalf of the United States.[38]

And so it is here. Just as the Supreme Court held that the state of South Carolina was immune from the underlying private action brought before the Federal Maritime Commission, even though it was not immune from the subsequent suit *by* the Commission,[39] here, the Band is immune from the underlying private action brought before the Board.

3. Neither the Band nor Congress have waived the Band's immunity to the Board proceeding.

Though Indian tribes are generally immune from suit, they may consent to suit and waive that immunity, or Congress may waive that immunity through legislation. But the Supreme Court has steadfastly held that waivers of sovereign immunity must be strictly construed.[40] The Band has not in any way consented to the underlying action before the Board.[41] And the Supreme Court has stated and restated that as to congressional waivers of tribal immunity, "[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"[42]

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[38] *Id.*
[39] *See Federal Maritime Comm'n*, 535 U.S. 743.
[40] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1982).
[41] Board's Memorandum, Dkt. 2, Ex. 3 at 2 (stating the Band "has not waived" its immunity).
[42] *Santa Clara Pueblo*, 436 U.S. at 59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

In *Santa Clara Pueblo v. Martinez*, a tribal member sought declaratory and injunctive relief against her tribe under the Indian Civil Rights Act.[43] The Supreme Court acknowledged that when the ICRA was passed, Congress intended to place new substantive federal-law obligations upon tribes.[44] But even that intent to impose new obligations on tribes did not support the conclusion that Congress had unequivocally waived tribal sovereign immunity in federal courts. The Court concluded that without an unequivocal waiver, the tribe's immunity remained intact:

> Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. *In the absence here of any unequivocal expression of contrary legislative intent,* we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.[45]

Similarly, the NLRA does not waive tribal sovereign immunity. "[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."[46] Regardless of whether the NLRA *could* apply to the Band *if its immunity were waived*, there is no indication in the NLRA or its legislative history that Congress waived tribal sovereign immunity. In earlier decisions, the Board has seemed to rely on a constructive waiver theory to find that the NLRA waives tribal sovereign immunity. Under its analysis, by engaging in commercial activity that is otherwise within the ambit of the NLRA, a tribe constructively or implicitly waives its sovereign immunity from private actions under the Act. But, the Supreme Court has rejected this constructive

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[43] 25 U.S.C. § 1302 (1976) ("the ICRA").
[44] *Santa Clara Pueblo*, 436 U.S. at 59.
[45] *Id.* (e*mphasis supplied*).
[46] *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000).

waiver concept as having "no place" in its sovereign immunity jurisprudence.[47] Sovereign immunity is fundamental to a tribe's political status, and to suggest that immunity is waived because a regulatory entity decides that the Band's activities are commercial is untenable.

4. Without jurisdiction over the Band, the Board's subpoena was improper and may not be enforced.

Where neither the tribe nor Congress has clearly waived the tribe's sovereign immunity, the subpoena should not be enforced,[48] and the Board proceeding should be dismissed.[49] The threshold issue of immunity is jurisdictional and where, as here, there is no express waiver of the tribe's immunity from suit by Congress or the tribe, a court's inquiry ends.[50] Because the Band has not consented to the underlying action in which the subpoena was issued, and Congress has not waived the Band's immunity from this action, the Board did not have jurisdiction to issue the subpoena. This court should not enforce a subpoena that was never within the authority of the Board to issue.

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[47] *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678, 119 S. Ct. 2219 (1999) (expressly overruling *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S 184 (1964), the only Supreme Court case to rely on a constructive waiver theory because "we think that the constructive waiver experiment of *Parden* was ill conceived and see no merit in attempting to salvage any remnant of it.").

[48] *E.g.*, *Karuk Tribe Housing Authority*, 260 F.3d at 1075.

[49] *See, e.g.*, *Chavoon v. Chao*, 355 F.3d 141 (2d Cir. 2004) (dismissing private action brought under the Family and Medical Leave Act where neither the statute nor the tribe had waived tribal immunity from suite).

[50] *Puyallup Tribe*, 433 U.S. at 172-73; *Rupp v. Omaha Indian Tribe*, 45 F.3d at 1244.

IV. Even if the Board proceeding were not barred by sovereign immunity, the NLRA does not apply to the Band, so the Board lacked statutory jurisdiction over the Band, and the subpoena was improper.

A. The NLRA may not be applied to the Band because doing so would improperly abrogate the Band's inherent sovereign and treaty rights.

1. The Band has inherent rights to govern itself, to regulate internal matters, and to manage its own economic resources.

The Supreme Court has long recognized that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'"[51] The lynchpin of the Supreme Court's Indian-sovereignty jurisprudence is that certain sovereign rights inhere in a tribe and its members within a reservation, and that even aside from treaty-guaranteed rights, "Indian tribes retain attributes of sovereignty over both their members and their territory to the extent that sovereignty has not been withdrawn by federal statute or treaty."[52] Centuries of Supreme Court precedent establish that these retained rights include a tribe's right to govern itself. The Court has

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[51] *Montana v. United States*, 450 U.S. 544, 563 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313 (1978). *Accord United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[52] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). *See also, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Wheeler*, 435 U.S. at 323; *Mazurie*, 419 U.S. 544; *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *National Labor Relations Board v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000) ("'The two primary sources of explicit limitations on tribal sovereign or political independence are treaties and federal legislation; the Indian tribes thus retain all aspects of tribal sovereignty not *specifically* withdrawn.'") (emphasis in original) (quoting *Donovan v. Navajo Forest Prod. Ind.*, 692 F.2d 709, 712 (10th Cir. 1982)); *Buster v. Wright*, 135 F.947, 950 (8th Cir. 1905) ("[E]very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.").

detailed that:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U. S. 559 (1832); see *United States v. Mazurie*, 419 U. S. 544 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U. S. 381-382 (1886). See *United States v. Wheeler*, 435 U. S. 313 (1978).[53]

This right of self-governance extends throughout a tribe's territory,[54] and across its people.[55] It affords tribes the power "to undertake and regulate economic activity within the reservation."[56] In short, tribes have power to make their own substantive law, and to enforce that law in their own forums.[57]

Tribal sovereign powers are protected both by the United States' trust responsibility to tribes and the judiciary's obligation to defer to the Congress's policy decisions in this area of law.[58] Accordingly, the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-

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[53] *Santa Clara Pueblo*, 436 U.S. at 55. *See also Fond du Lac Heavy Equip.*, 986 F.2d at 249.

[54] *Iowa Mutual Ins.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); *Mazurie*, 419 U.S. at 558 ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.").

[55] *Three Affiliated Tribes*, 476 U.S. at 890 ("'A tribe's power to prescribe the conduct of tribal members has never been doubted[.]'") (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)). *Accord McClanahan*, 411 U.S. at 171-72.

[56] *Mescalero Apache Tribe*, 462 U.S. at 335.

[57] *Santa Clara Pueblo*, 436 U.S. at 55-56; *Fond du Lac Heavy Equip.*, 986 F.2d at 249.

[58] *Iowa Mutual Ins.*, 480 U.S. at 14 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.") (quoting *Santa Clara Pueblo*, 436 U.S. at 60).

government[,]"[59] and has respected "Congress's jealous regard for Indian self-governance."[60] Indeed, "[b]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes."[61] As a separate sovereign, the Band retains the inherent rights to govern itself and to regulate its internal affairs, including by managing the economic resources within its reservation.

2. Treaty and sovereign rights may only be abrogated by the clear and plain intent Congress.

Where a specific Indian right— be it an inherent right or treaty right— exists, it can only be abrogated upon the "clear and plain" intent of Congress to abrogate that right.[62] Because Congress has plenary power over Indian affairs, it may unilaterally

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[59] *Iowa Mutual Ins.*, 480 U.S. 9, 14 (1987); *Merrion*, 455 U.S. at 138, n.5; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 and n.10 (1980); *Williams v. Lee*, 358 U.S. 217, 220-21 (1959).

[60] *Three Affiliated Tribes*, 476 U.S. at 890 (citing *Mescalero Apache Tribe*, 462 U.S. at 334-35 and *Fisher v. District Court*, 424 U.S. 382, 388-89 (1976)).

[61] *Mescalero Apache Tribe*, 462 U.S. at 334-35. *See also Iowa Mutual Ins.*, 480 U.S. at 14, n.5 ("Numerous federal statutes designed to promote tribal government embody this policy.") (citing 25 U.S.C. §§ 450, 450a (Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§ 476-479 (Indian Reorganization Act); 25 U.S.C. §§ 1301-1341 (Indian Civil Rights Act)); 25 U.S.C. § 1451 (Indian Financing Act); 25 U.S.C. §§ 1901 and 1902 (Indian Child Welfare Act); 25 U.S.C. § 2701 (Indian Gaming Regulatory Act). The executive branch of the U.S. government has also recognized the sovereign power of tribes to govern within their own reservations. Proclamation of George W. Bush, National American Indian Heritage Month, November 4, 2004; Executive Order 13175 of William J. Clinton, November 6, 2000 56 FR 218; Executive Order 13084 of William Clinton, May 14, 1998, 63 FR 27655; Memorandum of William Clinton, April 29, 1994, 59 FR 22951; Proclamation 6450 of George Bush, June 23, 1992, 57 FR 28579.

[62] *Fond du Lac Heavy Equip.*, 986 F.2d at 248 (citing *Dion*, 476 U.S. at 738). *See also United States v. Blue*, 722 F.2d 383, 385 (8th Cir. 1983) ("[I]f a particular Indian right or policy is infringed by a general federal criminal law, that law will be held not to apply to

(footnote continued on next page)

abrogate an Indian treaty through a later-enacted statute, but the Supreme Court presumes that "such power 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."[63] And so the Supreme Court has described the proper analysis for these rights:

> "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . ." *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 690 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S. at 412; in the absence of explicit statement, "'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" *Id*. at 413, quoting *Pigeon River Co. v. Cox Co.*, 291 U. S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.
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> We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. See *Leavenworth, L., & G. R. Co. v. United States*, 92 U. S. 733, 741-742 (1876); see also Wilkinson & Volkman, 627-630, 645-659. In other cases, we have looked to the statute's "'legislative history'" and "'surrounding circumstances,'" as well as to "'the face of the Act.'" *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 587 (1977), quoting *Mattz v. Arnett*, 412 U. S. 481, 505 (1973). Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights, cf. *Seminole Nation v. United States*, 316 U. S. 286, 296-297 (1942). We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing

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(footnote continued from previous page)

Indians on reservations unless specifically so provided."); *United States v. White*, 508 F2d. 453, 455 (8th Cir. 1975) ("areas traditionally left to tribal self-government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests.").

[63] *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903).

> court from clear and reliable evidence in the legislative history of a statute." Cohen 223. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.[64]

The Eighth Circuit has consistently adhered to this *Dion* analysis in cases concerning both treaty rights and reserved inherent rights of sovereignty.[65]

3. The Band's operation of the Fortune Bay Casino and its regulation of employment relationships at the Casino are exercises of the Band's sovereign and treaty-guaranteed rights.

Fortune Bay Casino is the alter ego of the Bois Forte Reservation Tribal Council, and its operation is wholly governmental. It could not be otherwise. Under the Indian Gaming Regulatory Act (the "IGRA"),[66] Indian gaming, such as that at Fortune Bay Casino, may *only* use gaming revenues to fund tribal-governance operations and provide for the welfare of the tribe and its members, or for charitable purposes.[67]

When it passed the IGRA, Congress explicitly wove gaming into the essential fabric of tribal self-governance by encouraging "gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal

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[64] *United States v. Dion*, 476 U.S. 734, 738-40 (1986). *See also Pueblo of San Juan*, 280 F.3d at 1284 ("Limitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from surrounding circumstances and legislative history.") (quoting *Donovan v. Navajo Forest Prod. Ind.*, 692 F.2d 709, 712 (10th Cir. 1982), which cited *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *Morton v. Mancari*, 417 U.S. 535 (1974)).

[65] *Fond du Lac Heavy Equip.*, 986 F.2d at 248 ("Specific Indian rights will not be deemed to have been abrogated or limited absent a clear and plain congressional intent."); *Blue*, 722 F.2d at 385; *White*, 508 F2d. at 455; *U.S. v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir. 1976).

[66] 25 U.S.C. § 2701 *et seq.*

[67] *Id.* at § 2710(b)(2)(A).

governments[.]"[68] No longer are casinos solely the province of profiteers. Since passage of the IGRA in 1988, there are two kinds of casinos—private ones that operate for the profit of investors; and those (like the Fortune Bay Casino) owned and operated by tribal governments for the sole purpose of raising revenue to operate the government and to provide services to its membership. This importance of this gaming revenue as a source of tribal governmental funding is analogous to a locality's reliance on property taxation.

The Fortune Bay Casino is wholly owned by the Band, operated solely by the Band, and managed solely for the benefit of the Band's members. The Casino operates under the law of the Band,[69] and if any issues arise with the Casino, the Band's Tribal Council always retains ultimate responsibility.[70] The Casino employs approximately 450 people, and one-third of these are Indians.[71] Of the Indians employed at the Casino, 82% are members of the Band.[72] And fully 100% of the Casino's profits are returned to the tribal government to fund governmental operations and programs like health care services, education, emergency services, youth programs, elder assistance, housing programs, economic development, road work, and community water and sewer systems.[73] In the absence of the Casino, the Band would return to the days of high unemployment, negligible services to its members, and no reservation economy.

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[68] *Id.* at § 2702(1).
[69] *See id.* at § 2701(5).
[70] Bois Forte Ordinance 43-94, approved 59 Fed. Reg. 2829 (January 18, 1994).
[71] Aff. of N. Adams, Ex. 4 at ¶ 3.
[72] *Id.*
[73] Aff. of K. Greiner, Ex. 5 at ¶ 4-6.

The Board hangs its hat on its *San Manuel Indian Bingo* decision.[74] In that opinion the Board stated, without citation or support, that

> When Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way. When the Indian tribes act in this manner, the special attributes of their sovereignty are not implicated. Running a commercial business is not an expression of sovereignty in the same way that running a tribal court system is.[75]

But this unsupported conclusion ignores that tribes' "commercial" revenue-raising operations are often the only reason governmental programs like the tribal court system—or the youth programs, elderly assistance programs, emergency services, or health care services—are able to exist.[76] It ignores that the creation of "commercial" enterprises to employ its constituency and grow the local economy is a critical function of many governments.[77] And in this case, it ignores the *express congressional policy* that tribal operations such as the Fortune Bay Casino will generate "tribal revenue" in order to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments[.]"[78]

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[74] Board's Memorandum, Dkt. 2 at 8.
[75] *San Manuel*, 341 NLRB at 1063.
[76] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (recognizing gaming often "provide[s] the sole source of revenues for the operation of the tribal government and the provision of tribal services[.]").
[77] *See, e.g.*, Barack Obama, President-Elect, Remarks of President-Elect Barack Obama As Prepared for Delivery: American Recovery and Reinvestment (Jan. 8, 2009), available at http://www.whitehouse.gov/agenda/economy/, last visited Feb. 3, 2009 ("I have moved quickly to work with my economic team and leaders of both parties on an American Recovery and Reinvestment Plan that will immediately jumpstart job creation and long-term growth.").
[78] 25 U.S.C. § 2702.

The *San Manuel* decision continued, again without citation, that "[a]t times, the tribes continue to act in a manner consistent with that mantle of uniqueness. They do so primarily when they are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes."[79] It contrasted these functions with participation in interstate commerce.[80] Setting aside the question of how exactly the Board's specialization in labor relations informs an inquiry as to which "traditional functions" are "consistent with [a tribe's] mantle of uniqueness," this District has already recognized that one "traditional function" of tribes was to participate not only in interstate commerce, but indeed in an "international market economy."[81]

Nationwide, courts have found that a "tribe's sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation."[82] Matters affecting employment at the Casino "are indeed internal economic matters which directly affect a sovereign's right of self-government."[83] The Eighth Circuit has noted that "the ability of an Indian Tribe to generate revenues is vital to Tribal interests—and thus an area of *heightened* sovereignty—because such revenues

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[79] *San Manuel*, 341 NLRB at 1062.
[80] *Id.*
[81] *United States v. Bresette*, 761 F. Supp. 658, 662 (1991) (implying an inherent right to sell the fruits of the land into treaty-secured usufructory rights in light of historical evidence that the tribe had long engaged in commerce).
[82] *Pueblo of San Juan*, 280 F.3d at 1286. *See also Kiowa Tribe*, 523 U.S. at 760 (refusing to confine tribal sovereign immunity to "governmental" rather than "commercial" activities of tribe).
[83] *Pueblo of San Juan*, 280 F.3d at 1286.

are necessary for the provision of tribal services."[84] And the Supreme Court itself, in the opinion that was the precursor to Congressional enactment of the IGRA, recognized that tribal gaming "at present provide[s] the sole source of revenues for the operation of the tribal governments and the provision of tribal services. . . . Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."[85]

So *San Manuel* presents a false choice: either the activity is sovereign or it affects interstate commerce. But it is only the *Board*'s jurisdiction that is limited to situations involving interstate commerce— the Band's sovereignty is not limited to situations *outside* of interstate commerce. Rather, express congressional policy regarding Indian gaming, and gaming's direct support for other tribal services show that the operation of the Fortune Bay Casino is a governmental function, and regulation of its governmental employees is an internal matter. Under controlling precedent, and as a practical matter, the operation of the Fortune Bay Casino furthers the Band's efforts to realize tribal self-sufficiency— just as Congress intended.[86]

4. Applying the NLRA to the Band conflicts with the Band's inherent sovereign right to govern itself.

Applying the NLRA to the Band would interfere with the Band's right of self-governance in myriad ways. For example, a strike by tribal employees could seriously

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[84] *In re. Otter Tail Power Co.*, 116 F.3d 1207, 1216 n.9 (8th Cir. 1997) (emphasis added).
[85] *Cabazon Band of Mission Indians*, 480 U.S. at 216.
[86] 25 U.S.C. §§ 2701(4) and 2702(1).

threaten the Band's ability to provide essential governmental services.[87] And applying the NLRA would interfere with the Band's recognized authority to require Indian preference in employment.[88] If it is applicable to the Band, the NLRA would displace tribal policies governing the employment relationship, including its established grievance procedures. And if it is applicable to the Band, the NLRA would allow unconsented suit against the Band by third parties, and could require a 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.

In *Fond du Lac Heavy Equipment*, the Eighth Circuit considered whether applying the Age Discrimination in Employment Act (ADEA) to a tribally chartered and operated business would conflict with the tribe's inherent sovereign right to govern itself.[89] It concluded that the tribal business's hiring decisions "involved a strictly internal matter[,]"[90] and that applying the ADEA to the tribal business would conflict with the tribe's sovereign rights because "[f]ederal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the

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[87] *See* Corrected Brief of Amici Indian Tribes and Tribal Organizations in Support of Petitioners and Reversal of the NLRB's Judgment ("San Manuel Amici Brief") (April 19, 2006), 2006 WL 1092145, *filed in San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007), attached as Exhibit 6, at *23-24 ("Many tribal governments have little or no discretionary funding other than revenue from their economic enterprises. Strikes against tribal enterprises that the Board describes dismissively as "commercial in nature—not governmental" could easily disrupt Tribes' ability to provide essential services to an even greater degree than strikes against state or local governments, because other governments can typically rely for the bulk of their revenues on their tax bas, which many Tribes conspicuously lack.").

[88] *See generally id.* at *24-29.

[89] 986 F.2d 246 (8th Cir. 1993).

[90] *Id.* at 249.

business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government."[91] It reasoned that "[s]ubjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe."[92] Instead, "disputes regarding this issue should be allowed to be resolved internally within the tribe."[93]

So it is here. If it could be applied to the Band, the NLRA would allow a private claimant to call the Band to answer to an adjudicatory proceeding before the Board,[94] even though the Band has not waived its sovereign immunity to such an action. This

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[91] *Id.*

[92] *Id.*

[93] *Id.* The *Fond du Lac Heavy Equipment* Court emphasized that the employment relationship at issue was between a member and the tribe. The same facts are present here, but even if they were not, *Fond du Lac Heavy Equipment* is dispositive. Where the employment relationship is between a nonmember and the Band, the nonmember (by applying for a job with the Band on the Band's reservation) has entered into a consensual relationship with the Band, and so is subject to the Band's regulation of that consensual relationship. *See Montana*, 450 U.S. at 565 ("A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members[.]"). Accordingly, the Band may require the employee to follow Band-established employment policies, including grievance procedures. Alternatively, even if the nonmember's employment relationship could not be regulated by the Band under the *Montana* consensual-relationship test, the Band could still place conditions on the employment because it retains the treaty right to exclude the nonmember employee from tribal lands. Aff. of J. Bowes, Ex. 1. This right to exclude nonmembers from the trust property upon which the Fortune Bay Casino is located "necessarily includes the power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation." *Merrion*, 455 U.S. at 144. *See also generally* Kaighn Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation*, 2008 Mich. St. L. Rev. 505, 527 (2008) ("The Court's modern precedents in *Williams*, *Merrion*, and *New Mexico* should leave no doubt that tribes have inherent authority to regulate the conduct of nonmembers who voluntarily enter the reservation to exploit reservation resources or otherwise attain economic gain.").

[94] 29 U.S.C. § 210.

conflict alone may be enough to invalidate the Act as against the Band.[95] But this conflict is an especially insidious affront to the tribe's inherent right of self-governance because application of the NLRA would allow the Board to award monetary damages against the Band[96] (and such damages are actually sought by the claimant here[97]) even though the Band's grievance process does not allow recovery of monetary damages.[98] By balancing the needs of tribal employees against the Band's obligation to its members to protect the Tribal treasury, the Band's employment-grievance process is uniquely governmental, but would be trampled by application of the NLRA.

Further, just as in *Fond du Lac Heavy Equipment*, this case concerns the Band's regulation of a member of the Band who is employed by the Band at a tribal enterprise located on tribal trust land within the Band's reservation.[99] The Band's Reservations were set aside "for the perpetual use and occupancy" of the Band.[100] Application of the NLRA to the Band would interfere with this use and so be inconsistent with the purpose for which the reservation was created. As in *Fond du Lac Heavy Equipment*, applying the NLRA here would oust the Band's regulation of its internal employment relationships

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[95] *See Three Affiliated Tribes*, 476 U.S. at 890-91 (invalidating a North Dakota statute with a "requirement that the Tribe consent to suit in *all* civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit" because "[t]his result simply cannot be reconciled with Congress's jealous regard for Indian self-governance.").

[96] 29 U.S.C. § 210(c) (allowing reinstatement with or without backpay upon finding an unfair labor practice by a preponderance of the evidence).

[97] Board's Memorandum, Dkt. 2, at Ex 1 (seeking recovery of lost wages).

[98] Aff. of N. Adams, Ex. 4 at ¶ 4.

[99] *Compare Fond du Lac Heavy Equip.*, 986 F.2d at 249 ("The dispute is between an Indian applicant and an Indian tribal employer. The applicant is a member of the tribe, and the business is located on the reservation.").

[100] Aff. of J. Bowes, Ex. 1.

at the expense of its sovereignty. The Band has a policy for Casino employees to appeal their termination to an appeals board in place.[101] If the appeal is successful, the employee will be reinstated.[102] But here, the employee whose claim forms the basis of the underlying Board proceeding *did not use* the Band's grievance process.[103] Instead, she and the Union seek to supplant the tribe's authority with the Board's. Unless Congress intends this result, it cannot stand. But it was Congress that specifically sought to promote tribal self-government and political autonomy through Indian gaming.[104] Just as applying the ADEA to a tribal business affected the tribe's specific right of self-governance,[105] applying the NLRA to the Bois Forte Band's tribal business would infringe the Band's specific right to govern its own affairs.

5. The NLRA does not evince the clear and plain congressional intent necessary to abrogate the Band's sovereign rights.

The Band's self-governance powers mean nothing if its governmental prerogatives may be ousted by a statute that— by its express terms and its legislative history— does not apply to tribes. The Band's power to regulate internal matters is illusory if a private

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[101] Aff. of N. Adams, Ex. 4 at ¶ 4.
[102] *Id.*
[103] *Id.*
[104] 25 U.S.C. §§ 2701(4) and 2702(1).
[105] *Fond du Lac Heavy Equip.*, 986 F.2d at 249. *See also, e.g.*, EEOC v. Cherokee Nation, 871 F.2d 937,938-39 (10th Cir. 1989) (following cannons of Indian law to find the ADEA inapplicable to tribal enterprises); *Donovan*, 692 F.2d at 712-14 (finding Occupational Safety and Health Act (OSHA) inapplicable to tribal enterprises as an interference with tribal sovereignty and self-government); *Lumber Industry Pension Fund v. Warm Sprints Forest Products Industries*, 730 F. Supp. 324, 327-29 (E.D. Cal. 1990) (holding that a tribal pension plan is an intramural matter of self-government exempt from the regulatory provisions of the Employee Retirement Income Security Act (ERISA)).

party may end-run Band regulation with a call to an agency that Congress has not granted jurisdiction over the Band. And the Band cannot, on the one hand, regulate its own economic resources with policies duly approved by the Tribal Council, but at the same time be compelled to follow provisions of the NLRA that are directly to the contrary. Because the Band's inherent sovereign right to self-governance directly conflicts with the application of the NLRA, one or the other must yield—either the NLRA applies to the Band, or its sovereign rights stand.

"Because the tribe's specific right of self-government would be affected," as would its rights to manage its internal affairs and economic resources, the proper test of the applicability of the NLRA to the Band is set forth in *Dion*.[106] The NLRA can only apply to the Band if an "explicit statement of Congress" evinces congressional intent to apply the Act to tribes, or if "sufficiently compelling" legislative history surrounding the enactment of the NLRA suggests clear congressional intent that the Act apply to tribes.[107]

The text of the NLRA does not once mention Indians or Indian tribes. So the Act can only apply to the Band if the legislative history of the NLRA shows Congress intended it to apply to tribes.[108] It does not. The extensive legislative history of the NLRA does not make even a passing reference to Indian tribes.[109] Rather, "the NLRA

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[106] 476 U.S. 734 (1986). *See e.g. Fond du Lac Heavy Equip.*, 986 F.2d at 249-51 (analyzing the ADEA under *Dion* because application of the statute would affect the tribe's specific right of self-government).
[107] *Fond du Lac Heavy Equip.*, 986 F.2d at 249-50 (quoting *Dion*, 476 U.S. at 739-40).
[108] *Id.* at 250.
[109] *See* 29 U.S.C. §§ 151 *et seq.* *See also Sac & Fox Indus.*, 307 N.L.R.B. 241, 245 (1991).

was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers[.]"[110]

Federal Indian law instructs that where the statute is silent but would abrogate specific tribal rights, the "correct presumption is that silence does not work a divesture of tribal power."[111] It is not enough that Congress could have exempted tribes but didn't:

> "[*Dion*] indicates that some affirmative evidence of congressional intent, either in the language of the statute or its legislative history, is required to find the 'clear and plain' intent to apply the statute to Indian tribes. Where, as here, the statute is silent and "the legislative history contains insufficient evidence that treaty rights were specifically considered and eliminated in the creation of [a statute]," that statue may not abrogate a sovereign right.[112]

Under *Dion* and *Fond du Lac Heavy Equipment*, the NLRA cannot be applied to the Band.[113]

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[110] *San Manuel*, 475 F.3d at 1310. Evaluated in the context of evolving federal Indian policy (which reaffirmed congressional commitment to tribal self-governance in the Indian Reorganization Act, 25 U.S.C. § 477 *et seq.*, just a year before the NLRA was passed), it is most likely that if Congress *had* considered the applicability of the NLRA to tribes, it would have specifically exempted them from applicability of the act. *See generally* San Manuel Amici Brief, 2006 WL 1092145, Ex. 6 at *4-14. The NLRA was passed just one year after the Indian Reorganization Act, 25 U.S.C. §§ 478 *et seq.*, a statute that rejected "[t]he overly paternalistic approach of prior years[, that] had proved both exploitative and destructive of Indian interests." *Morton*, 417 U.S. at 553. Instead, the purpose of this "sweeping" legislation was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Id.* at 542. It is unlikely that Congress one year passed landmark legislation regarding tribal rights of self-government, and then the next *sub silentio* made incursions into that very power it sought to protect.

[111] *Pueblo of San Juan*, 276 F.3d at 1196 (holding the NLRA inapplicable to tribes).

[112] *Bresette*, 761 F. Supp. at 663-64. *See also Dion*, 476 U.S. at 739-40.

[113] *Compare Fond du Lac Heavy Equip.*, 986 F.2d at 246 (refusing to apply the ADEA to the tribe where "[the language in the ADEA does not expressly refer to Indians[,]" and "[t]he legislative history of the [ADEA] contains no reference regarding its applicability to Indian tribes.").

B. The Board's reliance on *San Manuel* and *Tuscarora* is unavailing.

To avoid this result, the Board does two things. First, it ignores that this case implicates the Band's reserved right of self-governance.[114] Even though the Band specifically alerted the Board to these issues when it refused to comply with the subpoena on jurisdictional grounds,[115] the Board's Memorandum is wholly silent as to how the Board believes the NLRA can abrogate either of these rights. It lists no textual statutory basis for jurisdiction over tribes; no legislative history evincing congressional intent that the NLRA apply to tribes; no *Dion* analysis. It merely ignores the issue and talks about "coverage" instead—an issue not raised by the Band.

Second, to the extent that the Board hints that applicability, not coverage, is an issue, it relies on *San Manuel Indian Bingo v. N.L.R.B.*,[116] which in turn relied on *F.P.C. v. Tuscarora Indian Nation*.[117] And the Board states that the *San Manuel* Court is the "*only* circuit court that has directly addressed the applicability of the National Labor Relations Act to Indian tribes."[118] It is not.[119] The circuits are split on this issue. But in the Eighth Circuit, a general statute may not abrogate a specific Indian right, be it an

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[114] *See* Board's Memorandum, Dkt. 2.
[115] *Id*. at Ex. 3.
[116] 475 F.3d 1306 (D.C. Cir. 2007).
[117] 362 U.S. 99 (1960).
[118] Board's Memorandum, Dkt. 2, at 9 (emphasis added).
[119] *See Pueblo of San Juan*, 280 F.3d 1278 (refusing to apply the NLRA to a tribe to preempt the tribe's right to work ordinance because "[w]e conclude, the holding in *Tuscarora* does not require the application of section 8(a)(3) of the NLRA to Indian tribes.").

inherent right or treaty right, without clear and plain congressional intent to abrogate the right.[120]

1. The "*Tuscarora* principle" is nonbinding dictum.

What has become known as the *Tuscarora* principle is a legally untethered interpretation that developed through a fundamental misreading of that decision. In *Tuscarora*, the Supreme Court decided the question of whether the Federal Power Act authorized the condemnation of off-reservation land owned by a tribe in fee.[121] And in passing, the Court noted that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[122] But the *Tuscarora* Court actually resolved the question before it by engaging in its typical statutory analysis, and found evidence that Congress affirmatively intended the Act to apply to tribes because "the Act specifically defines and treats with lands occupied by Indians[.]"[123]

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[120] *Dion*, 476 U.S. at 739-40; *Fond du Lac Heavy Equip.*, 986 F.2d at 250.

[121] *Tuscarora*, 362 U.S. at 115.

[122] *Id.* at 116. The "many decisions" on which the Court relied were actually three. Each "involved the taxation of individual Indians, *not* the inherent sovereign rights of tribes on reservations." *San Manuel*, 341 NLRB at 1071 (Schaumber, dissenting). *See also Oklahoma Tax Comm'n v. U.S.*, 319 U.S. 598 (1943) (state may impose inheritance tax on estate of tribal member); *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418 (1935) (federal tax laws apply to earnings of funds invested on behalf of individual tribe members); *Choteau v. Burnet*, 283 U.S. 691 (1931) (applying the Internal Revenue Code to individual Indians because "The language of the [Code] subjects the income of 'every individual' to tax"). Not surprisingly, the *Tuscarora* Court did not cite the NLRA as an example of a statute that applies to tribes.

[123] *Tuscarora*, 362 U.S. at 18. *See also Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765, 786 (1984) (stating that *Tuscarora* resolved the question of applicability of the Federal Power Act to tribes when it found textual congressional intent for the Act to apply to tribes).

The Court's detour through language regarding statutes of general applicability was irrelevant to its holding that Congress specifically included tribes within the application of the Act. And so even courts adopting it as a "rule" (including the Board), acknowledge that "*Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case."[124]

2. The NLRA need not be evaluated under *Tuscarora* at all because the NLRA is not a statute of general application.

The crux of the D.C. Circuit's *San Manuel* decision that the NLRA applies to tribes is its reliance on this *Tuscarora* dictum about "a general statute in terms applying to all persons[.]"[125] And *San Manuel* assumed, without actually deciding, that the NLRA is a statute of general application. But the Tenth Circuit looked closer. It found that "the NLRA by its terms is not a statute of general application, it excludes states and territories."[126] Even if there were a "*Tuscarora* rule" for statutes of general application, this statute is not one, and cannot be eligible for *Tuscarora* treatment.

3. *Fond du Lac Heavy Equipment* harmonizes *Tuscarora* with the decades of prior and subsequent cases requiring clear and plain intent to abrogate sovereign rights.

The Supreme Court has never expressly repudiated its *Tuscarora* dictum. But in the almost 50 years since it was announced, the Supreme Court has never relied on it either. Flower children were born, bellbottoms came into style, Neil Armstrong walked on the moon, bellbottoms went out of style, Halley's Comet was visible, the internet was

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[124] *San Manuel*, 475 F.3d at 1311. *See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996).
[125] *San Manuel*, 475 F.3d at 1311 (quoting *Tuscarora*, 362 U.S. at 116).
[126] *Pueblo of San Juan*, 280 F.3d at 1283.

born, the Berlin Wall fell, bellbottoms came back into style (*sub nom* "flare" jeans), the Red Sox broke the Curse, the European Union was born, the U.S. elected its first African-American President, and yet the Supreme Court *has not once* relied on this *Tuscarora* principle. Bellbottoms have had a more enduring presence than the *Tuscarora* dictum.[127]

Time and again since *Tuscarora*, the Supreme Court has relied instead on enduring axioms of Indian law: sovereign Indian rights may be abrogated by Congress only if Congress manifests the clear and plain intent to do so.[128] It has quietly rejected *Tuscarora*'s sound bite in favor of traditional Indian-law principles.[129] Even the *San Manuel* Court recognized that the "*Tuscarora* statement is [] in tension with the longstanding principles that (1) ambiguities in a federal statue must be resolved in favor of Indian, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal state so as to impair tribal sovereignty."[130]

Without the Supreme Court's reliance on or repudiation of the *Tuscarora* dictum, lower courts have been left to grapple with the dictum's effect, if any, on these well-

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[127] In contrast, the Supreme Court has several times relied on the reasoning of the *Tuscarora dissent*. *C.I.A. v. Sims*, 471 U.S. 159, 175, n.20 ("Great nations, like great men, should keep their word.") (citing *Tuscarora*, 362 U.S. at 142 (Black, J., dissenting)). *Accord Heckler v. Mathews*, 465 U.S. 728, 748 (1984); *Astrup v. I.N.S.*, 402 U.S. 509, 513 (1971).

[128] *E.g. Dion*, 476 U.S. at 738; *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 690 (1979); *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 587 (1977); *Mattz v. Arnett*, 412 U. S. 481, 505 (1973); *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968).

[129] *Oneida County v. Onieda Indian Nation of New York State*, 470 U.S. 226, 248 n.21 (1985) (stating *Tuscarora* "implicitly" applied traditional cannons of Indian law to the statute at issue).

[130] *San Manuel*, 475 F.3d at 1311.

established cannons of Indian law.[131] The Seventh Circuit initially adopted the *Tuscarora* dictum,[132] but later retreated from that decision and instead relied on the *Dion* approach.[133] The Tenth Circuit concluded that the Court has impliedly overruled *Tuscarora*.[134] And the Eighth Circuit harmonized the *Tuscarora* dictum with the decades of prior and subsequent Supreme Court cases requiring clear and plain intent to abrogate sovereign rights by holding that the *Tuscarora* dictum "does not apply when the interest sought to be affected is a specific right reserved to the Indians."[135]

Even the Ninth Circuit (which seemingly embraced the *Tuscarora* dictum), went out of its way to invent judicial "exceptions" in *Donovan v. Coeur d'Alene Tribal Farm* to make the dictum work in light of the Court's past and subsequent Indian law-decisions.[136] Of course, these "exceptions" only reprise the actual rule. The Second Circuit favorably described the *Coeur d'Alene* test this way:

> First, it borrowed a presumption, from a dictum in *Federal Power Comm'n v. Tuscarora Indian Nation*, that "a general statute in terms applying to all persons includes Indians and their property interests." Second, it noted three exceptions to the rule of general applicability:
>
> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other

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[131] *See also generally* Smith, Jr., *supra* n.93 at 533-542 (describing the circuit split and concluding the "Tenth and Eighth Circuits have articulated the correct approach.").
[132] *Smart v. State Farm Ins.*, 868 F.2d 929 (7th Cir. 1989).
[133] *See Great Lakes Indian Fish and Wildlife*, 4 F.3d 490.
[134] *Pueblo of San Juan*, 280 F.3d at 1283; *Donovan*, 692 F.2d at 712.
[135] *Fond du Lac Heavy Equip.*, 986 F.2d at 248.
[136] 751 F.2d 1113, 1116 (9th Cir. 1985).

> means that Congress intended the law not to apply to Indians on their reservations[.]"[137]

It is this *Coeur d'Alene* analysis (complete with exceptions) that the Board adopted in *San Manuel* to find that the NLRA applies to tribes.[138] But the *Tuscarora* dictum itself provides no exceptions. The circuit courts' need to invent "exceptions" where the Supreme Court has provided none cautions that the Supreme Court never intended the *Tuscarora dictum* to be interpreted as a broad new rule in its Indian-law jurisprudence.

But even assuming that the *Tuscarora* dictum is not dead law, the Board is right that "[w]hether or not *San Manuel* and *Fond du Lac Heavy Equip[ment]* are in any conflict should not concern the court[.]"[139] Regardless of whether they conflict, *Fond du Lac Heavy Equipment* is the law of this Circuit. In this Circuit, the *Tuscarora* dictum "does not apply when the interest sought to be affected is a specific right reserved to the Indians."[140]

C. Even if *San Manuel* applied to this case, the NLRA could not be applied to the Band.

Assuming *arguendo* that *Fond du Lac Heavy Equipment* was *not* the law of this Circuit, and the Board's proffered *San Manuel-Coeur d'Alene* analysis could be applied to this case, then even still, under its own analysis, the NLRA could not be applied to the

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[137] *Mashantucket Sand & Gravel*, 95 F.3d at 179 (adopting *Coeur d'Alene* test) (internal citation, quotation, and alteration omitted).
[138] *San Manuel Indian*, 341 NLRB at 1060.
[139] Board's Memorandum, Dkt. 2, at 10.
[140] *Fond du Lac Heavy Equip.*, 986 F.2d at 248.

Band.[141] Under that test, the statute may not be applied to a tribe if it would touch "exclusive rights of self-governance in purely intramural matters[,]" or "abrogate rights guaranteed by Indian treaties[,]" or if there is evidence that Congress intended to exempt Indians from application of the statute.[142] Though it need only fall within *one* for the statute to fail, application of the NLRA against the Band meets *each* of these "exceptions."

First, the Band has the right to govern its internal employment relationships and in fact *has* governed those relationships. Section IV(A)(5) of this brief details how application of the NLRA would impermissibly oust these policies. Second, in the case of a nonmember, applying the NLRA to the Band would abrogate its treaty right to exclude nonmembers and to condition their continued stay on the Lake Vermilion Reservation.[143] And finally, though the text of the statute and its legislative history are silent regarding the statute's application to Indians, the historical context of the NLRA's passage suggests that if Congress intended anything with regard to Indians, it intended that the Act would not apply to tribes.[144] *San Manuel-Coeur d'Alene* is not the law of this Circuit, but even if it were, the NLRA still could not be applied against the Band.

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[141] *San Manuel*, 341 NLRB 1055, at *13 ("[W]e recognize the necessity of going beyond the general test of *Tuscarora-Coeur d'Alene* to examine the specific facts in each case to determine wither the assertion of jurisdiction over Indian tribes will effectuate the purposes of the Act.").

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

[143] *See supra* n.93. *Cf. San Manuel*, 341 NLRB at 1063 ("[T]he Responded does not allege the existence of any treaties covering the tribe[.]").

[144] *See supra* n.110.

V. The improper subpoena may not be enforced.

No matter how you cut it, the NLRA does not apply to the Band. Rote reliance on *Tuscarora* dictum, out-of-circuit precedent, and the peremptory notion that tribal revenue-raising activities are not governmental, does not make it otherwise. But if the NLRA does not apply to the Band, the Board has no statutory authority to serve a subpoena on the board in the first place—let alone request this court to enforce one. A subpoena that lacks jurisdiction should not be enforced.[145] That is precisely the case here.

CONCLUSION

Because the Band's sovereign immunity divested the Board of jurisdiction to bring the underlying action, that action should be dismissed—there is no need to reach the merits of the Board's argument. But even if immunity were not an issue, the subpoena still may not be enforced. *Fond du Lac Heavy Equipment* has already addressed and discarded the Board's argument: *Tuscarora* and its progeny, including the Board's *San Manuel* decision, do not apply to this case. The NLRA, silent as to Indian tribes both on its face and in its legislative history, simply does not evince the congressional intent necessary to abrogate the tribe's sovereign rights, and so does not apply to the Band. Because the NLRA does not apply here, the Board had no statutory jurisdiction to issue this subpoena and it should not be enforced.

[145] *Fresenius Medical Care*, 526 F.3d at 375; *Karuk Tribe Housing Authority*, 260 F.3d at 1082-83.

Dated: February 5, 2009 BOIS FORTE BAND OF CHIPPEWA INDIANS

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CERTIFICATE OF SERVICE

I certify that on February 5, 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:

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

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