UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

(1) THE CHICKASAW NATION, a federally-recognized Indian Tribe, Plaintiff, v. (1) NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the Board, (2) WILMA B. LIEBMAN, Chairman, (3) CRAIG BECKER, (4) MARK G. PEARCE, AND (5) BRIAN HAYES, Defendants.	)	Civil Action No. 5:11-cv-506-W

PLAINTIFF CHICKASAW NATION'S OPENING BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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I. INTRODUCTION

A. Nature of the Action.

This action is brought to protect the Chickasaw Nation's Treaty right of self-government and inherent sovereign authority to engage in and regulate economic activity from infringement by the National Labor Relations Board and its members (collectively the "Board") in clear violation of this Circuit's rule that general federal laws do not apply to a tribal government's exercise of sovereign authority absent express congressional authorization. *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010). At a hearing to commence on June 1, 2011, at the Grayson County

Courthouse in Sherman, Texas, the Board will seek to apply the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, to the Chickasaw Nation's conduct of gaming at one of its licensed gaming locations, the WinStar World Casino ("WinStar"), by subjecting the Nation to trial on unfair labor practice charges brought under section 8 of the NLRA, 29 U.S.C. § 158.

This Circuit's rule in *Dobbs* applies here. First, the Chickasaw Nation regulates, operates and manages all activities at the WinStar location in the exercise of the Nation's Treaty right of self-government and inherent sovereign authority to engage in economic activity, and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, the Chickasaw Nation – State of Oklahoma Gaming Compact ("Compact"),[1] and the Nation's laws. The WinStar location is licensed by the Chickasaw Nation's Office of the Gaming Commissioner ("CNOGC"), as required by the Chickasaw Nation Public Gaming Act of 1994 ("Public Gaming Act"),[2] Chickasaw Nation Code ("CNC") § 3-3306(9)(a), and IGRA, 25 U.S.C. §§ 2710(b)(1)(B), 2710(d)(1)(A). Thus, the Nation conducts gaming at the WinStar location in the exercise of its sovereign authority. Second, Congress has not expressly authorized the application of the NLRA to Indian tribes. Indeed, neither the text nor the legislative history of the Act mention Indian tribes. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002). The NLRA is therefore inapplicable to the Chickasaw Nation.

[1] Exhibit 1, attached hereto.

[2] Exhibit 2, attached hereto.

Furthermore, applying the NLRA to the Nation would abrogate its Treaty right of self-government and power to exclude, divest the Nation of its inherent sovereign authority to engage in and regulate economic activity, and violate its rights under IGRA, the Compact, and the Nation's laws. These violations of the Nation's sovereign authority constitute irreparable harm. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (prospect of significant interference with tribal self-government is irreparable harm).

B. Jurisdiction.

This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1362 because it is brought by a federally-recognized Indian Tribe with a governing body duly recognized by the Secretary of the Interior, and states substantial questions of federal law arising under the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2, Treaties between the United States and the Chickasaw Nation,[3] and federal statutory and common law.

In this action, the Chickasaw Nation seeks to protect rights held by Treaty and under its inherent sovereign authority from interference by the Board. This court's federal question jurisdiction applies to claims based on treaty rights, *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203-04 (10th Cir. 2002), and questions concerning the scope of tribal inherent sovereign authority. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471

[3] The Treaties pursuant to which this Court has jurisdiction include the 1830 Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333; the 1855 Treaty of Washington, Act of Jun. 22, 1855, 11 Stat. 611; and the 1866 Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769 (hereinafter the "Chickasaw Treaties"). The Treaties are attached hereto as Exhibits 3, 4, and 5, respectively.

U.S. 845, 850-53 (1985); and IGRA. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). In addition, Indian tribes have a right of action to "sue[] to enforce Indian rights protected by treaties, statutes and executive orders." *Timpanogos Tribe*, 286 F.3d at 1204 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)).

Because this action seeks to protect the Nation's sovereign rights from the application of the NLRA, the decision in *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938), has no application here. In *Myers*, the Supreme Court held that a federal district court lacked jurisdiction to enjoin a Board hearing when the corporation argued that it was not engaged in interstate commerce under the purview of the Act. *Id.* at 47; *see* 29 U.S.C. § 160(a) ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."). As this case is based on a source of law independent from the NLRA, *Myers* is inapposite. *See Maremont Corp. v. NLRB*, 1976 WL 4206, at *9 (W.D. Okla. 1976) (*Myers* does not bar district court from enjoining NLRA hearing; "[t]his is a F.O.I.A. proceeding and not a proceeding under the N.L.R.A."); *Sears, Roebuck and Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1973) (*per curiam*) ("The District Court was correct in its premise that there is jurisdiction to enjoin [NLRB] proceedings pending resolution of a [FOIA] claim.").[4] Moreover, the Tenth Circuit has repeatedly affirmed preliminary injunctions granted by a district court to protect tribal sovereignty when the jurisdiction of the authority attempting to enforce its

[4] Even with respect to claims based on the NLRA, *Myers* has no force when the Board acts in excess of its statutory powers. *Leedom v. Kyne*, 358 U.S. 184, 191 (1958).

laws upon the tribe is highly questionable. *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1256 (10th Cir. 2006); *Prairie Band of Potawatomi Indians*, 253 F.3d at 1253-54.

II. STATEMENT OF FACTS

The Chickasaw Nation is a federally-recognized Indian Tribe, *see* 75 Fed. Reg. 60,810 (Oct. 1, 2010), organized under the Chickasaw Constitution.[5] The Nation's government is comprised of three departments, Legislative, Executive and Judicial, Chickasaw Const., art. V, § 1, which govern within the territory described in the Constitution. *Id*., pmbl. The Nation's right of self-government is protected by the Chickasaw Treaties. The 1830 Treaty of Dancing Rabbit Creek provides that the Nation has "the jurisdiction and government of all the persons and property that may be within their limits." 7 Stat. 333, art. 4. And the 1855 Treaty of Washington and the 1866 Treaty of Washington secure to the Nation the right to determine who may enter Tribal Territory, the right to attach conditions to the presence of persons permitted to enter that territory, and the power to exclude. *Morris v. Hitchcock*, 194 U.S. 384, 389 (1904) (citing the 1855 Treaty of Washington, arts. 7 and 14, 11 Stat. L. 611; 1866 Treaty of Washington, art. 8, 14 Stat. L. 769); *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (reaffirming *Morris*); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) (same).

The Nation conducts gaming in accordance with IGRA. In order to conduct class II and class III gaming under IGRA,[6] an Indian tribe must enact an ordinance regulating that activity, which must be approved by the Chairman of the National Indian Gaming

[5] Exhibit 6, attached hereto.

[6] *See* 25 U.S.C. § 2703(7), (8), (defining class II and III gaming).

Commission ("NIGC"). *Id.* § 2710(b)(1)(B), (d)(1)(A). For class III gaming, IGRA also requires a Tribal-State gaming compact. *Id.* § 2710(d)(1)(C). The Chickasaw Nation has met both of these requirements. *See* Chickasaw Nation Public Gaming Act of 1994, CNC §§ 3-3101 to 3-3610, 59 Fed. Reg. 18,167 (April 15, 1994) (approving the ordinance); Chickasaw Nation and State of Oklahoma Gaming Compact ("Compact"), 70 Fed. Reg. 6,725 (Feb. 8, 2005) (approving the Compact). The Public Gaming Act applies to all gaming conducted under the Compact, and establishes the CNOGC, *see* CNC § 3-3401, who is empowered to "ensure . . . that the policies and procedures set out [for licensing] are implemented with respect to key employees and primary management officials employed at any gaming facility located on tribal lands. . . ." *Id.* § 3-3306.

The Nation regulates, operates, and manages WinStar, which is a gaming location, duly licensed by the CNOGC. WinStar has no legal existence separate from the Chickasaw Nation. The WinStar gaming location is located in Thackerville, Oklahoma within Tribal Territory, on lands held in trust for the Chickasaw Nation by the United States. All persons working at the WinStar location are employees of the Chickasaw Nation, and are subject to personnel rules and regulations enacted by the Nation's Legislature. *See* CNC §§ 2-550.01 to 2-550.04 ("Personnel Code").

On December 10, 2010, the International Brotherhood of Teamsters Local 886, affiliated with the International Brotherhood of Teamsters, ("Teamsters" or the "Union") filed a charge with the Board alleging that "WinStar World Casino" has engaged in unfair labor practices in violation of the NLRA. Exhibit 7, Charge Against Employer, No. 17-CA-25031 (Dec. 10, 2010). The Teamsters amended that charge on December 23, 2010.

Exhibit 8, Amended Charge Against Employer (Dec. 23, 2010). The Chickasaw Nation responded to the first amended charge, asserting that the NLRA "has *no* lawful application to WinStar or any of [the] Tribe's facilities," and responding to the allegations made. Exhibit 9, Letter from Leonard Court, Attorney for the Nation, to Charles Hoskin, Resident Officer of the NLRB (Jan. 12, 2011). On February 22, 2011, the Teamsters filed a second amended charge. Exhibit 10. The Nation responded to that charge, reiterating "that the National Labor Relations Act does not apply to [the Nation] because of tribal sovereignty," and responding to the substance of the allegations made. Exhibit 11, Letter from Leonard Court, Attorney for the Nation, to Susan Wade-Wilhout, NLRB (March 10, 2011).

On March 31, 2011, the Acting General Counsel of the NLRB issued a Complaint and Notice of Hearing naming "WinStar World Casino" as the respondent. Exhibit 12. The Complaint alleges several violations of the NLRA, including Section 8(a)(1) (interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the NLRA) and Section 8(a)(1) & (3) (discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization). Complaint at 5, ¶¶ 7 & 8. The Complaint seeks an Order requiring the WinStar World Casino to: (1) "supply the union, on its request, with the full names and addresses of all current employees employed as blackjack dealers," (2) "on request, grant representatives of the Union reasonable physical access to all bulletin boards and all other places where notices to employees are customarily posted, including permitting the Union to communicate with employees via

any electronic media, that [WinStar] customarily uses to communicate to employees," and (3) promptly hold a meeting or meetings, "scheduled to ensure the widest possibly [sic] attendance, at which the Notice is to be read to the employees by a responsible agent of [WinStar]" or by a Board agent in the presence of a responsible WinStar agent. Complaint at 6, ¶ 10. A settlement conference was held on April 25, 2011, but settlement was not achieved.

On April 12, 2011, the Board issued a subpoena *duces tecum* to "WinStar World Casino" directing WinStar to appear at a hearing on May 3 or at such time as the hearing may be rescheduled for and produce various personnel-related documents. Exhibit 13. On April 29, 2011, the Board issued a subpoena *duces tecum* to Chickasaw Nation d/b/a WinStar World Casino to appear at a hearing on May 17 and produce a large volume of documents. Exhibit 14. The hearing has been rescheduled to take place on June 1, 2011, at the Grayson County Courthouse in Sherman, Texas.

III. ARGUMENT

The Chickasaw Nation is entitled to temporary injunctive relief upon a showing: "(1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the [restraining order] is issued; (3) that the threatened injury outweighs the harm the [restraining order] might cause the opposing party; and (4) that the [restraining order] if issued will not adversely affect the public interest." *Prairie Band of Potawatomi Indians*, 253 F.3d at 1246; *see also Wyandotte Nation*, 443 F.3d at 1254-55.

A. The Chickasaw Nation Has a Substantial Likelihood of Success on the Merits.

1. The rule of law set forth in *Dobbs*, not the Board's *San Manuel* test, is controlling in this Circuit.

"In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (citing *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002) (*en banc*); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989); *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982)). This rule applies whether the exercise of tribal sovereign power is based on a treaty that "expressly protect[s] Indian tribes' sovereignty," *id*. at 1284 (quoting *Donovan*, 692 F.2d at 711-12), or inherent sovereign authority. *Id*. (citing *San Juan*, 276 F.3d at 1191). In *Dobbs*, the Court also made clear that "the proposition that '[f]ederal statutes of general application apply to Native Americans and their property interests,'" *id*. at 1284 n.8 (quoting *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d 545, 556 (10th Cir. 1986)), applies only to "cases in which an Indian tribe exercises its property rights," and thus not to "cases in which [a tribe] 'exercise[s] its authority as a sovereign.'" *Id*. (quoting *San Juan*, 276 F.3d at 1199).

These rules are based on the pathmarking decision in *San Juan*, in which the Tenth Circuit held that the NLRA did not preempt tribal sovereign authority to enact a right-to-work ordinance. 276 F.3d at 1200. The Board argued that section 8(a)(3) of the NLRA, *id*. § 158(a)(3), protected the right of a union and an employer to enter into a union

security agreement, and that under the express language of section 14(b) of the NLRA, 29 U.S.C. § 164(b), only states or territories could prohibit such agreements. The court rejected that argument, holding that the Pueblo's right-to-work ordinance was an exercise of its "retained sovereign authority," *San Juan*, 276 F.3d at 1195, that the NLRA would be construed to work a divestment of tribal sovereignty only if "Congress ha[d] made its intent clear that we do so," *id*., and that the silence of the NLRA with respect to Indian tribes "is not sufficient to establish congressional intent to strip Indian tribes of their retained sovereignty to govern their own territory. *Id*. at 1196. Rather, "[t]he correct presumption is that silence does not work a divestiture of tribal power." *Id.* (citing *Merrion*, 455 U.S. at 148 n.14).

In so holding, the Tenth Circuit found inapposite the decision in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), which held that the Federal Power Act ("FPA") authorized the condemnation of land owned by the Tuscarora Indian Nation, which Congress had never designated as a reservation by statute or treaty. *San Juan*, 276 F.3d at 1198-1200. At the outset, the court determined that the dictum in *Tuscarora* that "it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests," 362 U.S. at 116,[7] addressed only the applicability of such laws to individual Indians.[8] Addressing the legal force of the

[7] *See EEOC v. Cherokee Nation*, 871 F.2d 937, 938 n.3 (10th Cir. 1989) (recognizing this statement as a dictum).

[8] The Tenth Circuit explained that in *Tuscarora*, the Supreme Court had rejected an argument that relied on the rule set out in *Elk v. Wilkins*, 112 U.S. 94 (1884), that "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them," *San Juan*, 276 F.3d at 1198 (quoting *Tuscarora*,

Tuscarora decision, the Tenth Circuit held that it "dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land," *id*. at 1198, and thus "do[es] not constitute a holding as to tribal sovereign authority to govern." *Id*. at 1199.[9] On this basis, the Tenth Circuit subsequently held in *Dobbs* that the *Tuscarora* dictum applies only to an Indian tribe's exercise of its property rights, not when it "exercise[s] its authority as a sovereign.'" *Dobbs*, 600 F.3d at 1283 n.8 (quoting *San Juan*, 276 F.3d at 1199).[10]

For nearly 30 years, the Board held that federally-recognized Indian tribes and reservation tribal enterprises are exempt from the NLRA. *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976). But in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), the Board held that under *Tuscarora* "statutes of 'general application' apply to the conduct and operations, not only of individual Indians, but also of Indian tribes,"

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362 U.S. at 116), based on later cases that had modified that rule. *Id*. The Tenth Circuit found that those cases concerned only the applicability of general laws to individual Indians, and read the *Tuscarora* dictum to refer to those cases. *Id*.

[9] The Court explained that:

> *Tuscarora* mentions no attempts by the tribe to govern the disputed land, nor does it take cognizance of any argument that taking the land would incidentally infringe on tribal sovereign authority to govern. It was the tribe's possessory interest in the land, rather than its sovereign authority to govern activity on the land, that was at stake in *Tuscarora*.

Id.

[10] This Circuit has also squarely held that "[t]he so-called *Tuscarora* rule *is not applicable* to treaty cases," *EEOC v. Cherokee Nation*, 871 F.2d at 938 n.3; *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d at 711 ("The *Tuscarora* rule does not apply to Indians if the application of the general rule would be in derogation of the Indians' treaty rights").

id. at 1059, and that the NLRA applies to the conduct and operations of Indian tribes on and off the reservation unless it is shown that "(1) the law 'touches exclusive rights of self-governance in purely intramural matters'; (2) the application of the law would abrogate treaty rights; or (3) there is 'proof' in the statutory language or legislative history that Congress did not intend the law to apply to Indians tribes." *Id*. (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985)).

The Board's *San Manuel* test cannot be reconciled with the law of this Circuit, and it is therefore inapplicable here. In *Dobbs* and *San Juan*, the Tenth Circuit made clear that the *Tuscarora* dictum has no application to cases in which a tribe is exercising its sovereign authority. *Dobbs*, 600 F.3d at 1283 n.8 (quoting *San Juan*, 276 F.3d at 1199).[11] In contrast, the Board construes *Tuscarora* to mean that general federal laws apply to Indian tribes. *San Manuel*, 341 N.L.R.B. at 1059. In *San Juan*, the court held that the absence of a reference to Indian tribes in a statute and its legislative history demonstrates its inapplicability to the tribes. "Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *San Juan*, 276 F.3d at 1196. But under *San Manuel*, silence establishes a double negative: that Congress did not intend that the NLRA not apply to Indian tribes. *San Manuel*, 341 N.L.R.B. at 1058. Finally, respect for Indian sovereignty

[11] Even if *Tuscarora* were otherwise applicable, this Circuit has held that the NLRA is not a "generally applicable" law, given the exceptions set forth in section 14(b), 29 U.S.C. § 164(b), which expressly recognize that states and territories may prohibit Union shop provisions. *San Juan*, 276 F.2d at 1199. That same conclusion applies with even greater force when the broader exemptions set forth in section 2(2), 29 U.S.C. § 152(2), are considered.

is the core of this Circuit's approach. *Dobbs*, 600 F.3d at 1283. In *Dobbs*, the court refused to assume Congress intended to infringe on tribal sovereignty by "treating tribal governments as a kind of inferior sovereign" unless it could find "an express statement or strong evidence of congressional intent." *Id*. at 1284. In contrast, the Board considers the sovereign status of Indian tribes as a factor to consider in the exercise of its discretionary jurisdiction. *San Manuel*, 341 N.L.R.B. at 1062-63. In sum, the Board's approach turns the *Dobbs* test upside down, is not the law of this Circuit, and does not apply to this case.

2. The NLRA is inapplicable because the Chickasaw Nation conducts gaming in the exercise of its sovereign authority.

As we show below the Chickasaw Nation regulates, operates, and manages all activities at the WinStar gaming location in the exercise of its sovereign authority, and the NLRA is therefore inapplicable to the Nation under the rule of *Dobbs*, 600 F.3d at 1283. Furthermore, applying the NLRA to the Nation would shift substantial control of the Nation's gaming operations to the Board and the Teamsters, subordinate the Nation's sovereign powers to those of the Board and the Teamsters, and make their decisions enforceable by the Board in its own fora through the prosecution of unfair labor practice charges. *See* 29 U.S.C. § 160. Application of the NLRA to the Nation is therefore barred because it would interfere with the Nation's sovereign powers. *See Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 711 (10th Cir. 1982) (barring application of general statute that would interfere with Treaty rights and dilute tribal sovereign authority).

The Nation's Treaty right of self-government is protected by the 1830 Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333, under which it has "the jurisdiction and government of all the persons and property that may be within their limits." *Id*. at art. 4; *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465-66 (1995) (the 1830 Treaty "provides for the [Chickasaw Nation's] sovereignty within Indian country"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (stating that the Article 4 rights are "guaranteed to the Tribe"). The Nation conducts gaming in the exercise of this right at licensed gaming locations, one of which is the WinStar location.

Applying the NLRA to the Nation would divest the Nation of the right to determine the manner in which it will engage in economic activity. The Board has already violated this right by denominating WinStar as an entity separate from the Nation. And under the NLRA, the Board has the power to determine the "unit appropriate for the purpose of collective bargaining," 29 U.S.C. § 159(b), which would enable it to pick and choose the categories of employees it would recognize as a bargaining unit without regard to how the Nation's government is organized. The Board has no authority to alter or fragment the Nation's governmental structure in this manner.

The Nation also has the right to determine who may enter Tribal Territory, the right to condition the presence of those permitted to enter, and the power to exclude. As the Court held in *Morris v. Hitchcock*, 194 U.S. 384 (1904):

> While it is unquestioned that, by the Constitution of the United States, Congress is vested with paramount power to regulate commerce with the Indian tribes, yet it is also

> undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, and the duty of the United States to protect the Indians 'from aggression by other Indians and white persons, not subject to their jurisdiction and laws,' has also been recognized. Treaty June 22, 1855, arts. 7 and 14 (11 Stat. at L. 611); Treaty April 28, 1866, art. 8 (14 Stat. at L. 769).

Id. at 388-89. *See also Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (reaffirming *Morris*); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-42 (1982) (same). Applying the NLRA to require the Nation to grant access on the terms sought by the Board would abrogate these rights. The Board has no right of access to Nation facilities to enforce the NLRA. Nor do the Teamsters have a right to engage in organizing and representation activities in the Nation's facilities, either in person or electronically. Accordingly, the Teamsters have no right to the names and addresses of Nation employees, or to communicate with such employees using information furnished by the Nation. Applying the NLRA to the Nation to require it to grant such access would divest the Nation of its power to exclude. Granting the Teamsters access would also deprive the Nation of the right to administer and enforce its background check and licensing processes as a condition of entry, CNC §§ 3-3606, 3-3610 which is required by IGRA, 25 U.S.C. § 2710(b)(2)(F), and the Compact, Part (10)(A)(1) at 27. At the same time, the Nation would remain responsible for compliance with these laws, and for shielding its gaming activities from "organized crime and other corrupting influences." 25 U.S.C. § 2702(2). This would impose a Hobson's choice on the Nation.

Gaming is conducted by the Nation in the exercise of its sovereign authority to "undertake and regulate economic activity," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), which includes the right to conduct gaming on Indian reservation lands when state public policy towards gaming is regulatory rather than prohibitory. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987).[12] Congress found in IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." *See* 25 U.S.C. § 2701(5). IGRA provides a statutory basis for both "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and "the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, . . ." 25 U.S.C. § 2702(2).[13] In enacting IGRA, Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-466, at 6 (1988) reprinted in U.S.C.C.A.N. 3071, 3076.

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[12] By providing revenue for the operation of tribal governments and the delivery of tribal services, *id.* at 218- 219, gaming furthers "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216 (quoting *Mescalero Apache*, 462 U.S. at 333-34).

[13] As the Tenth Circuit found in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), in holding that a tribe's sovereign immunity extended to the tribe's economic development authority and the casino that it operates, "[o]ne of the ways that Congress has promoted tribal sovereignty through economic development is . . . the authorization of Indian gaming." *Id.* at 1183 (citing IGRA § 2702(1)).

As required by IGRA, the Nation enacted the Public Gaming Act to regulate all class II and class III gaming that it conducts, and entered into a class III gaming compact with the State of Oklahoma. Both have been approved, and the Compact now has the force of federal law. 25 U.S.C. §§ 2710(d)(2)(C), (d)(3)(B). Pursuant to IGRA, the Nation's gaming revenues are used only to fund tribal government operations and programs, provide for the general welfare of the tribe, promote tribal economic development, and for charitable and local purposes. 25 U.S.C. § 2710(b)(2)(B).

All persons working at the Nation's gaming locations, including WinStar, are Nation employees, who are subject to the Nation's regulatory authority under IGRA, the Compact, and the Public Gaming Act. In addition, their employment is subject to personnel rules enacted by the Chickasaw Legislature in the exercise of the Nation's right of self-government.[14] *See* CNC §§ 2-550.01 to 2-550.04 ("Personnel Code"). The Personnel Code comprehensively addresses the terms and conditions of employment, *see* CNC § 2-550.04, and provides an employment preference for Tribal members. CNC § 2-550.04.

[14] The Personnel Code is also a valid exercise of the Nation's inherent sovereign authority as all of the Nation's employees have entered into a "consensual relationship with the [Nation]," through their employment agreement, and because their conduct has a "direct effect on the [Nation's] political integrity, [and] economic security," as the Tribal Government depends on their work to function. *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Employees of the Nation who are permitted to enter Tribal Territory remain subject to the Nation's power to exclude, if, for example, their gaming license is suspended or revoked. *Merrion*, 455 U.S. at 144 (nonmembers permitted to enter tribal territory "remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. . . .").

Applying the NLRA to the Chickasaw Nation would divest the Nation of its right to regulate, operate, and manage gaming at the WinStar location. First, it would require the Nation to engage in collective bargaining, *see* 29 U.S.C. §§ 157-59, concerning "wages, hours, and other terms and conditions of employment. . . ." § 158(d). This would subject virtually all of the rights on which the Nation relies to regulate, operate, and manage activities at the WinStar location to negotiations concerning the "terms and conditions of employment." 29 U.S.C. § 158(d). For example, the regulatory requirements imposed and administered by the Nation under IGRA, the Compact, and the Public Gaming Act – including the background and licensing requirements, *see* 25 U.S.C. § 2710(b)(2)(F); CNC §§ 3-3606, 3-3610, could be subjected to collective bargaining, as well as the Personnel Code, including the Nation's employment preference for tribal members. As a result, the Nation would be required to bargain for the continued applicability of its own laws to its own governmental activities. The result of the collective bargaining process would be a *de facto* statute governing conditions of employment that would replace the Nation's laws, and thereby divest the Nation of its right of self-government and inherent sovereign authority to engage in economic activity.

Second, applying the NLRA to the Nation would guarantee its employees the right to strike, *see* 29 U.S.C. § 157, 29 U.S.C. § 163, which would confer on a representative selected by its employees, *see* § 159(a), the power to bring the tribal government to a halt. A strike by Nation employees would jeopardize the Nation's ability to operate its government; protect the safety, health, and welfare of its members, residents, and visitors; and provide Tribal services. Furthermore, to eliminate the threat of a strike would require

the consent of the employees' representative through the collective bargaining process. 29 U.S.C. §§ 157, 158(d). As a result, the Nation's ability to continue to meet its governmental responsibilities would depend on the outcome of the bargaining process.

Subordinating the Nation's sovereignty to the NLRA in this manner violates federal law. "Requiring the consent of the [Union] deposits in the hands of the [Union] the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority." *Merrion*, 455 U.S. at 147 (1982) (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). And it has not done so in the NLRA, which is silent with respect to Indian tribes, and therefore does not abrogate tribal authority to govern tribal territory. *San Juan*, 276 F.3d at 1196.

3. Congress has not expressly authorized the application of the NLRA to Indian tribes.

Under *Dobbs*, the NLRA is inapplicable to the Chickasaw Nation unless Congress has expressly authorized its application. 600 F.3d at 1283. The Board will likely urge that "in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause," *San Manuel*, 341 N.L.R.B. at 1057 (citing *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis in original)), and that therefore the Board

has jurisdiction to apply the NLRA to the Chickasaw Nation. But that assertion simply begs the question to be decided here, which is controlled by the rule of *Dobbs*.[15]

We begin by recognizing that neither the NLRA nor its legislative history mention Indian tribes, *San Juan*, 276 F.3d at 1196, as the Board itself has recognized. *Sac & Fox Indus. Ltd.*, 307 N.L.R.B. 241, 245 (2004) (the Board "is not aware of [] any discussion whatsoever in the legislative history of the NLRA dealing with Indians"). Accordingly, the initial question is what inference to draw from this silence. On that question, the rule of this Circuit is clear: "Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *San Juan*, 276 F.3d at 1196 (citations omitted). Rather, "the proper inference from silence is that the sovereign power [] remains intact." *Id*. (quoting *Merrion*, 455 U.S. at 148 n.14). The force of this rule is demonstrated by *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), in which the Court rejected the argument that the diversity statute, 28 U.S.C. § 1332, limited tribal jurisdiction and overrode the federal policy of deference to tribal courts. The Court found that "[t]he diversity statute, 28 U.S.C. § 1332, makes no reference to

[15] The jurisdiction conferred on the Board by Congress in the NLRA is obviously not unlimited. Thus, the Board could not regulate climate change simply because Congress may authorize a federal agency to do so under the Commerce Clause. Nor may the Board assert jurisdiction over foreign seamen simply because the Congress has the power to confer that authority. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17, 22 (1963). And in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court held that the Board could not exercise jurisdiction over church-operated schools. Notably, the *Dobbs* Court and the Supreme Court in *Catholic Bishop* applied the same rule: "in the absence of a clear expression of Congress' intent to bring [Indian tribes exercising sovereign authority] within the jurisdiction of the Board," the Board lacks jurisdiction under the NLRA. Compare *Catholic Bishop*, 440 U.S. at 507, with *Dobbs*, 600 F.3d at 1283.

Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government," 480 U.S. at 17, and that the diversity statute therefore had no effect on tribal sovereignty. *Id*. at 18. "[B]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact." *Id*. at 18 (quoting *Merrion*, 455 U.S. at 149 n.14).

Where Indian treaty rights are at issue, as is the case here, the test is even more demanding. As the Tenth Circuit explained in *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989):

> Like the Supreme Court, we have been "extremely reluctant to find congressional abrogation of treaty rights" absent explicit statutory language. *See United States v. Dion*, 476 U.S. 734, 739 (1986). . . . Indian treaty rights are too fundamental to be easily cast aside." *Id*. (citations omitted).

Id. at 938. In *Dion*, the Court required that "Congress' intention to abrogate Indian treaty rights be clear and plain," *Dion*, 476 U.S. at 738, emphasizing that:

> "[w]hat 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 the conflict by abrogating the treaty."

Id. at 739-40. The NLRA does not satisfy this standard. The absence of any reference to Indian tribes in the NLRA or its legislative history makes it impossible to show that, in

enacting the NLRA, Congress "actually considered" the conflict between that Act and Indian treaty rights "and chose to resolve that conflict by abrogating the treaty." *Id.*[16]

Nor does the Board's reliance on the definition of "employer" under the Act, *see* section 2(2), 29 U.S.C. § 159(2), aid its cause. The definition of "employer" – like the Act as a whole – is silent with respect to Indian tribes, and that silence does not support the application of the Act to Indian tribes. *San Juan*, 276 F.3d at 1194-96; *EEOC v. Cherokee Nation*, 871 F.2d at 938-39 (silence of ADEA with respect to Indian tribes is not sufficient to abrogate rights of Indian sovereignty). And whether Indian tribes are "employers" within the literal meaning of the NLRA would not determine whether the Act applies to Indian tribes in any event. *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 712 (10th Cir. 1982) (although the parties conceded that a tribal enterprise was an "employer" within the literal meaning of OSHA, the Court held that OSHA did not apply to the tribe because its application would violate the treaty power to exclude, and "dilute the principles of tribal sovereignty and self-government recognized in the treaty"). In sum, the only basis on which the NLRA could be argued to apply to Indian tribes is by implied preemption, which "does not suffice." *San Juan*, 276 F.2d at 1192 (citing *LaPlante*, 480 U.S. at 18).[17]

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[16] Moreover, the available indications in the text are consistent with the inference to be drawn from that silence – that the sovereign power remains intact. *Id.* The Act's definition of "commerce," section 2(6), 29 U.S.C. § 152(6), expressly refers to States, the District of Columbia, Territories and foreign countries, but conspicuously omits any reference to Indian tribes.

[17] Finally, if more were needed, the context in which the NLRA was passed makes it inconceivable that it was intended to apply to Indian tribes. As the Supreme Court has recognized, "the meaning of one statute may be affected by other Acts, particularly where

B. The Chickasaw Nation will Suffer Irreparable Harm Absent Injunctive Relief.

In assessing the irreparable harm factor, a court should consider whether: (a) the injury is "certain or great," *Prairie Band of Potowatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quoting *A.O. Smith Corp. v. F.T.C.*, 530 F.2d 515, 525 (3d Cir. 1976)); (b) "the injury can[not] be adequately atoned for in money," *id.* (quoting *A.O. Smith Corp.*, 530 F.2d at 525 (amendment in *Prairie Band*)); and (c) the injury cannot be remedied "following a final determination on the merits." *Id.* Applying the NLRA to the Nation would cause certain and great injury to the Nation's Treaty rights and inherent sovereign authority, *see supra* at 13-19, that money damages could not remedy. And if the Board is permitted to move forward, the Nation will "be compelled to expend time and effort on litigation [before a body] that does not have jurisdiction over it, which is an injury that cannot be vindicated following a determination on the merits." *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (quoting *Seneca-Cayuga*

Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-531 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)). The year before Congress enacted the NLRA, it enacted the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-77. "The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). To enhance self-government, section 16 of the IRA authorized Indian tribes to adopt constitutions exercising "all powers vested in any Indian tribe or tribal council by existing law," as well as additional powers specifically stated in section 16. 25 U.S.C. § 476(e). To facilitate tribal economic development, section 17 of the IRA authorized the Secretary of the Interior to issue charters of incorporation authorizing Indian tribes to organize and operate business corporations under such charters. 25 U.S.C. § 477. It is inconceivable that, one year later, Congress would have reversed direction, and decided instead to treat Indian tribes as private employers under the Act. *See Catholic Bishop*, 440 U.S. at 504 (Congress was "focused on employment in private industry").

Tribe v. Oklahoma, 874 F.2d 709, 716 (10th Cir. 1989) (amendment added)). And while the alleged violation of a treaty or inherent sovereign right presents an issue of law that is subject to *de novo* review by the Court of Appeals, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1190 (10th Cir. 2002), if the Board were to rule that the NLRA applies, the Nation would instead have to seek judicial review under the section 10(f), 29 U.S.C. § 160(f), of the NLRA – the very enactment that the Nation claims is inapplicable here. Finally, the Tenth Circuit has clearly established that the improper exercise of jurisdiction over a tribe is an irreparable injury to the tribe's inherent sovereign authority. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Prairie Band*, 253 F.3d at 1250-51; *Winnebago Tribe of Neb. v. Stovall*, 216 F. Supp.2d 1226 (D. Kan. 2002), *aff'd*, 341 F.3d 1202, 1233 (10th Cir. 2003). So too here.

C. The Threatened Injury to the Nation Outweighs Any Possible Injury to the Board.

Any possible injury to the Board does not outweigh the threat to the Chickasaw Nation's treaty rights and inherent sovereignty. First, the injunction would not prevent the Board from enforcing the NLRA elsewhere. *See Prairie Band of Potawatomi Indians*, 253 F.3d at 1252 ("the state has not been prevented from enforcing its registration and titling laws wholesale-only with respect to the tribe and its members"). Second, if the Board establishes that it has jurisdiction over the Nation, the Board proceeding may continue where it left off. *See Wyandotte Nation*, 443 F.3d at 1256. But if an injunction is *not* issued, the Nation's treaty right of self-government and inherent sovereign authority to

engage in economic activity would be violated by the Board's application of the NLRA to the Nation. The balance of harm factor therefore supports issuance of an injunction.

D. The Public Interest Supports the Grant of Injunctive Relief.

This Circuit has repeatedly affirmed that supporting tribal self-government is a matter of public interest. *Prairie Band of Potawatomi Indians*, 253 F.3d at 1253; *Seneca-Cayuga*, 874 F.2d at 716; *see also Sac and Fox Nation of Mo. v. LaFaver*, 905 F. Supp. 904, 907-08 (D. Kan. 1995) ("The public also has a genuine interest in helping to assure Tribal self-government, self-sufficiency and self-determination."). The public interest therefore supports issuance of an injunction here.

CONCLUSION

For the foregoing reasons, the Chickasaw Nation respectfully submits that injunctive relief should be granted to protect its sovereign authority from abrogation and infringement by the Board.

Dated: May 12, 2011

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PLAINTIFF CHICKASAW NATION'S EXHIBITS
IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING
ORDER AND/OR PRELIMINARY INJUNCTION

1. The Chickasaw Nation and State of Oklahoma Gaming Compact
2. Chickasaw Public Gaming Act of 1994, Chickasaw Nation Code §§ 3-3101 to 3-3610
3. 1830 Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 33
4. 1855 Treaty of Washington, Act of Jun. 22, 1855, 11 Stat. 611
5. 1866 Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769
6. Constitution of the Chickasaw Nation
7. Charge Against Employer, No. 17-CA-25031 (Dec. 10, 2010)
8. Amended Charge Against Employer, No. 17-CA-25031 (Dec. 23, 2010)
9. Letter from Leonard Court, Attorney for the Chickasaw Nation, to Charles Hoskin, Resident Officer of the NLRB (Jan. 12, 2011)
10. Second Amended Charge Against Employer, No. 17-CA-25031 (Feb. 22, 2010)
11. Letter from Leonard Court, Attorney for the Chickasaw Nation, to Susan Wade-Wilhout, NLRB (Mar. 10, 2011)
12. Complaint and Notice of Hearing, No. 17-CA-25031 (Mar. 31, 2011)
13. Subpoena *duces tecum*, No. 17-CA-25031 (Apr. 12, 2011)
14. Subpoena *duces tecum*, No. 17-CA-25031 (Apr. 29, 2011)
15. Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Chickasaw Nation d/b/a Windstar World Casino v. International Brotherhood of Teamstears Local 886, et al., United States of America, Before the National Labor Relations Board, 17th Region, Cases 17-CA-25031 and 17-CA-25121