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UNITED STATES GOVERNMENT

**NATIONAL LABOR RELATIONS BOARD**

**OFFICE OF THE GENERAL COUNSEL**

Division of Enforcement Litigation  
1099-14<sup>th</sup> Street, N.W., Suite 10800  
Washington, D.C. 20570-0001

January 30, 2009

Ms. Edith R. Blackwell, Associate Solicitor  
United States Department of the Interior  
Main Interior, Room 6513  
Washington, DC 20240

Re: Little River Band of Ottawa Indians  
NLRB Case No. GR-7-CA-51156

Dear Ms. Blackwell:

Your letter dated January 15, 2009, expressing the United States Department of the Interior's position regarding the National Labor Relations Board's possible exercise of jurisdiction over the Little River Band of Ottawa Indians (the "Band") in an unfair labor practice case pending before the Grand Rapids Resident Office in NLRB Region 7, has been forwarded to me for response. We have carefully considered the Department's views and, as explained below, must respectfully disagree with the position advanced in your letter. Nevertheless, it is our hope that our agencies can initiate a dialogue touching upon several areas of common concern.

At the outset, we want to clarify the procedural posture of the case. The Regional Director for Region 7, who oversees the Grand Rapids Resident Office subject to the General Counsel's ultimate supervision, has not issued an unfair labor practice complaint charging the Band with unlawful conduct by its exercise of its sovereign power. Indeed, the Director has not asserted the existence of Board jurisdiction over the Band. Rather, upon a charge filed by General Teamsters Union Local 406 alleging the Band's promulgation of a labor relations ordinance (the "Ordinance") as an unfair labor practice, the Resident Office has commenced an investigation—as the National Labor Relations Act ("NLRA") requires—into the Board's jurisdiction over the matter. *NLRB v. Indus. Union of Marine & Shipbuilding Workers of Am.*, 391 U.S. 418, 424 (1968); *NLRB v. Barrett Co.*, 120 F.2d 583, 585 (7th Cir. 1941) ("The first step is the filing of a

charge . . . . Upon its filing, the Board is required to investigate . . . . Its powers and its duties are closely related. Its duty to investigate before it exercises its power to file a complaint seems to us clear.”).

The charge that has been filed challenges the Ordinance as applied to the labor relations of the Little River Casino Resort (the “Casino”), which the Ordinance expressly includes within its scope and which is identified by the Ordinance as an arm of the Band’s tribal government. Accordingly, the Resident Office has issued subpoenas to Band officials that are relevant to two interrelated, threshold questions—first, whether the Band is the employer, a “single employer,” or a “joint employer” of the employees who work at the Casino, and second, whether Board jurisdiction over the Band is appropriate under the principles of *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007). These subpoenas were issued only after we requested that the Band provide us the information voluntarily, and it chose not to do so.

If evidence gathered during the investigation supports Board jurisdiction over the Band under the principles enunciated in *San Manuel* and confirms the Band’s status as an “employer” of the Casino’s employees for purposes of the NLRA, then the merits of the unfair labor practice charge would be evaluated. If there is reasonable cause to believe that the Band’s promulgation and maintenance of the Ordinance tends to interfere with Casino employees’ exercise of Section 7 rights under the NLRA, 29 U.S.C. § 157, then the Regional Director, in the name of the General Counsel, would likely issue an unfair labor practice complaint against the Band.

As indicated above, if complaint is deemed warranted, the allegations of NLRB jurisdiction over the Band would rely primarily on *San Manuel*, where the Board indicated that it made no distinction in its jurisdictional analysis between Indian tribal enterprises and the Indian tribes themselves. Indeed, the Board in that case repeatedly referred to the issue it was addressing as whether to assert jurisdiction over “Indian tribes.” See 341 N.L.R.B. at 1057 (“[W]e now adopt a new approach to the question of the Board’s jurisdiction over Indian tribes . . . .”). Moreover, in affirming the Board’s decision on review, the D.C. Circuit recognized that the Board’s exercise of jurisdiction over the San Manuel casino effectively regulated the San Manuel tribe itself. See 475 F.3d at 1314-15. Consequently, we cannot agree that a potentially unlawful tribal regulation governing labor relations between the tribe as an NLRA employer and its employees can only be challenged in federal district court pursuant to *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

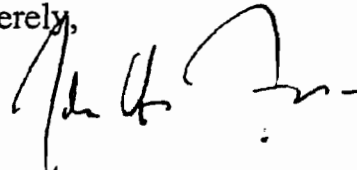
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On the other hand, if the investigation reveals either that the Band is not the NLRA "employer" of the Casino's employees, or that application of *San Manuel* precludes the exercise of Board jurisdiction over the Band, then the charge will be dismissed by the Regional Director absent withdrawal by the charging party union. In that event, the Agency would have to consider whether it has other options including, as you suggest, the option of bringing a *Nash-Finch* action against the Band in the appropriate district court.

In conclusion, we would note that the issues raised in your letter are recurring and important to both our offices. As the General Counsel's office has been considering whether to assert jurisdiction over various tribal enterprises, several difficult and complex questions have arisen, particularly in the tribal casino context where DOI plays a significant role. As you recently suggested, it might prove helpful for representatives of our two offices to discuss these issues at further length. The primary contact in the General Counsel's office on these matters is Assistant General Counsel Eric Moskowitz. He is reachable at (202) 273-2931.

Thank you for your letter and for the subsequent follow-up call to the General Counsel's office. We look forward to a mutually beneficial dialogue concerning these overlapping areas of interest.

Sincerely,



John H. Ferguson  
Associate General Counsel

cc: Honorable Don Koon  
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