

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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LITTLE RIVER BAND OF OTTAWA  
INDIANS,

Plaintiff,

Case No. 1:09-cv-141

Oral Argument Requested

v.

NATIONAL LABOR RELATIONS  
BOARD,

Defendant.

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**MOTION OF THE LITTLE RIVER BAND OF OTTAWA INDIANS FOR  
SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW  
(ORAL ARGUMENT REQUESTED)**

The Little River Band of Ottawa Indians (the “Band” or the “Tribe”) hereby moves for summary judgment on its Amended Verified Complaint for declaratory and injunctive relief against the Defendant, the National Labor Relations Board (the “NLRB” or the “Board”), to prevent it from proceeding with coercive administrative actions against the Band that would significantly impair the Band’s governmental authority as a federally recognized Indian tribe. For the reasons set forth herein, the motion should be granted.

**FACTS**

The Band consists of close to 4,000 tribal members “who continue to reside close to their ancestral homeland as recognized in the Manistee Reservation in the 1836 Treaty of Washington and the reservation in the 1855 Treaty of Detroit, which area is now

known as Manistee and Mason Counties, Michigan.” 25 U.S.C. § 1300k(4); *Statement of Undisputed Material Facts in Support of the Little River Band of Ottawa Indians Motion for Summary Judgment* (“SMF”) ¶ 2. Congress restored the Band to federal recognition in 1994, recognizing that the Band had maintained a governmental structure and had engaged in continuous dealings with federal, state, and local governments since 1836, but had been “denied the opportunity to reorganize” under the Indian Reorganization Act of 1934 “[d]ue to a lack of Federal appropriations.” 25 U.S.C. § 1300k(5). *See generally* 25 U.S.C. §§ 1300k-1300k-7 (the “Restoration Act”); JAMES M. MCCLURKEN, OUR PEOPLE, OUR JOURNEY: THE LITTLE RIVER BAND OF OTTAWA INDIANS (MICH. STATE UNIV. PRESS 2009) (“MCCLURKEN”) 177-251. The Restoration Act provides that:

[a]ll laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians, including . . . the Indian Reorganization Act . . . which are not inconsistent with any specific provision of this subchapter shall be applicable to the Band[] and [its] members.

25 U.S.C. § 1300k-2(a).

Pursuant to the Restoration Act, the Band has enhanced its governmental capabilities and the provision of governmental services to its members, and has taken significant actions to restore its land base and revitalize its tribal community. SMF ¶¶ 3-12. *See generally* MCCLURKEN 253-268. The United States, through the Secretary of the Interior, has taken over 1,200 acres of land into trust for the Band in and near Manistee and Mason Counties (the Band’s “trust lands” or “reservation”). SMF ¶ 8. *See* 25 U.S.C. §§ 1300k-4(b), 1300k(d). The Band’s Housing Department has built, and is continuing to build, reservation homes for low income and elderly tribal members; its Health Department provides direct care services to many tribal members and their families; the Band’s Department of Natural Resources is working to restore fish populations within the

reservation; the Band is actively restoring its language; and plans are under way to construct a new Community Center and Government Building complex on the reservation. SMF ¶ 10.

Lacking a viable tax base, the Band supports its governmental services by generating revenues pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (“IGRA”). SMF ¶ 11. Its IGRA gaming revenues provide in the order of \$20 million per year for the tribal government. *Id.* The other principal sources of governmental funds for the Band are through contracts entered into by the Tribe with federal agencies through the Indian Self-Determination and Education Assistance Act of 1975, Indian Health Care Improvement Act of 1976, and Native American Housing Assistance and Self-Determination Act of 1996. *Id.*

Pursuant to the Restoration Act, the Band has enacted a Constitution in accordance with the Indian Reorganization Act, 25 U.S.C. § 476 (“IRA”). SMF ¶ 3. That Constitution, as provided for under the IRA, has been approved by the Secretary of the Interior. *Id. See also* 25 U.S.C. § 1300k-6(a)(1). It provides that “[t]he Tribe’s jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.” SMF ¶ 5. Pursuant to this Constitution, the Band has, in turn, enacted laws governing labor relations within its reservation. SMF ¶¶ 13-18.

These laws, set forth in Article XVI of the Tribe’s Fair Employment Practices Code (“Article XVI”), govern the Band’s public sector and are similar to state public sector labor laws. SMF ¶15. For example, like most state laws, Article XVI prohibits strikes against its governmental agencies, commissions, and subordinate organizations,

and requires labor organizations and public employers to use alternative dispute resolution processes to resolve bargaining impasses. SMF ¶¶ 33-34. Amended Verified Complaint (“AVC”) Exhibit B §§ 16.06-16.07. Like state public sector labor laws, the Band’s law also waives the sovereign immunity of its public employers from suit to facilitate the resolution of bargaining disputes and unfair labor practices and for the enforcement of collective bargaining agreements. *Id.* § 16.25.

In addition to other tribal government agencies, departments, commissions, and subordinate organizations, Article XVI applies to the Band’s generation of governmental revenues through IGRA gaming activities. SMF ¶¶ 15-18. The Band’s IGRA gaming facility is known as the Little River Casino Resort (“LRCR”), and it is wholly owned by the Band and governed by a Board that is appointed by, and accountable to, the Tribe’s Ogema (its executive officer) and Tribal Council (its legislative body). SMF ¶¶ 4, 37, 40-43. The Band currently regulates reservation labor organizing and collective bargaining, involving tribal members, non-Indians, and a labor organization at LRCR pursuant to Article XVI. SMF ¶¶ 15-18, 46.

On or about March 28, 2008, the International Brotherhood of Teamsters filed a “Charge Against Employer” with the NLRB, naming the Little River Band of Ottawa Indians Tribal Government as the “Employer,” and the Band’s Tribal Council Speaker, Don Koon, as the “Employer Representative.” SMF ¶ 19. The Charge asserts that the Tribal Government “has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsection[] (1) . . . of the National Labor Relations Act.” SMF ¶ 20. For the “facts constituting the alleged unfair labor practice” the Charge states, in pertinent part that,

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

SMF ¶ 20.

In the months following the service of this Charge upon the Band, a legal controversy emerged between the Band and the Board. Eventually, the Interior Department entered the controversy, siding with the Band. SMF ¶ 29; AVC Exhibit L.

The NLRB takes the position that it may proceed against the Band on the Teamsters' Charge if (a) the Band's tribal government and its IGRA gaming operations at the LRCR can be considered a "joint employer" or "single employer" under legal standards governing private sector employers and (b) the Band's IGRA gaming operations at the LRCR employ a significant number of non-Indians and cater to a significant number of non-Indian patrons. SMF ¶¶ 26, 31; AVC Exhibits J and M. The NLRB served subpoenas upon the Band's tribal government officials to command the giving of testimony and production of documents regarding this two-part theory. SMF ¶¶ 26-27; AVC Exhibit J. The Band responded that it has enacted and implemented its IRA Constitution and Article XVI pursuant to its inherent authority as an Indian tribal government; that, as such, it cannot be treated as a NLRA employer under "joint employer" or "single employer" standards; and that if the NLRB seeks to challenge the Band's IRA Constitution and laws on the ground that they are conflict with the NLRA,

the Board may commence an original action in the federal court against the Band, as a government, to claim that its laws are preempted. SMF ¶ 28; AVC Exhibit K.

In a letter recounting these positions, dated December 11, 2008, the Band, through counsel, requested written assurances from the NLRB that it would withdraw its subpoenas and the Teamsters' Charge. *Id.* By letter dated January 15, 2009, the Interior Department wrote to the NLRB, expressing its agreement with the Band's legal position, and asking the NLRB to "put an end" to its agency action. SMF ¶ 29; AVC Exhibit L. The NLRB responded to the Interior Department by letter dated January 30, 2009, holding to its asserted two-part theory for proceeding against the Band on the Teamsters' Charge. SMF ¶ 31; AVC Exhibit M. It said that upon satisfying that theory, the Board "would likely issue an unfair labor practice complaint against the Band," referring to "a potentially unlawful tribal regulation governing labor relations." *Id.* The Band subsequently filed this action for declaratory and injunctive relief against the NLRB on February 18, 2009.

## ARGUMENT

This case presents the issue whether the NLRB can hale the Little River Band of Ottawa Indians before it to declare the Band's IRA Constitution and laws governing public sector labor relations the unfair labor practices of a NLRA employer. Under established principles of federal Indian law, the proper resolution of this issue turns on (a) whether the Band's enactment and implementation of its Constitution and laws involve the exercise of tribal sovereignty, protected by federal law and (b) if so, whether Congress clearly empowered the NLRB to impair the Band's sovereign authority through its threatened agency proceedings. What is not at issue in this case is (a) whether the

NLRA applies to one part of the Band's public sector, its IGRA gaming operations or (b) if so, whether the Band's laws must bow to the NLRA. These latter issues would properly be presented if the NLRB brought a direct federal court action against the Band to claim that its laws are preempted, in whole or in part, by the NLRA. This case presents only the issue of whether the NLRB can attack the Band's Constitution and laws by means of a coercive unfair labor practices proceeding under the NLRA.

The Tribe invokes this Court's subject matter jurisdiction pursuant to 28 U.S.C. §1362 (actions by Indian tribes arising under federal law) and 28 U.S.C. §1331 (federal questions). It is entitled to summary judgment on its claims if "there is no genuine issue as to any material fact" and it is entitled judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The material facts are not in dispute. As set forth below, under well-established principles of federal Indian law, the Tribe faces imminent harm to its self-governing authority from the NLRB's threatened coercive actions. Judgment should therefore enter on the Band's requested declaratory and injunctive relief to resolve the parties' controversy and protect the Tribe from the continuing unlawful assertion of authority by the Board.

**I. THE NLRB HAS NO AUTHORITY TO SUBJECT THE BAND TO AN UNFAIR LABOR PRACTICE PROCEEDING TO STRIKE DOWN THE BAND'S PUBLIC SECTOR LABOR RELATIONS LAWS**

While special principles of federal Indian law govern this case, the difficulty of the NLRB's approach becomes immediately apparent when one recognizes that the NLRB can no more prosecute an unfair labor practice charge against an Indian tribe for exercising its inherent authority than it can prosecute such a charge against a state. The Board could never commence an unfair labor practice proceeding against a state

government for enacting or implementing a state labor law with respect to a state entity over which the NLRB claimed authority under the NLRA. It could bring an original action to claim preemption in the federal court. *See, e.g., NLRB v. State of Florida, Dept. of Bus. Reg.*, 868 F.2d 391 (11<sup>th</sup> Cir. 1989); *NLRB v. State of North Dakota*, 504 F. Supp.2d 750 (D.N.D. 2007). And it can pursue the same course to challenge tribal law. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10<sup>th</sup> Cir. 2002) (en banc). The Board cannot, however, adjudicate such a claim through an agency proceeding by deeming the governmental acts of the state or the tribe to be the unfair labor practices of an employer.

As discussed below, the Band governs its reservation labor relations pursuant to its established prerogative as an Indian tribal government.<sup>1</sup> Thus, without a clear directive from Congress, the NLRB cannot attack the Band's enactment and implementation of its laws by means of an unfair labor practice proceeding. Congress has never approved such a course by the Board. The NLRB's only lawful route is to challenge the Band's Constitution and Code through a direct action in the federal court.

**A. The Band Exercises Inherent Authority over Labor Relations Within Its Reservation Pursuant to Well-Established Principles of Federal Indian Law**

The Band has enacted its Constitution and Article XVI pursuant to its inherent authority as a federally recognized Indian tribe under longstanding Supreme Court precedent in accord with congressional policy. Indeed, the Band's Constitution, the target of the Teamsters' Charge, was enacted in accordance with the IRA, and approved by the Secretary of Interior.

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<sup>1</sup> The Band refers to itself and the "Little River Band of Ottawa Indians Tribal Government," the asserted NLRB employer in the Teamsters' Charge, interchangeably; for the Band, as a legal entity, is the tribal government.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), a unanimous Supreme Court summarized almost two centuries of federal Indian law with a simple statement: “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Id.* at 509. Since the early days of the Republic, the Court consistently has declared that Indian tribes possess attributes of sovereignty, subject only to the limits that Congress may impose. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 522-523 (6<sup>th</sup> Cir.) (reciting Supreme Court’s principles), *cert. denied*, 549 U.S. 1053 (2006).<sup>2</sup>

Pursuant to the IRA, enacted in 1934, Congress provided a mechanism for tribes to promulgate constitutions to govern their territories. *See* 25 U.S.C. § 476.<sup>3</sup> The IRA reflects Congress’ firm commitment to “the goal of promoting tribal self-government.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-336 & n. 17 (1983) (discussing purpose of IRA and other laws). *See also Morton v. Mancari*, 417 U.S. 535, 542 (1974) (describing IRA’s purpose to promote “self-government, both politically and economically”). This commitment “encompasses far more than encouraging tribal management of disputes between members, but includes Congress’ overriding goal of encouraging tribal self-sufficiency and economic development.” *Mescalero Apache Tribe*, 462 U.S. at 335 (citation and quotation omitted).

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<sup>2</sup> Congress’ authority over Indian affairs is grounded in the Constitution, principally in the Indian Commerce Clause, U.S. Const. Art I, § 8, cl 3 (“Congress shall have the Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”).

<sup>3</sup> The IRA provides, in pertinent part, that “[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution,” subject to ratification by the tribe’s members and approval by the Secretary of Interior. 25 U.S.C. § 476(a) § 476(d).

“In part as a necessary implication of this broad federal commitment,” reflected not only in the IRA, but in Congress’ more contemporary enactments, the Supreme Court has “held that tribes have the power to manage the use of [their] territory and resources by both members and nonmembers,” and “to undertake and regulate economic activity within the reservation” without external interference. *Id.* (citations and footnote omitted). *See also Williams v. Lee*, 358 U.S. 218, 223 (1959) (holding that action by non-Indian reservation business to collect debt from Navajo customer is subject to the exclusive authority of the Navajo Nation). Indeed, the Court has long held that “[n]onmembers who lawfully enter tribal lands 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.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (emphasis in original). *Accord Plains Commerce Bank v. Long Family & Cattle Co., Inc.*, 128 S. Ct. 2709, 2723 (2008).

Even on non-Indian fee land within the exterior boundaries of an Indian reservation (so-called “checkerboard reservations,” where various parcels of once Indian-owned lands have been sold to, or confiscated for, non-Indians), tribes have power to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981).

From these and other Supreme Court precedents, it is clear that, within their reservations or trust lands (those lands held by the United States in trust for tribes),<sup>4</sup>

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<sup>4</sup> Indian reservations and trust lands together constitute the “Indian country” within which tribes exercise their inherent authority as tribal governments. *Citizen Band Potawatomi Indian Tribe*,

Indian tribes have inherent authority to govern labor and employment relations involving both members and non-members. *See, e.g., Pueblo of San Juan*, 276 F.3d at 1189, 1192-93 (Pueblo exercised “sovereign authority” in enacting right-to-work law covering non-Indian reservation business and its tribal and non-tribal employees); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9<sup>th</sup> Cir. 1990) (tribes exercised inherent authority in subjecting non-Indian reservation employer, employing both Indians and non-Indians, to tribal employment regulation), *cert. denied*, 499 U.S. 943 (2001); *EEOC v. Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d 246, 249 (8<sup>th</sup> Cir. 1993) (employment dispute between tribal member and tribal employer implicated tribe’s “implicit right of self-government”); *Reich v. Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d 490, 494-495 (7<sup>th</sup> Cir. 1993) (Posner, J.) (tribal regulation of wages and hours of game wardens involved the “sovereign functions of tribal government”); *Littell v. Nakai*, 344 F.2d 486, 488-490 (9<sup>th</sup> Cir. 1965) (tribal court had exclusive jurisdiction over employment contract dispute between tribal attorney and tribal chairman), *cert. denied*, 382 U.S. 986 (1966).

Indeed, an employment relationship between a non-member and a tribe or between a tribal member and a non-member employer is obviously a “consensual relationship” under the more restricted setting of *Montana*. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10<sup>th</sup> Cir. 2007), *cert. denied*, 128 S.Ct. 1229 (2008). Thus, a tribe clearly has regulatory authority “when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation.” *Id.* at 1071-72. As recently as last term, the

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498 U.S. at 511. The employment relationships governed by the Band’s Constitution, the focus of the Teamsters’ Charge, and Article XVI are on lands held by the United States in trust for the Band. *See SMF ¶¶ 8, 13-18.*

Supreme Court cited to such a relationship as giving rise to the exercise of tribal authority under *Montana*. See *Plains Commerce Bank*, 128 S.Ct. at 2723 (“The logic of *Montana* is that . . . a business enterprise employing tribal members . . . may be regulated [by the tribe].”).

Even more obviously, within its reservation, a tribe has authority to govern the employment relationship between tribal members or non-tribal members who enter into employment with the tribe itself, or with one of its agencies or instrumentalities. See, e.g., *Penobscot Nation v. Fellencher*, 164 F.3d 706, 712 (1<sup>st</sup> Cir. 1999); *Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d at 249; *Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 494-495; *Littell*, 344 F.2d at 490; *Graham v. Applied Geo Technologies*, 593 F. Supp. 2d 915, 919-920 (S.D. Miss. 2008); *Davis v. Mille Lacs Band of Chippewa Indians*, 26 F. Supp. 2d 1175, 1179 (D. Minn. 1998), *aff’d on other grounds*, 193 F.3d 990 (8<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000).

In the case at bar, the Band’s governance of labor relations pursuant to Article XVI constitutes just such a proper exercise of its inherent authority. Article XVI regulates the Band’s public sector labor relations; that is, those involving the Band’s agencies, commissions, and other branches of the Tribe, including its IGRA gaming operations. See AVC Exhibit B §§ 16.01-16.26. Through both Article XVI, specifically, and the Band’s Fair Employment Practices Code, generally, the Band governs the consensual employment relationship between its tribal members and its tribal agencies, commissions or subordinate economic organizations, and between non-tribal members and such agencies, commissions and organizations within the reservation. See *id.*

Labor unions, which seek to do business within the reservation by inserting themselves into these consensual employment relationships as the bargaining agent for employees, fall directly within the scope of the Band's regulatory powers. *See Mescalero Apache Tribe*, 462 U.S. at 335; *Jicarilla Apache Tribe*, 455 U.S. at 144; *Montana*, 450 U.S. at 565 (citing, *inter alia*, *Williams v. Lee*, 353 U.S. at 223).

The Band's exercise of such authority is not of trivial concern for the welfare of the Tribe and its government. It reflects significant public policy choices with far ranging consequences for the operations of government and the allocation of economic resources derived from the reservation. The following are just a few examples:

- *Strikes* The Band prohibits strikes in its public sector. This is consistent with the public policy of most states and the federal government.<sup>5</sup> Strikes against governments are anathema to governmental stability.<sup>6</sup> The public policy against strikes in the public sector pertains to whatever form governmental activity may take, whether it involves the operation of off-track betting to generate governmental revenues or more routine governmental services, like law enforcement.<sup>7</sup> A central rationale for the prohibition against strikes in the public sector is that the economic conditions of public employment are subject to the ultimate authority of legislative bodies, which cannot be made captive to the weapon of strikes in their oversight of the public fisc.<sup>8</sup> The Band's prohibition against strikes reflects just such critical public policy concerns.

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<sup>5</sup> Compare, e.g., AVC Exhibit B § 16.06 and 5 U.S.C. § 7116(b)(7)(A); MICH. COMP. LAWS § 423.202; N.Y. CIV. SERV. LAW § 210(1); WASH. REV. CODE § 41.56.120; WIS. STAT. § 111.70(4)(L).

<sup>6</sup> See *Board of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n*, 800 A.2d 286, 288 - 289 (N.J. Super. 2001) (surveying laws and history of public policy against strikes in the public sector). See generally James Duff, Jr., Annotation, *Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage*, 37 A.L.R.3d 1147 (1971 & Supp. 2007) (same). As one commentator observes: "Given the strong policy in most states against strikes by government employees, it is not surprising that the statutory penalties for strikes are numerous, varied, and often quite severe." Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector*, 38 STAN. L. REV. 1097, 1116 (1986).

<sup>7</sup> Arguments to the contrary have met with a "total lack of success." Duff, 37 A.L.R.3d at 1152. See *New York City Off-Track Betting Corporation v. Local 2021 of Dist. Council 37*, 416 N.Y.S.2d 974 (1979).

<sup>8</sup> See generally Duff, 37 A.L.R.3d at 1151-52 & n.14 (citing cases); Richard Doherty, *Review: The Politics of Public Sector Unionism*, 81 YALE L.J. 758, 767 (1972) ("[S]trikes have the potential of altering our system of public benefit conferral.").

- *Bargaining Impasse Procedures Within the Public Sector* Like many states that permit public sector labor organizing, but prohibit strikes, the Band has a carefully designed mandatory dispute resolution process to address impasses in collective bargaining.<sup>9</sup> These procedures, in the context of states, can implicate constitutional issues regarding the delegation of legislative power to non-governmental bodies, like arbitration panels, which may be granted authority to resolve such bargaining impasses.<sup>10</sup> The Band's law reflects precisely the same kinds of sensitive public policy choices.
- *Adjudication of Collective Bargaining Disputes and Contracts* As in the case of state law, the Band's law prohibits collective bargaining over matters that would conflict with tribal law.<sup>11</sup> It further provides a process to resolve disputes on that issue through tribal court adjudication.<sup>12</sup> The Band's law also provides for tribal court adjudication of disputes arising under collective bargaining agreements, and, as in the case of state law, the Band has waived the sovereign immunity of its agencies, departments, and subordinate organizations for that purpose.<sup>13</sup>

It goes without saying that, as in the case of a state government, the Band's regulation of these public sector labor relations involves matters that are "politically sensitive." *Kent Co. Deputy Sheriffs' Ass'n v. Kent Co. Sheriff*, 605 N.W.2d 363, 365 (Mich. App. 1999), *aff'd in part*, 616 N.W.2d 677 (Mich. 2000). *Accord City of Lansing v. Carl Schlegel, Inc.*, 669 N.W.2d 315, 318 (Mich. App. 2003) (Neff, J.) (quoting from *Kent Co.*).

In sum, the regulation of public sector labor relations directly implicates the allocation of economic resources derived from the reservation between tribal members, non-tribal members, and tribal government. There could be no more central concern for the exercise of tribal sovereignty. *See Mescalero Apache Tribe*, 462 U.S. at 335;

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<sup>9</sup> Compare, e.g., AVC Exhibit B § 16.16 and MICH. COMP. LAWS § 423.207 (mediation); N.Y. CIV. SERV. LAW § 209(3)(b) (factfinding); IOWA CODE §§ 20.19-20.22 (mediation, fact finding and binding arbitration). *See generally* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 155 & nn. 16-17 (describing interaction of public sector strike prohibitions and interest arbitration dispute resolution process).

<sup>10</sup> *See* Anderson, *supra* note 10, at 169-172 (discussing cases).

<sup>11</sup> Compare AVC Exhibit B § 16.12 and HAW. REV. STAT. § 89-9(d); IOWA CODE § 20.9; NEV. REV. STAT. § 288.150 (3)(a)-(d); WASH. REV. CODE § 41.56.100.

<sup>12</sup> *See* AVC Exhibit B § 16.24(d)(2).

<sup>13</sup> Compare AVC Exhibit B §§ 16.24(d), 16.26 and 5 ILL. COMP. STAT. § 315/25; MICH. COMP. LAWS § 423.9d(4); KAN. STAT. § 75-4355d; IOWA CODE § 20.23.

*Jicarilla Apache Tribe*, 455 U.S. at 141-145; *Williams*, 358 U.S. at 223. It falls squarely within the sphere of tribal self-governance protected and endorsed by the Supreme Court’s long-standing Indian law jurisprudence: a “tribe’s traditional and undisputed power to exclude persons from tribal land . . . gives it the power to set conditions on entry to that land via licensing requirements.” *Plains Commerce Bank, Inc.*, 128 S. Ct. at 2723 (citations and quotations omitted). “Regulatory authority goes hand in hand with the power to exclude.” *Id.* (citation and quotations omitted). Of equal importance, the Band’s exercise of this authority squarely comports with Congress’ firm commitment to encouraging tribal self-governance and independence, under both the IRA and more contemporary enactments. *See Mescalero Apache Tribe*, 462 U.S. at 334-336 & n.17 (referring to statutes reflecting Congress’ commitment to tribal self-government); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 & n.5 (1987) (same).

**B. In the Absence of a Clear Directive From Congress, the NLRB Has No Power to Impair the Band’s Inherent Governmental Authority over Reservation Labor Relations By Means of a Coercive Agency Proceeding**

Given the historic vulnerability of tribes to state and federal power, and the firm federal commitment to preserving tribal self-government, the Supreme Court protects the exercise of tribal sovereignty from external interference in the absence of a clear directive from Congress. *See, e.g., Iowa Mut. Ins. Co.*, 480 U.S. at 18 (absent clear directive from Congress, the diversity jurisdiction statute, 28 U.S.C. § 1332, will not be interpreted to allow the undermining of a tribal court’s sovereign authority over reservation affairs); *Jicarilla Apache Tribe*, 455 U.S. at 146, 149 (tribe’s fundamental authority to regulate economic activity within the reservation may not be divested absent clear directive from Congress); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 72 (1976) (to avoid

“unsettl[ing] a tribal government’s ability to maintain authority,” claims of both members and non-members against tribal government under Congress’ Indian Civil Rights Act must be resolved within tribal forums unless Congress clearly provides otherwise). As the Tenth Circuit has said, “unequivocal Supreme Court precedent dictates” that in construing statutes that could undermine the sovereign authority of tribes, courts must presume that Congress intended to leave tribal sovereignty unimpaired unless there is a “clear indication of congressional intent” showing otherwise. *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10<sup>th</sup> Cir. 1989) (emphasis in original). *Accord Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 493-496 (presumption against abrogation of treaty rights applies to statutes that may intrude upon tribal prerogatives); *Fond du Lac*, 986 F.2d at 250-251 (where tribe’s right of self-government would be affected by statute, presumption applies “absent a clear and plain congressional intent”). *See also San Manuel*, 475 F.3d at 1311 (discussing rule of *Santa Clara Pueblo*), 1317 (referring back to discussion of same rule, requiring “presumption against application”).<sup>14</sup>

This means that when a federal agency seeks to assert coercive authority against an Indian tribe (as the NLRB does in this case) in a manner that would undermine a tribe’s sovereign authority (here, by the NLRB’s assertion that it can force the Band to defend its exercise of governmental authority in an unfair labor practice proceeding), the burden rests with the agency to show that Congress clearly intended to allow such an intrusion. *See Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 495-496 (following *Cherokee Nation*); *Cherokee Nation*, 871 F.2d at 939.

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<sup>14</sup> This established canon of construction has its roots in the Constitution’s Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which vests Congress with plenary authority over Indian affairs, and the unique trust relationship between the United States and Indian tribes. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan*, 369 F.3d 960, 971 (6<sup>th</sup> Cir. 2004).

Congress, however, has given no indication whatsoever that the NLRB may use the mechanism of an unfair labor practice proceeding to thwart an Indian tribe's exercise of inherent governmental authority over public sector labor and employment relations within its reservation. The NLRA is completely silent on the subject, and Congress' silence can never be implied to condone the undermining of tribal sovereignty. *See Iowa Mut. Ins. Co.* 480 U.S. at 18 (“[T]he proper inference from silence . . . is that the sovereign power . . . remains intact.”); *Santa Clara Pueblo*, 436 U.S. at 60 (Court must “tread lightly in the absence of clear indications of legislative intent”).<sup>15</sup>

Thus, the Board's position, that it can proceed against the Band on the Teamster's Charge for governing reservation labor relations in accordance with its Constitution and Article XVI is untenable. Under unequivocal federal court precedent and its IRA Constitutional prerogative, the Band is exercising its authority as a tribal government. That authority is protected from coercive interference absent a clear directive from Congress, and such a directive is utterly lacking here.

**C. The NLRB's Attempt to Treat the Band's Exercise of Sovereign Authority as the Unfair Labor Practice of a Private Employer Runs Afoul of the Supreme Court's Decision in *Merrion v. Jicarilla Apache Tribe* and the Court's Admonition Against Treating Tribes As Private Organizations**

The Board's centerpiece theory is that it can attack the Band's exercise of government authority as an unfair labor practice by employing legal standards that apply

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<sup>15</sup> The Teamsters' "Charge Against Employer" invokes Section 8(a)(1) of the NLRA, 29 U.S.C. § 158 (a)(1), *see* SMF ¶ 20, in which Congress provided that “it shall be an unfair labor practice for an employer to . . . interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” Obviously, Congress has in no way suggested that this provision may be invoked to attack the exercise of sovereign authority by Indian tribes. Tribes are not mentioned in the definition of “employer.” *See* 29 U.S.C. § 152(1)-(2) (defining employers as “persons,” including, *inter alia*, individuals and corporations, but not “the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof”).

in the private sector. The Board narrows the Teamsters' Charge, which challenges Article XVI on its face, to focus only on one part of the Band's public sector, its IGRA gaming operations, and then asserts authority to proceed on the Teamsters' Charge if the Band and its IGRA gaming operations may be deemed a "joint" or "single" employer under the NLRB's test for asserting authority over private businesses. SMF ¶¶ 26, 31; AVC Exhibits J & M.<sup>16</sup> Ignoring the protestations of the Interior Department, the NLRB would reduce the acts of tribal government – the Band's exercise of inherent authority over its public sector labor relations – to the acts of an amorphous appendage to an alleged private enterprise. This violates unequivocal Supreme Court mandates.

In *Jicarilla Apache Tribe*, the Supreme Court addressed a challenge to the tribe's severance taxes by a mining company engaged in mining operations on the tribe's reservation. The company argued that the tribe could not lawfully impose the tax because it had not reserved that authority in its lease with the company. 455 U.S. at 137. The Court rejected that argument, stating that it "*denigrates* Indian sovereignty" to suggest that the Tribe had only those rights of a mere private contracting party. *Id.* at 146 (emphasis added). A tribe's "sovereign power," like that of a state or of the federal government, "even when unexercised . . . will remain intact unless surrendered in unmistakable terms." *Id.* at 148. The tribe's intact "sovereign power" was "[the] *power*

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<sup>16</sup> The Sixth Circuit explained the "single employer" and "joint employer" concepts in *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-994 (6<sup>th</sup> Cir. 1997). The "single employer" or "integrated enterprise" test considers whether two nominally separate entities "are so interrelated that they may be considered a 'single employer' or an 'integrated enterprise.'" *Id.* at 993. Four criteria are considered, although none is conclusive: (1) common ownership and financial control, (2) common management, common directors and boards, (3) interrelationship of operations (e.g. common offices, record keeping, shared bank accounts), and (4) centralized control of labor relations. *Id.* at 994. *Accord NLRB v. Palmer Donavin Manufacturing Co.*, 369 F.3d 954, 957 (6<sup>th</sup> Cir. 2004). The "joint employer" concept considers whether a business "has control over another company's employees sufficient to show that the two companies are acting as a 'joint employer' of those employees." *Swallows*, 128 F.3d at 993.

to exclude” non-Indians and “the lesser power to place conditions on entry, on continued presence, or on reservation conduct.” *Id.* at 144 (emphasis in original). This “fundamental attribute[] of [tribal] sovereignty,” the Court said, must remain intact unless “divested by Congress or by necessary implication of the tribe’s dependent status.” *Jicarilla Apache Tribe*, 455 U.S. at 146. *Accord Wheeler*, 435 U.S. at 323.<sup>17</sup>

The intact power of the Little River Band of Ottawa Indians at issue in this case is, similarly, its “power to manage the use of its territory and resources by both members and nonmembers,” *Mescalero Apache Tribe*, 462 U.S. at 335 and to “regulate economic activity within the reservation.” *Id.* Article XVI reflects the Band’s inherent “power to place conditions on entry, on continued presence, or on reservation conduct” by employees and unions engaged in pursuing economic self-interest within the reservation. *See Merrion*, 455 U.S. at 144; *Pueblo San Juan*, 276 F.3d at 1192-93. More specifically, as discussed in subsection A, above, it reflects the critical public policy choices of a sovereign regarding decision-making processes and resource allocations affecting the very machinery of government.

*Jicarilla Apache Tribe* is not the only case in which the Court has admonished parties for seeking to undermine the role of Indian tribes as self-governing sovereigns by attempting to treat them as private entities. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes within “Indian country” cannot be treated as mere “private, voluntary organizations”); *Wheeler*, 435 U.S. at 323 (same); *Bryan v. Itasca County*, 426 U.S. 373, 388 (1987) (same). Such attempts, the Court has noted, reflect an

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<sup>17</sup> The Court has found an attribute of tribal sovereignty to have been divested “by necessary implication of [a] tribe’s dependent status” in three limited settings: (a) criminal jurisdiction over non-Indians, (b) the exercise of foreign relations with other nations, and (c) the sale of Indian lands to non-Indians without federal oversight. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980); *Wheeler*, 435 U.S. at 326.

“assimilationist” view of tribal authority, one that has been long-rejected. *See id.* at 388 n.14 (quotations and citation omitted).

In the instant case, the NLRB “denigrates” the sovereign authority of the Little River Band of Ottawa Indians by pursuing coercive measures against the Band as if it can be treated as a mere private organization when, under established principles of federal Indian law, it is engaged in the exercise of its sovereign authority as a self-governing tribe. *See Jicarilla Apache Tribe*, 455 U.S. at 144-147.<sup>18</sup>

\* \* \*

In the end, as a matter of law, the facts sought by the NLRB in its pending subpoenas to establish its “single” or “joint” employer theory are immaterial to its authority to attack the acts of a tribal government as the unfair labor practices of an NLRB employer. Whether the Band applies its labor relations laws only to its reservation public sector, as in the case of Article XVI, or expands them to cover private

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<sup>18</sup> The NLRB’s “joint” or “single” employer theory for proceeding against the Band’s public sector labor laws is not enhanced by targeting only the Band’s IGRA gaming. Indeed, the Band’s application of Article XVI to its generation of governmental revenue through IGRA gaming is very much at the core of its sovereign authority. *See Jicarilla Apache Tribe*, 455 U.S. at 144 (tribes have the authority “to raise revenues to pay for the costs of government”); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211, 216-22 (1986) (tribes have exclusive authority to regulation reservation gaming to raise governmental revenue in a state that does not prohibit such gaming as a matter of criminal law and public policy). IGRA codifies this tribal authority, *see* 25 U.S.C. § 2701(5) (restating *Cabazon* holding) with the purpose of “promot[ing] strong tribal governments.” *Id.* § 2702(1). Further, the sensitive issues summarized at pages 13-14 above are just as prevalent with respect to the Band’s gaming operations at LRCR as they are with respect to its Housing or Health Departments. Indeed, a strike against the LRCR to leverage collective bargaining concessions on wages or working conditions would immediately implicate the prerogatives of the Tribal Council in its decisions about the allocation of governmental revenues for the Band. Not only are the revenues generated by LRCR the revenues of the Band’s governing Tribal Council, but the Tribal Council has final authority over the LRCR’s annual budget and even its personnel policies. SMF ¶¶ 41-44. Thus, a strike against the LRCR would, for all intents and purposes, be a strike at the heart of tribal government. The politically sensitive public policy questions that surround a state in addressing its labor relations laws, *see supra* at 13-14, likewise face the Band with respect to all aspects of its public sector, including, in particular, its IGRA gaming operations. Thus, the Band’s application of Article XVI to labor relations at the LRCR involves a critical exercise of tribal sovereignty.

employers on the reservation, it cannot be subjected to an unfair labor practice adjudication for doing so. The NLRB must concede the former as much as it is apparently willing to concede the latter.<sup>19</sup> The enactment and implementation of such laws, in either context, involves the exercise of inherent tribal sovereignty. *See, e.g., San Juan County*, 497 F.3d at 1071; *Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d at 249; *Shoshone-Bannock Tribes*, 905 F.2d at 1315; *Applied Geo Technologies*, 593 F. Supp. 2d at 919-920; *Mille Lacs Band of Chippewa Indians*, 26 F. Supp. 2d at 1179. Absent a clear directive from Congress, such tribal authority is protected from impairment by the NLRB through an unfair labor practices proceeding. Again, such a directive is utterly lacking here.<sup>20</sup>

By continuing to press its course, the NLRB threatens the Band's identity as an Indian tribal government: its dignitary interest as a sovereign. Worse still, the Board need not attempt such a course to pursue its assertion that the Tribe's law cannot stand in

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<sup>19</sup> The NLRB apparently would treat the Band *as a government* subject to a direct action for preemption if it were applying its law to a private business, entirely disassociated from the Tribe, but not if the Tribe applies the law to itself. *See* AVC Exhibit L at 2-3. This is curious to say the least, for the more an entity operates as an arm of the tribe, or is controlled by it, the more tribal governmental authority may be brought to bear on such entity. *See, e.g., Smith v. Salish Kootenai College*, 434 F.3d 1127, 1134 (9<sup>th</sup> Cir. 2006), *cert. denied*, 547 U.S. 1209 (2006).

<sup>20</sup> The foregoing analysis is consistent with the D.C. Circuit's decision in *San Manuel*. Indeed, the *San Manuel* Court recognized the Supreme Court's rule that, in the absence of a "clear expression of Congressional intent," courts must refrain from imposing a federal statute upon a tribe if it will impair tribal sovereignty. *San Manuel*, 475 F.3d at 1312. The unfair labor practice charges at issue in *San Manuel* involved assertions that the tribe's gaming facility discriminated against one union in favor of another in the context of a labor organization campaign. *Id.* at 1309. In that setting, the D.C. Circuit did not find that there was an impairment of tribal sovereignty to warrant application of the rule. *See id.* at 1315. The instant case, however, involves a direct attack on the Band's enactment and implementation of its IRA Constitution and its carefully crafted public sector labor law by means of an unfair labor practice proceeding. Unlike the situation presented in *San Manuel*, this *does* present a case where a direct impairment of tribal sovereignty is at stake. In this setting, *San Manuel* itself teaches that the Supreme Court imposes a presumption against such a course unless the NLRB can show that Congress clearly made such a route available to it. *See San Manuel*, 475 F.3d at 1312 (citing *Santa Clara Pueblo* rule), 1317 (referencing "presumption" against undermining tribal sovereignty).

the face of the NLRA. As both the Department of the Interior and the Tribe have urged the Board, it can confront the Tribe *as a government* by asserting, in an original action before this Court, that the Band's law is preempted by the NLRA. *See* Exhibits G, K, and L. It is unfathomable that the NLRB would attempt to haul a state government into an unfair labor practice case for enacting and implementing a public sector labor law. It is equally unfathomable that the NLRB has attempted to do just that to a tribe in the exercise of its inherent, sovereign authority over its reservation affairs for such a course flies in the face of fundamental principles of federal Indian law. The NLRB's proper course, in either case, is to bring an original action against the state or tribal government to claim that its laws are preempted by the NLRA.

**D. Had Congress Intended to Allow the NLRB to Undermine Tribal Sovereign Authority Pursuant to Section 8(a)(1) of the NLRA, It Would Not Have Left Tribes Out of Section 301 of the Act**

The NLRB's lack of power to undermine the Band's exercise of tribal governmental authority by means of an unfair labor practice proceeding is reinforced by Congress' exclusion of tribes from section 301 of the NLRA (29 U.S.C. § 185). The NLRA is a unified statutory scheme with an overarching goal of promoting workplace harmony within the Nation's private sector through collective bargaining. Both section 8(a)(1) (29 U.S.C. § 158 (a)(1)), the provision invoked by the Teamsters' Charge, which makes employer interference with collective bargaining an "unfair labor practice," and section 301, which provides a federal cause of action for labor organizations to enforce collective bargaining agreements against employers, are part of Congress' design to achieve that end. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179-180 (1967). Section 301 is a lynchpin provision of this unified regime. Indeed, the Supreme Court

describes it as having preemptive force “so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization” as well as “claims substantially dependent on analysis of a collective-bargaining agreement.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987).

Congress left tribes out of section 301 by not waiving their sovereign immunity from suit. Congress is presumed to have known full-well that by not unequivocally waiving that immunity, tribes would be excluded. *See Souter v. Jones*, 395 F.3d 577, 598 (6<sup>th</sup> Cir. 2005) (courts must presume that Congress knows the law affecting its enactments). Indeed, the doctrine of tribal sovereign immunity from private lawsuits, which requires nothing less than an unequivocal waiver by Congress (or by the affected tribe) to be set aside, was firmly in place in 1947 when Congress enacted section 301. *See United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). *See also Citizen Band Potawatomi Tribe*, 498 U.S. at 510 (Congress “has always been at liberty to dispense with [ ] tribal immunity or to limit it,” it nevertheless has “consistently reiterated its approval of the immunity doctrine.”). In an integrated statutory scheme such as the NLRA, it would have been absurd for Congress to have left tribes out of section 301 while, at the same time, intending to include them under section 8(a)(1). *See Smith v. Babcock*, 19 F.3d 257, 263 (6<sup>th</sup> Cir. 1994) (interpretations which yield internal inconsistencies are to be avoided). Congress would never intend such disharmony for its national labor policy, and, in construing the NLRA, Courts cannot attribute such an intent to Congress. *Id.*; *United States v. Perry*, 360 F.3d 519, 537 (6<sup>th</sup> Cir. 2004) (courts may not construe a statute in a manner that renders part of the law superfluous). Thus, a proper harmonizing construction of the NLRA must not only exclude tribes from NLRA

employer status under section 301 but, absent some clear indication otherwise (and there is none), from such status under its sister provision, section 8(a)(1).<sup>21</sup>

## **II. THE BAND IS ENTITLED TO ITS REQUESTED DECLARATORY AND INJUNCTIVE RELIEF AGAINST THE BOARD**

Declaratory judgment should enter to resolve the parties' controversy and relieve the Band from the NLRB's continued asserted power. *See Kelley v. E.I. DuPont de Nemours and Co.*, 17 F.3d 836, 845 (6<sup>th</sup> Cir. 1994) (reciting standards for declaratory relief). The Band's requested injunction should likewise issue to enjoin the NLRB from taking any further coercive measures against the Band on the Teamsters' Charge because such measures threaten irreparable harm to the Band's status as an Indian tribal government. *See United States v. Miami Univ.*, 294 F.3d 797, 816 (6<sup>th</sup> Cir. 2002) (reciting criteria for injunction). The NLRB threatens to leave the Band mired in its coercive agency proceedings when it has no power to do so.<sup>22</sup>

The Band anticipates that the NLRB will claim that the Band cannot establish that it will suffer imminent harm through the full brunt of the Board's coercive authority because, under the NLRB's view of how a line may be drawn, it could decide to decline

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<sup>21</sup> This point should not be confused with the issue of whether tribes have sovereign immunity from actions brought by the federal government, like an original action claiming preemption of tribal law. While the doctrine of tribal sovereign immunity from private lawsuits is black letter law, federal courts have held that, like states, tribes do not have sovereign immunity from suit by the United States or its agencies. That issue is not raised here. The point is that section 8(a)(1) and section 301 cannot stand in harmony as Congress intended under the NLRB's approach.

<sup>22</sup> It is well-established that the assertion of agency authority against an Indian tribe in a setting where the agency lacks jurisdiction to proceed constitutes irreparable harm to the tribe. *See EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1077 (9<sup>th</sup> Cir. 2001) (noting "irreparable injury vis-à-vis Tribe's sovereignty"). *Accord NLRB v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995, 998 (9<sup>th</sup> Cir. 2003) ("There can be no serious doubt that" a tribal entity faces irreparable harm in having to endure an agency proceeding when the agency lacks jurisdiction). *See also Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d at 495 (court addressing agency jurisdiction before exhaustion of agency proceedings to prevent "intru[sion] on the sovereign functions of tribal government"). An injunction should therefore issue against the Board to protect the Little River Band of Ottawa Indians from this harm.

jurisdiction if only tribal members (or only a few non-tribal members) work in the Band's IGRA gaming operations and only tribal members (or only a few non-tribal members) patronize those operations. See AVC Exhibit J and Exhibit M (citing San Manuel Indian Bingo & Casino, 341 NLRB 1033 (2004)). For all of the reasons spelled out in Section I, however, the NLRB cannot exert its coercive power in *any* form against the Band – whether by serving its subpoenas upon tribal officials to coerce their testimony or production of documents (*see* 29 C.F.R. §§ 101.4), by issuing a formal complaint against the Band (*see* 29 C.F.R. §§ 102.15), or by commanding the appearance of witnesses and documents by deposition or an adjudicatory hearing before an administrative law judge (*see* 29 C.F.R. §§ 102.30-102.31, 102.35(2)) – if, as a matter of law, it cannot proceed with coercive measures against the Band through an unfair labor practice proceeding to challenge the Band's exercise of inherent governmental authority.

The Tribe is before this Court seeking relief precisely because it should not be left to guess where, along this continuum of asserted coercive power, the NLRB's actions would take it. The NLRB has not withdrawn its pending subpoenas against tribal officials, and it has given no indication that, if it were able to gather the facts to support its legal theory for commencing an unfair labor practice complaint on the Teamsters' Charge, it would step back as requested by the Band and the Interior Department. In short, imposition of its coercive authority by the NLRB is ongoing and warrants the injunction. *Cf. McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6<sup>th</sup> Cir. 2000) (threatened or imminent conduct of state official in violation of federal law supports action for injunction under *Ex Parte Young* doctrine).<sup>23</sup>

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<sup>23</sup> In the context of the Pre-Motion Conference before this Court, the Band's counsel stated that there was no dispute about the facts to support the NLRB's theory for proceeding against the

### III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION

The Supreme Court describes the field of federal Indian law as “anomalous” and “complex,” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quotations and citation omitted), requiring courts to “tread lightly” when the interests of tribal government are at stake, *Santa Clara Pueblo*, 436 U.S. at 60. Thus, while established legal doctrines routinely apply to resolve disputes in the non-Indian context, the same doctrines cannot be presumed to operate in the context of cases involving tribes. *See, e.g., White Mountain Apache Tribe*, 448 U.S. at 144 (test for federal pre-emption of state laws affecting Indian tribes favors tribal interests and is not the same as ordinary state law pre-emption analysis); *Cherokee Nation*, 871 F.2d at 939 (“normal rules of construction do not apply” when treaties or statutes affecting Indian tribes are at issue). The NLRB presumes that the agency exhaustion doctrine applies, without qualification, to prevent this Court from granting the relief requested by the Band. *See National Labor Relations Board’s Response to the Plaintiff’s Request for Pre-Motion Conference*. (Docket Entry #17). In this view it is, once again, mistaken.

First, this is an action brought by a federally recognized Indian tribe, invoking this Court’s subject matter jurisdiction pursuant to 28 U.S.C. § 1362. Section 1362 gives this

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Band and, notwithstanding the Band’s disagreement with that theory, it would provide those facts. Thus, the Band has set forth the facts to show that the NLRB would proceed with a formal unfair labor practices complaint against it under the Board’s legal theory, whether the Board gathered those facts by subpoena or on its own. Those facts are: (a) the Band’s IGRA gaming operations employ a significant number of non-Indians, (b) a significant number of non-Indians from both Michigan and other states, patronize those gaming operations, and (c) the Band’s governmental revenues from its IGRA gaming operations are sufficient to be considered by the NLRB to “affect commerce.” *See SMF ¶¶ 11, 46-47*. The Band has also offered up the facts on the NLRB’s “joint” or “single employer” theory. *See SMFs ¶¶ 36-45*. The Band provides these facts, in this context, not because they are material to its right to be free from the NLRB’s asserted authority to proceed against it on the Teamsters’ Charge, but to allow the Court to confirm the imminence of the NLRB proceeding with the full measure of its coercive agency authority on that Charge (from complaint to hearing to adjudication) against the Tribe. This threatened irreparable harm warrants the Band’s requested injunctive relief.

Court jurisdiction over civil actions brought by tribes “wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1362. “The substantive interest which Congress . . . sought to protect [by allowing actions under this section] is tribal self-government.” *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976). The Tribe seeks relief to protect its rights of self-government from the Board’s asserted agency authority. Thus, this action falls squarely within the terms of section 1362.

The Board’s assertion – that the Tribe must endure the very harm that the Tribe seeks relief from – is similar to arguments that tribes have faced by states when they have invoked section 1362 to seek relief from asserted state authority that impairs tribal sovereignty: that abstention doctrines prevent the federal court from intervening. Such exhaustion arguments, made in a variety of forms, have been soundly rejected. *See, e.g., Moe*, 425 U.S. at 475 (rejecting application of Tax Injunction Act to action under section 1362); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1204-05, 1207 (10<sup>th</sup> Cir. 2003) (explaining abstention doctrines inapplicable in context of action brought under section 1362); *Tohono O’Odham Nation v. Schwartz*, 837 F. Supp. 1024, 1028 (D. Ariz. 1993) (rejecting application of Anti-Injunction Act, 28 U.S.C. § 2283 to action under section 1362).

Likewise, in the instant case, forcing the Band to endure the very harm it seeks to prevent would undermine the purpose of section 1362. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1362.

Second, this Court has jurisdiction pursuant to the federal question jurisdiction statute, 28 U.S.C. § 1331. The protection sought by the Band in this case is not unlike

that which states would seek in similar settings. See *Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d at 494-495 (comparing comity owed to state to same comity owed to tribes). Indeed, the case of *Florida Board of Business Regulation Dept. of Business Regulation, Div. of Pari-Mutuel Wagering v. NLRB*, 686 F.2d 1362 (11<sup>th</sup> Cir. 1982), is very similar to the one at bar. There, a state agency brought a declaratory judgment action against the NLRB, claiming that “the Board’s jurisdiction ... impermissibly impinged on a State industry in violation of the tenth amendment.” *Id.* at 1370. The NLRB challenged the district court’s subject matter jurisdiction under the exhaustion doctrine. The Eleventh Circuit squarely rejected that challenge. It explained that the agency’s claims of state authority impairment by the NLRB “obviously ‘arise under’ the Constitution or law of the United States. Neither is frivolous or foreclosed by prior decision. . . . Subject matter jurisdiction under 28 U.S.C. § 1331 was clearly present.” *Id.* at 1369-70 (citations and quotations omitted). Accord *Lipsomb v. Fed. Labor Relations Auth.*, 200 F. Supp. 2d 650, 656 & n.9 (S.D. Miss. 2001) (rejecting exhaustion doctrine in context of action challenging jurisdiction of FLRA), *aff’d*, 333 F.3d 611 (5<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 935 (2004). There is no reason to treat Indian tribes differently for actions brought to protect their sovereign status from impairment by the NLRB.

Third, even if the exhaustion doctrine could be invoked in the special circumstances of an action brought by an Indian tribe under section 1362 or those attending federal law comity interests under section 1331, established exceptions to the doctrine would bar its application in this case. In *Chapa de Indian Health Program, Inc.*, 316 F.3d 995, the NLRB asserted that, under the Supreme Court’s exhaustion precedents,

the court lacked jurisdiction, in a subpoena enforcement action, to address the agency's jurisdiction until after the exhaustion of agency proceedings. *See id.* at 998 n.1.

Apparently recognizing that the Ninth Circuit would not depart from its own precedent deciding otherwise, however, the NLRB, simply preserved the argument. *See id.* The Ninth Circuit made note of it, but paid it no heed, given that its prior cases directed otherwise. *See id.*

Under those cases, the Ninth Circuit has made clear that agency exhaustion is not required 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 its jurisdiction.” *Id.* at 998 (quoting *Karuk Tribe Housing Auth.*, 260 F.3d at 1077, quoting *Marshall v. Burlington N., Inc.*, 595 F.2d 511, 513 (9<sup>th</sup> Cir.1979)). The Sixth Circuit has adopted these same criteria as an exception to the agency exhaustion doctrine. *See Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6<sup>th</sup> Cir. 1981) (citing *Burlington N., Inc.*, 595 F.2d at 513).

These criteria are established in the case at bar. First, as set forth in Section II, the Band faces irreparable harm from the NLRB's agency action against it. Second, as set forth in Section I, under well-established principles of federal Indian law, the Board's jurisdiction is plainly lacking. Third, because the Board's jurisdiction to undermine inherent tribal authority turns on principles of federal Indian law, “there can be no serious doubt” that its special expertise is of no relevance to that determination. *See Chapa De Indian Health Program, Inc.*, 316 F.3d at 998. Thus, even if the NLRB could invoke the

exhaustion doctrine in the special circumstances of this case, that doctrine would not stand as an obstacle to this Court's authority to proceed.

### **CONCLUSION**

For the foregoing reasons, the Band respectfully submits that summary judgment should enter in its favor. The Court should issue a declaratory judgment, declaring that the Board has no authority to proceed against the Band on the Teamsters' Charge to challenge the Band's Constitution and laws governing reservation labor relations. The Court should also issue a permanent injunction against the Board, enjoining it from proceeding with any and all coercive measures against the Band in furtherance of the Teamsters' Charge.

Dated: June 22, 2009

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