UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Soaring Eagle Casino and Resort,
An Enterprise of the Saginaw
Chippewa Indian Tribe of Michigan

Respondent,

and Case No. 07-CA-053586

International Union, United
Automobile, Aerospace and
Agricultural Implement
Workers of America (UAW)

Charging Party.

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S BRIEF IN SUPPORT OF THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

The National Labor Relations Board and its members (collectively the "Board") threaten to infringe on the treaty rights of the Saginaw Chippewa Indian Tribe of Michigan ("Tribe") in violation of federal case law that general federal laws do not apply to a tribal government's exercise of sovereign authority absent express congressional authorization.[1] The Board is seeking to apply the National Labor Relations Act ("NLRA")[2] to the Tribe's regulation, operation, and management of gaming at one of its licensed gaming locations, the Soaring Eagle Casino and Resort ("SECR"), by subjecting the Saginaw Tribe to a charge of unfair labor practice brought under section 8 of the NLRA.[3] SECR is a gaming facility wholly-owned and duly chartered by the Tribe and operated pursuant to the Indian Gaming Regulatory Act ("IGRA"),[4] the Saginaw Chippewa Tribe – State of Michigan Gaming Compact ("Compact"),[5] and the Tribe's laws. The Board is proceeding on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Worker of America ("UAW" or "Union"), and its desire to enter or engage in activities within the Saginaw Tribe's Isabella Reservation and the Soaring Eagle Casino and Resort.

The Saginaw Tribe operates gaming activities at SECR as part of its government gaming, conducted as an exercise of 1) the Saginaw Tribe's treaty rights of self-government 2) the Tribe's inherent sovereign authority to engage in economic activity, and 3) the Tribe's federally recognized rights under to IGRA and the regulations issued thereunder. Indian tribes are authorized to conduct tribal government gaming under IGRA as a "means of

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[1] *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010).
[2] 29 U.S.C. §§ 151-169.
[3] *Id.* at § 158.
[4] 25 U.S.C. §§ 2701-2721.
[5] Exhibit R-13.

promoting economic development, and strong tribal governments,"[6] and by federal law are limited to using gaming revenues only for governmental and charitable purposes.[7] IGRA further provides that Indian tribes may conduct Class III (or casino) gaming only in accordance with a tribal ordinance approved by the Chairperson of the National Indian Gaming Commission,[8] and pursuant to a Tribal-State Compact,[9] which the Secretary of the Interior has approved.[10] The United States Secretary of the Interior (the "Secretary") published approval of the Compact in the Federal Register as required by IGRA.[11] The SECR is licensed by the Saginaw Chippewa Gaming Commission ("SCGC"), as required by Section 5 of the Gaming Code of the Saginaw Chippewa Indian Tribe of Michigan ("Tribal Gaming Code")[12] and IGRA.[13] Soaring Eagle Gaming ("SEG") is a wholly owned government subdivision of the Saginaw Tribe chartered to conduct, operate, and manage gaming exclusively on behalf of the Saginaw Tribe.[14] There can be no doubt, and the Board does not dispute, that the Saginaw Tribe's regulation, operation, and management of gaming at SECR is an exercise of the Saginaw Tribe's sovereign authority.[15]

The Saginaw Tribe has had a long history of protecting and exercising its sovereign authority over its lands, its reservations, and its members through treaties, traditions, and

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[6] 25 U.S.C. § 2702(1).
[7] 25 U.S.C. § 2710 (b)(2)(B).
[8] *Id.* at (d)(1)(A).
[9] *Id.* at (d)(1)(C).
[10] *Id.* at (d)(8)(D).
[11] *Id.* at (d)(8)(D). *See also* 58 Fed. Reg. 63262 (Nov. 30, 1993).
[12] Exhibit R-14.
[13] 25 U.S.C. §§ 2710(b)(1)(B), 2710(d)(1)(A).
[14] Exhibit R-15.
[15] Exhibit R-17.

tribal laws.[16] Federal courts have recognized that state and local laws and regulations do not apply to the Tribe and its members on its reservation without the Tribe's consent.[17] They further have recognized that "federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent expressed congressional authorization."[18] Congress has not expressly authorized the application of the NLRA to Indian tribes. Nothing in either the text or the legislative history of the Act even mentions Indian tribes.[19]

The Board's actions threaten and impair the Saginaw Tribe's sovereign authority to engage in and regulate economic activity and to fund essential government functions of the Tribe. Furthermore, the Board's actions violate the Saginaw Tribe's rights under IGRA. At its heart, the Board's action threatens to divest the Saginaw Tribe of its law-making powers and regulatory authority by allowing a nontribal entity to use the "collective bargaining" process to determine what laws will apply to the Saginaw Tribe's gaming facility. The Board's actions further impose the threat of a labor strike on a facility wholly owned and operated by the Saginaw Tribe, thereby jeopardizing the primary funding source of the Tribe's government and its governmental services to Tribal members. The Board's actions to assert jurisdiction impair and threaten to abrogate the Saginaw Tribe's treaty right of self-government, the very essence of its sovereignty, as well as its treaty right to exclude

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[16] *See* Amended Constitution and By-Laws of the Saginaw Chippewa Indian Tribe of Michigan, Nov. 4, 1986, Exhibit R-16; and Tribal Ordinance No. 3 Code of Conduct and Power to Exclude Non-Members, Exhibit R-06.

[17] *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, CIV. 05-10296-BC, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010) *motion for relief from judgment denied*, 05-10296-BC, 2011 WL 1884196 (E.D. Mich. May 18, 2011).

[18] *Dobbs*, 600 F. 3rd at 1283 (footnote omitted) (emphasis added).

[19] *See NLRB v. Pueblo of San Juan,* 276 F. 3rd 1186, 1196 (10th Cir. 2002) (noting that "neither the legislative history of the NLRA, nor its language, make any mention of Indian Tribes" and holding that the NLRA did not divest the Pueblo of San Juan of its inherent sovereign authority to enact a right to work ordinance).

undesirable intruders from its lands.

II. PROCEDURAL HISTORY

A. Current NLRB Complaint Background.

On April 1, 2011 the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") filed the charge in Case 7-CA-53586 alleging that Soaring Eagle Casino and Resort, wholly owned and operated by the Saginaw Chippewa Indian Tribe of Michigan (collectively, the "Tribe") violated §8(a)(1) and (a)(3) of the National Labor Relations Act ("Act") by terminating UAW supporter Susan Lewis on or about November 15, 2010 for allegedly violating the Tribe's Solicitation Policy.

On May 26, 2011, the UAW filed an amended charge in this case alleging the Tribe violated §8(a)(1) and (a)(3) of the Act by suspending Susan Lewis on or about October 23, 2010 for Union Activity.

On September 13, 2011, the Region Seven Director, Stephen M. Glasser, issued a Complaint and Notice of Hearing alleging that the Tribe violated §8(a)(1) and (a)(3) of the Act. The matter was scheduled for hearing on October 13, 2011.

On September 22, 2011 the Tribe filed an Answer by Special Appearance in the matter arguing that the Board has no jurisdiction over the Tribe.

On September 27, 2011 the Board ordered that the hearing scheduled for October 13, 2011 be postponed to November 2, 2011.

On September 30, 2011 the Tribe filed an Amended Answer by Special Appearance in the matter maintaining that the Board has no jurisdiction over the Tribe and answering the Complaint.

On October 28, 2011, the Board ordered that the hearing scheduled for November 2, 2011 be postponed to December 14, 2011 due to the Tribe's complaint and motion for temporary restraining order and preliminary injunction filed in the United States District Court for the Eastern District of Michigan.

On December 14 and 15, 2011, the scheduled hearing was held.

On March 26, 2012 the Administrative Law Judge issued his decision.

The Tribe now files this brief, in support of the exceptions filed to the Administrative Law Judge's decision. The Tribe requests the Board to dismiss the instant case by determining that the application of the National Labor Relations Act would violate the Tribe's inherent sovereign rights protected by federal law, would abrogate significant Treaty rights of self-government, and would violate the Tribe's Treaty right to exclude provided and protected by the Tribe's Treaties of 1855 and 1865. The Board should decline to assert its jurisdiction in this matter and this case should be dismissed.

B. Prior NLRB Cases.

The NLRB charges described above are the latest in a series of actions over the last several years by unions to seeking access to SECR and attempting to persuade the NLRB assert its jurisdiction and apply the NLRA to the Tribe.

1. Teamsters election case.

On October 12, 2007 a petition for election was filed by the NLRB on behalf of employees of the SECR Casino Housekeeping Department. The Tribe at that time asserted its position that the NLRA does not apply to Indian tribes and that the NLRB did not have jurisdiction in that case. The Tribe participated in a hearing in that matter on October 30, 2007 and presented evidence that substantiated the Tribe's position that the

NLRB lacked jurisdiction over the Tribe or the SECR. The Regional Director reviewed the record established at the NLRB hearing and ruled that the NLRA applied to the SECR. The Tribe filed an appeal from the decision of the Regional Director to the NLRB on December 3, 2007. The Tribe's appeal was summarily rejected by the NLRB in an Order of December 19, 2007 because in the view of the Board the Tribe's request for review raised "no substantial issues warranting review." The NLRB's truncated treatment of the complicated legal issues associated with federal Indian law, the judicial canons for interpreting that law, and the Tribe's treaties with the United States illustrate the inability of the NLRB process to adequately address the fundamental principles involved in the case.

2. Security Union election case.

On November 28, 2007 the Security union filed a Petition to Hold Representative Election. On December 11, 2007 the Tribe was notified that the Petition was withdrawn. On December 10, 2007 the Security union filed a second Petition to Hold Representative Election. A hearing on the petition was held on December 21, 2007 and the Tribe filed its Motion to Dismiss on January 2, 2008. The Regional Director issued his Decision and Direction for Election on January 17, 2008. The Tribe filed a Request for Review of Regional Director's Decision and To Stay Election on January 29, 2008 and on February 15, 2008 the Tribe received notice that the Regional Director had administratively cancelled the election and approved the withdrawal of the petition.

3. Teamsters' challenge.

On December 14, 2007 the Teamsters union filed a charge with the NLRB alleging that the SECR was denying employees their rights under the NLRA by establishing Ordinance 28-Tribal Government Labor Ordinance. The NLRB investigated the Charge and

on January 23, 2008 the NLRB notified the Tribe that a Complaint would be issued unless the parties could reach a settlement. The Complaint was issued on January 28, 2008 and the Tribe filed its Answer on February 8, 2008. An Amended Complaint was filed on July 28, 2008 and the Tribe filed its Answer by Special Appearance on August 12, 2008. Settlement negotiations continued until September 10, 2008 when a final settlement was approved by the Tribal Council. The negotiated Settlement required the Tribe to repeal Ordinance 28 and to provide adequate notice of the repeal to the employees who would be impacted. The NLRB issued an Order Conditionally Approving the Withdrawal Request, Dismissing the Complaint, and Withdrawing the Notice of Hearing on September 15, 2008. The Tribal Council approved Resolution 08-148 to repeal Ordinance 28 on September 17, 2008 and notified employees by placing a printed notice in the paycheck envelopes.

In each of these prior proceedings, as in the present case, the Saginaw Tribe preserved its jurisdictional arguments and sought to make the Board aware of the Tribe's treaty rights and rights of self-government inherent in establishment of its Reservation as a permanent homeland. Unfortunately, the NLRB has not been willing to give due consideration to the Tribe's inherent sovereign rights protected by federal law and by Treaties with the United States.

III. STATEMENT OF FACTS

The Saginaw Tribe is a federally recognized Indian Tribe.[20] The Saginaw Tribe operates SECR as part of its sovereign authority to make its own laws as provided in its

[20] *See* 75 Fed. Reg. 60,810 (Oct. 1, 2010)

gaming charter. The operation of the SECR is an essential governmental function.[21] Pursuant to the Saginaw Tribe's Constitution it has sovereign authority over lands set aside for its reservation. The lands occupied by the Saginaw Chippewa Indian Tribe within the State of Michigan were first set apart by Executive Order in 1855 and then secured by Treaties in 1855 and 1864.[22] The 1864 Treaty specifically stated that the land selected in Isabella County set aside as the Isabella Reservation would be set aside for the "exclusive use, ownership, and occupancy of the Saginaw Chippewa".[23]

In the previous proceedings discussed above, the Board authorized union organization votes in *Soaring Eagle Casino and Resort v. Local 286, International Brotherhood of Teamsters*[24] and *Soaring Eagle Casino and Resort v. International Union, Security, Police and Fire Professionals of America (SPFPA)*[25] for employees of SECR. In both cases, the Board determined that application of the NLRA was appropriate without giving fair consideration to the Tribe's right to self-governance, and the Tribe's treaty based right to exclude non-members contained in the Treaties of 1855 and 1864. Unlike the present case, the record in the previous proceedings didn't contain expert testimony relating to the Treaty rights that would be abrogated by application of the NLRA to the Saginaw Tribe's casino operations. The present case does contain undisputed expert testimony supporting the treaty

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[21] Charter of Soaring Eagle Gaming, Exhibit R-15, P. 8.

[22] Executive Order of May 14, 1855 Kappler, Charles, Comp. and Ed., *Indian Affairs: Laws and Treaties* (Washington: Government printing office, 1913), Vol. III, 846-47; Treaty with the Chippewa of Saginaw Swan Creek, and Black River, August 2nd, 1855 11 Stat. 683 August 2nd, 1855); and Treaty with the Chippewa of Saginaw and Swan Creek and Black River, 1864, 14 Stat. 637 (October 18, 1864), Exhibits R-01, R-02, and R-03 respectfully.

[23] *Id.*

[24] *Soaring Eagle Casino and Resort v. Local 286, International Brotherhood of Teamsters*, Case 7-RC-23147, Nov. 20, 2007.

[25] *Soaring Eagle Casino and Resort v. International Union, Security, Police and Fire Professionals of America (SPFPA)*, Case GR-7-RC-23163, January 17, 2008.

based rights of self-government and the right to exclude unwanted intruders from the Tribe's Reservation.[26]

IV. ARGUMENT

A. THE NLRA DOES NOT APPLY TO THE SAGINAW TRIBE BECAUSE THE TRIBE HAS TREATY-PROECTED RIGHTS THAT HAVE NOT BEEN ABROGATED BY CONGRESS.

The NLRA cannot be applied to the Saginaw Tribe because such application would abrogate treaty protected rights. The Board may not unilaterally abrogate tribal treaty rights and no such abrogation has been authorized by Congress. Therefore, this proceeding must be dismissed.

1. Treaty Rights Cannot Be Abrogated Without Clear And Plain Congressional Intent.

Under the U.S. Constitution, Indian treaties are the supreme law of the land.[27] While Congress has plenary power over Indian affairs and can unilaterally abrogate an Indian treaty through a later-enacted statute, "presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves that it should do so."[28]

The United States Supreme Court has repeatedly held that if Congress wishes to abrogate Indian treaty rights it must make its intention "clear and plain."[29] Typically, explicit statutory language is required, because this ensures legislative accountability for the

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[26] *See generally* Transcript of Record at 1-108, *Soaring Eagle Casino and Resort v. UAW*, (Case No. 07-CA-053586, Dec. 14 & 15, 2011).
[27] *See* U.S. Const. art. VI, cl. 2.
[28] *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903).
[29] *E.g., United States v. Dion,* 476 U.S. 734, 738 (1986).

abrogation of treaty rights.[30] In the absence of explicit statutory language, courts may look to the legislative history and the circumstances surrounding the statute's enactment.[31] "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[32]

This is a very high standard. For example, in *Menominee Tribe v. United States,* the Supreme Court was asked to decide whether the Termination Act of 1954 had abrogated the Menominee Tribe's treaty-protected hunting and fishing rights.[33] Although the Act ended the Tribe's government-to-government relationship with the United States, provided that all state laws would be applicable to Tribal members, and contained provisions for the disposal of all Tribal property, the Supreme Court held that it had not abrogated the Menominee's hunting and fishing rights.[34] The Court came to this conclusion even though two bills that would have explicitly preserved the Tribe's hunting and fishing rights were rejected in favor of the bill ultimately adopted by Congress, which was silent with respect to those rights.[35]

Decisions such as *Menominee* emphasize that treaties impose not only contractual obligations on the federal government, but also moral obligations.[36] Furthermore, because treaty rights are property rights, if they are taken, the federal government must provide just

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[30] *Id.* at 739. *See also Washington v. Washington Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights .... ").
[31] *Dion,* 476 U.S. at 739.
[32] *Id.* at 739-40.
[33] 381 U.S. 404 (1968).
[34] *Id.* at 412-13.
[35] *Id.* at 415 (Stevens dissenting).
[36] *Muckleshoot Indian Tribe v. Hall,* 698 F .Supp. 1502 (W.D. Wash. 1988) ("The United States has a fiduciary duty and moral obligation[] of the highest responsibility and trust to protect the Indians' treaty rights").

compensation under the Fifth Amendment.[37] Thus, "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress."[38]

2. The 1864 Treaty Includes A Right To Exclude Non-Indians From Trust Lands Located Within the Isabella Reservation.

Indian treaties are broadly construed by federal courts, which look "only to the substance of the right without regard to technical rules."[39] Consequently, express treaty rights often include several implied rights that are necessary to fully effectuate the purpose of the treaty.[40] Additionally, treaties must be interpreted as the Indians would have understood them, and any ambiguities must be construed in the tribe's favor.[41] These canons of construction are intended to compensate for the United States considerable bargaining advantages, including its role in the drafting of treaties and its command of the English language in which they were written.[42]

The 1864 Treaty between the Saginaw Chippewa and the United States set apart the Isabella Indian Reservation for the "exclusive use, ownership, and occupancy" of the Tribe.[43] The Supreme Court has examined similar language in other treaties and held that it gives an Indian tribe the right to exclude non-Indians from reservation lands that today are still held

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[37] *Menominee,* 381 U.S. at 407; *United States v. Shoshone Tribe,* 304 U.S. 111 (1938).
[38] *Dion,* 476 U.S. at 739.
[39] *United States v. Winans,* 198 U.S. 371,381 (1905).
[40] *See, e.g., Winans,* 198 U.S. at 380-81 (holding that the treaty right to take fish includes the right to enter private lands to access fishing grounds).
[41] *Choctaw Nation v. United States,* 318 U.S. 423, 431-32 (1943).
[42] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass 'n,* 443 U.S. 658, 675-76 (1979).
[43] *See* Art. 2, Treaty with the Chippewa of Saginaw, Swan Creek and Black River, Oct. 18, 1864, 14 Stat. 63 7.

by the United States in trust for the tribe or its members.[44] This treaty right to exclude also includes other subsidiary rights, such as the right to pass laws governing the conduct of any non-Indian that may be permitted to enter reservation trust lands.[45]

For example, in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,* the Court examined treaty language stating that a "tract shall be set apart ... for the exclusive use and benefit of said confederated tribes and bands of Indians" and that no "white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon said reservation without permission of the tribe."[46] Justice Stevens concluded that this language gave the Yakima Nation the right to pass zoning laws that would govern not only trust lands, but also non-Indian-owned fee lands:

> The United States has granted to many Indian tribes, including the Yakima Nation - "a power unknown to any other sovereignty in this Nation: a power to exclude nonmembers entirely from territory reserved for the tribe." That power necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community ... Just as the Tribe had authority to limit absolutely access to the reservation, so it could also limit access to persons whose activities would conform to the Tribe's general plan for land use.[47]

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[44] *South Dakota v. Bourland,* 508 U.S. 679, 688 (1993). *See also Montana v. United States,* 450 U.S. 544, 553-54 (1981) (noting that treaty language stating that certain lands shall be "set apart for the absolute and undisturbed use and occupation of the Indians herein named" "gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it").

[45] *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 156 (1980) (noting that 1855 treaties with the Lummi, Makah, and Yakima tribes, each of which set apart land for the "exclusive use" of the Indians "can be read to recognize not only the "inherent power to exclude non-Indians" from trust lands, but also, the power to "impose conditions on those permitted to enter").

[46] 492 U.S. 433, 435-36 (1989).

[47] *Id.* at 433, 435-36.

Thus, the 1864 Treaty recognizes the Saginaw Chippewa's right to exclude non-Indians from trust lands within the Isabella Reservation. Alternatively, if the Tribe decides to permit non-Indians to enter the Reservation, it may condition that entry on compliance with Tribal laws.

The undisputed expert testimony presented by the Saginaw Tribe at the December 14th and 15th, 2012 hearing in this matter clearly established that the Saginaw Chippewa understood that they had treaty based rights to exclude unwanted individuals from the Isabella Reservation. These rights were more than just a general right to prevent non-Indians from entering or settling upon their Reservation; they are very specific rights to allow the Saginaw Chippewa to control access and activities on their Reservation that would interfere with their ability to exercise their own jurisdiction and their own governing laws. The ALJ's rulings and findings give a narrow one-sided interpretation of the nature of the treaty right involved. This interpretation does not give full weight to the importance of what the Saginaw understood they were getting with their 1864 Treaty. The expert witnesses for the Tribe testified that the treaty right to exclude is the basis for the Tribe's current laws and policies allowing it to prohibit solicitation at its facilities and exclude individuals from the Reservation at its discretion.

3. The ALJ's Decision does not Comport with the Indian Law Canons of Construction.

The ALJ's finding at page 3 that "neither treaty, however, even remotely addresses the future application of Federal regulatory laws to the predecessor Tribe's business operations involving non-Indian employees" reveals a fundamental misperception in how treaties are to be viewed and interpreted. The canons of construction established by the

Supreme Court require that treaties be interpreted as the Indians would have understood them and that they be liberally construed in the Indians' favor.[48] Supreme Court precedent does not support the theory posited by the ALJ that treaties should somehow anticipate and specifically identify future events that may be impacted by the requirements. Indeed the ALJ's position in this case is patently unreasonable and blatantly disregards the canons of Indian law construction.

Professor Bowes testified that the Saginaw Chippewa understood that the 1855 Treaty establishing the Isabella Reservation as a permanent homeland included a right to exclude.[49] Bowes further testified that the Saginaw Tribe's current exclusion ordinance relates back to its treaty based right to exclude.[50] In exercising their treaty rights Professor Bowes testified that The Saginaw Chippewa excluded and removed individuals from their Reservation, including federal agents that the Saginaw viewed as threats to their treaty based sovereignty.[51]

Professor Valentine testified about the importance of Chippewa understanding of treaty negotiations and provisions. His undisputed testimony established that the 1855 treaty's establishment of the Isabella Indian Reservation as a permanent home for the Saginaw Chippewa also included a treaty right to exclude unwanted intruders from the

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[48] *Merrion v: Jicarilla Apache Tribe,* 455 U.S. 130 (1982).
[49] Transcript of Record at 76:12-25; 77:1-14, *Soaring Eagle Casino and Resort v. UAW*, (Case No. 07-CA-053586, Dec. 15, 2011).
[50] *Id.* at 84:14-22.
[51] *Id.* at 93-94.

Reservation, just as Commissioner of Indian Affairs George Manypenny had explained in other Chippewa treaty negotiations.[52]

The cases relied on by the ALJ and the General Counsel are unpersuasive in establishing a one-size-fits-all general interpretation of Indian treaty rights. The canons of construction require that each individual treaty be examined in its own historical context and viewed from the perspective of the Indian signatories to the treaty. In this case, the central focus is what the Saginaw Chippewa understood they were receiving from the United States in the treaties of the 1855 and 1864. The Saginaw Tribe's experts in this case provided undisputed and unrebutted expert testimony regarding the Saginaw Chippewa's understanding of these treaties and the rights pursuant thereto. No contrary evidence was submitted. The treaty language of other cases and for other tribes is simply not relevant to understanding and interpreting the Saginaw Chippewa treaties. There is no evidence in the record to substantiate the characterization of a general treaty right as argued by the General Counsel and used as a basis for the ALJ's decision. To do so simply ignores the canons of construction.

In the present case application of the NLRA by the Board will abrogate the Saginaw Chippewa's treaty based right to exclude. The Board therefore should decline to assert jurisdiction and these proceedings should be dismissed.

4. The Tribe's Treaties With The United States Reflect An Inherent Sovereign Power To Self-Government And Regulation Of Its Own Economic Resources.

[52] Transcript of Record at 32:2-15, *Soaring Eagle Casino and Resort v. UAW*, (Case No. 07-CA-053586, Dec. 14, 2011).

The Tribe's treaties with the United States also recognized and ratified an inherent right to self-government and power over the Tribe's own economic resources. What is of critical importance in the Supreme Court's jurisprudence on treaty abrogation - and hence to the present case - is that treaty rights inherent to a tribe and its members within a reservation include many rights that may not be specified in the Treaty. For example, in *Dion,* the treaty at issue did not specifically mention hunting and fishing rights, but the Court concluded the tribe's inherent rights under the treaty included the rights to hunt and fish.[53] The Supreme Court has also recognized that the rights to self-government, including a wide array of sovereign and economic powers, are also inherent whether or not they are specified precisely in a treaty.[54] These inherent rights include a right to govern tribal economic resources and this right attaches to the Saginaw Tribe by virtue of its treaty making history with the United States.

Undisputed expert testimony in this case clearly established that the Saginaw Chippewa understood that they had an inherent treaty based right of self-government from the 1855 and 1864 treaties establishing the Isabella Reservation as their permanent home. Professor Valentine testified that the Saginaw Chippewa understood that the 1855 treaty provisions establishing the Isabella Reservation would provide them with a permanent home and would protect their sovereign right to govern themselves.[55] Professor Bowes also testified that, at the time the treaties were executed, the Saginaw Chippewa understood that

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[53] 476 U.S. at 737-38.

[54] *See e.g., Merrion v: Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *United States v. Wheeler,* 435 U.S. 313, 322 (1978); *United States v. Mazurie,* 419 U.S. 544 (1975); *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).

[55] Transcript of Record at 30:2-12, *Soaring Eagle Casino and Resort v. UAW,* (Case No. 07-CA-053586, Dec. 14, 2011).

the establishment of the Isabella Reservation included rights of self-government and rights of sovereignty for the Tribe.[56] Bowes further testified that the treaty rights of self-government and the right to exclude are more than mere property rights.[57] These rights are treaty based rights.[58] These rights came with the establishment of the reservation, allowing the Saginaw Tribe to exercise jurisdiction over the reservation and to make its own laws. Application of the NLRA will abrogate this important treaty based right. The Board should therefore decline to assert jurisdiction and these proceedings should be dismissed.

5. Application Of The NLRA Would Abrogate The Tribe's Treaty Rights Without Congressional Authorization.

The Soaring Eagle Casino and Resort is located on trust lands within the boundaries of the Isabella Reservation. A ruling that the NLRA is applicable to the SECR would compel the Tribe to allow unions to enter Indian lands, thus violating its treaty right to exclude non-members. Furthermore, application of the NLRA to the Tribe would violate the Tribe's right to govern its territory and to limit access to its trust lands to those persons whose activities are in conformance with Tribal laws.

Applying the NLRA to the Saginaw Tribe would also interfere with its inherent sovereign powers to govern its own economic resources, a right that the federal courts, executive branch, and legislative branch have recognized as belonging to tribes within their own land within their own reservations.[59] This is especially true when those powers of

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[56] Transcript of Record at 76:4-18, *Soaring Eagle Casino and Resort v. UAW*, (Case No. 07-CA-053586, Dec. 15, 2011).
[57] *Id.* at 77:15-25; 78:1-2.
[58] *Id.* at 84:12-13.
[59] *See, e.g., Indian Self-Determination and Education Assistance Act,* 25 U.S.C. § 450 and 450a(b) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian

government and regulation involve an activity that is vital to funding tribal governments and government programs. As stated by Congress in the IGRA, "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[60]

This conclusion is supported by existing case law. In *Donovan v. Navajo Forest Products Industries,* the Tenth Circuit considered whether the Occupational Safety and Health Act, which does not reference Indian tribes, was applicable to a tribal business enterprise operating on the Navajo Reservation.[61] An 1868 treaty with the Navajo states that "no person ... shall ever be permitted to pass over, settle upon, or reside in, the [Navajo Reservation]."[62] Because application of OSHA would authorize federal employees to enter tribal lands to inspect tribal facilities, the court held that application of the statute "would

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tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."); *Indian Financing Act,* 25 U.S.C. § 1451 ("It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."); *Indian Child Welfare Act,* 25 U.S. C. §§ 1901 and 1902; and *Indian Gaming Regulatory Act,* 25 U.S.C. § 2701 ("[N]umerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue and "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."); Proclamation of George W. Bush, National American Indian Heritage Month, November 4, 2004; Executive Order 13175 of William J. Clinton, November 6, 2000 56 FR 218; Executive Order 13084 of William Clinton, May 14, 1998, 63 FR 27655; Memorandum of William Clinton, April29, 1994, 59 FR 22951; Proclamation6450 of George Bush, June 23, 1992, 57 FR 28579.

[60] 25 U.S.C. § 2701.

[61] 692 F.2d 709 (10th Cir. 1982).

[62] *Id. at* 711.

constitute abrogation of Article II of the Navajo Treaty relating to the exclusion of non-Indians not authorized to enter upon the Navajo Reservation."[63] This abrogation could not be sustained, since Congress had not made its intent to do so clear and plain.[64]

Neither the text of the NLRA, nor its extensive legislative history, contain any reference to Indian tribes let alone Indian treaty rights.[65] Because it cannot be claimed that Congress "actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty," the NLRA is inapplicable.[66]

B. THE NLRA IS INAPPLICABLE TO TRIBES REGARDLESS OF PROTECTED TREATY RIGHTS.

1. The Board's Past Decisions Regarding Other Tribes Do Not Apply To The Saginaw Tribe's Treaty Right Claims.

In its decisions in *San Manuel Indian Bingo and Casino and Hotel Employees & Restaurant Employees,*[67] and *Foxwoods Resort and Casino and International Union UAW, AFL-CIO,*[68] the Board concluded that the NLRA applied to the tribes in those cases. However, in neither *San Manuel* nor *Pequot* did the Board confront a treaty-protected right to exclude or a treaty based right to self-government and economic self-determination. Given the Supreme Court's repeated instruction that only Congress can abrogate treaty

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[63] *Id.* At 712.
[64] *Id.* at 714. *See also Equal Employment Opportunity Comm 'n v. Cherokee Nation,* 871 F.2d 937 (10th Cir. 1989) (holding that Age Discrimination and Employment Act was inapplicable to Cherokee Nation, which possessed a treaty right to regulate the conduct of all persons within its territory).
[65] *See e.g., Sac & Fox Indus.* 307 N.L.R.B. 241, 245 (1991).
[66] *Dion,* 476 U.S. at 739-40.
[67] 341 N.L.R.B. No. 138 (May 28, 2004).
[68] Case No. 34-RC- 2230 (Oct. 24, 2007).

rights, and only if it does so clearly, this case is distinguishable from both *San Manuel* and *Foxwoods.*

2. The Board's Past Reliance On *Tuscarora* Is Misplaced.

Even if the Board was to draw on *San Manuel* and *Foxwoods* decisions for guidance in this case, the Board's reasoning in those cases is misplaced. The Tribe is well aware that the Board has relied in the past on the Supreme Court's forty-seven year old *dictum* in the case of *Federal Power Comm 'n v. Tuscarora Indian Nation.*[69] The *dictum,* repeated without detailed analysis by some lower courts since that time, states that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests "even when the statute fails to address Indians.[70]

There are at least three reasons why the *dictum* in Tuscarora should not be credited. The main reason is that, when read in its entirety, the decision itself (as opposed to the one-sentence *dictum)* uses the same basic approach that was used by the Court in its more recent decisions concerning tribal treaty rights, such as *Dion,* which is the approach urged by the Tribe here. *Tuscarora* was not a case where the federal statute in question was in fact silent as to its application to Indians. The statute involved was the Federal Power Act and the issue was whether that Act authorized the condemnation of tribal off-reservation fee land.[71] The court held that the Act did authorize the condemnation.[72] But the Court's holding was based on an analysis of the plain wording of the Act, on the fact that the legislative history of the Act showed a specific congressional intent with regard to its applicability to off-reservation

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[69] 362, U.S. 99 (1960).
[70] 362 U.S. at 116.
[71] 362 U.S. at 111; 16U.S.C. 797(e) (Federal Power Act section specifying the findings required to condemn tribal lands).
[72] 362 U.S. at 123.

tribal lands, and on an analysis of the context of the Act (which indicated a particular congressional intent with regard to the Tuscarora Tribe's land at issue).[73] In short, the Court's decision was supported by a detailed *Dion*-like analysis where the Court asked if Congress specifically considered the conflict between the statute and tribal right, and chose to abrogate the right. The *Tuscarora* decision itself does not rely on the one sentence of *dictum* now emphasized by the Board, a sentence that was not even necessary to the Court's *Tuscarora* holding.

A second reason to question the *Tuscarora dictum* is that it came during the short-lived so-called "termination era" - a time when both Congress and the Executive Branch were trying to terminate Indian tribes and reservations rather than trying to encourage their independence. The Court's *dictum* echoed and followed the policies being promoted by Congress at that time. Today, however, the policies of Congress and the Executive Branch have changed dramatically. The current policies, recognizing tribal sovereignty and promoting tribal self-sufficiency and independence have made the *Tuscarora* one-sentence dictum inapplicable and outdated.

A final reason to reject the *Tuscarora* analysis is that there has been no unanimity in the lower courts about the continued force of its *dictum.* The Tenth Circuit, for example, has concluded that the *dictum* does not accurately state current law, and has taken the position that courts should not apply federal statutes to Indian tribes where Congress is silent on the

[73] 362 U.S. at 118-19 (The Federal Power Act "neither overlooks nor excludes Indians or lands owned or occupied by them". Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians – "tribal lands embraced within Indian reservations." The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." (citations omitted)).

issue. In *N.L.R.B. V. Pueblo of San Juan*,[74] the court found that the *Tuscarora dictum* has been implicitly overruled by subsequent Supreme Court decisions, concluding, much like *Dion,* "[l]imitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from surrounding circumstances and legislative history."[75]

The Seventh Circuit initially adopted the *Tuscarora dictum*,[76] but in a later case relied on the *Dion* approach instead, avoiding the mention of *Tuscarora*, and specifically distinguishing precedent relying on that decision.[77]

The Eighth Circuit has referred to the *Tuscarora dictum,* but in practice has followed the *Dion* approach, requiring that Congress must show some clear intent to apply a statute (silent as to its application to tribes) to tribes when self-governance or treaty rights are affected.[78]

Finally, the Ninth Circuit and Second Circuit seemingly embraced the *Tuscarora dictum* that silent statutes generally apply to tribes, but then each Circuit had to go out of its way to invent judicial "exceptions" to make the *dictum* work under today's policies. However, the *Tuscarora* decision itself provides no exceptions to its supposed rule. If the *Tuscarora dictum* is worthy of reliance, then all federal statutes should apply to all tribes always. But such a result would be impossible to reconcile with the decades of Supreme Court decisions, which require that Congress specifically choose to abrogate tribal treaty

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[74] 280 F.3d 1278 (10th Cir. 2000)
[75] 280 F.3d at 1284. *See also Donovan v. Navajo Forest Products Industries,* 692 F.2d 709, 713 (10th Cir. 1982).
[76] *Smart v. State Farm Ins.,* 868 F.2d 929 (7th Cir. 1989).
[77] *See Reich v. Great Lakes Indian Fish and Wildlife Commission,* 4 F.3d 490 (7th Cir. 1993).
[78] *See E.E.O.C. v. Fond du Lac Heavy Equipment and Construction Co.,* 986 F.2d 246 (8th Cir. 1993).

rights.[79] The necessity for Courts of Appeals to invent exceptions where the Supreme Court has provided none demonstrates that the Supreme Court never intended its dictum in *Tuscarora* to be interpreted as a broad new rule in its Indian law jurisprudence.

In this case the Board should refrain from a rote recital of the *Tuscarora dictum* to justify applying the NLRA to all tribes. The Board has said in its past decisions that it will conduct a case-by-case inquiry regarding the application of the NLRA to tribes. Here, the Saginaw Tribe has presented treaty based arguments, supported by undisputed expert testimony and by decades of Supreme Court precedent, that the NLRA can't be applied to the Tribe in the absence of any evidence Congress considered and intended abrogation of the Saginaw Tribe's treaty rights. Based on the record before the Board, the Act does not apply to the Saginaw Tribe on its land within its reservation and this proceeding must therefore be dismissed.

3. Even Under The *San Manuel* Framework, The NLRA Does Not Apply To The Saginaw Chippewa Tribe.

The Board in *San Manuel* concluded that the NLRA applied generally to tribes under the *dictum* in *Tuscarora.* The Board then adopted the three exceptions established in *Donovan v. Coeur d'Alene Tribal Farm,*[80] for determining those circumstances under which the Act should not apply to operations on Native American tribal lands. Those exceptions are:

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[79] *United States v. Dion,* 476 U.S. 734, 738 (1986); *Menominee Tribe v. United States,* 381 U.S. U.S. 404 (1968); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *see also Washington v. Washington Commercial Passenger Fishing Vesel Ass 'n,* 43 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights .... ").

[80] 751 F.2d 1113, 1115 (9th Cir. 1985).

(1) the law "touches exclusive rights of self-government 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 for the law to apply to Indian tribes.

In the event that none of the exceptions apply, the Board decided that it must also examine "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction."[81]

As is evident from the earlier sections of this brief, the Tribe does not believe the *San Manuel* framework, with its reliance on *Tuscarora,* is the proper framework to consider the Tribe's treaty based claim. But even under *San Manuel,* the Tribe's earlier discussion of its treaty rights demonstrates that the Saginaw Tribe fits precisely into the second *Donovan* exception because the application of the NLRA to the Tribe would abrogate the Tribe's treaty rights without any clear intent to do so from Congress.

The ALJ attempts to get around *San Manuel* by his overly broad interpretation of the Tribe's Treaties. In *San Manuel*, the Board recognized that it would not have jurisdiction if the application of the NLRA would abrogate a Tribe's treaty right. The ALJ now qualifies the Board's position in *San Manuel* by requiring a degree of specificity in the Tribe's Treaty that is both unreasonable and contrary to federal law. The Tribe's experts testified that the treaty right to exclude would have included the circumstances in this case. In the face of this evidence, the ALJ now moves the goal posts requiring a degree of specificity not previously contemplated in *San Manuel.* Under the ALJ's approach, it is hard to imagine any treaty language developed over 150 years ago that would satisfy the Board's test under *San Manuel.* If the Board's decision

[81] *San Manuel,* supra, at 1062.

in San Manuel stands for the proposition stated: that if application of the NLRA would abrogate a treaty right, then this case must be dismissed. The Tribe's experts have provided undisputed evidence and testimony that the application of the NLRA in this case violates the Tribe's Treaty right of exclusion. The record contains no evidence to the contrary.

4. Policy Considerations Weigh Heavily Against The Application Of The NLRA To The Tribe.

Since the second *Donovan* exception applies here, to the extent the Board thinks it is necessary or appropriate for it to determine matters of federal Indian law policy, policy considerations here weigh against the application of the NLRA to the Tribe. Both the Legislative Branch and Executive Branch of the federal government have consistently and specifically promoted tribal independence, self-government, self-regulation, and economic self-sufficiency. Of particular importance are modern congressional statements of these policies, since it is a congressional statute that the Board must implement. The Supreme Court often has acknowledged these policies, stating succinctly in a 1987 case,

> As we have repeatedly recognized, this tradition [of tribal sovereignty] is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.[82]

The statements of Congressional policy in legislation over the last number of years (certainly since the passage of the NLRA) are myriad. Perhaps the most pertinent of these policy declarations to present proceedings is the congressional statement related specifically to gaming that appears in the Indian Gaming Regulatory Act: "[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong

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[82] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980). *See also California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216.

tribal government."[83] This is exactly what the Saginaw Tribe is doing both in its development of its government gaming facility and, more particularly, in its regulation of labor relations at that facility. It is promoting "economic development," demonstrating "self-sufficiency," and engaging in activities that demonstrate a "strong tribal government." The Board would be interfering in these activities with if it adopted a discretionary reading of the NLRA to enforce that Act against the Tribe. If the Board indeed wants to engage in a balancing of interests, it must give great weight to the current policy of the legislative branch that drafted the NLRA in the first place.

In addition to Congressional policy declarations, the Executive Branch has formally endorsed these policies as well.[84] The Executive Order of President William Clinton probably put the Executive Branch's position most articulately:

> The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.[85]

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[83] 25 U.S.C. § 2701

[84] *See, e.g., Proclamation of George W. Bush, National American Indian Heritage Month*, November 4, 2004; Executive Order 13175 of William J. Clinton, November 6, 2000, 56 FR 218; Executive Order 13084 of William J. Clinton, May 14, 1998, 63 FR 27655; Memorandum of William Clinton, April 29, 1994, 59 FR 22951; Proclamation 6450 of George Bush, June 23, 1992, 57 FR 28579.

[85] Executive Order No. 13084, May 14, 1998, 63 FR 27655.

A second factor that should weigh heavily toward the Tribe is the fact that its government gaming activity is being conducted entirely on tribally-owned land within the Tribe's recognized reservation. A tribe cannot develop a strong tribal government and economic self-sufficiency when an agency of the federal government prevents it from exercising its treaty based rights to self-governmental power within its most basic jurisdiction-its own land on its own reservation. This is not a case of the Tribe attempting to regulate activities outside its own domain, and there is no federal law stating that non-Indians who voluntary apply and accept jobs for Tribes on tribal lands within reservations are exempt from tribal regulation.

A final factor weighing in favor of the Tribe is the long-standing rule of construction with regard to federal statutes affecting Indians. Federal courts consistently have held that vague or ambiguous federal statutes should always be read in light of the policies and doctrines described above, and should be liberally construed by the courts in favor of tribal interests.[86] These rules of construction are highly relevant and must be recognized and applied by the Board when it interprets the NLRA. At an absolute minimum, whether the NLRA applies to tribe to tribes should be considered an ambiguity since the statute does not mention tribes, was enacted in an era when independent tribal governments were being encouraged, and whose application to tribes would contradict explicit federal policy declarations.

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[86] *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 269 (1992); *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989); *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136. 143-44 (1980).

Even if the Board follows its *San Manuel* framework in this case, the second Donovan exception applies, and the consistent policy of the federal government to support tribal self-determination and economic independence weigh heavily against applying the NLRA to the Tribe.

C. THE TRIBE IS A GOVERNMENT AND, AS SUCH, IS NOT AN EMPLOYER AS DEFINED BY THE ACT.

Although it is the position of the Tribe that the NLRA does not apply, even if it did, the Tribe would be exempt from its coverage. The Act specifically exempts governments such as "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof from the definition of "employer" and, hence, from the operation of the Act.[87] "Political subdivisions" within the meaning of Section 152(2) are "entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."[88]

The reason for this exemption is obvious: governments provide services and functions that do not make them amenable to organization, collective bargaining, and strikes unless they voluntarily decide otherwise and create their own labor relations rules. Tribal governments fall into this category because they provide government services and they are "administered by individuals who are responsible to public officials or to the general electorate."[89]

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[87] 29 U.S.C. § 152(2).
[88] *NLRB v. Natural Gas Util. Dist. of Hawkins County,* 402 U.S. 600, 604-05 (1971).
[89] *Hawkins,* 402 U.S. at 604-05.

The Board's earlier analysis denying that tribes were governmental entities is contradictory. On the one hand, the Board applies the NLRA to tribes by implying coverage where Congress has been silent. However, when it comes to the definition of "employer," the Board refuses to imply anything in the absence of explicit language about tribal governments. Apparently, in the absence of explicit language dealing with tribes, the Board finds it acceptable to "interpret" the applicability of the Act to the detriment of tribes but refuses to so "interpret" the government exemption to the benefit of tribes-claiming it cannot do so in the absence of an explicit reference to tribes. If the absence of an explicit reference to tribes prevents them from being considered "governments" for the exemption in 29 U.S.C. § 152(2), it should equally prevent the Board from considering them covered by the Act. On the other hand, if the Board can imply the Act's applicability to tribes, it should not be prevented from implying tribes' inclusion in the government exemption.

A better informed analysis of this issue has been presented recently by Tenth Circuit Court of Appeals. In *National Labor Relations Board v. Pueblo of San Juan,*[90] the court found that tribes were to be treated as political subdivisions for purposes of enacting right to work laws. After citing the numerous federal court decisions that analyze the retained sovereign and governmental rights of tribes, the court ultimately found, "Like states and territories, the Pueblo has a strong interest as a sovereign in regulating economic activity involving its own members within its own territory, and it therefore may enact laws governing such activity."[91]

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[90] 276 F.3d 1186 (10th Cir. 2002).
[91] 276 F.3d at 1200.

In like manner, the Seventh Circuit Court of Appeals found that tribal law enforcement officers should be treated like state law enforcement officers for purposes of the Fair Labor Standards Act.[92] The *Reich* court concluded that the Act's exemptions included "[tribal] agencies' law-enforcement employees, and any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act .... "[93] This exemption was granted to tribal employees despite the fact that they were not specifically included in the government exemptions otherwise provided for in the Act.

Further, with regard to the NLRA, federal courts have held that other governments not expressly mentioned in the 29 U.S.C. § 152(2) governmental exemption are impliedly included in the exemption.[94] Since tribes are governments in every meaningful sense, they must also be exempt from the definition of employer under the Act.

But even if the Board were tempted to adopt a narrow reading of the definition of employer, tribes should still be exempt on public policy grounds. Indeed the Supreme Court and the Board itself have implied that non-governmental groups not mentioned in the statute should otherwise be excluded from the definition of "employer." In *Herbert Harvey, Inc.*,[95] the Board held that the World Bank was outside the Board's jurisdiction even though it is not expressly exempted. The Board held it would need "the affirmative intention of the Congress clearly expressed" to subject the World Bank to Board jurisdiction, since "nothing

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[92] *Reich v. Great Lakes Indian Fish and Wildlife Commission,* 4 F.3d 490 (7th Cir. 1993).
[93] 4 F.3d at 495.
[94] *See Chaparro-Febus v. Int'l Longshoremen Ass 'n,* 983 F.2d 325 (1st Cir. 1993) (subdivision of a United States Territory exempt); *Compton v. Nat'l. Mar. Union,* 533 F.2d 1270 (1st Cir. 1976) (same); *Virgin Islands Port Auth. v. SIU de Puerto Rico,* 354 F. Supp. 312 (D.V.I. 1973) (same).
[95] 171 N.L.R.B. 238 (1968).

in the language of the statute or in its legislative history ... would lead us to conclude that Congress intended the Board to exercise its jurisdiction over the operations of the World Bank."[96]

In *N.L.R.B. v. Catholic Bishop of Chicago*,[97] the Supreme Court held that even though the Act's definition of "employer" does not exclude church operated schools, it would imply such an exemption to avoid a constitutional question. Because "the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools," the "absence of an "affirmative intention of the Congress clearly expressed" fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers."[98]

These cases demonstrate that when countervailing policy concerns are present, the Court will require a clear statement of congressional intent before it concludes that the Act applies. Because there is no clear statement of congressional intent to apply the Act to Saginaw's on-reservation governmental gaming, the Act does not apply.

D. VIOLATION OF IGRA

Congress enacted the Indian Gaming Regulatory Act "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]"[99] It based the law on the finding 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

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[96] *Id.* at 238-39.
[97] 440 U.S. 490 (1979).
[98] 440 U.S. at 506.
[99] 25 U.S.C. § 2702(1).

within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[100] And the statute *requires* tribes to enact gaming ordinances—which must be approved by the Chairman of the National Indian Gaming Commission—before they may engage in class II[101] or class III[102] gaming. In passing the IGRA, Congress recognized the exclusive right of tribes to regulate Indian gaming and codified that right. The SECR is a class III gaming facility that has operated under IGRA since its opening. In October 1993, the tribal council passed Title 9 of the Tribal Gaming Code[103] to regulate its gaming operations. Since its inception, the Tribe has exclusively regulated Soaring Eagle Casino Resort, just as Congress intended.

The General Counsel argued and the ALJ ruled that IGRA nevertheless allows it to impose federal labor regulations at the SECR because there is "no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA."[104] But this argument ignores both the text of IGRA and the longstanding law against which IGRA was passed. The conclusion that "Congress did not "enact a comprehensive scheme governing labor relations at Indian casinos'"[105] is nonsensical since Congress enacted a comprehensive scheme governing *all* regulation at Indian casinos. It did not pick and choose between regulatory topics, but instead recognized that "Indian tribes have the *exclusive right to regulate gaming activity*[.]"[106] Moreover, when Congress enacted IGRA, the Board,

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[100] 25 U.S.C. § 2701(5) (emphasis added).
[101] 25 U.S.C. § 2710(b).
[102] 25 U.S.C. § 2710(d)(1).
[103] Ex. 2 to Tribe's Mot., Dkt. 5-3
[104] NLRB Br., Dkt.11, Pg ID 581 (*quoting San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1317 (D.C. Cir. 2007)).
[105] *Id.* (quoting *San Manuel*, 475 F.3d at 1317) (internal alteration omitted).
[106] 25 U.S.C. § 2701(5) (emphasis added).

consistent with longstanding federal law prohibiting the application of silent statutes to Indian tribes,[107] did not regulate Indian gaming.[108] So there would have been "no indication" that Congress would *need* to limit the scope of the NLRA when it enacted IGRA.

When Congress enacted IGRA, the Board respected tribal sovereignty, and the statutes easily coexisted. It is the Board who has since changed positions, with "no indication" from Congress that its reversal is proper. If the Tribe allows the Board to assert jurisdiction over SECR and apply its labor regulations—that have not been enacted by the Tribe nor approved by the Chairman of the NIGC—to the class III operation, the Tribe will be in violation of IGRA.[109]

V. CONCLUSION

Throughout these proceedings the Saginaw Tribe has repeatedly asserted that the National Labor Relations Act does not apply to its tribally owned and operated gaming facilities because Congress has not expressly authorized that application. The Tribe has further asserted that the NLRB's decision in *San Manuel* was wrongly decided when the board chose to abandon over 30 years of prior policy and the substantial weight of federal court Indian law precedent recognizing the importance of treaties and tribal sovereignty within the framework of our federal system. But even under its own analysis, the Board must give substantial consideration to Congressional and Executive policy and the impact of application of the NLRA would have on the Saginaw Tribe's treaty protected rights of self-government and the right to exclude included within the treaties of 1855 in 1864 that established the Isabella Indian Reservation. As demonstrated in the sections above, the Saginaw Tribe has established through expert testimony

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[107] *E.g., Lone Wolf v. Hitchcock,* 187 U.S. 553, 566 (1903).
[108] *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1309-10 (D.C. Cir. 2007)
[109] 25 U.S.C. § 2710(d)(1).

in these proceedings the undisputed existence of treaty rights that cannot be abrogated by the Boards application of the NLRA. For the reasons stated above, the Saginaw Tribe respectfully requests that the Board refrain from asserting jurisdiction over the Saginaw Tribe and that these proceedings be dismissed.

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