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Tribal Labor Sovereignty Act, National Labor Relations Act and more - Indian Nations Law Update - June 2015

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Sixth Circuit rules that National Labor Relations Act applies to tribe

The ***Little River Band of Ottawa Indians*** (Tribe) owns and operates Little River Casino Resort, whose revenues provide half the Tribe's budget. The casino employs 107 members of the Tribe, 27 members of other tribes and 771 non-Indians. The majority of the casino's customers are non-Indians. The Tribe's Fair Employment Practices Code (FEPC) gives the Tribe the extensive authority to determine the terms and conditions under which collective bargaining may occur and prohibits strikes.

After Teamsters, Local No. 406, filed a Charge Against the Tribe, the Acting General Counsel of the National Labor Relations Board (NLRB) filed an unfair labor practice complaint, alleging that the above-summarized provisions of the FEPC violated the National Labor Relations Act (NLRA). The Tribe argued that NLRB exercise of jurisdiction would impermissibly interfere with the Band's inherent tribal sovereign authority to regulate labor relations on its tribal lands but the Board ruled that it had jurisdiction and that the Tribe had violated the NLRA.

On June 9, the Sixth Circuit affirmed, adopting the *Coeur d' Alene* Rule. The Court concluded that the application of the NLRA did not touch "exclusive rights of self-governance in purely intramural affairs," notwithstanding the potential impact on revenues required to operate the tribal government:

> Intramural matters concern conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe. Mashantucket Sand & Gravel, 95 F.3d at 181. We find that Articles XVI and XVII [of the FEPC], even the provisions the Band underscores, do not regulate purely intramural matters; rather, they principally regulate the labor-organizing activities of Band employees, and specifically of casino employees, most of whom are not Band members.
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> The Band responds that Article XVI targets those non-member activities—particularly casino employee strikes and labor-organizing efforts—that jeopardize the revenues of its tribal government and thus threaten its tribal self-sufficiency. This argument overreaches. … The right to conduct commercial enterprises free of federal regulation is not an aspect of tribal self-government. …. And Indian tribes are not shielded from general federal statutes because the

application of those statutes may incidentally affect the revenue streams of tribal commercial operations that fund tribal government.

The Court rejected the arguments that (1) the Tribe's right to exclude non-members supported its right to bar NLRB from exercising jurisdiction, (2) the NLRA's explicit exemption for "any state or political subdivision thereof" should be extended to tribes as a matter of comity, and (3) Congress' failure to waive tribes' immunity for private suits indicated an intention that the NLRA not apply to tribes.

Judge David McKeague dissented. Judge McKeague would have adopted the position of the Tenth Circuit Court of Appeals in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), in which the Court held that the NLRA did not divest the Tribe of its authority to enact a right to work ordinance because "divestiture is disfavored as a matter of national policy … and will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority" and "[t]he correct presumption is that silence does not work a divestiture of tribal power."

Senate Committee approves tribal Labor Sovereignty Act

The Senate Indian Affairs Committee approved S.248, the Tribal Labor Sovereignty Act, by a voice vote on June 10. The Act would insulate tribes from union organizing efforts by providing tribes with the same exemption from the NLRA that state and municipal governments enjoy. There has thus far been no hearing on the companion bill in the House or Representatives, HR 511.

Ninth Circuit en banc reverses *Big Lagoon* decision on fee to trust

In *Big Lagoon Rancheria v. State of California* (9th Circuit 2014), Big Lagoon Rancheria (Tribe) sued in federal court under the Indian Gaming Regulatory Act (IGRA) to force the state to negotiate a Class III gaming compact that would permit gaming operations on fee land that the Department of the Interior had taken into trust for the Tribe in 1994 pursuant to Section 5 of the Indian Reorganization Act (IRA). The State argued that it had no obligation to negotiate with the Tribe because the Tribe lacked "Indian land" as that term was defined in the IGRA. Specifically, the state argued that the Tribe was not "under federal jurisdiction" in 1934 and was, therefore, ineligible to have land taken into trust under the IRA pursuant to the Supreme Court's 2009 decision in *Carcieri v. Salazar*. In 2014, a three-judge panel of the Ninth Circuit Court of Appeals agreed with California but on June 4, the entire Ninth Circuit Court of Appeals, sitting en banc, reversed the three-judge panel. The Court held that California could challenge the Secretary's trust acquisition only by seeking judicial review under the Administrative Procedure Act (APA) and would not be permitted to do an "end run" around the APA by making a collateral attack on the acquisition. An APA challenge, the Court observed, must be brought within six years after the Secretary's decision: "Therefore, California's arguments that the BIA does not properly hold the eleven-acre parcel in trust for Big Lagoon Rancheria fail, both because the state has failed to file the appropriate APA action and because such an APA challenge would be time-barred." For the same reasons, the Court rejected California's challenge to the Interior Department's 1979 decision to include the Tribe on its list of recognized tribal entities.

Oneida tribe prevails in dispute with the City of Green Bay

In *Oneida Seven Generations Corporation v. City of Green Bay*, Oneida Seven Generations Corporation (OSG), a wholly owned subsidiary of the Oneida Nation of Wisconsin, had sought a conditional use permit to install a renewable energy facility in the City of Green Bay (City). After initially issuing the permit, the City subsequently voted to rescind it on the basis that it was obtained through misrepresentation. OSG appealed. The circuit court affirmed the City's decision but the Court of Appeals reversed, characterizing the City's decision as "flagrant misuse of discretion, … Fickle and inconstant." The Wisconsin Supreme Court affirmed: "Like the court of appeals we conclude that the City's decision to rescind the conditional use permit was not based on substantial evidence."

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