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San Manuel's Second Exception: Identifying Treaty Provisions That Support Tribal Labor Sovereignty

Briana Green
University of Michigan Law School

NOTE

SAN MANUEL'S SECOND EXCEPTION: IDENTIFYING TREATY PROVISIONS THAT SUPPORT TRIBAL LABOR SOVEREIGNTY

*Briana Green**

Abstract

Inspired by the holding in WinStar World Casino*, this Note considers the potential for tribes to make treaty-based arguments when facing the threat of National Labor Relations Board jurisdiction. This Note presents the results of a survey of U.S. government treaties with Native Americans to identify those treaties with language similar to that interpreted by the Board in* WinStar World Casino*. The survey identified four treaties and four tribes that could make treaty-based arguments like those made in* Winstar World Casino*: the Confederated Tribes of the Umatilla Indian Reservation, the Muscogee (Creek) Nation, the Seminole Nation of Oklahoma, and the Menominee Indian Tribe of Wisconsin. As the applicability of* WinStar World Casino *is narrow, this Note also considers the possibility of a broader legislative option to clarify the law and ensure labor sovereignty for all tribes.*

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I. Introduction

As Native American tribes expand their role as employers, the courts and the National Labor Relations Board (NLRB or Board) struggle to determine the place of tribal employers with respect to the National Labor Relations Act (the Act). When it comes to labor regulation, the Board and some courts have decided that the "generally applicable" regulatory regimes of the United States federal government, such as the Act, take precedence over inherent tribal sovereignty and self-governance rights.[1] However, the Board recently held in *WinStar World Casino* that the Act does not apply if it would abrogate a tribe's treaty rights.[2] This Note begins with an analysis of the Board's findings in *WinStar World Casino*. Then, it presents original research identifying treaties with substantially similar language to that interpreted by the Board in *WinStar World Casino* to determine if other tribes could advance similar arguments when faced with the threat of Board jurisdiction. Next, it applies the analysis, standards, and canons used in *WinStar World Casino* to develop arguments against applying the Act to the four tribes identified. Finally, it considers the potential for a legislative solution to create consistency in the application of the Act to tribal enterprises.

II. The Board's Analysis in *WinStar World Casino*

Congress enacted the National Labor Relations Act in 1935.[3] The purpose of the Act is to aid the free flow of commerce by encouraging collective bargaining practices between unions, employees, and employers.[4] Congress created the National Labor Relations Board to administer the Act.[5] The NLRB oversees elections and litigates claims of "unfair labor practices" against unions and employers.[6] Failure to bargain "in good faith," or the

1. *See, e.g.*, N.L.R.B. v. Little River Band of Ottawa Indians, 788 F.3d 537 (6th Cir. 2015); Soaring Eagle Casino & Resort, 361 N.L.R.B. No. 73, 201 L.R.R.M. (BNA) 1549 (Oct. 27, 2014).

2. WinStar World Casino, 362 N.L.R.B. No. 109, 2014-2015 NLRB Dec. ¶ 15,968 (June 4, 2015).

3. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2015).

4. 29 U.S.C. § 151.

5. 29 U.S.C. § 153.

6. 29 U.S.C. §§ 153, 158.

commission's finding of other unfair labor practices, can lead to Board levied sanctions and enforcement orders.[7]

The law does not apply to all relationships that we think of colloquially as employer-employee relationships. The scope of the law is limited by the definitions of "employee" and "employer" in the Act.[8] Congress expressly excluded employers including federal government wholly owned corporations, any Federal Reserve Bank, or any state or political subdivision from the definition of "employer."[9] Congress also excluded agricultural employees,[10] domestic laborers,[11] independent contractors,[12] public employers,[13] and railway employees governed by the Railway Labor Act.[14] Subsequent Board and court decisions interpreting the Act have also excluded broad categories of employees such as supervisors, managers, and student employees.[15]

Over the past forty years, courts and the Board have sometimes concluded that corporations wholly-owned by tribes on Indian land are within Board jurisdiction. But at other times, courts have reached the opposite conclusion. In the most recent NLRB decision on-point, *WinStar World Casino*, the Board held that the Chickasaw Nation (the Nation) is not subject to the application of the Act.[16] Applying the test established in *San Manuel Indian Bingo & Casino*,[17] the Board found that application of the Act would abrogate treaty rights specific to the Nation; specifically, the 1830 Treaty of Dancing Rabbit Creek.[18] Therefore, the Board declined to assert jurisdiction over the Nation.[19]

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7. 29 U.S.C. § 158.
8. 29 U.S.C. § 152(2)–(3).
9. 29 U.S.C. § 152(2).
10. 29 U.S.C. § 152(3).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. For further analysis on these exclusions, see Robert A. Epstein, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 St. John's J. Legal Comment. 157 (2005); George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 Ariz. L. Rev. 525 (1995).
16. WinStar World Casino, 362 N.L.R.B. No. 109, at 1, 2014-2015 NLRB Dec. ¶ 15,968 (June 4, 2015).
17. San Manuel Indian Bingo & Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. 2007) (upholding the Board's conclusions in San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055 (2004)).
18. *Id.*
19. *Id.* at 4.

A. *Procedural History*

WinStar World Casino's procedural history is somewhat extraordinary. On December 18, 2010, an agent of WinStar World Casino informed employees working at the casino that they did not have the protections of the Act because of the Nation's sovereignty.[20] The Board's General Counsel filed a Complaint and Notice of Hearing on March 31, 2011.[21] The Board initially issued a Decision and Order on July 12, 2013, holding that it would be appropriate to assert jurisdiction over the Nation.[22] The Board reasoned that the treaty language read in the context of three successive treaties demonstrated a federal government trend of narrowing the sovereignty of the Chickasaw Nation.[23] Based on this interpretation, the Board found that it would not abrogate the Nation's sovereignty to apply the Act to the Nation's enterprise.[24] The Nation then filed a petition for review in the United States Court of Appeals for the Tenth Circuit.[25]

However, at the time of the July 12 Decision and Order, the Board included two members whose appointments were facing constitutional challenges in the courts.[26] In *NLRB v. Noel Canning*, the Supreme Court held that the appointments of the challenged members were invalid recess appointments, and the Court nullified the appointments.[27] Because the Board had not been properly constituted at the time of the July 12 Decision and Order, the Tenth Circuit vacated it and remanded the case back to the Board.[28] The Board then issued the June 4, 2015 Decision and Order, where it found that the Nation is not subject to the Board's jurisdiction, and that application of the Act would abrogate treaty rights specific to the Nation.[29]

The Nation, a federally recognized Indian tribe, has entered into several treaties with the United States. These include the 1830 Treaty of Dancing Rabbit Creek (the 1830 Treaty)[30] and the 1866 Treaty of Washington (the

20. WinStar World Casino, 359 N.L.R.B. 1472, 1473 (2013), *vacated by WinStar World Casino*, 362 N.L.R.B. No. 109.

21. National Labor Relations Board, *Chicksaw Nation d/b/a WinStar World Casino*, Cases & Decisions, https://www.nlrb.gov/case/17-CA-025121 (last visited Feb. 19, 2017).

22. *WinStar World Casino*, 359 N.L.R.B. at 1474–78.

23. *Id.* at 1474–77.

24. *Id.* at 1472–80.

25. *WinStar World Casino*, 362 N.L.R.B. No. 109.

26. *Id.* at 1.

27. N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 2555–56 (2014).

28. *WinStar World Casino*, 362 N.L.R.B. at 1.

29. *Id.* at 4.

30. Treaty with the Choctaw 1830, Sep. 27, 1830, 7 Stat. 333, *reprinted in* 2 Kappler, Indian Affairs: Laws and Treaties 310 (1904).

1866 Treaty).[31] The Board's 2015 decision cited relevant treaty language in Article IV of the 1830 Treaty:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.[32]

B. *Analysis*

In *WinStar World Casino*, the Board applied the Tuscarora-Coeur D'Alene framework[33] that it adopted in *San Manuel*.[34] The Tuscarora-Coeur D'Alene framework establishes that in general, a federal statute applies to all persons, including Indians and their property interests.[35] However, the framework also provides that federal law will not apply when (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 was "proof" in the statutory language or legislative history that Con-

31. Treaty with the Choctaw and Chickasaw, 1866, Jun. 28, 1866, 14 Stat. 769, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 918 (1904).

32. Treaty with the Choctaw 1830, *supra* note 30, art. IV.

33. WinStar World Casino, 362 N.L.R.B. No. 109, at 2, 2014-2015 NLRB Dec. ¶ 15,968 (June 4, 2015) (citing San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1059 (2004)).

34. San Manuel Indian Bingo & Casino v. N.L.R.B., 475 F.3d 1306, 1309–10 (D.C. Cir. 2007).

35. The Tuscarora-Coeur D'Alene framework has been discussed in the context of several federal laws. *See, e.g.*, Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 179 (2d Cir. 1996) (applying the framework to hold that OSHA regulations apply to tribal construction company); Equal Emp't Opportunity Comm'n v. Fond du Lac Heavy Equipment, 986 F.2d 246, 249–50 (8th Cir. 1993) (refusing to apply the "general applicability" rule to the Age Discrimination in Employment Act). For a detailed criticism and analysis of the Tuscarora-Coeur D'Alene framework, see N.L.R.B. v. Little River Band of Ottawa Indians, 788 F.3d 537, 557–61 (2015) (McKeague, J., dissenting).

gress did not intend the Act to apply to Indian tribes.[36] If the Board finds any of these exceptions satisfied, it will not assert jurisdiction.[37]

In *WinStar World Casino*, after finding that the first and third exceptions did not apply, the Board determined that the Act would abrogate treaty rights, satisfying the second San Manuel exception.[38] The Board thus declined to assert jurisdiction.[39]

The Nation argued that applying the Act would abrogate two protected treaty rights, (1) the right to exclude or condition entrance on tribal territory; and (2) the Nation's treaty right to self-government.[40] The Nation also argued that the specific language in Article IV of the 1830 Treaty exempts the Nation from the application of all federal laws except those enacted pursuant to Congress' power to legislate concerning Indian affairs, and further that the Choctaw and Chickasaw Nations agreed to recognize Congress's plenary power only with respect to laws regulating Indian affairs.[41]

The Board rejected the Nation's "right to exclude" argument, citing recent decisions by the Board finding that the treaty provision articulating a tribe's right to exclude non-members from its territory was insufficient to bar application of the Act.[42] But the Board agreed with the Nation that the 1830 Treaty limited Congress's plenary power to Indian Affairs such that assertion of the Board's jurisdiction would abrogate the Nation's treaty rights.[43]

C. *The Rules of Construction Favoring Indian Tribes*

The Board applies six principles when construing Indian treaties. These include the following:

1. Indian nations did not seek out the United States to enter into these treaties. The Treaties were imposed upon the Nations and they had no choice but to consent.[44]

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36. *San Manuel*, 475 F.3d at 1310 (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985)).

37. The Board also articulated a fourth option in *San Manuel*, indicating that it would make a further inquiry to determine whether policy considerations suggest the Board should or should not assert its discretionary jurisdiction on a case-by-case basis. *Id.*

38. *WinStar World Casino*, 362 N.L.R.B. at 2.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2 n.6; *see also* Soaring Eagle Casino & Resort, 361 N.L.R.B. No. 73, 201 L.R.R.M. (BNA) 1549 (Oct. 27, 2014).

43. *WinStar World Casino*, 362 N.L.R.B. at 2.

44. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

2. As such, the treaties must be construed "as justice and reason demand."[45]
3. The Board should look "only to the substance of the right, without regard to technical rules."[46]
4. "[E]nlarged rules of construction are adopted in reference to Indian treaties."[47]
5. Treaties with the tribes "should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[48]
6. "[T]he utmost good faith shall always be observed towards the Indians."[49]

In considering the enlarged rules of construction to be used in interpreting Indian treaties, the Board found that Article IV of the 1830 Treaty, which secures the Nation from "all laws . . . except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs," forecloses application of the Act.[50] The Act was not enacted pursuant to the Indian Commerce Clause of the Constitution and was not passed as legislation over Indian affairs.[51] The Board held that to assert "jurisdiction would abrogate the Nation's treaty right to be secure from and against all laws except those passed by Congress under its authority over Indian affairs."[52]

The Board also found Article 7 of the subsequent 1866 Treaty, which states that the Nation agrees to only such laws, "that Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of persons and property within the Indian Territory" to be compatible with Article IV of the 1830 Treaty limiting Congress's power to legislation specific to Indian affairs.[53] Article 45 of the 1866 Treaty further served to reaffirm the obligations of

45. United States v. Winans, 198 U.S. 371, 380–81 (1905).

46. *Id.*

47. *In re* Kansas Indians, 72 U.S. (5 Wall.) 737, 760 (1866).

48. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973)); Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Choate v. Trapp, 224 U.S. 665, 675 (1912); Winters v. United States, 207 U.S. 564, 576–77 (1908)).

49. Northwest Ordinance art III (July 13, 1787).

50. WinStar World Casino, 362 N.L.R.B. No. 109, at 3, 2014-2015 NLRB Dec. ¶ 15,968 (June 4, 2015).

51. *Id.* at 4.

52. *Id.* (quotation marks omitted).

53. *Id.* at 3 (quoting Treaty with the Choctaw and Chickasaw, 1866, *supra* note 31).

the 1830 Treaty, not to limit them.[54] Because asserting jurisdiction would abrogate treaty rights specific to the Nation, the Board declined to assert jurisdiction and dismissed the complaint.[55]

III. Tribes with Similar Treaty Provisions and Potential Arguments Against the Application of the Act

A. *Introduction*

The Board's decision in *WinStar World Casino* is an exciting and modern example of a decision maker finding for a tribe based on treaty language. To explore the potential for other tribes to take advantage of this moment, Part III surveys other ratified treaties to determine if the arguments advanced in *WinStar World Casino* could be advanced in future litigation regarding the Act.

B. *Method*

In order to identify other treaties that would satisfy the second *San Manuel* exception, I read all of the ratified treaties with Indian tribes included in Volume II of Kappler's *Indian Affairs: Laws and Treaties*.[56] Focusing on language limiting Congress' plenary power over tribes to federal laws related to Indian affairs, I have identified four treaties and four corresponding tribes who could argue that the application of the Act would abrogate their treaty rights and satisfy the second *San Manuel* exception as interpreted in *WinStar World Casino*. In order to demonstrate the highly varied and diverse nature of tribal labor and employment, each analysis includes an extremely brief background on the tribe's relationship with the United States, the current tribal governance structure, pertinent tribal labor laws, as well as the scope of tribal enterprise both on and off reservation.

54. *Id.* at 3–4 (citing Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964, 978 (10th Cir. 1994), *rev'd on other grounds sub nom*. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995)).

55. *WinStar World Casino*, 362 N.L.R.B. at 4.

56. David Selden & Monica Martens, *Basic Indian Law Research Tips – Part I: Federal Indian Law*, http://www.narf.org/nill/resources/federal_indian_law_research_guide.pdf (last updated Aug. 2008), originally printed in Colorado Lawyer, May 2005, at 43.

C. *Results*

A. Confederated Tribes of the Umatilla Indian Reservation
B. Muscogee (Creek) Nation
C. Seminole Nation of Oklahoma
D. Menominee Indian Tribe of Wisconsin

Tribe	Treaty
Confederated Tribes of the Umatilla Indian Reservation	Treaty with the Walla Walla, Cayuse, Etc. 1855[57]
Muscogee (Creek) Nation	Treaty with the Creeks, Etc. 1856[58]
Seminole Nation of Oklahoma	Treaty with the Creeks, Etc. 1856[59] Treaty with the Seminole, 1866[60]
Menominee Indian Tribe of Wisconsin	Treaty with the Menominee, 1856[61]

57. Treaty with the Wallawalla, Cayuse, etc., 1855, Mar. 8, 1859, 12 Stat. 945, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 694 (1904).

58. Treaty with the Creeks, etc., 1856, Aug. 16, 1856, 11 Stat. 699, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 756 (1904).

59. *Id.*

60. Treaty with the Seminoles, 1866, Jul. 19, 1866, 14 Stat. 755, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 910 (1904).

61. Treaty with the Menominee, 1856, Apr. 18, 1856, 11 Stat. 679, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 755 (1904).

1. Confederated Tribes of the Umatilla Indian Reservation (CTUIR)

The CTUIR is a union of three tribes: the Cayuse, Umatilla, and Walla Walla.[62] The Confederated Tribes signed a treaty with the U.S. government in 1855 (the 1855 Treaty), ceding over 6.4 million acres to the United States.[63] Located in northeast Oregon, the 273 square mile reservation is home to nearly half of the 3,100 tribal members, 300 non-member Indians and 1,500 non-Indians.[64] The CTUIR is governed by a Constitution adopted in 1949.[65] The General Council, comprised of all Tribal members age 18 and older, elect the tribal governing body—an eight-member Board of Trustees.[66] A chairman presides over the Board,[67] which sets Tribal policy, makes decisions regarding Tribal affairs, and determines priority projects and issues.[68] The Tribal government employs nearly 500 employees in various departments concerning public health, natural resources, public safety, and economic development.[69] The Tribe employs more than 800 employees at its Wildhorse Casino & Resort and nearly 300 employees in other ventures.[70] Other examples of tribal enterprise include a Tribal Native Plant Nursery,[71] a cultural institute,[72] and commercial developments such as a gas station, a market, and a grain elevator.[73]

a. CTUIR Right to Work Code

The CTUIR enacted the Right to Work Code in 2009 as an expression of the Tribe's:

> desires to establish its own law governing the workplace, the rights of employees and the obligations of employers within the Umatilla Indian Reservation, and to avoid being bound by the laws of the

62. Confederated Tribes of the Umatilla Reservation, *About Us*, http://ctuir.org/about-us (last visited Feb. 19, 2017).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. Confederated Tribes of the Umatilla Reservation, *CTUIR Tribal Native Plant Nursery*, http://www.tribalnativeplants.com (last visited Feb. 17, 2017).
72. Tamástslikt Cultural Institute, http://www.tamastslikt.org (last visited Feb. 17, 2017).
73. Confederated Tribes of the Umatilla Reservation, *Tribal Enterprises & Businesses*, http://ctuir.org/tribal-enterprises-businesses (last visited Feb. 17, 2017).

> other sovereigns, such as the federal government . . . . No employee within the Umatilla Indian Reservation shall be forced to join, or be penalized for not joining, a union or other collective bargaining organization, and should be able to make that choice freely and voluntarily.[74]

On-reservation employees cannot be forced to join or resign from,[75] pay dues to,[76] or be vetted by a labor union.[77] Employers cannot deduct union dues from wages,[78] discriminate or retaliate against, threaten, or intimidate[79] employees based on union affiliation or lack thereof.[80] Unions are forbidden from attempting to organize tribal government employees[81] unless expressly authorized by law.[82] Authorized labor unions[83] and their agents[84] must register with and pay a fee to the Tribe.

The Tribal Court has jurisdiction over all causes of action alleging violations of the Right to Work Code.[85] The Court will issue injunctive relief and damages resulting from violation or threatened violation of the provisions of the Code.[86]

b. Relevant Treaty Provisions & Arguments Against Board Jurisdiction

In the 1855 Treaty, Article 8 states that, "said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States *for the government of said Indians*."[87]

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74. RIGHT TO WORK CODE § 101(G)–(H) (2009) (Confederated Tribes of the Umatilla Reservation).

75. *Id.* § 1.03(A)(1).

76. *Id.* § 1.03(A)(3).

77. The code refers to labor unions as "Labor Organizations" and defines them as "any organization of any kind, or agency or employee representation committee or union, which exists for the purpose, in whole or in part, of dealing with an Employer or Employers concerning wages, rates of pay, hours of work, other conditions of employment, or other forms of compensation." *Id.* § 1.02(C).

78. *Id.* § 1.04(A).

79. *Id.* § 1.04(C).

80. *Id.* § 1.04(B).

81. The code defines "Tribal Government Employer" as "the Tribe's government departments, programs and agencies, including the Yellowhawk Tribal Health Center and the Umatilla Reservation Housing Authority, but does not include Tribal enterprises whether they be incorporated or unincorporated." *Id.* § 1.02(G).

82. *Id.* § 1.04(D).

83. *Id.* § 1.05(A)–(B).

84. *Id.* § 1.06(A).

85. *Id.* § 1.07(A)(2).

86. *Id.* § 1.06(B)(1).

87. Treaty with the Wallawalla, Cayuse, etc., *supra* note 57, art. 8 (emphasis added).

If the Board sought to assert jurisdiction over the Tribe, the Tribe could make a strong argument under the second *San Manuel* exception that the Board should not assert jurisdiction because application of the Act would abrogate a treaty right specific to the Tribe.[88]

In *WinStar World Casino*, the Board found that in "giving due consideration to the enlarged rules of construction to be used in interpreting Indian treaties," a treaty provision that limited the legislative authority of the federal government to that legislation enacted pursuant to the Indian Commerce Clause or concerning Indian affairs foreclosed application of the Act.[89] There, the relevant treaty language limited the federal legislative authority to that enacted "for the government of said Indians."[90] Construing this language liberally in favor of the Tribe, an agreement to submit to "laws, rules, and regulations" "prescribed by the United States for the government of said Indians" should be read to limit the legislative authority of the United States to that legislation enacted pursuant to the Indian Commerce Clause or as legislation over Indian affairs.

The Board could respond that because the treaty provision does not expressly state a limitation to regulate "Indian Affairs" as articulated in *WinStar World Casino*, the language should not have the same force. The tribe's rejoinder is that any ambiguity in scope should be resolved to the tribe's benefit. To resolve ambiguity, the tribe can cite to Article 8 of the 1855 Treaty which articulates prospective goals for the tribe's relationship with the United States: friendly relations, non-violent methods of conflict and dispute resolution, and the limited extent of the U.S. legal authority over the tribe.[91] Looking "only to the substance of the right, without regard to technical rules,"[92] the Board should find that the substance of the treaty provision limits the federal government's legislative authority over the tribe to laws enacted pursuant to the Indian Commerce Clause or regarding Indian affairs, thus requiring the Board to refrain from asserting jurisdiction over the tribal enterprise.

88. San Manuel Indian Bingo & Casino, 341 N.L.R.B. 138, 1055 (2004).

89. WinStar World Casino, 362 N.L.R.B. No. 109, at 3, 2014-2015 NLRB Dec. ¶ 15,968 (June 4, 2015) (quotation marks omitted).

90. Treaty with the Wallawalla, Cayuse, etc., *supra* note 57, art. 8.

91. *Id.*

92. United States v. Winans, 198 U.S. 371, 380–81 (1905).

2. Muscogee (Creek) Nation[93]

The Muscogee (Creek) Nation (the Muscogee (Creek)) is one of the historical Five Civilized Tribes of the American Southeast.[94] After signing a treaty with the U.S. in 1832 (the 1832 Treaty), the Muscogee (Creek) were removed from their ancestral homeland in the southeastern woodlands to Indian Territory in Oklahoma.[95] The Muscogee (Creek) signed another treaty with the U.S in 1856 before the Civil War (the 1856 Treaty).[96] While the Muscogee (Creek) has no reservation, its tribal headquarters are in Okmulgee, Oklahoma, in eastern central Oklahoma.[97] As of April 20, 2016 the Nation has 80,591 members.[98] The tribal constitution was ratified in 1979.[99] The Principal Chief and Second Chief serve as the Muscogee (Creek)'s executive authority and have a cabinet to assist them.[100] The Principal and Second Chief are democratically elected every four years, and the Principal Chief appoints the Tribal Administrator and Secretary.[101] The National Council, the legislative body, is made up of 16 elected members representing districts within the tribal jurisdictional area.[102] The Muscogee (Creek)'s government provides services including housing, environmental services, and police.[103] The Muscogee (Creek) is engaged in various enterprises including gaming, smoke shops, truck stops, and recreational venues.[104] [105]

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93. The Muscogee (Creek) Nation, *Muscogee (Creek) Nation History*, CULTURE & HISTORY, http://www.mcn-nsn.gov/culturehistory/ (last visited Feb. 14, 2017).

94. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 232 (2006).

95. Muscogee (Creek) Nation, *supra* note 93.

96. Treaty with the Creeks, etc., *supra* note 58.

97. Muscogee (Creek) Nation, *supra* note 93.

98. The Muscogee (Creek) Nation, *Citizenship Facts & Stats*, CITIZENSHIP OFFICE, http://www.mcn-nsn.gov/services/ citizenship/citizenship-facts-and-stats/ (last visited Mar. 15, 2017).

99. MUSCOGEE CONST. (ANNOTATED) (1979), http://www.creeksupremecourt.com/index.php/mcn-constitutiion.

100. The Muscogee (Creek) Nation, *Executive Branch*, GOVERNMENT, http://www.mcn-nsn.gov/government/ executive-branch/ (last visited Mar. 17, 2017).

101. MUSCOGEE CONST. ART. V (ANNOTATED) (1979), http://www.creeksupremecourt.com/index.php/mcn-constitutiion.

102. *Id.* art. VI, § 1–2.

103. The Muscogee (Creek) Nation, DEPT. OF HOUSING, http://www.mcnhousing.com (last visitied Mar. 15, 2017); The Muscogee (Creek) Nation, *Environmental Services*, SERVICES, http://www.mcn-nsn.gov/services/environmental-services/ (last visited Mar. 17, 2017); The Muscogee (Creek) Nation, *Lighthorse Tribal Police*, SERVICES, https://www.mcn-nsn.gov/services/lighthorse-police/ (last visited Mar. 15, 2017).

104. OKLAHOMA HISTORICAL SOCIETY, OKLAHOMA TRIBAL POCKET GUIDE 2014, Muscogee (Creek) Nation, http://www.okhistory.org/pdf/pocketguide.pdf.

105. The Muscogee (Creek) Code does not currently govern labor relations. Therefore, this analysis will only consider arguments that can be made under the applicable treaty.

Article 4 of the 1856 Treaty states "no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians."[106] Article 15 affirms, "the Creeks and Seminoles shall be secured in the unrestricted right of self-government."[107]

If the Board sought to assert jurisdiction over the Muscogee (Creek)'s tribal enterprise by arguing that the treaty does not articulate language strong enough to prevent such jurisdiction, the Muscogee (Creek) could respond with arguments made under the second *San Manuel* exception that application of the Act to the Muscogee (Creek)'s enterprise would abrogate a Treaty right specific to the Muscogee (Creek). The treaty guarantees the right of self-government and keeps the Muscogee (Creek) free from laws passed by other states or territories. Pursuant to Article 15 of the 1856 treaty, the Board could argue that the application of a federal law would not be taking away from the tribe's right of self-government where the Muscogee (Creek) has not enacted any labor law or attempted to otherwise govern labor relations. If the Muscogee (Creek) enacted its own labor code and established jurisdiction over labor disputes, or articulated a public policy explaining its decision not to enact a labor code pursuant to its right to self-government, the Muscogee (Creek) could argue that applying the Act would abrogate the Muscogee (Creek)'s right to self-govern and determine its own public policy with respect to labor disputes arising in its enterprises.

The Muscogee (Creek) could also argue that construing the treaty "as justice and reason demand," the Board should look "only to the substance of the right, without regard to technical rules." Construing the treaty "liberally in favor of the Indians," the application of the Act would deprive the Muscogee (Creek) of its right of self-governance by foreclosing the its ability to meaningfully enact self-determined labor law and policy as the it deems necessary. Any ambiguity as to whether self-governance includes positive and negative rights should be resolved in favor of the Muscogee (Creek) to fully promote the ideals articulated in the treaty.

3. Seminole Nation of Oklahoma[108]

Like the Muscogee (Creek), the Seminole Nation of Oklahoma (the Seminole) is one of the Five Civilized Tribes of the American Southeast.[109] The Seminole also signed the 1832 Treaty, and were removed from their

106. Treaty with the Creeks, etc., *supra* note 58, art. 4.

107. *Id.* art. 15.

108. *See* The Great Seminole Nation of Oklahoma, *About the Seminole Nation of Oklahoma*, CULTURE, http://sno-nsn.gov/culture/aboutsno (last visited Feb. 17, 2017).

109. Cherokee Nation, *Inter-Tribal Council of the Five Civilized Tribes*, http://www.fivecivilizedtribes.org (last visited Feb. 17, 2017).

ancestral homeland in Florida to Indian Territory in Oklahoma.[110] The Seminole Nation is also a party to the 1856 Treaty discussed previously with regard to the Muscogee (Creek) Nation. The Seminole Nation is located in south-central Oklahoma, within the Seminole Nation Tribal Complex in Wewoka, Oklahoma, in Seminole County.[111] The tribe has 372 acres of federal trust land, 53 acres of fee-simple land, and 35,443 allotted acres.[112] There are approximately 17,000 tribal members, with 5,315 tribal citizens living in the Seminole County service area.[113] The Seminole Nation's constitution was ratified in 1969.[114] The democratically elected Chief and Assistant Chief chair the Seminole General Council.[115] The Seminole Nation is composed of 14 matrilineal bands, including two Freedman bands.[116] Each band has an elected chief and assistant chief.[117] Tribal government services include Indian child welfare, gaming, education, health care and police.[118] The Seminole Nation Department of Commerce oversees tribal enterprises in gaming, retail, and travel.[119]

a. Seminole Nation Employment Rights Act (the ERA) and Employment Relations Code (the ERC)

The Seminole Nation enacted the ERA in 1993.[120] The ERA establishes the Employment Rights Office and the Seminole Nation Employment Rights Commission, which are together responsible for enforcement of the ERA in conjunction with the Nation's Executive Office.[121] The ERA establishes policies including Indian preference in employment,[122] contracting,[123] training,[124] religious freedom,[125] and union compliance and complaints.[126]

110. The Great Seminole Nation of Oklahoma, *supra* note 108.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*; *see also* Martha Melaku, Note, *Seeking Acceptance: Are the Black Seminoles Native Americans?* Sylvia Davis v. The United States of America, 27 Am. Indian L. Rev. 539, 541, 543 (2003).
117. The Great Seminole Nation of Oklahoma, *supra* note 108.
118. *Id.*
119. *Id.*
120. Employment Rights Act tit. 11A (2015) (Seminole Nation).
121. *See id.* §§ 104, 106.
122. *Id.* § 108.
123. *Id.* § 109.
124. *Id.* § 111.
125. *Id.* § 114.
126. *Id.* § 115.

The Seminole Nation enacted the ERC in 2008.[127] The ERC establishes tribal employee salaries,[128] payroll procedures,[129] employee benefits,[130] discipline,[131] and various other employment related policies.[132] The ERC creates a Personnel Board to develop and approve all personnel policies, review employment related actions, report to the General Council on personnel related matters, and serve on personnel grievance boards.[133] The ERC delegates the implementation and enforcement of policies established in the ERC to the Director of the Department of Human Resources.[134]

b. Relevant Treaty Provisions & Arguments Against Board Jurisdiction

In the 1856 Treaty,[135] Article 4 states "no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians."[136] Article 15 affirms, "the Creeks and Seminoles shall be secured in the unrestricted right of self-government."[137] While the treaty language is the same as for the Muscogee (Creek), the Seminole Nation could make different arguments against Board jurisdiction because of its well-articulated labor laws and policy established in the ERC and the ERA.

If the Board sought to assert jurisdiction over the Seminole, it could argue that application of the Act would abrogate rights specific to the Seminole. Article 15 guarantees the unrestricted right of self-government. Here, the Seminole has codified law regarding labor and employment, and has a sophisticated court system to adjudicate claims arising out of labor and employment disputes. If the Board were to assert jurisdiction, they would be impermissibly infringing on the Seminole's ability to govern itself, determine its own labor policy, and adjudicate claims arising out of employer-employee relationships.

The Seminole could make the same argument put forward in the Muscogee (Creek) analysis regarding potential ambiguity in the definition of "self-government," asserting that the application of the Act would abrogate the Seminole's right to self-govern and determine its own public policy to

127. EMPLOYMENT RELATION CODE tit. 11 (2015) (Seminole Nation).
128. *Id.* § 301.
129. *Id.* § 601.
130. *Id.* § 701.
131. *Id.* § 801.
132. *See id.* §§ 901, 1001.
133. *Id.* §§ 201–207.
134. *Id.* § 401.
135. Treaty with the Creeks, etc., *supra* note 58.
136. *Id.* art. 4.
137. *Id.* art. 15.

adjudicate labor disputes arising in its tribal enterprise or impacting its employees.

In *WinStar World Casino*, the Board read the same language (before the proviso) to be compatible with the Nation's earlier agreement to be subject only to federal legislation concerning Indian Affairs.[138] There is no reason the Board should read the language here to apply differently to the right of self-government. The language of the 1866 Treaty is compatible with the 1856 Treaty, and provides no reason to give a less favorable reading to the tribe. When read in the context of the proviso, which explicitly states that any legislation shall not "interfere with or annul their present tribal organization, rights, laws, privileges, and customs,"[139] to apply the Act where the Seminole Nation has developed a sophisticated system of labor and employment law would impermissibly abrogate the treaty right.

It is possible that the Board could quibble over the meaning of *present* tribal law, and assert that "present" should mean the "present" time in which the treaty was signed, as in 1866. The Seminole Nation could alternatively argue that, read liberally in favor of the tribe, "present" should be construed to mean at the time the treaty right is asserted—the literal present day.

4. The Menominee Indian Tribe of Wisconsin[140]

The Menominee Tribe's relationship with the U.S. government has varied over time. Since the Treaty of 1848, the tribe was terminated[141] by Congress in the 1950s,[142] fought for federal recognition in the 60s and 70s,[143] obtained recognition in 1973,[144] and engaged in successful litigation over subsistence and other treaty rights.[145] The Menominee tribe is located 45 miles northwest of Green Bay, Wisconsin.[146] The Menominee Indian Reservation is 357 square miles, and is home to 4,857 of the tribe's 8,551 members.[147] The tribe is governed by a nine-member legislature that is

138. WinStar World Casino, 359 N.L.R.B. 1472, 1475–77 (2013), *vacated by* WinStar World Casino, 362 N.L.R.B. No. 109, 2014-2015 NLRB Dec. ¶ 15,968 (June 4, 2015).

139. Treaty with the Creeks, etc., *supra* note 59.

140. *See* The Menominee Indian Tribe of Wisconsin, *Brief History - About Us*, CULTURE, http://www.menominee-nsn.gov/CulturePages/BriefHistory.aspx (last visited Feb. 14, 2017).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* For further background and discussion of the termination era, see WILLIAM C. CANBY JR., AMERICAN INDIAN LAW IN A NUTSHELL 27–30 (6th ed. 2015).

145. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968).

146. The Menominee Indian Tribe of Wisconsin, *supra* note 140.

147. *Id.*; MENOMINEE INDIAN TRIBE OF WISCONSIN, FACTS AND FIGURES REFERENCE BOOK 10 (Supplement as of June 2008), http://www.menominee-nsn.gov/CulturePages/Documents/FactsFigureswithSupplement.pdf.

elected by enrolled tribal members.[148] The legislature annually elects a Chairperson, Vice Chairperson, and Secretary.[149] The judiciary is composed of lower and appellate tribal courts.[150] Tribal government departments include housing, medical, social services, and law enforcement.[151] The tribe has several business ventures, including the Menominee Casino Resort, Menominee Fuel Station, and a sawmill.[152] With over 650 employees, the tribe is one of the largest employers in Menominee County.[153] [154]

Article 3 of the 1856 Treaty with the Menominee[155] contains the following language:

> [I]t is further stipulated—1. That in case this agreement and the treaties made previously with the Menomonees (sic) should prove insufficient, from causes which cannot now been [be] foreseen, *to effect the said objects*, the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of the affairs of the Menomonees as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law as experience shall prove to be necessary.[156]

In other words, the 1856 Treaty provides that if the existing treaties become insufficient, the federal government can establish necessary laws "to effect the said objects" of the treaties. The Menominee treaties address many "objects," including: land cessions and removal, peace, provisions of food and farming equipment, and annuities.[157] But nowhere do the treaties address labor policy, organization, or collective bargaining. The tribe could

148. MENOMINEE INDIAN TRIBE OF WISCONSIN, *supra* note 147, at 4.
149. *Id.* at 7.
150. *Id.*
151. *Id.* at 49.
152. *Id.* at 31.
153. *Id.*
154. The Menominee Code does not currently govern labor relations. Therefore, this analysis will only consider arguments that can be made under the applicable treaty.
155. Treaty with the Menominee, *supra* note 61.
156. *Id.* art. 3 (emphasis added).
157. The different treaties include: Treaty with the Menominee, 1817, art. 1–2, Mar. 30, 1817, 7 Stat. 753, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 138 (1904); Treaty with the Menominee, 1831, Feb. 8, 1831, 7 Stat. 342, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 319 (1904); Treaty with the Menominee, 1832, Oct. 27, 1832, 7 Stat. 405, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 377 (1904); Treaty with the Menominee, 1836, Sept. 3, 1836, 7 Stat. 506, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 463 (1904); Treaty with the Menominee, 1848, art. 2, Jan. 23, 1849, 9 Stat. 952, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 572 (1904); Treaty with the Menominee, 1854, art. 2, May 12, 1854, 10 Stat. 1064, *reprinted in* 2 KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 626 (1904); Treaty with the Menominee, 1856, *supra* note 61, art. 3.

thus argue that it consented to legislative authority regarding the objects of the treaties, and nothing more. The Board could counter that that language is not adequately specific to serve as a limit on Congressional plenary power. The tribe could rebut that, construing the language liberally in favor of the tribe, to apply the Act would abrogate the tribe's right to be free from federal legislation regarding subjects not contemplated by the United States and the tribe at time of the treaty's signing.

While the use of treaty language in the ways suggested could serve to maintain tribal labor sovereignty for the identified tribes, the exception is of limited application. Many tribes face legal uncertainty and potentially costly federal lawsuits when developing their own labor law, interacting with Unions on reservation land, and determining whether or not the Act applies to tribal enterprise. The next part will explore the potential impacts of federal legislative solutions to the tribal labor sovereignty question. The proposed Tribal Labor Sovereignty Act of 2015 would amend the National Labor Relations Act to exclude tribal governments as employers for purposes of the Act, thereby ending the uncertainty for tribes in some circumstances, and maintaining labor sovereignty for tribal employers.[158] However, for the time being, the Board and the Courts struggle to determine the place of tribal employers in the national labor framework, leaving the tribes with insufficient information to accurately weigh the risks of exercising self-governance and sovereignty over tribal labor.

IV. The Proposed Tribal Labor Sovereignty Act

While treaty language could be put to work for these four tribes, the limited findings of the treaty survey show that, despite the federal legislative trend towards Tribal self-determination and federal statutes defining much of the relationship between the federal government and individual Tribal governments, individual tribes face inconsistent and highly fragmented judgments. However, some Congressional efforts have been made to address uncertainty in arguably "generally applicable" federal statutes, including the NLRA.

Congress attempted to pass legislation in 2011 and again in 2015 that would limit the Board's jurisdiction in Indian country by creating an explicit exclusion in the Act for tribal employers, adding to the exclusions discussed in Part II.[159] The amendment, sponsored by Representative Todd Rokita (R-IN), would "clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act" to amend the definition of

158. Tribal Labor Sovereignty Act of 2015, H.R. 511, 114th Cong. (2015) (as received by Senate, Nov. 18, 2015).

159. *Id.* § 2.

"employer" in the Act to exclude "any enterprises or institutions owned and operated by an Indian tribe and located on its Indian lands."[160] Additionally, the statute would define "Indian," "Indian tribes" and "Indian lands."[161]

This amendment would make certain that the Act does not apply to tribal enterprises or tribal governments located on Indian lands. Tribes could then enforce their own labor laws on their lands without being exposed to Board oversight. However, the proposed amendment creates a gap for those tribes who do not have reservations or trust land, or who operate enterprises or institutions on non-Indian lands. The amendment thus does not eliminate federal labor regulation from Indian country as a whole. Considering the diverse approaches and outcomes the various circuits and the Board have taken with respect to jurisdiction, this amendment would help to clarify and bolster Tribal labor sovereignty on Indian lands.

This amendment could be improved by removing the "Indian lands" provision. Hinging jurisdiction on "Indian lands" creates an unfair result for tribes without reservations. It also implicitly supports the *Montana* doctrine, which limits tribal regulatory jurisdiction over non-members and suggests that labor regulation is not an essential tenet of self-government. Yet today, labor regulation is an essential tool for tribal governments operating sophisticated enterprises with growing numbers of employees.

Congress could also consider a narrower exclusion under the Indian Gaming Regulatory Act (IGRA). Many of the unfair labor practices that raise jurisdiction questions occur in casinos operated pursuant to IGRA. A potential amendment to IGRA could be written narrowly to address commonly litigated jurisdictional questions. But this could result in a shortsighted band-aid that may not reflect the future nature of Tribal employment, especially as tribes continue to enter into a more diverse range of enterprises.[162] While a legislative remedy could provide heightened clarity for tribes in the present day, it could also be quickly eroded by subsequent turns in Congressional perspective. This could lead to uncertainty similar to that now created by conflicting judicial and Board opinions.

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160. *H.R. 511 – Tribal Labor Sovereignty Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/511/amendments (last visited Feb. 20, 2017).

161. H.R. 511, § 2.

162. *See, e.g.*, Memorandum from Monty Wilkinson, Director of the Executive Office for United States Attorneys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf. As tribes have become more economically sufficient, they have broadened the range of tribal businesses, which could raise additional jurisdictional challenges that an amendment to IGRA would not address. *Id.*

V. Conclusion

If the Board attempts to assert jurisdiction over Tribal labor regulation, the second *San Manuel* exception creates an avenue for these four tribes to argue that the Act does not apply to their tribal enterprises. These tribes could use treaty interpretation canons to assert that the application of the Act would abrogate a treaty right specific to the tribe. Yet for Indian country at large this exception provides a limited answer to the broader questions of Tribal civil and regulatory jurisdiction. The potential legislative solution would provide heightened clarity while simultaneously divesting sovereignty and self-governing authority from nations in the labor realm, especially those who operate on non-Indian lands. In light of the Supreme Court's recent decisions and historical track record in Indian law, and the presence of controversial Indian law doctrinal questions currently being litigated in the lower federal courts, there are significant risks in pushing legal questions to the judiciary. Nonetheless, the Board's decision in *WinStar World Casino* represents an exciting example of decision makers taking the long view—seeing historical treaties as modern tools of diplomacy, while considering seriously the present implications of their interpretations. While it is difficult to predict how future decisions impacting tribal sovereignty and self-governance will shape an interpretation like than in *WinStar World Casino*:

> [t]he relative stability [of Indian law doctrine] should now itself be honored. To the tribes, their chief task always has been not just to survive, but to build traditional and viable homelands for their people. The original promise of a measured separatism might have allowed that goal to be reached, but the work was interrupted by a century of assimilationist policies and their effects. Perhaps, at last, the tribes can begin to withdraw from the judicial system and train their energies on fulfilling their historic task of creating workable islands of Indianness within the larger society.[163]

163. Charles F. Wilkinson, American Indians: Time and the Law 122 (1987).