CHAPTER [____]

APPLICABILITY OF FEDERAL EMPLOYMENT AND LABOR LAWS TO INDIAN TRIBES: *FEDERAL POWER COMMISSION v. TUSCARORA INDIAN NATION*

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I. What is the *Tuscarora* Decision?

In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the United States Supreme Court decided whether lands owned in fee simple by the Tuscarora Indian Nation (i.e., non-trust lands) could be condemned by the developer of a hydroelectric power project under the authority of the Federal Power Act, 16 U.S.C. § 791 et seq. *Id.* at 100. The 1,000 acres of Tuscarora lands needed for the project were "part of a separate tract of 4,329 acres purchased in fee simple by [Tuscarora], with the assistance of Henry Dearborn, then Secretary of War, from the Holland Land Company on November 21, 1804, with the proceeds derived from the contemporaneous sale of their lands in North Carolina – from which they had removed in about the year 1775 to reside with the Oneidas in central New York." *Id.* at 105-106.

Tuscarora argued that its fee simple lands were part of a reservation and that, under Section 4(e) of the Federal Power Act, reservation lands could only be taken for the hydroelectric project if such project "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e). The Supreme Court disagreed – finding that the Federal Power Act expressly defined "reservations" to only include lands "owned by the United States." *Id.* at 111-112. Thus, the language of the Federal Power Act and Congressional intent was clear – lands owned in fee simple by an Indian tribe (and not held by the United States in trust for an Indian tribe) were not part of a "reservation" under the Federal Power Act. Another part of the Federal Power Act made clear that a licensee authorized to use lands owned by the United States, including "tribal lands embraced within Indian reservations," could not exercise condemnation authority but instead was required to pay annual charges for the use of the federally-owned lands. The Supreme Court found Congress' clear intent to confine "reservations" under the Federal Power Act to lands owned by the United States and not to lands owned in fee by Tuscarora. *Id.* at 114.

The Court also addressed whether the licensee could condemn Tuscarora's fee lands that, as the Court had just held, were not part of a "reservation." Tuscarora argued that the condemnation authority of the Federal Power Act, "being only a general Act of Congress, does not apply to Indians or their lands." *Id.* at 115. In response, the Court stated "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." *Id.* at 116. Lower courts have relied upon this statement to apply federal employment and labor laws to Indian tribes.

II. Why Does *Tuscarora* Matter Today?

Although the United States Supreme Court has never subsequently relied upon *Tuscarora* when analyzing the application of federal statutes to Indian tribes, some lower courts (including the Ninth Circuit Court of Appeals) have cited to *Tuscarora* as establishing a presumption that a federal law that is generally applicable to all persons (and otherwise silent as to its application to Indian tribes) will apply to Indian tribes. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations"). As discussed in more detail below, the language from *Tuscarora* is regularly cited or discussed by lower courts when analyzing whether federal employment and labor laws apply to Indian tribes.

III. The Ninth Circuit's Framework – *Donovan v. Coeur d'Alene Tribal Farm*

In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), the Court addressed whether Congress intended the Occupational Safety and Health Act [OSHA] to apply to tribal enterprises. The specific enterprise in question was a commercial farming enterprise wholly owned and operated by the Tribe, which produced grain and lentils for sale on the open market and employed 20 workers – some of whom were non-Indian. "Apart from its tribal ownership, the farm is similar in its operation and activities to other farms in the area." *Id.* at 1114. Following a consensual inspection and issuance of a citation for violations of OSHA, the Tribe challenged the application of OSHA to its commercial enterprise. The Tribe argued that "its inherent sovereign powers bar application of the Act to its activities absent an express congressional decision to that effect." *Id.* at 1115.

The Ninth Circuit began its analysis by citing to *Tuscarora* for the principle "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." *Id.* The Court characterized this statement from *Tuscarora* as dictum, "but it is dictum that has guided many of our decisions." *Id.*

After finding a presumption that federal laws of general applicability apply to Indian tribes and their activities, the Ninth Circuit carved out three "exceptions" to this rule:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . .' In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

Id. at 1116.

The Tribe argued that "application of OSHA regulations would interfere with rights of tribal self-government and therefore requires a 'clear' expression of congressional intent to apply the Act to tribal enterprises." *Id.* The Court disagreed, finding that to accept the Tribe's argument "would bring within the embrace of 'tribal self-government" all tribal business and commercial activity." *Id.* Analyzing the "aspects of tribal self-government" exception, the Court concluded:

> The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government.'

Id. Coeur d'Alene had no treaty with the United States and there was no other indication that Congress intended to exclude tribal enterprises from OSHA's reach; thus, the Ninth Circuit concluded that OSHA applied to the Coeur d'Alene Tribal Farm.

IV. Application of the *Coeur d'Alene* Exceptions

Subsequent cases in the Ninth Circuit applying the *Coeur d'Alene* framework have primarily dealt with the first exception – that is, whether application of a federal law of general applicability would touch "exclusive rights of self-governance in purely intramural matters." The Court has interpreted that exception narrowly. In *Coeur d'Alene*, the Court stated that the "tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." 751 F.2d at 1116.

Where a tribe operates a commercial enterprise that engages in interstate commerce and non-Indians comprise more than a nominal portion of its workforce, a court following the *Coeur d'Alene* analysis is not likely to find the tribe exempt from generally applicable federal employment laws under the tribal self-government exception.

A. Two Cases Where The Ninth Circuit Found General Statutes Inapplicable to Tribes.

On two occasions, the Ninth Circuit has concluded that federal employment laws of general applicability did not govern a Tribe's employment dispute. In *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001), the Court held the Age Discrimination in Employment Act (ADEA) did not apply to a tribal housing authority's relationship with an employee who was an enrolled tribal member, because this specific employment relationship touched on "purely internal matters related to the Tribe's self-governance." Subsequently, in *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004), the Court found the Fair Labor Standards Act (FLSA) not applicable to law enforcement officers employed by the Navajo Nation.

In *Karuk*, the Court framed the question as "whether employment practices at the Karuk Tribe Housing Authority are 'purely intramural matters' touching on the tribe's 'exclusive rights of self-governance.'" In determining that they were, the Court focused on the nature of the employer entity, stating: "The Housing Authority thus functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance." *Id.* at 1080. In addition, the Court found that tribal members occupy the vast majority of the housing provided by the Housing Authority and that twenty out of the Housing Authority's twenty-four employees were Indians. The fact that the discrimination claim was made by an Indian employee was also relevant to the Court's analysis: "the dispute here is entirely 'intramural,' between the tribal government and a member of the Tribe. . . . It does not concern non-Karuks or non-Indians as employers, employees, customers or anything else." *Id.* at 1082.

In *Snyder*, the Court examined whether law enforcement officers employed by the Navajo Nation were subject to the overtime pay requirements of the FLSA. The Court began its analysis by explaining that the FLSA is a statute of general applicability and that "such generally

applicable statutes typically apply to Indian tribes (citing *Tuscarora*)." 382 F.3d at 895. The Court explained that there is "an exemption, however, where the law would interfere with tribal self-government." The Navajo Nation's employment of law enforcement officers fell within the tribal self-government exception:

> In this case, we are concerned with employees hired to enforce the law. The Navajo Nation's DPS maintains law and order within the reservation and this is a traditional governmental function. The FLSA contains an express exemption for state and local law-enforcement officers. Tribal law enforcement clearly is a part of tribal government and is for that reason an appropriate activity to exempt as intramural.

Id. at 895. The fact that the officers did some small percentage of their work off the reservation was not material to the Court. The Court did find it relevant that non-tribal members constituted less than 4% of the tribal police force. "More important, all the officers work on the reservation to serve the interests of the tribe and reservation governance. We therefore affirm the district court's determination that the FLSA does not apply to the Navajo Nation's DPS." *Id.* at 896.

B. Other Cases Where the Ninth Circuit Found Federal Statutes Applicable to Tribes.

Cases in which the 9th Circuit has found federal employment laws applicable to Indian tribes, Indian organizations, or Indian-owned businesses under *Tuscarora* and *Coeur d'Alene* include *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.3d 683 (9th Cir. 1991), *U.S. Dep't of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991), *NLRB v. Chapa De Indian Health Program*, 316 F.3d 995 (9th Cir. 2003) and *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009).

In *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009), the Court addressed "whether the overtime provisions of the Fair Labor Standards Act apply to a retail business located on an Indian reservation and owned by Indian tribal members." *Id.* at 428. The business in question was located on trust land within the Puyallup Indian Reservation and was owned and operated by a Puyallup tribal member. The Secretary of Labor filed suit against the Mathesons for failing to pay overtime to their employees. The Court rejected the Mathesons' assertion that the "tribal self-government/intramural affairs" exception under *Coeur d'Alene* should exempt them from requirements of the FLSA. That Court found that unlike the law enforcement officers at issue in *Snyder* (where the Court found the FLSA inapplicable), there was no "traditional government function" in the Mathesons' case. In contrast, the Mathesons' business "is a purely commercial enterprise engaged in interstate commerce selling out-of-state goods to non-Indians and employing non-Indians." *Id.* at 434. The Court also noted that the business in question was not owned by the Tribe but by tribal members. In addition, the Puyallup Tribe had not enacted any wage and hour laws. "Thus, there is no evidence in the record that the Puyallup Tribe has acted on its right of self-governance in the field of wage and hours laws and specifically with respect to overtime." *Id*. The Court also rejected the assertion that application of the FLSA would violate any rights reserved in the Treaty of Medicine Creek. *Id.* at 434-436.

In *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), the Court considered whether the NLRB had jurisdiction over a tribal organization created by the Rumsey Indian Rancheria, pursuant to the Indian Self-Determination Act – 25 U.S.C. § 450(b)(1), to provide health services to qualifying Native Americans in Northern California. The Ninth Circuit applied its *Tuscarora*/*Coeur d'Alene* framework to find the NLRA applicable. Chapa De relied on *Karuk Tribe Housing Authority* – arguing that its activities were purely intramural. The Court distinguished Chapa De from *Karuk* on multiple grounds. First, Chapa De was not actually an Indian tribe. Although it was created by an Indian tribe, the Court found that the organization received funding from a variety of sources and could survive independent of the Tribe. In addition, Chapa De operated outpatient facilities on non-Indian land, nearly half of its patients were non-Indian, and at least half of its professional employees were non-Indian. Also, none of the organization's board members or its chief executive officer were members of the Tribe. Lastly, the dispute did not concern a relationship between the Tribe and its members. "This cuts against Chapa-De's claim that its activities touch rights of self-governance on a purely intramural matter." The Court found no other indication that Congress intended to exempt the Chapa De organization from the NLRA and thus found it applicable.

In *United States Department of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991), the Court considered whether OSHA applied to a sawmill owned and operated by the Confederated Tribes of Warm Springs and specifically whether application of OSHA was barred by the Tribe's treaty with the United States. The mill was owned and operated by the Tribe, and stumpage payments made by the mill to the Tribe are the largest source of income for the tribal government. Yet, 60% of the workforce was not Warm Springs tribal members, and virtually all of the mill's sales were located outside the reservation. Applying *Tuscarora*/*Coeur d'Alene*, the Court held OHSA applied.

The Court "rejected the argument that the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government. . . . The mill employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce." *Id.* at 184. The fact that revenue from the mill was critical to the tribal government did not mean that it was exempt from OSHA. Next, the Court found the general right of exclusion in the Tribe's Treaty was not sufficient to bar application of OSHA. In contrast to the Tenth Circuit's decision in Navajo Forest Products Industries, the Ninth Circuit found that the:

> conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce the OHSA [was not] sufficient to bar application of the Act to the Warm Springs mill. Were we to construe the Treaty right of exclusion broadly to bar application of the Act, the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the *Tuscarora* rule inapplicable to any Tribe which has signed a Treaty containing a general exclusion provision.

Id. at 186-87.

V. The Tenth Circuit's Approach – Requiring Clear Congressional Intent To Impair Tribal Sovereignty or Self-Governance

The Tenth Circuit Court of Appeals has declined to rely on *Tuscarora* when analyzing applicability of federal statutes to Indian tribes and instead requires a clear showing that Congress intended the statute to apply to Indian tribes. This effectively reverses the presumption that exists in the Ninth Circuit – requiring the proponent of the federal statute to prove its applicability to the Tribe instead of requiring the Tribe to establish that one of the *Coeur d'Alene* exceptions applies.

In *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982), the Court addressed whether Congress intended OSHA to apply to Navajo Forest Products Industries (NFPI) – a business owned and operated by the Navajo Nation within the Navajo Reservation. NFPI is an arm of the Navajo Tribal government and is in the business of manufacturing wood products, logging, and operating a sawmill. The Secretary of Labor's OSHA compliance officers entered the Reservation, inspected the NFPI facilities, found violations, and issued a citation with associated monetary penalties. The Tribe contested the petition – arguing that OSHA did not apply to NFPI on grounds that it would violate the Tribe's sovereign rights reserved by Treaty and that there was no indication that Congress intended OSHA to override treaty rights.

The Secretary of Labor relied on *Tuscarora* to argue that federal laws like OSHA are applicable to Indian tribes unless Congress expressly said otherwise. The Tenth Circuit distinguished *Tuscarora* on grounds that there was no treaty at issue in *Tuscarora* and that *Tuscarora* "does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights." *Id.* at 711. The Tenth Circuit also opined that the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding tribal power to tax non-Indians on tribal lands) limited or implicitly overruled the *Tuscarora* statement regarding laws of general application. The Navajo Treaty contained a right to exclude non-Indians. The Court found that applying OSHA to NFPI would abrogate the Navajo Treaty's provision excluding non-Indians not authorized to enter the Reservation. *Id.* at 712. The Court also held that such an application of OSHA would "dilute the principles of tribal sovereignty and self-government recognized in the treaty. . . . Limitations 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." *Id.* At page 714, the Court stated:

> The United States retains legislative plenary power to divest Indian tribes of any attributes of sovereignty. Absent some expression of such legislative intent, however, we shall not permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons (in this case 'employers') unless Indians are expressly excepted therefrom. We believe that *Merrion* settled that issue in favor of the tribes.

Subsequent Tenth Circuit cases also declined to imply that Congress intended federal employment laws of general application to include Indian tribes. *See EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).

In *Cherokee Nation*, the EEOC attempted to enforce a judicial subpoena relating to an age discrimination charge (pursuant to the ADEA) brought against the Cherokee Nation's Director of Health and Human Services. The District Court enforced the subpoena against the Tribe and the Tenth Circuit reversed. As part of its analysis, the Tenth Circuit summarized its rationale for not applying OSHA against the Navajo Nation in *Navajo Forest Products Industries*: (1) enforcement would have violated the Navajo's treaty rights to exclude non-Indians and (2) enforcement would "dilute the principles of tribal sovereignty and self-government recognized in the treaty." *Cherokee Nation*, 871 F.2d at 938. In *Cherokee Nation*, the Court relied on the latter "dilution of self-government" principle and held the ADEA inapplicable to the Tribe "because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government. Article V of the Cherokee's Treaty of New Echota secured to the Cherokee Nation "the right . . . to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their country." The EEOC relied on *Tuscarora* and its statement regarding laws of general application to support its assertion of authority to enforce the ADEA against the Tribe. The Court rejected that argument finding that *Tuscarora*, to the extent it had any "continuing vitality," was not applicable to treaty cases.

Citing *United States v. Dion*, 476 U.S. 734 (1986), the *Cherokee Nation* Court was "mindful" not to abrogate treaty rights in a "backhanded way" and that "in the absence of an explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Cherokee Nation*, 871 F.2d at 938. Although a plain reading of the ADEA's definition of "employer" would suggest the ADEA applied to Indian tribes, the Court noted "normal rules of [statutory] construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue." Citing *Merrion*, the Court concluded that "unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence regarding Indians), and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested, e.g., by legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of statutory construction to the benefit of Indian interests." *Id.* at 939.

In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), the NLRB brought suit challenging the Tribe's authority to enact a "right-to-work" ordinance, which allegedly conflicted with prohibitions in the National Labor Relations Act (NLRA). Under the NLRA, states and local governments may enact right-to-work laws, but private employers may not. The NLRA is silent regarding its application to Indian tribes. Thus, "the central question here is whether Congress [in the NLRA] intended to strip Indian tribal governments of this authority as a sovereign." *Id.* at 1191. Citing *United States v. Wheeler*, 435 U.S. 313 (1978), the Court explained that "until Congress acts, the tribes retain their existing sovereign powers." *Id.* at 1192. Citing *Merrion*, "tribes retain sovereign authority to regulate economic activity within their own territory." The Court also cited *Montana v. United States*, 450 U.S. 544 (1981) for the principle that tribes retain authority over non-Indians within the reservation except where the conduct occurs on non-Indian owned fee land and has no direct effect on the tribe. *Id.* at 1193.

Finding that the Tribe had sovereign authority to regulate labor relations within its jurisdiction, the Court inquired whether Congress intended to divest the Tribe of that authority.

"Divestiture [of tribal sovereign authority] 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." *Id.* at 1194. The Tenth Circuit declared a "presumption" that tribal sovereignty was not preempted by federal statutes absent clear intent. *Id.* at 1195.

> The [Supreme] Court has recognized that reservation tribes enjoy the right to 'make their own laws and be ruled by them,' as a benefit to be protected from state infringement. *Williams*, 358 U.S. at 220. Preempting tribal laws divests tribes of their retained sovereign authority, running counter to this policy and not benefiting Indians. . . . In the absence of clear evidence of congressional intent, therefore, federal law will not be read as stripping tribes of their retained sovereign authority to pass right-to-work laws and be governed by them.

Id. at 1195. Contrary to the presumptions established in *Coeur d'Alene*, the Tenth Circuit ruled that "silence is not sufficient to establish congressional intent to strip Indian tribes of their retained authority to govern their own territory." *Id.* at 1196. Citing *Merrion,* "the correct presumption is that silence does not work a divestiture of tribal power." *Id.* at 1196.

The Court's decision in *Pueblo of San Juan* contains a lengthy analysis of the *Tuscarora* opinion, finding that *Tuscarora* did not address or purport to limit the sovereign authority of Indian tribes; rather, in the Tenth Circuit's view, *Tuscarora* dealt only with whether federal laws could apply to an Indian tribe's proprietary ownership interests in land or other property.

> *Tuscarora* mentions no attempts by the tribe to govern the disputed land, nor does it take cognizance of any argument that taking the land would incidentally infringe on tribal sovereign authority to govern. It was the tribe's possessory interest in the land, rather than its sovereign authority to govern activity on the land, that was at stake in *Tuscarora*. The *Tuscarora* Court's remarks concerning statutes of general applicability were made in the context of property rights, and do not constitute a holding as to tribal sovereign authority to govern. . . . We are convinced [*Tuscarora*] does not apply where an Indian tribe has exercised its authority as a sovereign – here, by enacting a labor regulation – rather than in a proprietary capacity such as that of employer or landowner.

Id. at 1199. Because the Tribe's legislative enactment of its right-to-work ordinance was "clearly an exercise of sovereign authority over economic transactions on the reservation," *Tuscarora* did not apply and there was no other evidence that Congress intended the NLRA to preempt tribal authority to enact its own right-to-work ordinance. The Court also questioned whether the NLRA is truly a statute of "general applicability" given its exemption of state and local governments from its reach.

VI. Cases From Other Circuits

As discussed below, other Circuit Courts of Appeal have examined whether federal employment laws of general application apply to Indian tribes and their operations, with mixed results.

A. The D.C. Circuit Court of Appeals – *San Manuel v. NLRB*

In *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), the Court considered whether the NLRB had jurisdiction over the San Manuel Band's gaming operation. The Court began its analysis with *Tuscarora* and its statement that laws of general application include Indians and their property interests. However, the Court then considered that *Tuscarora* is "in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians [citations omitted] and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." The Court also noted that the statement from *Tuscarora* regarding laws of general application was "of uncertain significance, and possibly dictum, given the particulars of that case."

Despite its recognition that clear Congressional intent is required to impair tribal sovereignty and that *Tuscarora* may be of limited relevance to the question, the Court proceeded to find that the NLRA did apply to the San Manuel Band's gaming enterprise. The Court explained that there may be some instances when a statute of general application would unduly impair tribal sovereignty. According to the Court, tribal sovereignty is at its strongest "when explicitly established by a treaty or when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the Tribe." "Conversely, when a tribal government goes beyond maters of internal self-governance and enters into off-reservation business transactions with non-Indians, its claim of sovereignty is at its weakest." Thus,

> the determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law might not impinge on tribal sovereignty.

[internal citations omitted]. The Court construed "governmental functions" narrowly and confirmed it would not find a commercial activity to be "governmental" simply because it funded governmental operations.

Turning to the specifics of San Manuel's case, the Court found that "operation of a casino is not a traditional attribute of self-government." Similar to the Ninth Circuit's focus, the Court found that "the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation. For these reasons, the Tribe is not simply engaged in internal governance of its territory or its members, and its sovereignty over such matters is not called into question." The Court jettisoned the Tribe's argument that it had enacted its own tribal labor ordinance to govern relations with its employees. Although "application of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities . . . the total impact on tribal sovereignty here [is] probably modest." The Court was not impressed by "displacement of [tribal] legislative and executive authority that is secondary to a commercial undertaking." San Manuel did not seek certiorari in the U.S. Supreme Court.

B. The Seventh Circuit Court of Appeals

In *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993), the Seventh Circuit held that the Fair Labor Standards Act did not apply to the Commission's employees who served to supervise and enforce tribally created regulations relating to tribal fishing and hunting rights in the Great Lakes region. The Court found the activities of these employees similar to that of state or local law enforcement officials, who are expressly exempt from the requirements of the FLSA. The Court did not apply *Tuscarora* or *Coeur d'Alene.* Instead, similar to the Tenth Circuit, the Court started with the "presumption . . . that a statute does not modify or abrogate Indian rights." This principle extended beyond rights expressly found in treaties. The Court discussed the "inherent sovereignty" of Indian tribes and stated that "Indian tribes, like states . . . [may] manage their own police as they like, even though no treaty confers such prerogatives, until and unless Congress gives a stronger indication than it has here that it wants to intrude on the sovereign functions of tribal government." The Court made clear that it was not ruling that all employees of all Indian tribal agencies or entities were exempt from the FLSA. Rather, the Court's holding was that Indian "law-enforcement employees, and any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the [FLSA] are exempt."

The Court reached a different conclusion in *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010) where the Seventh Circuit, citing to *Tuscarora*, curtly held that OSHA applied to a sawmill owned and operated by the Menominee Tribe on its reservation. The Court distinguished the *Great Lakes Indian Fish and Wildlife Commission* case, because that prior case involved interference with tribal governance. In contrast, here, "the Menominee's sawmill is just a sawmill, a commercial enterprise." Conducting an analysis similar to the Ninth Circuit's *Coeur d'Alene* framework, the Court found no interference with self-governance, no applicable treaty provision that barred application of OSHA, and no indication that Congress intended to exempt tribal commercial enterprises from OSHA.

C. The Eighth Circuit Court of Appeals

In *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*, 986 F.2d 246 (8th Cir. 1993), the Court affirmed dismissal of an age discrimination case brought under the ADEA by the EEOC against a tribally-owned construction company located on the reservation. After citing the "general rule" from *Tuscarora* regarding statutes of general application, the Court noted the *Tuscarora* rule "does not apply when the interest sought to be affected is a specific right reserved to the Indians." *Id.* at 248. Such rights need not derive from a treaty, and "may also be based upon statutes, executive agreements, and federal common law." *Id.* at 248. Citing a prior Eighth Circuit case, *United States v. White*, 508 F.2d 453 (8th Cir. 1974), the Court found that "areas traditionally left to tribal self-government" are exempt from the *Tuscarora* doctrine. Citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court found that the Tribe had the power to "make their own substantive law in internal matters and to enforce that law in their own forums." Thus, the Tribe has the "implicit right of self-governance."

The specific dispute in the case involved a claim of age discrimination brought by a tribal member employee against a tribally owned enterprise operating on the reservation. "Subjecting

such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe. The consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions. Likewise, disputes regarding this issue should be allowed to be resolved internally within the tribe." *Id.* at 249. Citing *United States v. Dion*, 476 U.S. 734 (1986), the Court found that "some affirmative evidence of congressional intent, either in the language of the statute or its legislative history, is required to find the requisite 'clear and plain' intent to apply the statute to Indian tribes." *Id.* at 250. Thus, "we find that the ADEA does not apply to the narrow facts of this case which involve a member of the tribe, the tribe as an employer, and on the reservation employment." *Id.* at 251.

D. The Second Circuit Court of Appeals

In *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996), the Court considered whether OSHA applied to a tribally-owned construction business. The enterprise worked as an arm of the Tribe and worked only within the reservation. It had approximately 100 employees, which included Indians and non-Indians. The tribal enterprise, MSG, urged the Court to begin with the presumption that OSHA does not apply unless Congress expressed its specific intent to apply it to the Tribe. The Court instead conducted its analysis similar to the Ninth Circuit's C*oeur d'Alene* test, presuming that the statute applied unless it affected exclusive rights of self-governance in purely intramural matters. In the Court's view, applying the opposite presumption would "almost invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them." *Id.* at 178.

The Court found that OSHA applied to MSG. "The nature of MSG's work, the employment of non-Indians, and the continuing work at Foxwoods [the Tribe's casino enterprise], taken together, doom MSG's claim that its work implicates exclusive rights of self-governance in purely intramural matters." *Id.* at 180. "When all is said and done, MSG is in the construction business; and its activities are of a commercial and service character, not a governmental character." *Id.*

The Court was not persuaded by the argument that application of OSHA would affect tribal self-governance by precluding the promulgation of its own safety regulations. *Id.* at 181. The Court said the "question is not whether the statute affects tribal self-governance *in general*, but rather whether it affects tribal self-governance *in purely intramural matters*." *Id.* (emphasis in original). In addition, "there is nothing to prevent [the Tribe] from adopting its own safety regulations, as long as those regulations do not conflict with application of OSHA." *Id.*

E. The Sixth Circuit Court of Appeals – Pending Cases On NLRB Authority

The Sixth Circuit Court of Appeals has not yet addressed *Tuscarora* or the application of federal employment laws of general applicability to Indian tribes, but it soon will. Oral argument occurred in April 2015 in *Saginaw Chippewa Indian Tribe of Michigan v. NLRB*, Case Nos. 13-1569 and 13-1629. In *Saginaw Chippewa*, the Tribe enacted a No-Solicitation Policy that prohibits all employees from soliciting at its Soaring Eagle Casino and Resort. Various unions filed charges with the NLRB that disciplinary action taken against casino employees to enforce

the Tribe's policy violated the NLRA and the NLRB asserted jurisdiction over the casino. The Tribe argues that such jurisdiction would violate its sovereign right to enact and enforce its own laws, as well as its right to exclude non-Indians from its trust lands.

Another relevant case currently pending in the Sixth Circuit is *NLRB v. Little River Band of Ottawa Indians*, Case No. 14-2239. In that case, the NLRB filed the action seeking enforcement of an NLRB order issued against the Little River Band on September 15, 2014 relating to its gaming enterprise. In its Answer to the NLRB's application, the Little River Band argues that:

> the NLRB seeks to strike down the Band's laws governing labor unions and collective bargaining within its public sector on its reservation lands because they vary from the [NLRA]. . . . The [Tribe's] laws at issue have been fully operational for over six years, and they reflect the carefully considered public policy priorities of the Band. Like the labor laws of states, they govern such things as the licensing of labor unions, mandatory subjects of bargaining, and the resolution of unfair labor practices. Under well-established principles of federal Indian law, the [NLRB] needs an express warrant from Congress to strike down the Band's laws. It has none. Thus, the Band respectfully asks that the Court deny the [NLRB]'s Application for Enforcement and hold that the [NLRB]'s Order is void, unenforceable, and without effect.

VII. ERISA

Another federal employment law statute of general application not discussed above is ERISA. ERISA exempts "governmental plans" from its coverage. In 2006, Congress passed the Pension Protection Act of 2006, Pub. L. No. 109-280, which amends ERISA's exception for "governmental plans" to include:

> a plan which is established and maintained by an Indian tribal government . . . and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities.

Pension Protection Act of 2006, Section 906(a)(2)(A). In *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275 (10th Cir. 2010), the Court held that "a plan qualifies as a governmental plan [as defined in the Pension Protection Act] only if it is established and maintained by an Indian tribal government and all of the participants are employees primarily engaged in essential governmental functions rather than commercial activities." *Id.* at 1285. A court must do more than determine whether the duties of the employee at issue are governmental – the court must determine whether all plan participants meet the essential governmental functions test.

Prior to the Pension Protection Act, Circuit Courts of Appeal had held ERISA applicable to Indian tribal employers. In *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.3d 683 (9th Cir. 1991), the Court found ERISA applicable to a pension fund created for employees of a tribally owned and operated sawmill located on the reservation. In

Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989), the Court found ERISA applicable to a benefit plan offered to employees of a tribally owned and operated health center located on the reservation.

VIII. Summary of Opinions From the Circuit Courts of Appeal

Since the Ninth Circuit's opinion in *Coeur d'Alene* thirty years ago, there have been seven cases where Federal Circuit Courts of Appeal ruled that Indian tribes were not subject to federal employment laws of general application that were silent as to Indian tribes. *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004) (FLSA); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (NLRA); *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) (ADEA); *EEOC v. Fond du Lac Heavy Equipment & Construction Co*., 986 F.2d 246 (8th Cir. 1993) (ADEA); *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993) (FLSA); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (ADEA); *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (OSHA).

Three of those cases are from the Tenth Circuit Court of Appeals, which has taken a more protective view of Indian sovereignty and self-government than the other Circuits. In those three cases, the Tenth Circuit found that application of OSHA would conflict with a treaty right of exclusion, that application of the ADEA would directly interfere with a treaty-protected right of self-governance, and that application of the NLRA would infringe on a tribal government's sovereign authority to enact and implement its own labor legislation. No other Circuit Court of Appeal has so consistently affirmed principles of tribal sovereignty and self-governance. The Tenth Circuit starts with a presumption that laws silent as to Indian tribes shall not be construed to implicitly divest Indian tribes of sovereignty and the Tenth Circuit looks carefully for clear Congressional intent to divest tribes of their sovereign rights to self-governance.

Four cases from other Circuit Courts of Appeal (Seventh, Eighth, and Ninth) have also found federal employment laws of general application not applicable to Indian tribes. However, all of those cases presented situations where the employees seeking protection under federal law were tribal members. In three of the cases, the tribal employer was engaged in purely governmental functions (e.g., law-enforcement, fish and game enforcement, public housing). In the fourth case (*Fond du Lac*), the employer was a tribally-owned construction company, but the Eighth Circuit made clear that its decision finding the ADEA inapplicable was narrow and based on the fact that the dispute was between a tribal member and tribal employer and took place on the reservation.

In contrast, outside the Tenth Circuit, court decisions to date have held tribal employers subject to federal employment laws of general application if they meet one or more of the following criteria: (1) the entity engages in commercial, not governmental activity; (2) the entity engages in extra-territorial commerce (e.g., sales outside reservation boundaries); (3) the entity has more than a nominal non-Indian customer base; or (4) the entity employs more than a nominal number of non-Indians. If the entity basically functions as a for-profit commercial enterprise that looks much like a non-tribally owned commercial enterprise, courts have typically held such entity subject to federal employment and labor laws of general application. This is

true even if the tribal government depends on the commercial enterprise to fund its governmental operations.

Some courts (such as the 2nd Circuit and D.C. Circuit) have been willing to apply federal statutes to such commercial enterprises even if such application could preempt or infringe upon the tribal government's ability to enact and enforce its own labor laws. The Tenth Circuit has not been willing to implicitly preempt or divest Indian tribes of their right to make laws to govern economic relations within their reservation. Still, it seems that an Indian tribe will have a better (though not certain) chance of withstanding application of federal employment laws to its reservation if it has passed its own suite of employment, labor, and safety laws. *See, e.g., Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2004) (refusing to find that application of FLSA would impair tribal self-government where Indian tribe had not enacted its own wage and hour laws).

IX. Sovereign Immunity – Enforcement of Federal Employment Laws Against Indian Tribes Can Come Only Through Action of the United States, Not Through Private Suits.

The question of whether a federal employment law applies to an Indian tribe or tribal enterprise is different from the question of whether the Tribe's sovereign immunity has been waived by such statute. Courts have unanimously found that Indian tribes retain their sovereign immunity from suit under all the federal employment laws discussed above. Thus, while such laws have often been held to apply to Indian tribes, only the United States government, acting through the EEOC, Department of Labor, Department of Justice, etc., can take action or sue to enforce the statute against the Tribe.

For example, in *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), the Court applied *Tuscarora* and held that the public accommodations requirements of Title III of the ADA applied to the Tribe's "restaurant and gaming facility [which] is a commercial enterprise open to non-Indians from which the Tribe intends to profit." However, "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Id.* at 1130. Examining whether Title III of the ADA permitted private suit against the Tribe, the Court explained that: "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act. An examination of Title III of the ADA reveals that it does not meet the strict requirements of this test." *Id.* at 1131.

Similarly, in *Chayoon v. Chao*, 355 F.3d 141 (2d Cir. 2004), the Court affirmed dismissal of a casino employee's suit under the Family Medical Leave Act (FMLA) on grounds of sovereign immunity. As in most of the cases dismissed on sovereign immunity grounds, there was no analysis of whether the federal law applied to the Tribe. Rather, the Court simply addressed whether sovereign immunity barred the suit, which it did. Numerous other courts have dismissed cases against tribal employers on sovereign immunity grounds. *See, e.g., Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001) (finding tribes immune from claims based on the ADEA); *Larimer v. Konocti Vista Casino Resort*, 814 F. Supp. 2d 952 (N.D. Cal. 2011) (dismissing claims under FLSA on sovereign immunity grounds); *Prescott v. Little Six*, 284 F.

Supp. 2d 1224 (D. Minn. 2003) (holding ERISA applicable, but dismissing some claims on sovereign immunity grounds).

X. Employment Laws That Expressly Exempt Indian Tribes

Tuscarora and the cases discussed above address whether federal employment laws that are silent with regard to Indian tribes should apply to Indian tribes. However, two federal employment statutes expressly address and exempt Indian tribes from their reach. Those statutes are: (1) Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment because of race, color, sex, national origin, and religion; and (2) Title I of the Americans with Disabilities Act, which requires employers to provide reasonable accommodations for qualified disabled employees. Both of those statutes expressly exclude Indian tribes from the statutory definition of "employer." 42 U.S.C. § 2000e(b) (Title VI); 42 U.S.C. § 12111(B)(i) (ADA). Courts have also held that Indian tribes are exempt from discrimination claims brought under 42 U.S.C. § 1981, which generally prohibits discrimination on the basis of race or ethnicity in employment and other contractual relations. Courts have reasoned that Congress clearly intended to exempt Indian tribes from race-based discrimination claims in Title VII and thus plaintiffs should not be able to circumvent that intent by suing under the more general anti-discrimination statute in § 1981, which is silent as to Indian tribes. *See Taylor v. Ala. Intertribal Council*, 261 F.3d 1032, 1035 (11th Cir. 2001) (finding it would be "illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims based on a tribe's Indian employment preference programs simply by allowing a plaintiff to style his claim as a § 1981 suit").

Pursuant to the Alaska Native Claims Settlement Act (ANCSA), Alaska Native Corporations (ANC) are also expressly exempt from the requirements and associated liabilities of Title VII. 43 U.S.C. § 1626(g). Courts have construed this exemption narrowly and have thus far declined to extend that exemption to other federal laws. For example, in *Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206 (4th Cir. 2007), the Court declined to extend the exemption in ANCSA to claims arising under § 1981. In *Pearson v. Chugach Government Services, Inc.*, 669 F. Supp. 2d 467 (D. Del. 2009), the Court found that the ANC was subject to Title I of the ADA, as there was no specific exemption relating to Alaska Native Corporations. The Court also found the ANC subject to the FMLA. Although there is little case law to date, it seems unlikely that courts will be inclined to exempt ANCs from the requirements of federal employment law beyond the express exemption from Title VII.

XI. Criticism of the *Coeur d'Alene* and *San Manuel* Approaches

Indian law scholars have strongly criticized lower courts' reliance on *Tuscarora* in cases addressing the applicability of federal employment laws to Indian tribes. A few of the law review articles analyzing the framework set forth by the Ninth Circuit in *Coeur d'Alene* and the D.C. Circuit's decision in *San Manuel* include Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 Oregon Law Review 413 (2007); Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 Ariz. St. L.J. 681 (1994); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. Davis L. Rev. 85 (1991).

Mr. Wildenthal's article explains that the Supreme Court has not once relied on *Tuscarora*'s statement regarding laws of general application since deciding that case 55 years ago. The Supreme Court has cited to *Tuscarora* only twice in subsequent cases involving Indian tribes and neither citation related to the statement regarding laws of general application. *See Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 248 n. 21 (1985); *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765, 786 (1984). In fact, the citations to *Tuscarora* in these later cases are consistent with the Indian law canon requiring a clear and plain statement from Congress before permitting impairment of tribal sovereignty.

A more recent critique of *Tuscarora*, *Coeur d'Alene*, and *San Manuel* is found in the American Indian Law Scholars (AILS) Brief of Amicus Curiae filed on January 28, 2015 in support of the Saginaw Chippewa Tribe in its appeal to the Sixth Circuit Court of Appeals regarding the NLRB's assertion of jurisdiction over the Soaring Eagle Casino. *Saginaw Chippewa Indian Tribe of Michigan* v. *NLRB*, Case Nos. 13-1569/13-1629. The amicus brief is available at https://turtletalk.files.wordpress.com/2015/04/law-profs-amicus-brief.pdf.

In their brief, the AILS argue that the Ninth Circuit's presumption that federal employment laws apply to Indian tribes, as set forth in *Coeur d'Alene*, is not supported by *Tuscarora* and is not consistent with Indian law canons of construction used by the Supreme Court in numerous cases both before and after *Tuscarora*. The AILS argue that the approaches taken by the Ninth Circuit and D.C. Circuit in *Coeur d'Alene* and *San Manuel* are contrary to the Indian law canon that a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty. According to the AILS, the Ninth Circuit in *Coeur d'Alene* "flipped the normal Indian law presumptions" that have repeatedly been applied by the U.S. Supreme Court in Indian law cases. AILS Brief, at 26. AILS argue that the Ninth Circuit in *Coeur d'Alene* "anointed itself the arbiter of two subjects – whether statutes apply to tribes and what counts as a legitimate exercise of tribal sovereignty – in the absence of congressional direction and contrary to Supreme Court precedent." AILS Brief, at 28.

The AILS argue that *Tuscarora* did not involve a law of general application that was silent with regard to Indian tribes. Nor did the Supreme Court simply presume that the Federal Power Act would apply to the Tuscarora Indian Nation or its fee lands. In *Tuscarora*, the Supreme Court searched for and found clear congressional intent regarding how the Federal Power Act would apply to Indian tribes, to reservations, and to fee lands of Indian tribes. After reviewing and analyzing the Federal Power Act's text and legislative history, the Court concluded: "This analysis of the plain words and legislative history of the Act's definition of 'reservation' and of the plan and provisions of the Act leaves us with no doubt that Congress . . . intended to and did confine 'reservations,' including 'tribal lands embraced within Indian reservations,' to those located on lands 'owned by the United States.'" *Tuscarora*, 362 U.S. at 114. Thus, the Supreme Court did not simply presume that the federal law would apply to the Indian tribe but conducted a search for clear congressional intent to apply the law to the Tribe.

The AILS cite to a number of cases since *Tuscarora* in which the Supreme Court has applied the "clear congressional intent" canon in Indian law cases. Of most significance, the Supreme Court has applied the clear congressional intent canon (and not *Tuscarora*) to two cases

involving statutes of general applicability, which are *United States v. Dion*, 476 U.S. 734 (1986) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). In *Dion*, the Court examined whether the Bald and Golden Eagle Protection Act, which prohibits the taking of eagles throughout the United States, abrogated a tribal member's right to hunt eagles within the reservation. In analyzing the applicability of the Act to Indian treaty rights, the Court searched for "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." *Id.* at 739-40. The Court did not cite *Tuscarora* in its analysis or rely on any "general rule" that federal laws of general application apply to Indian tribes.

In *Iowa Mutual*, the Court considered whether the federal diversity jurisdiction statute, 28 U.S.C. § 1332, which authorizes federal court jurisdiction when parties are citizens of different states, applied to a tribal court action involving a tribal plaintiff and non-member defendant. The statute is silent with respect to Indian tribes. Although the Court remanded the case to the District Court to determine whether the parties were required to exhaust remedies in tribal court, the AILS point out that the Court did not simply presume that the diversity statute applied to the tribal court as a statute of general application. Instead, the Court said: "The diversity statute makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Iowa Mutual*, 480 U.S. at 17. The Court also stated: "In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion." *Id.* at 18. In *San Manuel*, the D.C. Circuit asserted that it had "found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application." *San Manuel*, 475 F.3d at 1312. The D.C. Circuit failed to cite *Dion* or *Iowa Mutual* in its opinion.

In their amicus brief, the AILS argue that:

> *Dion* and *Iowa Mutual*, along with many other Indian law cases decided since 1960, have embraced the Indian law rules of interpretation. Not only has the Supreme Court never applied the *Tuscarora* language in a subsequent case, but it has repeatedly made directly contradictory statements when deciding cases affecting tribal rights. This makes clear that the Supreme Court has marginalized its own language in *Tuscarora* concerning statutes of general applicability.

AILS Brief, at 24.

FEDERAL EMPLOYMENT LAWS OF "GENERAL APPLICABILITY"
(organized by statute)

Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678

- *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010) (holding OSHA applicable to tribally-owned sawmill operated on reservation, finding that the Tribe's "sawmill is just a sawmill, a commercial enterprise [subject to OSHA]")

- *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) (holding OSHA applicable to tribally-owned construction business that worked exclusively on-reservation but employed both tribal members and non-members)

- *U.S. Dep't of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991) (holding OSHA applicable to tribally owned sawmill and forest products enterprise located on reservation, where 45% of employees were non-Indian and virtually all sales went to buyers located off-reservation; and rejecting argument that general right of exclusion contained in Tribe's Treaty was sufficient to bar application of OSHA)

- *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (holding OSHA applicable to commercial farming enterprise owned and operated by the Tribe, finding that "because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government'")

- *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (holding OSHA not applicable to business enterprise owned and operated by Tribe on reservation on grounds that application of OSHA would conflict with treaty-right to exclude non-Indians from reservation and because application of the federal law would "dilute the principles of tribal sovereignty and self-government recognized in the treaty")

Age Discrimination in Employment Act (ADEA), 29 U.S.C. § § 621-634

- *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) (holding ADEA did not apply to tribal housing authority's relationship with employee who was enrolled tribal member, because this specific employment relationship touched on "purely internal matters related to the Tribe's self-governance")

- *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*, 986 F.2d 246 (8th Cir. 1993) (holding ADEA did not apply to tribally-owned construction company located on the reservation where employee claiming discrimination was tribal member; finding the dispute to be a "strictly internal matter")

- *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (ADEA not applicable to claim against tribal health and human services director, because enforcement of ADEA "would directly interfere with the Cherokee Nation's treaty-protected right of self-government").

- *EEOC v. Forest County Potawatomi Community*, Case No. 13-MC-61 (E.D. Wis., May 6, 2014) (ADEA found applicable to charge of discrimination filed by non-tribal member employee of tribal casino, as the dispute does not involve "purely intramural matters")

- *Myrick v. Devils Lake Sioux Manufacturing Corporation*, 718 F. Supp. 753 (D. N.D. 1989) (holding, without analysis, that ADEA applied to corporation majority owned by Indian tribe but incorporated under state law)

National Labor Relations Act (NLRA), 29 U.S.C. § § 151-187

- *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007) (affirming NLRB jurisdiction and application of NLRA over casino enterprise)

- *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) (affirming NLRB jurisdiction and application of NLRA over tribal organization created by Tribe under Indian Self Determination Act to contract with Indian Health Service and to provide health services to tribal members, where facilities were operated off-reservation and approximately half of its patients and employees were non-Indian)

- *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (NLRA did not preempt tribal government's sovereign authority to enact and implement right-to-work ordinance)

- *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858 (D. Minn. 2010) (affirming NLRB jurisdiction and application of NLRA relating to unfair labor practice charge against tribal casino, focusing on fact that casino enterprise was commercial not governmental)

Fair Labor Standards Act (FLSA), 29 U.S.C. § § 201-219

- *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (holding FLSA applicable to tribal member owners of retail store located on trust land within reservation where Indian tribe had not enacted its own wage and hour laws and no relevant treaty barred application)

- *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004) (holding FLSA not applicable to law enforcement officers employed by Tribe)

- *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993) (FLSA not applicable to tribal law-enforcement; specifically, fish and game wardens)

- *Costello v. Seminole Tribe of Florida*, 763 F. Supp.2d 1295 (M.D. Fla. 2010) (FLSA applicable to Tribe's casino, but Tribe had sovereign immunity from private suit)

Family and Medical Leave Act (FMLA), 29 U.S.C. § § 2601-2654

- *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003) (tribal exhaustion requirement applies to claims brought against tribal casino enterprise under FMLA)

- *Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004) (dismissing private FMLA suit brought by casino employees on sovereign immunity grounds, without reaching question of whether FMLA should apply)

- *Pearson v. Chugach Government Services, Inc.*, 669 F. Supp. 2d 467 (D. Del. 2009) (holding Alaska Native Corporation subject to the FMLA)

Americans with Disabilities Act (ADA) (Title III), 42 U.S.C. § 12181 *et seq.*

- *Florida Paraplegic Ass'n, Inc., v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999) (holding public accommodations requirements of Title III of ADA applied to Tribe's "restaurant and gaming facility [which] is a commercial enterprise open to non-Indians from which the Tribe intends to profit," but sovereign immunity barred suit against the Tribe)

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § § 1001-1461

- *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275 (10th Cir. 2010) (remanding case to determine whether tribe's plan was "governmental plan" under the Pension Protection Act of 2006, which included an exemption for plan that "is established and maintained by an Indian tribal government . . . and all of the participants of which are employees of such entity substantially all of whose services as such employee are in the performance of essential governmental functions but not in the performance of commercial activities")

- *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.3d 683 (9th Cir. 1991) (ERISA found applicable to pension fund for employees of tribally owned and operated sawmill located on reservation)

- *Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989) (ERISA found applicable to benefit plan offered to employees of tribally owned and operated health center located on reservation)

- *Colville Confederated Tribes v. Somday*, 96 F. Supp. 2d 1120 (E.D. Wash. 2000) (finding that retirement plan was exempt as "governmental plan" primarily deferring to determination of Department of Labor's Pension Benefit Guaranty Corporation that plan was exempt as "governmental plan")

Affordable Care Act (ACA) (large employer mandate at 26 U.S.C. § 4980H)

- *Northern Arapaho Tribe v. Burwell*, 2015 WL 872190 (D. Wyoming, Feb. 26, 2015) (finding that Tribe not likely to succeed on merits of its claim that Tribe is exempt from large employer mandate of ACA)

FEDERAL EMPLOYMENT LAWS OF "GENERAL APPLICABILITY"
(organized by Circuit)

2nd Circuit

- *Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004) (dismissing private FMLA suit brought by casino employees on sovereign immunity grounds, without reaching question of whether FMLA should apply)

- *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) (holding OSHA applicable to tribally-owned construction business that worked exclusively on-reservation but employed both tribal members and non-members)

7th Circuit

- *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010) holding OSHA applicable to tribally-owned sawmill operated on reservation, finding that the Tribe's "sawmill is just a sawmill, a commercial enterprise [subject to OSHA]")

- *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993) (FLSA not applicable to tribal law-enforcement; specifically, fish and game wardens)

- *Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989) (ERISA found applicable to benefit plan offered to employees of tribally owned and operated health center located on reservation)

- *EEOC v. Forest County Potawatomi Community*, Case No. 13-MC-61 (E.D. Wis., May 6, 2014) (ADEA found applicable to charge of discrimination filed by non-tribal member employee of tribal casino, as the dispute does not involve "purely intramural matters")

8th Circuit

- *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*, 986 F.2d 246 (8th Cir. 1993) (holding ADEA did not apply to tribally-owned construction company located on the reservation where employee claiming discrimination was tribal member; finding the dispute to be a "strictly internal matter")

- *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858 (D. Minn. 2010) (affirming NLRB jurisdiction and application of NLRA relating to unfair labor practice charge against tribal casino, focusing on fact that casino enterprise was commercial not governmental)

- *Myrick v. Devils Lake Sioux Manufacturing Corporation*, 718 F. Supp. 753 (D. N.D. 1989) (holding, without analysis, that ADEA applied to corporation majority owned by Indian tribe but incorporated under state law)

9th Circuit

- *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (holding FLSA applicable to tribal member owners of retail store located on trust land within reservation where Indian tribe had not enacted its own wage and hour laws and no relevant treaty barred application)

- *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004) (holding FLSA not applicable to law enforcement officers employed by Tribe)

- *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) (affirming NLRB jurisdiction and application of NLRA over tribal organization created by Tribe under Indian Self Determination Act to contract with Indian Health Service and to provide health services to tribal members, where facilities were operated off-reservation and approximately half of its patients and employees were non-Indian)

- *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003) (tribal exhaustion requirement applies to claims brought against tribal casino enterprise under FMLA)

- *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) (holding ADEA did not apply to tribal housing authority's relationship with employee who was enrolled tribal member, because this specific employment relationship touched on "purely internal matters related to the Tribe's self-governance")

- *U.S. Dep't of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991) (holding OSHA applicable to tribally owned sawmill and forest products enterprise located on reservation, where 45% of employees were non-Indian and virtually all sales went to buyers located off-reservation; and rejecting argument that general right of exclusion contained in Tribe's Treaty was sufficient to bar application of OSHA)

- *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.3d 683 (9th Cir. 1991) (ERISA found applicable to pension fund for employees of tribally owned and operated sawmill located on reservation)

- *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (holding OSHA applicable to commercial farming enterprise owned and operated by the Tribe, finding that "because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government'")

- *Colville Confederated Tribes v. Somday*, 96 F. Supp. 2d 1120 (E.D. Wash. 2000) (finding that retirement plan was exempt as "governmental plan" primarily deferring to

determination of Department of Labor's Pension Benefit Guaranty Corporation that plan was exempt as "governmental plan")

10th Circuit

- *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275 (10th Cir. 2010) (remanding case to determine whether tribe's plan was "governmental plan" under the Pension Protection Act of 2006, which included an exemption for plan that "is established and maintained by an Indian tribal government . . . and all of the participants of which are employees of such entity substantially all of whose services as such employee are in the performance of essential governmental functions but not in the performance of commercial activities")

- *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (NLRA did not preempt tribal government's sovereign authority to enact and implement right-to-work ordinance)

- *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (ADEA not applicable to claim against tribal health and human services director, because enforcement of ADEA "would directly interfere with the Cherokee Nation's treaty-protected right of self-government").

- *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (holding OSHA not applicable to business enterprise owned and operated by Tribe on reservation on grounds that application of OSHA would conflict with treaty-right to exclude non-Indians from reservation and because application of the federal law would "dilute the principles of tribal sovereignty and self-government recognized in the treaty")

- *Northern Arapaho Tribe v. Burwell*, 2015 WL 872190 (D. Wyoming, Feb. 26, 2015) (finding that Tribe not likely to succeed on merits of its claim that Tribe is exempt from large employer mandate of ACA)

11th Circuit

- *Florida Paraplegic Ass'n, Inc., v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999) (holding public accommodations requirements of Title III of ADA applied to Tribe's "restaurant and gaming facility [which] is a commercial enterprise open to non-Indians from which the Tribe intends to profit," but sovereign immunity barred suit against the Tribe)

- *Costello v. Seminole Tribe of Florida*, 763 F. Supp.2d 1295 (M.D. Fla. 2010) (FLSA applicable to Tribe's casino, but Tribe had sovereign immunity from private suit)

D.C. Circuit

- *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007) (affirming NLRB jurisdiction and application of NLRA over casino enterprise)