DE FACTO JUDICIAL PREEMPTION OF TRIBAL LABOR AND EMPLOYMENT LAW

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As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again removed from your present habitations.

—Senator Sam Houston[1]

I. INTRODUCTION—CONFLICTING FEDERAL COMMON LAW APPROACHES TO FEDERAL STATUTES OF GENERAL APPLICABILITY

The debate over whether laws of general applicability apply to Indian tribes has been simmering over the last few decades, waiting for an episode to bring it to a boil. The recent union votes at the Foxwoods Casino in Connecticut and the Soaring Eagle Casino in Michigan—two major casinos owned by Indian tribes—may just be such an episode.

In determining whether laws of general applicability apply to Indian tribes, two approaches have been identified by the federal courts: (1) the clear and unequivocal congressional intent standard,[2] and (2) the *Federal Power Commission v. Tuscarora Indian Nation* presumption grounded in dictum that statutes of general applicability apply to tribes. A third approach analyzing the impingement of the statute on tribal sovereignty, however, was created in the recent *San Manuel Indian Bingo and Casino v. NLRB* decision.[3] Some of the federal circuits confronting this question have adopted the so-called *Tuscarora* presumption.[4] This approach is relentlessly hostile to tribal sovereignty with respect to governmental affairs and autonomy in tribal enterprises, resulting in a negative result in almost all instances. Even when federal courts have ultimately held that various federal statutes of general applicability do not apply to Indian tribes, the *Tuscarora* presumption becomes stronger with each decision that cites its dictum. Conversely, the congressional intent approach recognizes and respects fundamental principles of federal Indian law—namely, congressional plenary power and tribal sovereignty. Interestingly, these conflicting approaches have their origins in Supreme Court dicta, but the Court has not yet agreed

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1. CONG. GLOBE, 33d Cong., 1st Sess. 202 (1854). *See also* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 140 (1960) (Black, J., dissenting) (quoting CONG. GLOBE, 33d Cong., 1st Sess., App. 202).

2. *See* United States v. Dion, 476 U.S. 734, 739-40 (1986); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151-53 (1980); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1978); Fisher v. Dist. Ct. of the Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 387-89 (1976); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968).

3. 475 F.3d 1306 (D.C. Cir. 2007).

4. *Id.* at 1311; *see also* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177-78 (2d Cir. 1996); Smart v. State Farm Ins. Co., 868 F.2d 929, 932-33 (7th Cir. 1989).

to hear a modern case in which it could validate one approach over the other, or follow another approach altogether.

For example, in *Elk v. Wilkins*,[5] the Court stated that "[g]eneral acts of congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[6] *Elk* has never been overturned, and the fundamental principles stated in the decision have been reaffirmed by the Supreme Court on more than one occasion.[7] In *Santa Clara Pueblo v. Martinez*,[8] the Court refused to find a waiver of the sovereign immunity of the tribe based upon a broad provision of the Indian Civil Rights Act. In reaching its decision, the Court relied upon the principle in *Elk* that clear congressional intent is necessary before federal courts can find an abrogation of tribal sovereignty. The *Martinez* Court stated:

> Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. . . . *In the absence here of any unequivocal expression of contrary legislative intent*, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.[9]

Some federal courts look to the language of the statute and legislative history to determine whether Congress unequivocally intended for the law to apply to tribes.[10] These federal courts will often use the approach created by the Supreme Court in *United States v. Dion*.[11] The "actual consideration" standard developed in *Dion* provides that the Court will uphold the enforcement of a law against Indian tribes only if Congress actually considered the conflict between the law and Indian treaty rights and expressly chose to abrogate such rights.[12]

Elk, *Martinez*, and *Dion* collectively require that an unequivocal expression of congressional intent must exist for a tribe to be required to adhere to the provisions of a federal statute, or for a tribe's sovereign immunity to be waived. Many federal courts, however, have ignored or weakly distinguished these precedents and have instead begun their analysis with the dictum provided by the Supreme Court in *Federal Power Commission v.*

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5. 112 U.S. 94 (1884).
6. *Id.* at 100.
7. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); Bryan v. Itasca County, 426 U.S. 373, 380-81 (1976).
8. 436 U.S. 49, 58-59 (1978).
9. *Id.* at 59 (emphasis added).
10. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196-97 (10th Cir. 2002); Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1035 (11th Cir. 2001); Charland v. Little Six, Inc., No. 99-1989, 1999 WL 1006448 (8th Cir. Nov. 1, 1999); Dille v. Council of Energy Res. Tribes, 801 F.2d 373, 374-75 (10th Cir. 1986).
11. 476 U.S. 734 (1986).
12. *Id.* at 739-40.

Tuscarora Indian Nation, which 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."[13] The *Tuscarora* "presumption is of recent vintage, and can be traced to [an] overly broad statement in [that] termination-era case."[14] The outcome in the federal circuits that apply the presumption is predestined, as those courts are unlikely to find exceptions.[15]

The *Tuscarora* line of cases often will then use the judicially crafted structure established by the Ninth Circuit decisions in *United States v. Farris* and *Donovan v. Coeur d'Alene Tribal Farm*,[16] both of which are hostile to tribal sovereignty. In *Coeur d'Alene*, for example, the Ninth Circuit began by presuming application of the Occupational Safety and Health Act[17] to a tribal enterprise. The court stated:

> 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 . . . .[18]

The dicta that created the *Tuscarora* presumption and the *Coeur d'Alene* three-part test have been criticized by federal courts[19] and Indian law scholars alike.[20]

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13. 362 U.S. 99, 116 (1960).

14. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 128-29 (2005).

15. *See* United States v. Farris, 624 F.2d 890, 896-97 (9th Cir. 1980) (applying federal criminal statute to a Tribe in disregard of an explicit treaty right to exclude any and all persons from the reservation); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

16. 751 F.2d 1113 (9th Cir. 1985).

17. *See* discussion *infra* Subsection II.B.5.

18. *Couer d'Alene*, 751 F.2d at 1116 (alteration and omission in original) (quoting *Farris*, 624 F.2d at 893-94).

19. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1199 (10th Cir. 2002) (en banc) (declining to follow *Tuscarora* as the decision "does not apply where an Indian tribe has exercised its authority as a sovereign" pursuant to claims brought under the National Labor Relations Act); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 178 (2d Cir. 1996) (describing presumption of applicability of federal statutes of general applicability to Indian tribes as "dictum"); EEOC v. Cherokee Nation, 871 F.2d 937, 938 n.3 (10th Cir. 1989) (dismissing Equal Employment Opportunity Commission claim that the *Tuscarora* presumption is applicable to the Age Discrimination in Employment Act and describing the *Tuscarora* presumption as "broad dictum").

20. *See generally* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004).

The hot spots of recent legal and academic conflict on this question have arisen in the surge of union activity in Indian country. The union-organizing activity at successful tribal businesses cuts to the heart of the critical questions that *Tuscarora* courts demand tribes answer—namely, the connection between tribal economic activity and tribal sovereignty. It is this question—whether such general laws apply to tribal businesses—that the *Tuscarora* courts have all but foreclosed, to the detriment of tribal sovereignty, by ignoring the specific legal history and circumstances of each tribe, each act of Congress, the tribal business involved, and especially, as this Article demonstrates, any other applicable tribal laws.

The attention paid to tribally held businesses is due mostly to the accelerated pace at which some of these businesses are growing and to the notoriety of tribally owned gaming operations. Much of the accelerated growth in gaming and expansion of tribally held businesses other than gaming is due to the passage of the Indian Gaming Regulatory Act (IGRA).[21] Many of the governmental services tribal governments provide to tribal citizens are based upon the gaming revenue earned. If no profitable gaming market is available, the tribal government will do what it can with federal government funding, grants, and any revenue generated by tribal enterprises, to provide as many services as possible. Throughout many areas of Indian country, however, IGRA has created a large amount of competition between tribes and some states, and, in other regions, saturation of the same regional gaming markets. A few tribes have diversified or are in the process of diversifying tribal economies. However, there are many areas of Indian country where the IGRA has had little effect, as the market is minimal at best. These tribes had already been pursuing various business opportunities aside from gaming well before the enactment of the IGRA.[22]

Tribes, in some cases, find that they are among the largest employers in a region.[23] As a result, depending on the region of the country where the

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21. 25 U.S.C. §§ 2701-2721 (2000 & Supp. V 2005).

22. For a detailed examination of the impact of IGRA on tribes, see Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39 (2007).

23. For example, the Oneida Tribe of Indians of Wisconsin is the third largest employer in the Green Bay region of Wisconsin. *See* GREEN BAY AREA CHAMBER OF COMMERCE, 30 LARGEST EMPLOYERS IN THE GREEN BAY AREA (2006), http://resources.titletown.org/resources/30largestemployersbcty2006.doc. The Menominee Tribe of Wisconsin is the largest employer in Menominee County. WISCONSIN DEP'T OF ADMINISTRATION, MENOMINEE INDIAN TRIBE OF WISCONSIN (2007), http://witribes.wi.gov/docview.asp?docid=9256&locid=57. *See also* Michael Cooper, *Harrah's, Tribe Eye Transfer*, THE TOPEKA CAPITAL-JOURNAL, Jan. 30, 2007, http://findarticles.com/p/articles/mi_qn4179 /is_2007-0130/ai_n17161995 (stating that the Prairie Band of the Potawatomi Nation of Kansas Tribal casino is the largest employer in Jackson County, and that the second largest is the tribal government); Robert J. Miller, *Coeur d'Alene Tribe Contributes to Idaho Economy*, NATIVE AMERICA, DISCOVERED AND CONQUERED, Apr. 27, 2007, http://lawlib.lclark.edu/ blog/na-

tribe is located, the tribe may be hiring many non-Indian employees. With the number of federally recognized tribes approaching 600, the various methods tribes will utilize to address relations with employees will differ, depending on the policy of the governing body of the tribe. Many tribes have enacted tribal legislation, codified as tribal law, which arguably preempts federal laws not expressly applicable to tribes.[24] Other tribes exert jurisdiction over non-Indian businesses without regard to the pressures of external sovereigns. A factor not widely discussed or analyzed is whether the incorporation of a non-Indian business under tribal law, operating entirely under tribally enacted labor and employment laws, must still adhere to federal and state labor and employment laws. The question is whether these employers should be required to abide by tribal law or by federal law.

Tribal, federal, and state courts all find themselves grappling with the issue of whether federal and state labor and employment laws are applicable to Indian tribes as evidenced by the variety of outcomes in judicial decisions. The focus of this Article is to provide an overview of the federal labor and employment laws, divided between the statutes that expressly exempt Indian tribes and the statutes that are silent. In addition, this Article addresses each statute and its generally understood applicability or inapplicability to Indian tribes and tribal businesses. Moreover, the interplay between applications of the silent federal statutes is identified, and this Article advocates for tribes, if the tribal governing body has not already done so, to enact substantive tribal labor and employment legislation to curtail the federal government's intrusion into tribal sovereignty. Tribal law should govern all businesses, whether Indian or non-Indian, which are either incorporated under tribal law or operate solely within Indian country. This logic is consistent for individuals who work within a certain state, or for businesses that operate or are incorporated under the laws of a certain jurisdiction and are subject to the laws of the state jurisdiction.

II. OVERVIEW OF FEDERAL LABOR AND EMPLOYMENT LAWS AND THE CURRENT APPLICATION OF SUCH LAWS TO INDIAN TRIBES

This Part summarizes the status of current federal law and employment laws as applied (or not) in Indian country. There are some federal statutes that contain express exemptions for Indian tribes. Most of the fed-

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tive_america/?p=132 (Coeur d'Alene Tribe is the second largest employer in northern Idaho).

24. *See* Right to Work Act, CHICKASAW NATION CODE tit. 2, §§ 2-570.1-.2 (2005), *available at* http://www.chickasaw.net/site06/docs/PR22-012.pdf; MOHEGAN TRIBE OF INDIANS OF CONN., CODE OF ORDINANCES ch. 4, art. VI (2006); MASHANTUCKET PEQUOT TRIBAL LAWS tit. 28 (2007), *available at* http://www.narf.org/nill/Codes/mpcode/28work.pdf; GRAND TRAVERSE BAND CODE tit. 18 (1993), *available at* http://www.narf.org/nill/Codes/gtcode/18.pdf.

eral labor and employment laws, however, are silent as to the applicability to tribes.

A. Federal Statutes Containing Express Exemptions for Indian Tribes

In some circumstances, Congress has specifically addressed the application of federal labor and employment laws. In these instances, Congress will generally provide an express exemption from the statutes' provisions akin to exemptions provided to state and local governments.

1. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964[25] prohibits discrimination in employment on the basis of race, color, national origin, sex, and religion. Unlike most federal labor and employment statutes, Title VII expressly exempts Indian tribes from the definition of "employer."[26] Title VII also permits the well-established practice of Indian preference in employment decisions by all employers "on or near a reservation," whether the entity is Indian or non-Indian owned.[27]

Federal courts have, however, interpreted all of Title VII's provisions, other than the tribal preference exemption, as applicable to non-Indian businesses operating within tribal jurisdiction.[28] These federal courts have not factored in whether the tribe had previously enacted tribal laws governing the action that created the claim in the first place. As discussed *infra*, no

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25. 42 U.S.C. §§ 2000e to -17 (2000 & Supp. 2007).

26. 42 U.S.C. § 2000e(b) provides:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, *an Indian tribe* . . . .

42 U.S.C. § 2000e(b) (emphasis added).

27. 42 U.S.C. § 2000e-2(i) provides:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. § 2000e-2(i).

28. *See, e.g.*, Tidwell v. Harrah's Kan. Casino Corp., 322 F. Supp. 2d 1200, 1205-06 (D. Kan. 2004) (asserting jurisdiction to adjudicate Title VII sexual harassment claim by non-tribal citizen employee of casino operated by non-tribal enterprise, in part, due to the lack of impact or concerns on tribal self-government); Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753, 753-55 (D.N.D. 1989) (asserting jurisdiction over Title VII and race and age discrimination claims brought by an Indian employee against commercial operation incorporated under state law in which Tribe was the majority (51%) owner of the business in conjunction with a Delaware corporation minority owner (49%)).

distinction should exist as to whether the business is Indian or non-Indian, or incorporated under tribal law or the laws of another jurisdiction.[29] The assertion that a business incorporated under the laws of Delaware, but operating in New York, is exempt from the laws of New York is laughable, but this distinction does exist within Indian country.

The legislative history of Title VII reveals that Congress categorically exempted Indian tribes from Title VII's definition of "employer," due to the recognition of tribal self-governance and the status of tribes as sovereign political entities.[30] Congress specifically recognized the tribes' inherent ability "to conduct their own affairs and economic activities without consideration of the provisions" of Title VII.[31] The rationale of Congress in excluding Indian tribes as employers under Title VII is provided by former South Dakota Senator Karl Mundt. Essentially, he stated that Indian tribes should be accorded the same protections that the United States government is afforded as a sovereign entity:

> To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts, and police forces. This amendment would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill.[32]

The express exemption provided by Title VII for Indian tribes has been challenged, but consistently reaffirmed, by the federal courts. In *Morton v. Mancari*, the Supreme Court stated that Title VII revealed "a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities."[33] In light of this, federal courts have rejected attempts to avoid the exemption in Title VII[34] by

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29. *See infra* Subsection II.B.1.

30. 110 CONG. REC. 13702 (1964).

31. *Id.*

32. *Id.*; *see also* 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, 695 (1994).

33. 417 U.S. 535, 545-46 (1974).

34. *See, e.g.*, Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 552 (4th Cir. 2006) (affirming district court decision holding that allowing a party to claim relief from discrimination pursuant to 42 U.S.C. § 1981 would circumvent the tribal exemption in Title VII and the intent of Congress in enacting Title VII); Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1035 (11th Cir. 2001) (dismissing claim under 42 U.S.C. § 1981, as deciding otherwise would "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"); Dille v. Council of Energy Res. Tribes, 801 F.2d 373, 374 (10th Cir. 1986) (dismissing a claim of sex discrimination, stating "[c]learly this language [of Title VII] exempts a single Indian tribe from the definition of 'employer' and therefore from the legal requirements of Title VII"); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 673-74 (8th Cir. 1986) (dismissing Title VII claim

plaintiffs claiming relief pursuant to 42 U.S.C. § 1981[35] against an Indian tribe or a tribal entity.

Overall, federal courts have been reluctant to apply the provisions of Title VII to Indian tribes and tribal entities, as application of Title VII would be contrary to the clear congressional language the statute provides.[36] Federal courts, however, have consistently applied Title VII to non-Indian held entities within Indian country, despite the inherent sovereignty tribes retain within Indian country pursuant to the rule reaffirmed in *Montana v. United States*—that non-Indians who have entered into consensual relations with a tribe are subject to tribal jurisdiction.[37]

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against tribal housing authority as an entity of the tribal government); Wardle v. Ute Indian Tribe, 623 F.2d 670, 673 (10th Cir. 1980) (dismissing a claim for relief against a tribal employer grounded in 42 U.S.C. § 1981, even though no claim was alleged pursuant to Title VII due to tribal exemption based upon the specific statute (Title VII) prevailing over general statutes); Tenney v. Iowa Tribe of Kan., 243 F. Supp. 2d 1196, 1198 (D. Kan. 2003); Hartman v. Golden Eagle Casino, Inc., 243 F. Supp. 2d 1200, 1203 (D. Kan. 2003); Curtis v. Sandia Casino, No. 02-2274, 2003 WL 21386332, at *2 (10th Cir. June 17, 2003) (unpublished opinion).

35. 42 U.S.C. § 1981, otherwise known as the more general anti-discrimination statute, provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (2000).

36. *See* Thomas v. Choctaw Mgmt./Servs. Enter., 313 F.3d 910, 911 (5th Cir. 2002). *But see* Aleman v. Chugach Support Servs., Inc., 485 F.3d 206, 213 (4th Cir. 2007) (holding that the exemption for Alaska Native Corporations (ANC) from suit under Title VII did not immunize employer from suit under the separate and independent cause of action for discrimination established by § 1981 for purposes of claims brought by employees against employer and its parent company). According to the opinion, apparently, the court affirmatively recognized that Indian tribal immunity is a bar to § 1981 liability pursuant to *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541 (4th Cir. 2006), but the ANC neglected to claim immunity in this case. *Aleman*, 485 F.3d at 213.

37. 450 U.S. 544 (1981); *see* discussion *infra* Subsection II.B.1.

2. *Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) requires employers to reasonably accommodate qualified disabled employees.[38] The ADA expressly excludes Indian tribes from the definition of "employer" in the same manner that Title VII does.[39] Although the language of ADA tribal exclusion tracks the language in Title VII, Congress did not provide any express legislative history for the ADA definition of "employer" similar to that provided in Title VII.[40] Courts have nonetheless routinely rejected arguments and assertions that Indian tribes and tribal entities are subject to the provisions of the ADA.[41] The ultimate holding in many of these decisions is consistent with the overall policy and intent of Congress in enacting both Title VII and the ADA.

Tribes should be careful, however, not to tempt Congress to use the so-called plenary power and simply amend Title VII or the ADA in a manner consistent with the recent amendments to the Employee Retirement Income Security Act.[42] Some commentators have cautioned tribes and tribal corporate entities not to flaunt the exemptions and instead to adopt, as many states have, their own ADA requirements or similar provisions.[43] Some tribes have enacted tribal legislation or included similar protections for disabled persons within their tribal personnel policy manuals.

3. *Employee Retirement Income Security Act*

Due largely to IGRA, recent years have seen burgeoning growth for some tribal economies, and, as a result, many tribal governments and enter-

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38. 42 U.S.C. §§ 12101-12213 (2000 & Supp. V 2005).

39. *Compare* 42 U.S.C. § 12111(5)(B)(i) (ADA), *with* 42 U.S.C. § 2000e-17 (Title VII). 42 U.S.C. § 12111(5)(B)(i) provides: "The term "employer" does not include— (i) the United States, a corporation wholly owned by the government of the United States, or *an Indian tribe* . . . ." 42 U.S.C. § 12111(5)(B)(i) (emphasis added).

40. *See* Limas, *supra* note 32, at 718; COHEN, *supra* note 14, at 1293.

41. *See* Ferguson v. SMSC Gaming Enter., 475 F. Supp. 2d 929, 931 (D. Minn. 2007); Giedosh v. Little Wound Sch. Bd., Inc., 995 F. Supp. 1052 (D.S.D. 1997); Curtis v. Sandia Casino, No. 02-2274, 2003 WL 21386332 (10th Cir. June 17, 2003) (unpublished opinion) (dismissing Title VII, ADEA, and ADA claims and stating that the "ADA claim fails because the ADA excludes Indian tribes as employers subject to suit"); Charland v. Little Six, Inc., No. 99-1989, 1999 WL 1006448 (8th Cir. Nov. 1, 1999) (unpublished opinion).

42. 29 U.S.C. §§ 1001-1461 (2000 & Supp. I 2007).

43. *See* Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126 (11th Cir. 1999) (dismissing claim due to the lack of express abrogation of Tribe's sovereign immunity, and not upon the express exclusion of the ADA's definition of employer); Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?*, 11 KAN. J.L. & PUB. POL'Y 441, 454 (2002).

prises have become attractive prospective employers to many Indians and non-Indians alike. Many tribal employers offer competitive benefit plans for their employees, although tribes are certainly not required to establish such benefit plans. When tribes establish benefit plans for their employees, the provisions of the Employee Retirement Income Security Act of 1974 (ERISA)[44] should not apply to tribes.

ERISA was enacted to remedy problems that arose mainly in the private sector retirement system.[45] Congress attempted to strike a balance between the concerns of employees and the fact that employers were not required to establish any benefit plans for their employees. Congress also was careful to craft a distinction between the plans of the private sector and those of governmental entities.[46] Although there was some concern over the lack of regulation for governmental plans, such plans were ultimately exempted from the provisions of ERISA.[47] In order for a government plan to be exempt from ERISA, the plan must meet the following definition:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C. 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C. 288 et seq.].[48]

Until the enactment of the Pension Protection Act of 2006 (PPA),[49] which amended ERISA[50] and the Internal Revenue Code (IRC), ERISA was silent with respect to Indian tribes. The federal appellate courts that had interpreted ERISA as applicable to Indian tribes prior to the enactment of the Pension Protection Act were extremely reluctant to uphold express treaty rights despite the absence of an unequivocal expression of congressional intent to apply the law to tribes.[51]

In *Lumber Industries Pension Fund v. Warm Springs Forest Products Industries*,[52] the Ninth Circuit applied *Coeur d'Alene*'s three-part approach

44. 29 U.S.C. §§ 1001-1461 (2000 & Supp. I 2007).

45. *See* H.R. REP. NO. 93-533, at 1 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639; 199 CONG. REC. 130 (1973) (statement of Sen. Williams).

46. H.R. REP. NO. 93-533, at 1 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639.

47. *Id.* at 4647.

48. 29 U.S.C. § 1002(32).

49. Pub. L. No. 109-280, 120 Stat. 780 (2006).

50. Section 906 of the Pension Protection Act amended 29 U.S.C. § 1002(32).

51. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989).

52. 939 F.2d 683 (9th Cir. 1991). For a more detailed discussion of the *Warm Springs* case, see generally Limas, *supra* note 32, at 732; William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Em-*

to eroding tribal sovereignty. The *Lumber* Court held that applying ERISA to a lumber mill wholly owned and operated by the Warm Springs Tribe and located entirely upon Warm Springs land would not usurp the decision-making power of the tribe, and further held that protection of the tribal business from liability did not constitute a function of self-governance.[53]

Likewise, in *Smart v. State Farm Insurance Co.*,[54] the Seventh Circuit adopted the approach of the Ninth Circuit and presumed application of ERISA under the *Tuscarora* dictum.[55] The Seventh Circuit then applied the *Coeur d'Alene* exception test and determined that ERISA was applicable to the Bad River Band in Wisconsin.[56] In its decision, the Seventh Circuit held that the 1854 Treaty with the Chippewa, which permitted the Tribe to exclude persons from the reservation "within its exclusive sovereignty," did not preclude application of ERISA.[57]

The applicability of ERISA to tribes, however, was modified from silent to express with the enactment of the PPA. Section 906(a) of the PPA amended ERISA to distinguish between the benefit plans of tribal governments and tribal commercial activities. As a result, 29 U.S.C. § 1002(b)(32) now reads:

> The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, 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 (whether or not an essential government function).[58]

As one can imagine, the amendment to ERISA has not been overly popular with Indian tribes. The PPA was passed and signed into law on September 30, 2006, and the Internal Revenue Service (IRS) initially gave Indian tribes until September 30, 2007, to comply with the law.[59] This deadline has created such a hardship for so many tribes that the IRS permit-

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ployers, 25 U. MEM. L. REV. 1365, 1387-88 (1995). Although the cases are important to review, recent amendments no longer make ERISA a statue of general applicability that is silent as to the applicability of Indian tribes, and therefore, a court's application of the current statute will differ significantly.

53. *Lumber*, 939 F.2d at 685.

54. 868 F.2d 929 (7th Cir. 1989). For a more detailed discussion of the *Smart* case, see generally Limas, *supra* note 32, at 731-32; Buffalo & Wadzinski, *supra* note 52, at 1386-87.

55. *Smart*, 868 F.2d at 935-36.

56. *Id.*

57. *Id.*

58. 29 U.S.C. § 1002(b)(32) (2000).

59. I.R.S. Notice 2006-89, 2006-43 I.R.B. 772 (Oct. 23, 2006), *available at* 2006 WL 2798282 (Transition Relief for Indian Tribal Governmental Plans).

ted an extension of six months after new regulations would be promulgated before full compliance is required.[60] Until then, tribes are under a good faith requirement to comply.[61] This means many tribes are, or will be, required to separate benefit plans that may have previously included all governmental and commercial tribal employees. This may end up hurting the returns on such benefit plans as the number of employees and the amount pooled together will be reduced. In fact, the whole scheme seems to run contrary to the overall intent of ERISA, which is supposed to protect the benefit plans of employees.[62]

Some members of Congress have recognized the problem inherent in statutorily distinguishing tribal government and tribal enterprises, and have introduced legislation to eliminate the distinction between government plans and tribal commercial activities.[63] The likelihood of any of these bills being enacted, however, is very low, as no committee hearings have been held addressing the issue at this point. Essentially, ERISA is no longer silent as to Indian tribes and tribal enterprises.[64] The benefit plans of an Indian tribal government, or the subdivision, agency, or instrumentality of the tribal government, constitute governmental plans under ERISA and therefore are exempt from its requirements.[65] If the plan benefits employees engaged in the performance of commercial activities, however, then it is not a governmental plan and is subject to the audit and filing requirements of ERISA.[66]

At this point, the IRS has yet to promulgate regulations to implement the PPA and § 906. However, the IRS did publish a notice that regulations are forthcoming, though a clear timeline was not provided.[67] In any case, the Joint Committee on Taxation's (JCX) Technical Explanation of § 906 of the PPA does list some examples.[68]

The JCX states that a tribal government plan exempt from the IRC and ERISA would include teachers in tribal schools.[69] However, such a plan

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60. I.R.S. Notice 2007-67, 2007-35 I.R.B. 467 (Aug. 27, 2007), *available at* 2007 WL 2265140 (Extension of Transition Relief for Indian Tribal Government Plans).

61. *Id.*

62. H.R. REP. NO. 93-533, at 1 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639.

63. The three bills introduced were the Tribal Government Pension Equality Act of 2007, H.R. 2119, 110th Cong. (2007), The Tribal Government Equality Act of 2007, S. 1129, 110th Cong. (2007), and Tribal Government Equality Act of 2007, S. 792, 110th Cong. (2007).

64. *See* 29 U.S.C. § 1002(b)(32) (2000 & Supp. I 2007).

65. *See id.*

66. *See id.*

67. 71 Fed. Reg. 45,474 (Aug. 9, 2006), *available at* 2006 WL 2263447.

68. JOINT COMM. ON TAXATION, JCX-38-06, TECHNICAL EXPLANATION OF H.R. 4, THE "PENSION PROTECTION ACT OF 2006" AS PASSED BY THE U.S. HOUSE OF REPRESENTATIVES ON JULY 28, 2006 AND AS CONSIDERED BY THE U.S. SENATE ON AUGUST 3, 2006 (2006), *available at* http://www.house.gov/jct/x-38-06.pdf.

69. *Id.* at 244.

would not include tribal employees of tribally owned or operated hotels, casinos, service stations, convenience stores, or marinas, as the work conducted by the tribal employees would presumably be "in the performance of commercial activities," regardless of whether such activities were an essential governmental function.[70] Any regulations promulgated by the IRS following such a distinction would be wholly contrary to much of the federal legislation relating to Indian tribes, because the regulations would ignore the intrinsic link between commercial activities and tribal governments' ability to provide essential governmental services as part of tribal self-determination and self-governance.[71] With this governmental-commercial distinction created by the PPA, Congress has ignored the fact that without tribal commercial activities, any hope for tribal governments achieving any level of self-sufficiency is seriously hindered.

4. *The Worker Adjustment and Retraining Notification Act*

The Worker Adjustment and Retraining Notification Act (WARN) requires employers to provide notice to employees in the event of a plant closing or a mass layoff at least sixty days in advance.[72] The definition of "employer" provided in WARN does not reference Indian tribes and does not specifically exclude the federal government or Indian tribes.[73] The regulations promulgated by the Secretary of Labor, however, expressly exclude tribal governments and the federal government from the definition of "employer."[74]

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70. *Id.*

71. *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450- to e-3); Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4270 (codified at 25 U.S.C. § 458aa-hh); Exec. Order No. 12,401, 48 Fed. Reg. 2309 (1983), *available at* 1983 WL 506833.

72. 29 U.S.C. §§ 2101-2109 (2000 & Supp. I 2007).

73. 29 U.S.C. § 2101(a)(1) provides:

> [T]he term "employer" means any business enterprise that employs—
> (A) 100 or more employees, excluding part-time employees; or
> (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime) . . . .

29 U.S.C. § 2101(a)(1).

29 U.S.C. § 2101(a)(7) provides:

> [T]he term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers . . . .

29 U.S.C. § 2101(a)(7).

74. 20 C.F.R. § 639.3(a)(1)(ii) states in part:

> The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (*i.e.*, take part in a commercial or industrial enterprise,

The WARN regulations, conversely, seem to include tribal commercial enterprises that are organized separate from the regular tribal government, have their own governing bodies, and have independent authority to manage their personnel and assets.[75] Although this definition is more specific than the new amendments to ERISA, the intent to include tribal commercial enterprises is apparent from the WARN regulations. To date, there are no reported federal decisions addressing whether WARN applies to tribes or tribal commercial enterprises, or what tribal enterprises may constitute an "employer." Based upon the plain language of 29 C.F.R. § 639.3, however, tribal governments are clearly exempt from coverage, but some tribal enterprises that are (1) separately organized, (2) have their own governing body, and (3) have independent authority to manage their personnel and assets may constitute an employer for purposes of WARN.

B. Federal Statutes Silent with Regard to Indian Tribes

The majority of federal labor and employment laws were enacted by Congress without regard to their application to or impact upon Indian tribes. The legislative history is sparse in terms of any discussion among members of Congress, and the courts have been left as the arbiters of the application of these statutes to tribes.

1. *Age Discrimination in Employment Act*

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination in employment against persons age forty and older.[76] The governmental entity responsible for the enforcement of the ADEA is the Equal Employment Opportunity Commission (EEOC). Unlike Title VII

> supply a service or good on a mercantile basis . . .), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

20 C.F.R. § 639.3(a)(1)(ii) (2008).

75. *See id.*

76. 29 U.S.C. §§ 621-34 (2000). The portion of the ADEA defining employer, at 29 U.S.C. § 630(b), provides:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b). *See also supra* notes 19 and 33.

and the ADA, the ADEA (and the remainder of the federal statutes examined in this Article) is a federal law that is silent regarding Indian tribes and tribal entities. Similar to the other silent federal laws of general applicability, the ADEA could potentially infringe on the inherent ability of a tribe to regulate internal affairs and to be governed by its own laws.

The ADEA definition of "employer" is almost identical to the Title VII and ADA definition of "employer," and in fact, the ADEA definition was specifically modeled after the Title VII definition.[77] The definition in the ADEA, however, contains one very important omission. There is no reference to Indian tribes in the statute or in its legislative history.[78] Despite this omission, however, three federal appellate courts have held the ADEA inapplicable to tribes and tribal enterprises.[79]

The Tenth Circuit, in *Equal Employment Opportunity Commission v. Cherokee Nation*, held that the ADEA was not applicable to Indian tribes and dismissed a claim of age discrimination brought by an employee against the Cherokee Nation.[80] The EEOC had attempted to judicially enforce an administrative subpoena directing the Cherokee Nation to produce documents of several of its former tribal employees.[81] The Nation argued that tribal sovereign immunity precluded EEOC jurisdiction absent specific and unequivocal congressional intent to apply the ADEA to Indian tribes.[82]

Importantly, the court reexamined the basis for its holding in *Donovan v. Navajo Forest Products Industries*,[83] where it had held that the Occupational Safety and Health Act applied to a business owned and operated by the Navajo and located within the exterior boundaries of the reservation. As discussed *infra*, the Tenth Circuit refused to apply OSHA to the tribal business and the Navajo absent clear congressional intent, as application would have abrogated treaty provisions.[84]

The *Cherokee Nation* Court appropriately invoked *Navajo Forest Products* and the Supreme Court's well-settled canon of construction that statutes are to be liberally construed in favor of Indian tribes.[85] In its enact-

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77. EEOC v. Cherokee Nation, 871 F.2d 937, 942 n.3 (10th Cir. 1989); *see also* Limas, *supra* note 32, at 719.

78. *Cherokee Nation*, 871 F.2d at 941 n.2 (Tacha, J., dissenting).

79. *Id.* at 938; EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982).

80. *Cherokee Nation*, 871 F.2d at 938.

81. *Id.* at 937.

82. *Id.* at 938.

83. *Navajo Forest Prods.*, 692 F.2d at 709; *see* discussion *infra* Subsection II.B.5.

84. *Navajo Forest Prods.*, 692 F.2d at 712-14.

85. *Cherokee Nation*, 871 F.2d at 938-39. *See also* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Choate v. Trapp, 224 U.S. 665 (1912); United States v. Winans, 198 U.S. 371 (1905).

ment of the ADEA, Congress was silent in substance and intent as to the statute's applicability to Indian tribes. Therefore, an ambiguity was present.[86] Thus, under the Supreme Court's canon, the Tenth Circuit held the ADEA inapplicable to Indian tribes.[87]

The other two circuits that have examined the application of the ADEA to tribes have unfortunately relied upon analysis inconsistent with Supreme Court decisions.[88] In so doing, both circuits ultimately concluded that the ADEA did not apply to Indian tribes. The analysis in both decisions is flawed, however, and has paved the way for courts to slowly erode tribal sovereignty.

The Eighth Circuit, in *EEOC v. Fond du Lac Heavy Equipment & Construction Co., Inc.*, examined a claim of age discrimination by an employee of the Fond du Lac's wholly owned and operated construction company.[89] The construction company was organized pursuant to tribal law and was located within the exterior boundaries of the reservation.[90] The *Fond du Lac* Court placed considerable emphasis on these facts, in addition to noting that the claimant/employee was a citizen of the Tribe.[91] The court began its analysis on the wrong foot, by citing the *Tuscarora* dictum that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[92] The court misconstrued the Tenth Circuit's holding in *Cherokee Nation*, however, by stating that "[b]ecause the tribe's specific right of self-government would be affected, the general rule of applicability does not apply."[93] This is a tortured interpretation of what the Tenth Circuit held in *Cherokee Nation*. At no point did the *Cherokee Nation* Court state that *Tuscarora* is a "general rule" that would normally apply but for the Cherokee's right to self-governance. Ultimately, the *Fond du Lac* Court applied the *Dion* "actual consideration" test as opposed to the *Coeur d'Alene* test and held that "[b]ecause of the special rules of construction that apply in a case such as this, we do not find that a clear and plain intention of Congress should be extrapolated from the omission of the phrase 'an Indian tribe' from the definition of 'employer' in the ADEA."[94]

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86. *Cherokee Nation*, 871 F.2d at 939.
87. *Id.*
88. EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 248 (8th Cir. 1993).
89. *Fond du Lac Heavy Equip.*, 986 F.2d at 248.
90. *Id.*
91. *Id.* at 247.
92. *Id.* at 248 (quoting Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960)).
93. *Id.* at 249 (citing EEOC v. Cherokee Nation, 871 F.2d 937, 938 (10th Cir. 1989)).
94. *Id.* at 250-51.

The court continued, however, by limiting the facts of the case: "Therefore, 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 . . . ."[95] Those "narrow facts" should not have even been part of the discussion. The holding should not be modified if the employee is a non-Indian employee or if the employer is a non-Indian business operating on the reservation or incorporated pursuant to tribal law. If this last quote from the court were rephrased and instead of "tribe," the term "state" were inserted (therefore, we find the ADEA does not apply to the narrow facts of this case which involve a citizen of the state, the state as an employer, and employment within the state), the holding would be obvious. If the state were the defendant/appellant, the citizenship of the claimant would not have been relevant.

The point is that whether the claimant is Indian or non-Indian should not even be considered in these cases. If the person seeks to enter into a consensual employment relationship with a tribe, a tribal enterprise, or any business incorporated or operating within the exterior boundaries of the reservation, such a person is subject to the laws (outside the criminal context if non-Indian, of course) of that jurisdiction as affirmed by the Supreme Court in *Montana v. United States*.[96] Why federal courts have ignored the *Montana* rules is unclear.[97] Nowhere in the *Montana* decision are these rules referred to as exceptions. The Court simply restates the fundamental *rule* that:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[98]

Montana makes it very clear that non-Indians entering into consensual relationships with a tribe or others under the jurisdiction of the tribe (such as a non-Indian business incorporated under tribal law or operating within the reservation), in terms of employment or business contracts, should expect to

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95. *Id.* at 251.

96. 450 U.S. 544, 568 (1981). For a very thorough and logical discussion of *United States v. Montana*, in the context of applying statutes of general applicability to Indian tribes, see generally Skibine, *supra* note 20, at 119.

97. *Montana*, 450 U.S. at 565-66.

98. *Id.* (citations omitted).

be governed by tribal law, and the tribe may exercise jurisdiction over such individuals or business.[99]

With this context in place, the Ninth Circuit's decision in *EEOC v. Karuk Tribe Housing Authority*[100] seems even more inconsistent with fundamental principles of federal Indian law. The Ninth Circuit in *Karuk* began its analysis, as did the Eighth Circuit in *Fond du Lac*, on the wrong foot and continued down a slippery slope of misinterpretation of core concepts of federal Indian law, applying *Tuscarora* and the *Coeur d'Alene* "rules." What is interesting is that the *Karuk* Court relies upon the *Coeur d'Alene* Court's statement that for any of the *Coeur d'Alene* rules to apply, "Congress must *expressly* apply a statute to Indians before . . . it reaches them."[101] Nevertheless, despite its presence in the opinion, the *Karuk* Court ignores the rule.[102] The *Farris* Court, moreover, ignored its own language that Congress must expressly apply a statute to Indians as a precondition of applicability by also relying upon the *Tuscarora* presumption in applying a general criminal statute to an Indian on the reservation.[103]

The *Farris* Court somehow managed to misconstrue some of the most fundamental principles of federal Indian law in only a couple of paragraphs. This misconstruction is apparently the foundation for the *Coeur d'Alene* test, and is further compounded by the *Karuk* Court's misguided concentration on whether application of the ADEA would touch the "exclusive rights of self-governance in purely intramural matters."[104]

The *Karuk* Court presupposed that the *Cherokee Nation* and *Fond du Lac* courts engaged in the same analysis in holding that the ADEA did not apply to Indian tribes. In so doing, *Karuk* stated that *Cherokee Nation* relied upon the second *Coeur d'Alene* exception in concluding that the treaty at issue reserved powers of self-government. The *Cherokee Nation* Court, however, relegated *Coeur d'Alene* to a footnote and even went so far as to state, "[i]n fact, in [*Donovan v.*] *Navajo Forest Products* we questioned the continuing vitality of the *Tuscarora* dictum in light of the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe*."[105] *Karuk* and *Coeur d'Alene* ignore the clear statement that *Tuscarora* was invalid, instead citing *Cherokee Nation* in support of the flawed *Coeur d'Alene* exceptions to *Tus-*

99. The Supreme Court, however, recently granted *certiorari* to *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 829 (2008). This case may have far-reaching impacts on tribal jurisdiction and the ability of tribal courts to exercise jurisdiction over nonmember individuals and businesses operating within the exterior boundaries of the reservation.

100. 260 F.3d 1071 (9th Cir. 2001).

101. *Id.* at 1079.

102. *Id.* at 1078-79.

103. United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980).

104. *Karuk*, 260 F.3d at 1079.

105. EEOC v. Cherokee Nation, 871 F.2d 937, 938 n.3 (10th Cir. 1989).

carora.[106] Many of the federal courts would do fine to simply ignore or disregard any federal appellate decisions addressing the application of the ADEA to Indian tribes, other than the clear and logical analysis of the Tenth Circuit in *Cherokee Nation*.

2. *Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) establishes standards for minimum wage, overtime pay, recordkeeping, and child labor.[107] FLSA applies to enterprises with employees who engage in interstate commerce,[108] and to federal, state, and local government agencies regardless of their impact on interstate commerce.[109]

To date, only two federal appellate courts, the Seventh and Ninth Circuits, have addressed the applicability of FLSA to Indian tribes.[110] Both courts avoided the real issue, however, and determined the outcome of the dispute based upon exemptions to FLSA unrelated to Indian tribes' inherent sovereignty.

In *Reich v. Great Lakes Indian Fish & Wildlife Commission*,[111] the Seventh Circuit examined whether FLSA applied to a tribal organization operating pursuant to a constitution adopted by the consortium of member tribes.[112] Just three years earlier, the Seventh Circuit had issued its heavily criticized decision in *Smart v. State Farm Insurance Co.*,[113] so *Reich* may have been relatively fresh in the court's institutional memory. In *Reich*, the U.S. Department of Labor sought to enforce a subpoena to obtain payroll records of the tribal organization to determine whether the organization's game wardens were being paid time and a half for overtime as required by FLSA.[114]

Judge Posner's opinion dodged the real issues. The court held that FLSA did not apply to the tribal organization and its game wardens due to a FLSA exemption for law enforcement officials.[115] Thankfully, however, the majority opinion in *Reich* did not begin its analysis with *Tuscarora*, and in

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106. For interesting commentary on the *Coeur d'Alene* exceptions, see Mitchell Peterson, *Applicability of Federal Employment Law to Indian Tribes*, 47 S.D. L. REV. 631, 647-51 (2002).

107. 29 U.S.C. §§ 201-19 (2000 & Supp. I 2007); 29 C.F.R. §§ 510-794 (2006).

108. *See generally* 29 U.S.C. § 203.

109. 29 U.S.C. § 203(e)(4)(B).

110. Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989).

111. *Reich*, 4 F.3d at 494.

112. *Id.* at 492.

113. 868 F.2d 929 (7th Cir. 1989). For criticism of the *Smart* decision, see Limas, *supra* note 32, at 731-32; Buffalo & Wadzinski, *supra* note 52, at 1386-87.

114. *Reich*, 4 F.3d at 491.

115. *Id.* at 493-94.

fact, *Tuscarora* was not mentioned at all.[116] What is troubling is the majority's failure to determine whether FLSA actually applies to Indian tribes and tribal enterprises. At the same time, however, the opinion, in dicta, states that FLSA is presumably applicable to tribes:

> *The Fair Labor Standards Act does not mention Indians. It was enacted in 1938, at a time when Indian problems were not at the forefront of the national policy agenda. Nothing in the legislative history suggests that Congress thought about the possible impact of the Act on Indian rights, customs, or practices.* If therefore the Chippewa had a treaty right to employ law enforcement officers on any terms, the Fair Labor Standards Act would be presumed not to abrogate the right by forcing the Great Lakes Indian Fish and Wildlife Commission to pay time and a half for overtime. But one searches the treaties in vain for such a right.[117]

According to Judge Posner and the *Reich* Court, the Indian Reorganization Act of 1934 apparently does not constitute the result of national congressional policy as "Indian problems were not at the forefront" during this period.[118]

The Ninth Circuit, on the other hand, unwaveringly applies the *Coeur d'Alene* analysis in *Snyder v. Navajo Nation*, but asserts that its reasoning is consistent with *Reich*.[119] In *Snyder*, several Navajo Nation law enforcement employees filed claims against the Nation for violating the FLSA.[120] The *Snyder* Court first presumed applicability pursuant to *Tuscarora* and then examined whether any of the *Coeur d'Alene* exceptions applied.[121] In the same move the Seventh Circuit made in *Reich*,[122] the *Snyder* Court held that FLSA contains a law enforcement exception that is applicable to tribal law enforcement staff. The court attempted to reconcile its analysis with *Coeur d'Alene*, however, by stating that "[t]ribal law enforcement clearly is a part of tribal government and is for that reason an appropriate activity to exempt as intramural."[123]

In another matter currently making its way through the federal courts, citizens of a tribe conducting business on tribal land are arguing that FLSA does not apply to their business. Thus far, in *Chao v. Matheson*, District Court Judge Ronald B. Leighton has held FLSA applicable to the tribal citizens because under *Coeur d'Alene*, this matter does not satisfy any of the exceptions to *Tuscarora*.[124] The federal district court, in granting the Secre-

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116. *But see id.* at 496-504 (Coffey, J., dissenting).
117. *Id.* at 493 (emphasis added) (citations omitted).
118. *Id.*
119. Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004).
120. *Id.*
121. *Id.*
122. *See Reich*, 4 F.3d at 493.
123. *Snyder*, 382 F.3d at 895.
124. *See* Chao v. Matheson, No. C06-5361RBL, 2007 WL 1830738, at *3 (W.D. Wash. June 25, 2007).

tary of Labor's summary judgment motion, held that although the business is on tribal land, the business employs non-tribal citizens and sells products to non-tribal customers, so none of the *Coeur d'Alene* exceptions applies.[125] The tribal government exerting jurisdiction over the land where the business operates has not sought to intervene, and is not arguing that tribal, rather than federal law, applies to the business.[126]

These decisions indicate how courts have judicially crafted a test that is grounded neither in federal Indian policy, legislation, nor the case law of the Supreme Court. This judicial maneuvering is even more apparent in recent decisions regarding the application of the National Labor Relations Act to Indian tribes and tribal businesses.

3. *National Labor Relations Act*

The application of the National Labor Relations Act (NLRA)[127] to Indian tribes and tribal enterprises has become the focus of national news with the rise of gaming operations conducted pursuant to IGRA.[128] The NLRA permits workers to join unions and to collectively bargain with their employers.[129] At one time, it is believed unionized workers accounted for almost one-third of the United States workforce, but union membership has steadily declined.[130] The NLRA created the National Labor Relations Board (NLRB) to enforce this right,[131] and it prohibits employers from committing unfair labor practices that might discourage organizing or prevent workers from negotiating a union contract.[132]

In *Yukon Kuskokwim Health Corp.*[133] and *San Manuel Indian Bingo & Casino*,[134] the NLRB ignored the Supreme Court and overturned three dec-

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125. *Id.* at *4.

126. *Id.* at *3.

127. 29 U.S.C. §§ 151-69 (2000 & Supp. IV 2004). *See also* 29 C.F.R. pts. 101-03 (2007).

128. Jonathan Rabinovitz, *Union Hopes to Organize Workers at Tribe's Casino*, N.Y. TIMES, Jan. 24, 1998; Steven Greenhouse, *Unions War Over Tribal Casinos in California*, N.Y. TIMES, May 4, 2005; James P. Sweeny, *U.S. Labor Laws Apply to Tribes, Court Says*, SAN DIEGO UNION-TRIB., Feb. 10, 2007; Erica Werner, *Appeals Court Rules Indian Tribes Subject to Federal Labor Law*, S.F. CHRON., Feb. 9, 2007.

129. 29 U.S.C. § 157.

130. According to the U.S. Bureau of Labor Statistics, in 2006, "12.0 percent of employed wage and salary workers were union members, down from 12.5 percent" in 2005. *See* Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, USDL 07-0113 (Jan. 25, 2007), *available at* http://www.bls.gov/news.release/archives/union2_01252007.pdf. "The number of persons belonging to a union fell by 326,000 in 2006 to 15.4 million. The union membership rate has steadily declined from 20.1 percent in 1983, the first year for which comparable union data are available." *Id.*

131. *See* 29 U.S.C. §§ 153-56.

132. 29 U.S.C. § 158.

133. 341 N.L.R.B. 1075, 2004 WL 1304594 (2004).

ades of NLRB precedent by "adopt[ing] a new approach that gives due recognition to those competing interests," namely, federal labor policy and the "special status of Indian tribes in our society."[135] In not so specific terms, the NLRB's new approach is that Indian tribes and tribal enterprises employ a majority of non-Indian individuals, and much of the revenue generated comes from non-Indians, so the NLRA should apply to tribes and tribal enterprises.[136] In *San Manuel*, the NLRB adopted the *Tuscarora* dictum and the *Coeur d'Alene* process and applied it to on-reservation activities.[137] After the *Tuscarora* and *Coeur d'Alene* analysis was complete, however, the NLRB balanced the additional policy considerations of federal labor policy against the special status of Indian tribes.[138]

In *San Manuel Indian Bingo & Casino v. NLRB*,[139] the U.S. Court of Appeals for the D.C. Circuit had the opportunity to clear the air in terms of the tortured logic and interpretation of federal Indian law employed by the NLRB. The court framed the questions involved as: "(1) Would application of the NLRA to San Manuel's casino violate federal Indian law by impinging upon protected tribal sovereignty? and (2) Assuming the preceding question is answered in the negative, does the term 'employer' in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises?"[140]

The *San Manuel* Court began its analysis by recognizing the tension between *Tuscarora* as "possibly dictum" and "longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians, . . . and (2) [the fact that] a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty."[141]

The court initially seemed to recognize the connection between tribal government and commercial activities and how tribal governments rely ex-

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134. 341 N.L.R.B. 1055, 2004 WL 1283584 (2004).

135. *Id.* at 1056. In *Yukon Kuskokwim Health Corp.*, the NLRB used the "balance" created in *San Manuel* and determined that the NLRB did not have jurisdiction over the matter because the tribal entity (a hospital based upon consortium of Indian tribes) was "fulfilling a traditionally tribal or governmental function." 341 N.L.R.B. at 1076.

136. *San Manuel*, 341 N.L.R.B. at 1065.

137. *Id.*

138. *Id.* at 1059-60. The NLRB had previously adopted the *Coeur d'Alene* test for off-reservation activities in *Sac & Fox Indus.*, 307 N.L.R.B. 241 (1992). For a thorough examination of the NLRB's decision, see Singel, *supra* note 20, at 697-719; Anna Wermuth, *Union's Gamble Pays Off: In* San Manuel Indian Bingo & Casino*, the NLRB Breaks the Nation's Promise and Reverses Decades-Old Precedent to Assert Jurisdiction over Tribal Enterprises on Indian Reservations*, 21 LAB. LAW. 81, 88-107 (2005).

139. 475 F.3d 1306 (D.C. Cir. 2007).

140. *Id.* at 1311.

141. *Id.* (citations omitted).

clusively upon revenue from commercial enterprises.[142] The court stated that the application of the NLRA did not impinge upon the Tribes' sovereignty "enough," however, to construe the NLRA narrowly against application.[143] Therefore, the court did not need to "choose between *Tuscarora*'s statement that laws of general applicability apply also to Indian tribes and *Santa Clara Pueblo*'s statement that courts may not construe laws in a way that impinges upon tribal sovereignty absent a clear indication of Congressional intent."[144]

How that conclusion was arrived at took a great deal of evasiveness and circular reasoning. The court reasoned that the operation of a casino was not a traditional attribute of self-government and that the vast majority of the casino's employees and customers were not members of the Tribe and lived off the reservation.[145] While the operation of a casino may not seem to be a traditional attribute of self-government, the court ignored the clear and specific intent of Congress when IGRA was enacted to promote self-sufficiency and self-government through economic development.[146]

The next argument the court rejected was that the NLRA's legislative history or text indicates a congressional intent to apply the statute to tribal governments.[147] The briefs of the pro-tribal interest made very strong arguments that Congress had no intention of applying the NLRA to the tribes. The NLRA was enacted in 1935, and the Indian Reorganization Act (IRA)[148] was enacted in 1934. Both pieces of legislation were enacted in connection with President Franklin Delano Roosevelt's "New Deal" policies. Many of the provisions of the IRA promoted tribes to engage in economic development.[149] The IRA remains one of the cornerstones of modern Indian congressional policy, but the period of time and the goals of the IRA were ignored by the *San Manuel* Court:

> This point is irrelevant in light of our conclusion above that the NLRA does not impinge on the Tribe's sovereignty enough to warrant construing the statute as inapplicable. In the absence of a presumption against application of the NLRA, the legislative history need not expressly anticipate every category of employer that might fall within the NLRA's broad definition.[150]

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142. *Id.* at 1313.
143. *Id.* at 1315.
144. *Id.*
145. *Id.*
146. *See supra* note 70 and accompanying text. *See also* 25 U.S.C. § 2702(1) (2000) (stating that one of the overall purposes of the IGRA is to provide a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments").
147. *San Manuel*, 475 F.3d at 1317-18.
148. Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-94a (2000 & Supp. III 2003)) (also known as the Wheeler-Howard Act).
149. *See* Singel, *supra* note 20, at 705 n.104.
150. *San Manuel*, 475 F.3d at 1317.

Generally, the court affirmed the NLRB's decision by relying upon two misnomers: (1) the operation of a casino is not a traditional attribute of self-government, and the tribe's casino is virtually identical to purely commercial casinos across the country; and (2) the majority of the casino's employees and customers were not tribal members and lived off the reservation.[151]

The *San Manuel* Court had an opportunity to address the underlying tension between the use of Supreme Court dicta and the misapplication and ignorance of fundamental principles of Indian law. As the decision indicates, however, it seems courts will continue to rely upon facts not relevant to the issues at hand, such as the percentage of non-Indian employees and customers coming onto the reservation. More case law can be expected with regard to the NLRA, as many tribes are experiencing the invasion of union-organizing efforts within tribal enterprises and will be litigating the issue of whether tribal labor and employment law should govern unionization in Indian country.[152]

4. *Family Medical Leave Act*

The Family Medical Leave Act (FMLA)[153] was enacted to "entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition[,]"[154] and also to minimize "the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis[.]"[155] The FMLA defines an "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."[156]

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151. *Id.* at 1318.

152. *See* Foxwoods Resort Casino, Decision and Direction of Election, Case No. 34-RC-2230 (Oct. 24, 2007), *available at* http://www.nlrb.gov/shared_files/Regional%20Decisions/2007/34-RC-2230%2010-24-07.htm (dismissing arguments of Mashantucket Pequot Tribe that tribal law employment law, not NLRA, applies to unionization within Indian country); Soaring Eagle Casino and Resort, Decision and Direction of Election, Case No. GR-7-RC-23147 (Nov. 20, 2007), *available at* http://www.nlrb.gov/shared_files/Regional%20Decisions/2008/GR-07-RC-23163%201-17-07.pdf (dismissing claims that the Saginaw Chippewa Tribe's treaty-reserved right to self-government and sovereign immunity prevented the NLRB from enforcing the NLRA within the exterior boundaries of the reservation).

153. 29 U.S.C. §§ 2601-54 (2000 & Supp. IV 2004). *See also* 29 C.F.R. pt. 825 (2007).

154. 29 U.S.C. § 2601(b)(2).

155. *Id.* § 2601(b)(4).

156. 29 U.S.C. § 2611(4)(A)(i).

Nowhere does the FMLA reference applicability to Indian tribes or tribal enterprises. The Second Circuit is the only federal appellate court to address whether the FMLA is applicable to Indian tribes and tribal employers. In *Chayoon v. Chao*,[157] the court dismissed the claim of a tribal employee against members of the Mashantucket Pequot Tribal Council and other management staff for violating the FMLA. The dismissal was based on a lack of subject matter jurisdiction because the Pequots did not waive sovereign immunity.[158] The plaintiff had alleged claims against the individual council members and management in order to avoid an assertion of sovereign immunity by the Tribe.[159] In dismissing the matter, the Second Circuit held that the Tribe's sovereign immunity prevented enforcement, as the FMLA did not clearly and unequivocally waive tribal sovereign immunity, but did not necessarily waive application, of the FMLA:

> "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (citations omitted) . . . . The FMLA makes no reference to the "'amenity of Indian tribes to suit.'"[160]

The court did state, however, that "tribal sovereignty has the potential to deny many Americans employment benefits and rights that Congress" has given to employees in the private sector, but that any remedies available were subject to congressional action.[161]

The U.S. District Court for the Northern District of New York recently addressed a FMLA claim against a tribe and followed the reasoning of the *Chayoon* Court. In *Myers v. Seneca Niagara Casino*,[162] the court did not apply the FMLA to the Seneca Nation because Congress did not waive the immunity of the Nation:

> Congress has not expressly abrogated the sovereignty of Indian Nations in the FMLA, and Congress must *expressly* do so for there to be an effective abrogation. The only other way a Nation may be sued under the FMLA is if the Nation itself *expressly* and *clearly* waived and relinquished its immunity from suit.[163]

A distinction drawn between the *Chayoon* decision and the *Seneca Niagara Casino* decision is that in *Chayoon* an individual brought suit against tribal officials and the Tribe. Generally, in decisions relating to statutes of gen-

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157. 355 F.3d 141 (2d Cir. 2004).
158. *Id.* at 142-43.
159. *Id.* at 143.
160. *Id.*
161. *Id.*
162. 488 F. Supp. 2d 166 (N.D.N.Y. 2006).
163. *Id.* at 169.

eral applicability as applicable to tribes, the *federal government* is enforcing or attempting to enforce the law against the tribe.[164]

5. *Occupational Safety and Health Act*

The Occupational Safety and Health Act of 1970 (OSHA)[165] was enacted to prevent work-related injuries, illnesses, and deaths by issuing and enforcing standards for workplace safety and health.[166] OSHA is silent as to Indian tribes and tribal enterprises, but the Ninth and Second Circuits have both issued decisions holding that OSHA is applicable to Indian tribes and tribal enterprises.[167] The Tenth Circuit is the only federal appellate court to hold that application of OSHA violates tribal sovereignty.[168]

In *Donovan v. Navajo Forest Products Industries*, the Tenth Circuit examined whether the Secretary of Labor could enforce citations against a tribal enterprise owned and operated by the Navajo Nation.[169] The *Navajo Forest Products* Court held that OSHA could not be applied to the tribal enterprise without unequivocal congressional intent to do so, as application would have abrogated treaty provisions.[170] This holding was subsequently examined and adopted by the Tenth Circuit in *EEOC v. Cherokee Nation*.[171]

The Ninth and Second Circuits, however, reached different conclusions when presented with the question of whether OSHA applied to Indian tribes and tribal enterprises.[172] The Ninth Circuit's decision in *Donovan v. Coeur d'Alene Tribal Farm*[173] has certainly had a large impact on Indian country and the surrounding communities. In *Coeur d'Alene Tribal Farm*, the Secretary of Labor attempted to fine a tribally owned and operated business located within the exterior boundaries of the reservation for violations of OSHA.[174]

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164. EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

165. 29 U.S.C. §§ 651-678 (2000 & Supp. IV 2004); 29 C.F.R. §§ 1900-2400.

166. *See* 29 U.S.C. § 651.

167. *See Coeur d'Alene*, 751 F.2d at 1118; *Reich*, 95 F.3d at 182.

168. *See* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982).

169. *Id.*

170. *Id.* at 714.

171. 871 F.2d 937 (10th Cir. 1989) (holding ADEA inapplicable to the Navajo due to the lack of an unequivocal congressional intent to apply the ADEA to tribes).

172. *See Coeur d'Alene*, 751 F.2d at 1118; *Reich*, 95 F.3d at 182.

173. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

174. *Id.*

The *Coeur d'Alene Tribal Farm* Court breathed life into the *Tuscarora* dictum by giving the "rule" three exceptions.[175] However, *Tuscarora* does not state a rule, and nowhere in the decision is *Elk v. Wilkins* expressly overruled.[176] Remember that the *Elk* Court specifically stated that "[g]eneral acts of Congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[177] The most troublesome exception created by the *Coeur d'Alene Tribal Farm* Court is where application of the statute would undermine self-governance of purely intramural matters.[178] The problem with this exception is that OSHA would not have undermined the tribe's self-governance because the tribal business was a commercial enterprise with no bearing on the internal governance of the tribe.[179]

Although on occasion federal courts have utilized the *Coeur d'Alene Tribal Farm* "exceptions" to recognize and uphold the sovereignty of tribes,[180] the *Coeur d'Alene Tribal Farm* decision severely impaired tribes' ability to further their goals of self-sufficiency and autonomy. The *Coeur d'Alene Tribal Farm* decision simply ignored the overall federal policy of promoting self-governance and self-sufficiency for tribes and tribal programs through economic development. The *Coeur d'Alene Tribal Farm* Court, apparently did not completely understand the connection between tribal governmental services, the revenue generated by tribal enterprises, and self-sufficiency. More importantly, the *Coeur d'Alene Tribal Farm* Court determined that inherent tribal sovereignty, exercised long before the creation of the United States Constitution, cannot withstand the overriding federal policy of ensuring a safe and healthy workplace as required by OSHA and other federal statutes of general applicability.

This impact on federal courts is apparent in *Reich v. Mashantucket Sand & Gravel*,[181] where the Second Circuit based its holding on the tribal enterprise as a commercial entity. The court concluded that application of OSHA to the tribal enterprise would not interfere with the Tribe's self-governance in purely intramural affairs,[182] borrowing from the Ninth Circuit's distinction in *Coeur d'Alene* between governmental affairs and tribal commercial entities.[183] This holding was reached despite the fact that the tribal enterprise was owned and operated by the Tribe within the exterior boundaries of the reservation and the enterprise performed work almost

175. *Id.* at 1116.
176. *See* 362 U.S. 99 (1960).
177. Elk v. Wilkins, 112 U.S. 94, 100 (1884).
178. *Coeur d'Alene*, 751 F.2d at 1116-17.
179. *Id.* at 1117.
180. *See* EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001).
181. 95 F.3d 174 (2d Cir. 1996).
182. *Id.* at 175-76.
183. *Id.* at 180-81.

exclusively on the reservation.[184] It seems that even if the business were non-Indian, employing mostly non-Indians, any tribal law relating to safety and health standards and conditions should have preempted OSHA's application to the tribal enterprise.[185]

At least one commentator has attacked the *Mashantucket Sand* decision as contrary to the purpose of OSHA.[186] Congress enacted OSHA with the intention of preventing private employers and state governments from requiring safety and health standards *lower* than the standards required by OSHA.[187] The *Mashantucket Sand* decision, however, prevents tribes from enacting *any* standards inconsistent with OSHA, despite the clear federal policy of self-governance and self-sufficiency. In addition, *Mashantucket Sand* was decided without consideration of the Tenth Circuit's holdings in *EEOC v. Cherokee Nation* and *Donovan v. Navajo Forest Products Industries*. After the *Mashantucket Sand* decision, the *Tuscarora* presumption was subsequently codified as a promulgated regulation by the Secretary of Labor for purposes of OSHA.[188]

6. *Uniformed Services Employment and Reemployment Rights Act*

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services.[189] USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.[190] USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of

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184. *Id.* at 180.
185. *See supra* Subsection II.B.1.
186. *See* Peterson, *supra* note 106.
187. *See generally* 29 U.S.C. §§ 651, 655 (2000).
188. 29 C.F.R. § 1975.4(b)(3) states:

> *Indians*. The Williams-Steiger Act [or OSHA] contains no special provisions with respect to different treatment in the case of Indians. It is well settled that under statutes of general application, such as the Williams-Steiger Act, Indians are treated as any other person, unless Congress expressly provided for special treatment. Therefore, provided they otherwise come within the definition of the term "employer" as interpreted in this part, Indians and Indian tribes, whether on or off reservations, and non-Indians on reservations, will be treated as employers subject to the requirements of the Act.

29 C.F.R. § 1975.4(b)(3) (citation omitted).
189. 38 U.S.C. §§ 4301-4334 (2000 & Supp. I 2007).
190. *See id.* § 4301.

the uniformed services to reclaim their civilian employment after being absent due to military service or training.[191]

USERRA does not mention tribal governments or tribal enterprises, and to date, no federal appellate court has examined whether USERRA applies to Indian tribes.[192] The specific language of the regulations promulgated by the Secretary of Labor to implement USERRA does not expressly mention tribes.[193] The final rule, however, published by the Secretary of Labor, does briefly examine the applicability of USERRA and its rules in response to comments received.[194] The Secretary's response is interesting in light of the regulation promulgated for OSHA and the position the Secretary has taken in the various attempts to actually enforce the statutes implemented by the Department of Labor:

> While the face of the statute does not explicitly cover Native American tribal employers, USERRA's legislative history reflects the Act was intended to apply to "Native American tribes and their business enterprises." S. Rep. No. 103-158, at 42 (1993). Thus, although the Department concludes that USERRA likely applies to Native American tribal employers, *the Department recognizes that there is a difference between the right to demand compliance with the law and the means to enforce it* . . . . Accordingly, the Department recognizes that the application of USERRA's provisions to Native American tribal employers is a complicated and heavily fact-dependent issue that, if raised in a USERRA proceeding, will ultimately be resolved by the courts on a case-by-case basis.[195]

The Secretary of Labor aptly points out the difference between the right to demand compliance with the law and the means to enforce it.

III. CONCLUSION—THE DE FACTO JUDICIAL PREEMPTION OF TRIBAL LAW

In light of all this, one wonders what might happen, for example, if a court finds that the Saginaw Chippewa Indian Tribe of Michigan is bound by the terms of the NLRA, but then the Tribal Council resolves to preclude any union or NLRA official from entering the reservation consistent with the Tribe's treaty and inherent sovereignty. Having a court determine that a statute of general applicability is applicable to a tribe or tribal enterprise is one matter, but a federal agency coming on the reservation and actually enforcing the statute is another. Some tribes are more "amicable" than others and may comply, but some tribes may fight back, literally.

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191. *Id.*

192. *See* 38 U.S.C. § 4303.

193. *See* Veterans' Employment and Training Service, Uniformed Service Employment and Reemployment Rights of Act of 1994, *as amended in* 70 Fed. Reg. 75,246 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

194. *Id.* at 75,252.

195. *Id.*

Federal courts and agencies have recently ignored clear Supreme Court common law in applying statutes of general applicability to tribal governments and tribal enterprises based upon various factors, such as non-Indian employees or customers, of which the relevance is questionable. Tribes must continue to assert that their inherent sovereignty precludes application of federal statutes to their governments and enterprises, regardless of the number of non-Indian employees and non-Indian customers. The laws of the tribes apply to the individuals and businesses subject to the tribes' jurisdiction. Pursuant to the *Montana* exceptions, all individuals and businesses entering into consensual relations with the tribes are subject to the tribes' jurisdiction and laws.[196] This is all water under the bridge, however.

What is different in the recent cases involving the union activity at Foxwoods, Soaring Eagle, and even San Manuel, is that there is applicable tribal labor law that fills in the gaps. In most, if not all, previous cases in which federal courts have chosen to apply federal employment statutes of general applicability to tribal businesses, there has been an absence of law applicable to employees. Federal courts have thus been doing what comes naturally to them—filling in gaps with whatever law is available. But now tribes have developed their own laws and have chosen to be ruled by those laws. This is the essence of tribal sovereignty and self-governance: bedrock principles of federal Indian law repeatedly affirmed and encouraged by Congress and the executive branch.

The recent Foxwoods and Soaring Eagle cases demonstrate that the *Tuscarora* courts have prevailed from the point of view of the NLRB. The *Tuscarora* courts once simply inserted federal law into tribal government affairs as a gap-filler. Now, those courts and the NLRB are preempting positive tribal law with federal law gap-fillers.

196. Montana v. United States, 450 U.S. 544 (1981).