When Congress Forgets: Breaking Through Congress's Failure to Mention Indian Tribes in Federal Employment Laws

By Kaighn Smith Jr.

Kaighn Smith Jr. is a shareholder with Drummond Woodsum's Tribal Nations Practice Group and currently serves as the Distinguished Practitioner in Residence Fellow at Cornell Law School. He represents Indian tribes and their enterprises in federal, state, and tribal courts across the country. Smith is an associate reporter (along with Matthew Fletcher and Wenona Singel) for the American Law Institute's *Restatement of the Law of American Indians* and the author of *Labor and Employment Law in Indian Country* (2011), the next edition of which is expected this year.

Congress's enactment of the Families First Coronavirus Response Act (FFCRA) on April 1, 2020, is a stark reminder that Indian tribes are often invisible to Congress when it enacts sweeping employment laws. Such invisibility dates as far back as the National Labor Relations Act of 1935 (NLRA). And it persists in a host of other laws, including the Fair Labor Standards Act, the Occupational Safety and Health Act (OSHA), the Family Medical Leave Act, and the Age Discrimination in Employment Act.

Congress should know that whenever it addresses whether to apply its employment laws to the other two sovereigns (the federal and state governments), the "third sovereign" (federally recognized Indian tribes)[1] should be right on its radar. It is a sad commentary on the branch with constitutional "plenary authority" over Indian affairs that Congress so often forgets.

Of course, such congressional silence ultimately breeds litigation when employees of Indian tribes want the remedies of the "silent" federal laws in question. While, absent a waiver, sovereign immunity bars suits by these employees against tribes, it is no bar to lawsuits by federal agencies.

The federal courts have struggled to figure out what to do in the face of such congressional silence. They have been split on the rule for over 35 years, so it is just a matter of time before the Supreme Court decides the question.

This article reviews the emergence of this split and examines the fallacy of one side of it: the rule generated by an infirm decision of the Ninth Circuit that has been uncritically followed by the Second, Sixth, and Seventh Circuits and, because of its infirmity, leads to line drawing on the basis of race. The counter rule, adopted by the Tenth and Eighth Circuits, is true to the fundamental principles of federal Indian law and implicates no such line drawing.

The Continuing Problem: A Few Examples of Congress Forgetting

The FFCRA requires "covered employers" to give paid leave to employees affected in specific ways by the COVID-19 pandemic and provides such employers (other than state and federal governments) with offsetting tax credits. From the face of the FFCRA, it is impossible to discern whether Indian tribes[2] are "covered employers."

FFCRA defines "covered employer" as "any person engaged in commerce or in any industry or activity affecting commerce."[3] This includes a "*private entity* or individual [that] employs fewer than 500 employees" and "a *public agency* or any other entity that is not a private entity or individual [that] employs 1 or more employees."[4] Indian tribes are governments, not private entities.[5] They might be considered public agencies, but the FFCRA adopts the Fair Labor Standards Act definition of "public agency": "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States ... a State, or a political subdivision of a State; or any interstate governmental agency."[6] Indian tribes do not fit any of these categories.

So as the pandemic unfolded, tribes across the country were left in the dark about whether they should pay employees who take leave for the qualifying COVID-19 events, and if they did, whether they could obtain the tax credits.

The invisibility of Indian tribes in Congress's employment laws is particularly odious when it is clear that Congress intended to exempt sovereign governments from the law but simply forgot to say anything about tribes. Indeed, if Congress intended to exclude governments from the sweep of an employment law but forgot to mention Indian tribes, it hardly seems appropriate to impose the law on tribes: they are simply the overlooked "third sovereign."

The NLRA and OSHA are two such laws: they define "employer" to exclude the federal and state governments but say nothing about Indian tribes.[7]

Although 1) the NLRA is universally understood to govern employers in the private sector, not in the public sector, and 2) the generation of governmental revenues through gaming by Indian tribes is as much a governmental undertaking as is the operation of a lottery by a state government,[8] federal courts have imposed the NLRA upon the gaming operations of Indian tribes because they appear more "commercial" than governmental.[9] Likewise, while OSHA on its face applies to private sector employers, not public sector employers, federal courts have imposed OSHA upon enterprises wholly owned and controlled by Indian tribes to generate revenues and economic development;[10] they would never do the same for an equivalent state enterprise, like a state-owned cement plant.[11]

The Circuit Split

The circuit split on the approach to whether a federal labor/employment law that is silent about its application to Indian tribes arose in the mid-1980s between the Tenth and Ninth Circuits.

In *Donovan v. Navajo Forest Products Industries*,[12] the Tenth Circuit addressed whether OSHA applied to Navajo Forest Products Industries (NFPI), a timber enterprise of the Navajo Nation with 650 employees, including 25 "non-Indian" individuals. The Department of Labor relied on dicta from a 1960 Supreme Court decision, *Fed. Power Comm'n v. Tuscarora Indian Nation,*[13] where the Court said, "it is now well settled ... that a general statute in terms applying to all persons includes Indians and their property interests."

The Tenth Circuit rejected the argument. First, it held that the Navajo treaty provision that the "[o]nly federal personnel authorized to enter the reservation are those specifically so authorized to deal with Indian affairs" precluded application of OSHA to NFPI.[14] Second, it found that the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe,*[15] confirming the inherent authority of Indian tribes to exclude nonmembers from their reservations and to regulate their activities while they remain, overruled whatever force the *Tuscarora* dicta had.[16] Thus, the Tenth Circuit said that, absent a clear expression of congressional intent, "we shall not permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon"; OSHA's silence would not do.[17]

Three years later, in *Donovan v. Coeur d'Alene Tribal Farm,*[18] the Ninth Circuit held that OSHA applied to a farm owned and operated by the Coeur d'Alene Tribe, employing 20 workers, some of whom were "non-Indian." The court framed the issue with a presumption of applicability:

> No one doubts that the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises. But neither is there any doubt that Congress has the power to modify or extinguish that right .... The issue raised on this appeal is whether ... congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject.[19]

Because OSHA is silent with respect to Indian tribes, it is hard to understand why the court would say that the Coeur d'Alene Tribal Farm was "subject" to the Act.

In any event, the Ninth Circuit took as its starting point the above-referenced *Tuscarora* dicta advocated by the Department of Labor but did not actually follow it. Instead, it invented three exceptions under a formulation developed by a single Ninth Circuit judge in a concurring opinion in a 1980 criminal case, *United States v. Farris:*[20]

> 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.[21]

There was no treaty at stake to invoke the second exception and no legislative history pertinent to the third. Thus, the only possible exception to the presumption of applicability was the first exception. The court said 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."[22] It then concluded, "[b]ecause 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.'"[23]

The Ninth Circuit then made clear that it disagreed with the Tenth Circuit's approach, to the extent that it relied upon *Merrion* and the protection of the Navajo Nation's inherent sovereignty.[24]

For the last 35 years, the Ninth Circuit's *Coeur d'Alene Tribal Farm* formulation has been followed, without close examination, by the Second, Sixth, and Seventh Circuits. The Tenth and the Eighth Circuits have rejected it, instead taking the position that if imposition of a federal employment law of general application to an Indian tribe would impinge upon the tribe's sovereign authority, the law will not apply absent a clear expression of intent by Congress.[25]

Assessing the Split

The Shaky Foundation of the *Coeur d'Alene Tribal Farm* Formulation

Perhaps it is in nature of common law that some rules seem to develop by accident. Or perhaps what has happened here reflects an attitude within the judiciary once attributed to the late Justice Antonin Scalia that, "when it comes to Indian law, most of the time we're just making it up."[26] Either way, that appears to be the case for the *Coeur d'Alene Tribal Farm* formulation. Just to say it in advance: the *Tuscarora* dictum upon which this formulation rests has nothing to do with the application of federal laws *to Indian tribes*; it has to do with the application of federal laws *to individual citizens of Indian tribes*. The same is true with the *Farris* case. This fundamental flaw in the formulation's genesis undermines its legitimacy.

Fed. Power Comm'n v. Tuscarora Indian Nation[27] involved a challenge by the Tuscarora Indian Nation ("the Nation") to the flooding of 1,000 acres of land owned by the Nation in fee simple for a hydroelectric project in upstate New York. The Nation argued

that it should escape the Federal Power Act's authorization for eminent domain over "the lands or property of others necessary to the construction, maintenance, or operation of" the project in light of the Supreme Court's 1884 decision in *Elk v. Wilkins*.[28] In *Wilkins,* the Court held that an individual tribal citizen did not have the right to vote. In 1884, tribal citizens were not citizens of the United States, and the *Wilkins* Court rejected the individual's asserted voting right, stating a rule at the time that "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[29] In 1960, of course, tribal citizens could also be citizens of the United States. Thus, the *Tuscarora* Court responded with dicta: "[h]owever that may have been," the Court said, "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."[30]

As noted above, *Farris* was a criminal case involving the application of federal criminal laws to individual tribal citizens. They argued that they could not be prosecuted under the Organized Crime Control Act, 18 U.S.C. § 1955, for running illegal gambling operations through Indian country. In his concurring opinion, Judge Choy never mentioned *Tuscarora*. He simply responded to the individuals' assertion "that § 1955 does not apply to them," stating "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations" and citing cases holding that various criminal statutes apply to individual tribal citizens.[31] Then, Judge Choy wrote that "there seem to be three exceptions to [the rule that federal laws generally apply with equal force to Indians on reservations]."[32]

> First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters .... Second, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws .... Finally, if appellants could prove by legislative history or some other means that Congress intended § 1955 not to apply to Indians on their reservations, we would give effect to that intent.[33]

Judge Choy was not joined in these musings by then Judge Anthony Kennedy or by Judge James Browning, the other two judges on the three-judge panel.

But the important point is that, just like the *Tuscarora* dictum, these musings emerge in a case involving the application of general federal laws to *individuals, not to Indian tribes or their sovereign instrumentalities.* This is of no small import. The imposition of federal or state law (those of the other two sovereigns) upon an Indian tribe (the third sovereign) immediately implicates the sovereign interests of the latter; it is an assertion of outside authority upon a sovereign government.

The Fundamentals

Fundamental principles of federal Indian law concerning the nature of tribal sovereignty inform this problem.

First, absent a clear expression of intent by Congress, the Supreme Court will not infer that Congress's acts abrogate or diminish (a) an established attribute of inherent tribal sovereignty (the retained governmental powers of tribes),[34] (b) a right confirmed by a treaty,[35] or (c) the boundaries of an established reservation.[36] The conservation of these powers, rights, and boundaries are critical to the stability of Indian tribes as functioning tribal governments.

Second, within their territories, Indian tribes have inherent sovereign authority to govern employment relations involving their own tribal citizens as well as those involving the tribe itself or arms of the tribe. That power is the same whether the employees are tribal citizens or nontribal citizens.[37] Indeed, when a nontribal citizen enters an Indian reservation or trust lands for employment, the tribe retains power to regulate the terms and conditions upon which that individual remains.[38] The leading treatise in the field describes this power as "intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty."[39] Even on fee lands owned by a nontribal member within the exterior boundaries of an Indian reservation, tribes retain inherent power to regulate contractual relationships between nontribal citizens and the tribe,[40] and an employment relationship is just that.[41]

Third, given Congress's constitutional plenary authority over Indian affairs, adjustments to address any perceived injustices involving the employment relations that Indian tribes have inherent sovereign authority to govern must be left to Congress.[42]

Given these fundamentals, the flaws of the *Coeur d'Alene Tribal Farm* formulation are clear. The imposition of silent federal employment laws upon Indian tribes abrogates their sovereign authority over employment relations within their territories without the requisite evidence of clear congressional intent. And this is so whether the employment involves tribal members or nontribal members. It is not up to the judiciary to fill any gaps left by Congress. Any abrogation of tribal sovereignty is up to Congress, and its silence will not suffice.

In short, the Tenth and Eighth Circuits have it right.

Racial Distinctions Implicit in the *Coeur d'Alene Tribal Farm* Formulation

Perhaps because it is divorced from fundamental principles of federal Indian law, the *Coeur d'Alene Tribal Farm* formulation leads to the drawing of lines on the basis of race.

Recall that under this formulation there is an exception to the presumption of applicability (derived from the *Tuscarora* dictum) if the silent federal employment law "touches upon exclusive rights of self-governance in purely intramural matters." This invariably leads courts to consider whether a given tribal employment setting involves the employment of tribal members only or the employment of an appreciable number of "non-Indians." If an Indian tribe employs "non-Indians," the logic goes, application of the silent law in question will not affect "purely intramural matters"; so the exception cannot operate, and the silent federal law applies.[43]

These same courts often overlook the Supreme Court decisions that confirm the sovereign authority of Indian tribes to govern their employment relations with nontribal citizens; they wrongly posit notions like "non-Indians are not subject to tribal jurisdiction"[44] or that "limitations on tribal authority are particularly acute where non-Indians are concerned."[45]

The bizarre result is that the "protections" perceived to be available to employees under these silent federal laws in the tribal employment setting operate when "non-Indians" proliferate the workforce, but not if the workforce is made up only of "Indians." The rule purports to protect a category of employees on the basis of their race, as "non-Indians." The truth of the matter is that Indian tribes should, and readily do, judge for themselves what laws to

adopt to protect their workforces.[46] Thus, the *Coeur d'Alene Tribal Farm* "exception," preventing the application of silent federal laws when "purely intramural matters" are at stake, also plays right into a defunct stereotype: that Indian tribes cannot be trusted to treat "non-Indians" fairly.

Until Congress acts with clarity, Indian tribes retain their inherent sovereign authority over employment relations within their territories, free from abrogation by federal agencies. When and if the matter reaches the Supreme Court, the *Coeur d'Alene Tribal Farm* formulation should be rejected, and the standard embraced by the Tenth and Eighth Circuits should prevail. ⊙

Endnotes

[1]*See* Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997).

[2]The term "Indian tribe" as used in this article encompasses federally recognized Indian tribes and "arms of tribes," enterprises imbued with tribal sovereign immunity that tribes own and control to generate government revenues. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006).

[3]29 C.F.R. § 826.10(a)(i)(A). The inclusion of the broad term "person" in the statutory definition hardly encompasses Indian tribes because "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).

[4]29 C.F.R. § 826.10(a)(i)(A)(2).

[5]*Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

[6]29 C.F.R. § 826.10(a).

[7]*See* 29 U.S.C. §§ 152, 652.

[8]"[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues.'" *Bay Mills Indian Cmty*., 572 U.S. at 810 (Sotomayer, J., concurring) (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 169 (2004)). No doubt similarly situated state entities would be exempt from the NLRA and subject only to a state's public sector labor laws. *Cf. N.Y. City Off-Track Betting Corp. v. Local 2021, Am. Fed'n of State, Cnty. & Mun. Emps.*, 416 N.Y.S.2d 974 (N.Y. Sup. Ct. 1979) (finding that off-track betting facility operated to generate state revenues and thus governed by state's public-sector labor laws); Mass. Gen. Laws ch. 150E, §§ 1-3 (2020) (demonstrating state lottery subject to state's public-sector labor laws).

[9]*See Pauma v. NLRB*, 888 F.3d 1066, 1077 (9th Cir. 2018); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). *But see NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 556-563 (6th Cir. 2015) (McKeague, J., dissenting) (stating that absent evidence of congressional intent to the contrary, the NLRB's restrictions on Little River Band of Ottawa Indians interfere with tribal sovereignty); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc) (rejecting challenge to Pueblo's right to work law as applied to lumber mill owned by non-tribal entity within the Pueblo).

[10]*See, e.g., Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). *But see Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533 (8th Cir. 2020) (finding tribe's reservation fishing enterprise was not subject to OSHA); *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982) (holding tribe's reservation timber enterprise was not subject to OSHA).

[11]*Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (discussing importance of state-owned cement plant for economic development).

[12]692 F.2d 709 (10th Cir. 1982).

[13]362 U.S. 99 (1960).

[14]692 F.2d at 711-12.

[15]455 U.S. 130 (1982).

[16]692 F.2d at 713.

[17]*Id.* at 714.

[18]751 F.2d 1113 (9th Cir. 1985).

[19]*Id.* at 1115.

[20]624 F.2d 890 (9th Cir.1980), *superseded by statute*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467, *as recognized in United States v. E.C. Invs., Inc.*, 77 F.3d 327 (9th Cir. 1996).

[21]*Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 (quoting *Farris*, 624 F.2d at 893-94).

[22]*Id.*

[23]*Id.* .

[24]*Id.* at 1117, n.3.

[25]*See Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535 (8th Cir. 2020); *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010).

[26]*See* Matthew L.M. Fletcher, *Montana Native Law Student Recall* Babbitt v. Youpee *and Meeting Justice Scalia*, Turtle Talk (Feb. 18, 2016) https://turtletalk.blog/2016/02/18/montana -native-law-student-recalls-babbitt-v-youpee-and-meeting-justice-scalia/.

[27]362 U.S. 99 (1960).

[28]*Id.* at 115-16 (quoting Federal Power Act, 16 U.S.C. § 796(2); and citing *Elk v. Wilkins,* 112 U.S. 94 (1884)).

[29]112 U.S. at 100.

[30]362 U.S. at 116.

[31]624 F.2d at 893.

[32]*Id.*

[33]*Id.*

[34]*See Bay Mills Indian Cmty*, 572 U.S. at 790.

[35]*See United States v. Dion*, 476 U.S. 734, 738 (1986).

[36]*See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

[37]*See Bay Mills Indian Community*, 572 U.S. at 788-790 ("[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority") (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). *See generally* Restatement of Law of American Indians § 20, cmt. C (Am. L. Inst., Tentative Draft No. 2, 2018) ("[T]ribes retain authority over members or citizens"); *Id.* at § 34 ("Indian tribes retain authority to regulate the conduct of nonmembers on Indian lands, except when a federal statute divests an Indian tribe of that authority or when tribal authority conflicts with an overriding national interest").

[38]*See Merrion*, 455 U.S. at 144-45.

[39]Cohen's Handbook of Federal Indian Law § 4.01[2][e] at 221 (Nell Jessup Newton et al. eds., 2012).

[40]*Montana v. United States*, 450 U.S. 544, 565-66 (1981).

[41]*See Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 918 F.3d 660, 673 (9th Cir. 2019).

[42]*See, e.g., Bay Mills Indian Cmty.*, 572 U.S. at 803 (examining the

principle that Congress, not the Court, holds responsibility for the abrogation of tribal sovereignty); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (clarifying that only Congress can grant state court authority that would infringe upon the inherent sovereignty retained by Indian tribes to adjudicate claims arising within their reservations).

[43]*See, e.g.*, *Little River Band of Ottawa Indians*, 788 F.3d at 543-544; *Mashantucket Sand & Gravel*, 95 F.3d at 180; *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

[44]*Menominee Tribal Enters.*, 601 F.3d at 670; *Merrion*, 455 U.S. at 144-45; *Montana,* 450 U.S. at 565-66.

[45]*Mashantucket Sand & Gravel*, 95 F.3d at 180; *see also Little River Band of Ottawa Indians Tribal Government,* 788 F.3d at 546 (describing tribal power over non-members as being at the "periphery" of "inherent tribal sovereignty"); *Merrion,* 455 U.S. at 144-45; *Montana,* 450 U.S. at 565-66.

[46]*See, e.g.*, Jamestown S'Klallam Tribe Tribal Code, tit. 3 Labor Code, https://jamestowntribe.org/wp-content/uploads/2018/05/Title_03_Labor_Code_9_12_14.pdf (last visited Jan. 31, 2021); Mashantucket Pequot Tribal Nation Employment Rights Code, tit. 31, http://www.mptnlaw.com/laws/Single/TITLE%2031%20MASHANTUCKET%20EMPLOYMENT % 20RIGHTS%20LAW%20(MERO).pdf (last visited Jan. 31, 2021); Little River Band of Ottawa Indians Fair Employment Practices Code, Ordinance #05-600-03 (July 28, 2010), www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title 600-03.pdf (lrboi-nsn.gov) (last visited Jan. 31, 2021).

President's Message *continued from page 4*

Ch. 4 (1748). ("Liberty is a right of doing whatever laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.") The term "trias politica" or "separation of powers" was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, the 18th century French social and political philosopher. His treatise on political theory and jurisprudence, more than twenty years in the making, is one of the great works in the history of political thought, inspiring both the Declaration of the Rights of Man and of the Citizen in France and the U.S. Constitution.

[4]Montesquieu declared that there is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice. It was avowedly for the public good that Socrates was put to death, that the Puritans were driven from England, and that French revolutionaries sent thousands to the guillotine. The fact that a people rule through self-government is certainly no guarantee that liberty will prevail. The citizens of Greek and Roman republics possessed public rights, but no individual rights in the modern sense. The U.S. Bill of Rights was intended as a limitation of the "sovereignty of the people" and their representative government in favor of the liberty of *all* the people.

[5]Montesquieu, *supra* note 3.

[6]These two aspects of liberty may be referred to by multiple names, including "Liberty of the Will" or philosophical liberty versus civil liberty or social liberty, the latter concerning the limits of power that are exercised by society (i.e. government) over the individual in order to achieve societal security. Note that extremes in either form of these two aspects of liberty naturally lead to anarchy or totalitarianism, respectfully, and abate true liberty.

[7]John Adams, *Thoughts on Government* 1 (1776). https://www.nps.gov/inde/upload/Thoughts-on-Government-John-Adams-2.pdf ("[A]s the divine science of politics is the science of social happiness, and the blessings of society depend entirely on the constitutions of government, which are generally institutions that last for many generations, there can be no employment more agreeable to a benevolent mind than a research after the best.") Montesquieu believed that a nation having political liberty as the direct end of its constitution, if its principles were sound, would achieve liberty in its highest perfection. Montesquieu, *supra* note 3, at Book XI, Ch. 5.

[8]John Adams, *Letter to Count de Sarsfield* (Feb. 3, 1786), https://founders.archives.gov/documents/Adams/99-01-02-0493.

[9]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[10]Thomas Jefferson, *Letter to George Hay* (June 20, 1807), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl180.php.

[11]Thomas Jefferson, *Letter to James Madison (Jan. 22,* 1797) https://www.loc.gov/resource/mtj1.020_1107_1108/?sp=1&st=text (emphasis added).

[12]The Federalist No. 71 (Alexander Hamilton).

[13]The Federalist No. 78 (Alexander Hamilton).

[14]George Washington, *Farewell Address* (1796) https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript (emphasis added).

[15]*Id.*

[16]Montesquieu, *supra* note 3, at Book XI, Ch. 20.

Editorial Policy

The Federal Lawyer *is the magazine of the Federal Bar Association. It serves the needs of the association and its members, as well as those of the legal profession as a whole and the public.*

The Federal Lawyer *is edited by members of its Editorial Board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board's judgment.*

The views expressed in The Federal Lawyer *are those of the authors and do not necessarily reflect the views of the association or of the Editorial Board. Articles and letters to the editor in response are welcome.*

773 F.3d 977
United States Court of Appeals, Ninth Circuit.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff–Appellant,
v.
PEABODY WESTERN COAL COMPANY; Navajo Nation, Rule 19 defendant, Defendants–Appellees,
v.
Kevin K. Washburn, Esquire; Sally Jewell, in her official capacity as Secretary of the Interior, Third–Party–Defendants–Appellees.

No. 12–17780
|
Argued and Submitted May 12, 2014.
|
Filed Sept. 26, 2014.
|
Amended Nov. 19, 2014.

Synopsis

Background: Equal Employment Opportunity Commission (EEOC) brought action against company that mined coal on Hopi and Navajo reservations under leases with the tribes, and against tribe, alleging that lease requirements that company give preference in employment to Navajo Indians constituted national origin discrimination in violation of Title VII. Company impleaded the Secretary of the Interior and counterclaimed against the EEOC for declaratory relief. The United States District Court for the District of Arizona, John W. Sedwick, J., denied EEOC's motion to supplement the record and, 2012 WL 5034276, granted summary judgment for the Secretary and tribe on the ground that the tribal hiring preferences in the leases were permissible under Title VII. EEOC appealed.

Holdings: On EEOC's motion to amend prior opinion, the Court of Appeals, W. Fletcher, Circuit Judge, held that:

on question of first impression, Title VII's prohibition against national origin discrimination did not prohibit the leases' tribal hiring preferences;

district court did not abuse its discretion by denying as untimely EEOC's request to supplement the record; and

EEOC waived on appeal its claim that company violated Title VII's record-keeping requirements.

Affirmed.

Opinion, 768 F.3d 962, amended and superseded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***979** P. David Lopez, General Counsel, Lorraine C. Davis, Acting Assistant General Counsel, and Susan Ruth Oxford (argued), Attorney, Equal Employment Opportunity Commission, Washington, D.C., for Plaintiff–Appellant.

John F. Lomax, Jr. (argued) and Kathryn Hackett King, Snell & Wilmer LLP, Phoenix, AZ; Louis Denetsosie, Attorney General, and Paul Spruhan, Assistant Attorney General, Navajo Nation Department of Justice, Window Rock, AZ; Lisa M. Enfield (argued), Paul E. Frye, and William Gregory Kelly, Frye Law Firm PC, Albuquerque, NM, for Defendants–Appellees.

Robert Dreher, Acting Assistant Attorney General, Ethan G. Shenkman (argued), Deputy Assistant Attorney General, James C. Kilbourne, Section Chief, and Kristofor Swanson, United States Department of Justice, Washington, D.C., for Third–Party–Defendants–Appellees.

Appeal from the United States District Court for the District of Arizona, John W. Sedwick, District Judge, Presiding. D.C. No. 2:01–cv–01050–JWS.

Before: SUSAN P. GRABER, WILLIAM A. FLETCHER, and RICHARD A. PAEZ, Circuit Judges.

ORDER AND AMENDED OPINION

ORDER

Plaintiff–Appellant's motion to amend the court's opinion is GRANTED. The Opinion, filed on September 26, 2014, and reported at 768 F.3d 962 (9th Cir.2014), is amended as follows:

At Slip Op. 22, 768 F.3d at 974, the sentence beginning with <The Indian preference exemption> and ending with <does not extend to Indians.> is deleted and replaced with:

> The Indian preference exemption contained in Section 703(i) is therefore necessary to clarify that Title VII's prohibition against racial or national origin discrimination does not extend to preferential hiring of Indians living on or near reservations.

An Amended Opinion is filed concurrently with this Order.

OPINION

Opinion

W. FLETCHER, Circuit Judge:

Peabody Western Coal Co. ("Peabody") mines coal at the Black Mesa Complex and Kayenta mines on the Hopi and Navajo reservations in northeastern Arizona under leases with the tribes. At issue in this appeal are two leases with the Navajo Nation ("the Nation") that permit Peabody to mine coal on Navajo reservation land. Each lease requires Peabody to give preference in employment to "Navajo Indians." Both leases received approval from the Department of the Interior ("Interior") under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a, 396e ("IMLA"). Since at least as early as the 1940s, Interior-approved mineral leases, including the two at issue here, have routinely included tribal hiring preference provisions.

This appeal is the latest stage in a long-running legal dispute about the tribal hiring ***980** preferences.[1] The Equal Employment Opportunity Commission ("EEOC") sued Peabody in the District of Arizona in 2001, alleging that Peabody's implementation of the tribal hiring preference constituted national origin discrimination in violation of Title VII of the Civil Rights Act of 1964. The EEOC also claimed that Peabody had violated Title VII's record-keeping requirements. *See* 42 U.S.C. § 2000e–8(c). Several years of litigation on procedural matters resulted in the joinder of the Nation under Federal Rule of Civil Procedure 19 and impleader of the Secretary and Assistant Secretary of the Interior (collectively, "the Secretary") under Federal Rule of Civil Procedure 14. The principal issue now before us is the EEOC's claim that Title VII prohibits the tribal hiring preference contained in the Peabody leases.

In the decision now on appeal, the district court granted summary judgment against the EEOC on the merits. It held that the Navajo hiring preference in the leases is a political classification, rather than a classification based on national origin, and therefore does not violate Title VII. We have jurisdiction over the EEOC's appeal pursuant to 28 U.S.C. § 1291. We agree with the district court that the tribal hiring preference is a political classification. We therefore affirm.

I. Background

Peabody's predecessor-in-interest entered into two leases with the Navajo Nation. The first, Lease No. 8580, signed in 1964, permits Peabody to mine coal on the Navajo reservation. The second, Lease No. 9910, signed in 1966, permits Peabody to mine on reservation land formerly held in trust for both the Navajo and Hopi tribes, now partitioned between the tribes.

In Lease No. 8580, Peabody "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible." The lease also provides that Peabody "shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with [its] operations under this lease." Lease No. 9910 contains a similar provision, and also states that Peabody "may at its option extend the benefits of [the hiring preference] to Hopi Indians." Interior drafted the leases and required the inclusion of the Navajo hiring preferences. The leases were approved by Interior under the IMLA. *Peabody IV,* 610 F.3d at 1075.

In 1998, two members of the Hopi Tribe and one member of the Otoe Tribe filed discrimination charges with the EEOC. They alleged that they had applied to Peabody for positions for which they were qualified, and that they were not hired because they were not Navajo. After an investigation, the EEOC sued Peabody in federal district court in Arizona in 2001. ***981** The EEOC alleged that Peabody's implementation of the tribal hiring preference provisions constituted national origin discrimination forbidden by Title VII.

After the EEOC brought its Title VII claims, Peabody moved for summary judgment. The district court granted the motion on two grounds, holding that the suit presented a nonjusticiable political question and that the Nation was a necessary party for whom joinder was not feasible. *Peabody I,* 214 F.R.D. at 560–61. We reversed, holding that the suit did not present a political question and that Rule 19 joinder was feasible, provided that the EEOC sought no affirmative relief against the Nation. *Peabody II,* 400 F.3d at 778. The Supreme Court denied review. *Peabody W. Coal Co. v. EEOC,* 546 U.S. 1150, 126 S.Ct. 1164, 163 L.Ed.2d 1128 (2006) (mem.).

On remand, the EEOC amended its complaint to join the Nation under Rule 19. The district court again granted summary judgment against the EEOC. It held that the EEOC sought affirmative relief against the Nation, defeating Rule 19 joinder; that the Secretary was a necessary party for whom joinder was not feasible; and that the tribal hiring preference did not violate Title VII because it was authorized by the Navajo–Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631–638. *Peabody III,* 2006 WL 2816603.

On appeal, we reversed in part and vacated in part. We again held that joinder of the Nation was feasible. We held further that, although the EEOC could not join the Secretary as a defendant under Rule 19, Peabody or the Nation could implead the Secretary as a third-party defendant under Rule 14(a) on claims for injunctive or declaratory relief. We vacated the judgment on the Title VII claim in order to allow the district court to consider the Secretary's arguments. *Peabody IV,* 610 F.3d 1070. The Supreme Court again denied review. *EEOC v. Peabody W. Coal Co.,* —— U.S. ——, 132 S.Ct. 91, 181 L.Ed.2d 21 (2011) (mem.).

On remand, the EEOC filed a second amended complaint. Peabody impleaded the Secretary and counterclaimed against the EEOC for declaratory relief. The district court granted the EEOC's motion to dismiss Peabody's counterclaims.

The Secretary then moved for summary judgment on Peabody's third-party complaint on the ground that the tribal hiring preferences in the leases were permissible under Title VII. The Nation and Peabody also moved for summary judgment.

The day before argument on those motions, the EEOC moved to supplement the record with the declaration and supporting documents of a former EEOC investigator who had interviewed Peabody's hiring officials in 1999. The district court denied the motion as untimely, noting that the information that the EEOC sought to introduce had long been available, and that, in any event, the information was not relevant because it pertained to pre–1999 practices.

The district court upheld the tribal hiring preferences in the leases. After "an examination of the status of Indian tribes in general and their relationship to the federal government," and drawing on the principles the Supreme Court articulated in *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), the court held that the preference was a political classification rather than a national origin classification. The EEOC timely appealed the grant of summary judgment and the denial of its motion to supplement the record.

II. Standard of Review

We review de novo a district court's grant of summary judgment. ***982** *Kang v. U. Lim Am., Inc.,* 296 F.3d 810, 814 (9th Cir.2002). We review for abuse of discretion a district court's denial of a motion to supplement the record. *Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc., of Ariz.,* 84 F.3d 1186, 1192 (9th Cir.1996).

III. Discussion

A. Title VII National Origin Discrimination

The EEOC argues that Title VII prohibits hiring preferences based on tribal affiliation, which it contends is a form of impermissible national origin discrimination. The EEOC is responsible for overseeing the implementation and enforcement of Title VII. 42 U.S.C. § 2000e–14. The Secretary argues that the tribal hiring preferences are based on political classifications that Title VII does not reach. The Secretary maintains that tribal hiring preferences serve to promote tribal self-governance in accordance with congressionally mandated federal Indian policy. None of the parties has argued that *Chevron* deference applies to the EEOC's or Interior's interpretations of the statutes each is charged with administering. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The question before us is one of first impression. But we do not walk on untrodden ground. We have previously stated that differential treatment in employment based on tribal affiliation can give rise to a Title VII national origin discrimination claim. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.* (*Dawavendewa I*), 154 F.3d 1117 (9th Cir.1998). Outside the context of Title VII, however, we have recognized that where differential treatment serves to fulfill the federal government's special trust obligation to the tribes as quasi-sovereign political entities, tribal preferences are permissibly based on political classifications. *Means v. Navajo Nation,* 432 F.3d 924, 932 (9th Cir.2005); *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1278 (9th Cir.2004); *see Mancari,* 417 U.S. 535, 94 S.Ct. 2474.

For the reasons that follow, we hold that the tribal hiring preferences in the Peabody leases are based on tribal affiliation, a political classification. We also hold that Title VII does not prohibit differential treatment based on this political classification.

1. Statutory Framework

We begin by reviewing the relevant provisions of the IMLA and of Title VII.

a. The Indian Mineral Leasing Act of 1938

The Peabody leases are authorized and governed by the IMLA. *See United States v. Navajo Nation,* 537 U.S. 488, 495, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). That statute provides, in relevant part:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

25 U.S.C. § 396a.

The IMLA was "designed to advance tribal independence." *Navajo Nation,* 537 U.S. at 494, 123 S.Ct. 1079. Congress "aimed to foster tribal self-determination by giving Indians a greater ***983** say in the use and disposition of the resources found on Indian lands." *Id.* (internal quotation marks and alteration omitted). The IMLA was intended (1) to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," H.R. Rep. No. 1872, 75th Cong., 3d Sess., at 1 (1938); (2) to ensure that Indians received "the greatest return from their property," *id.* at 2; and (3) to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," *id.* at 3. *See Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 767 n. 5, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).

The Indian Reorganization Act ("IRA"), also known as the Wheeler–Howard Act, enacted four years prior to the IMLA, has been described as "probably the most important single statute affecting Indians ... since its passage." Elmer R. Rusco, A Fateful Time: The Background and Legislative History of the Indian Reorganization Act, at ix (2000). The drafters of the IRA sought to reverse half a century of assimilationist policy. *See id.* at 62, 180. The IRA was a comprehensive reform statute, providing, among other things, for tribal self-government, restoration of lands to tribal ownership, economic development, and vocational training. Indian Reorganization Act, 48 Stat. 984, Pub.L. No. 73–383 (1934) (codified as amended at 25 U.S.C. § 461 et seq.). In the decades since its enactment, the IRA has been criticized for the lack of involvement of Indian communities during the drafting process, as well as for perceived failures in its implementation. Rusco, *supra,* at x-xi, 190. But it remains the case that the statute was conceived as a means to restore tribal sovereignty and to promote the tribes' self-governance and economic independence. *Mancari,* 417 U.S. at 542 & n. 12, 94 S.Ct. 2474 (quoting the statement of John Collier, Commissioner of Indian Affairs, that the IRA "is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affairs"); *see generally* Rusco, *supra.*

In enacting the IMLA, Congress expressly intended to further the policy goals articulated in the IRA. In the IMLA, Congress delegated broad discretion to the Secretary to approve mineral leases. *See Navajo Nation,* 537 U.S. at 494–95, 123 S.Ct. 1079. The IMLA does not mention hiring preferences of any kind, but in the exercise of its discretionary authority, Interior since the 1940s has routinely approved mineral leases that require a tribe's lessee to give preference in hiring to members of that tribe. This long-established practice serves to ensure that the economic value of the mineral leases on tribal lands inures to the benefit of the tribe and its members, consistent with the purpose of the IMLA.

Stewart Udall, Secretary of the Interior when the Peabody leases were prepared, stated in a declaration and in a deposition that Interior negotiated and drafted the leases. He affirmed that the Navajo preference provisions were a "key provision," given the economic importance of coal resources on the reservations. *Peabody IV,* 610 F.3d at 1075. Secretary Udall understood Interior's role in approving mining leases as carrying out a special trust duty owed to Indian tribes in general and, with respect to these leases, owed in particular to the Navajo and Hopi tribes whose coal was being mined.

b. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination in employment on the grounds of "race, color, ***984** religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). The EEOC contends that the tribal preference in the leases violates the prohibition against national original discrimination. Title VII does not define "national origin." The legislative history tells us very little about Congress's understanding of the term. The only discussion of "national origin" came in the context of permitting employers to indicate hiring preferences based on sex, religion, or national origin where those qualities are a "bona fide occupational qualification." That discussion centered on the distinction between discrimination based on race and discrimination based on national origin. Representative James Roosevelt stated, "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 3179–80 (1968); 110 Cong. Rec. 2549 (1964). Representative John Dent stated, "National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person." EEOC, *supra,* at 3180; 110 Cong. Rec. 2549 (1964).

Title VII contains two provisions specifically addressing Indian tribes. First, it provides that the term "employer" does not include "an Indian tribe," thus excluding Indian tribal governments entirely from coverage under Title VII. 42 U.S.C. § 2000e(b). Second, Section 703(i), known as the "Indian Preference exemption," expressly permits preferential hiring over non-Indians of Indians living on or near reservations. It 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).

The legislative history of Section 703(i) is sparse. We at least know that it was intended to help remedy past and present discrimination against Indians as a "minority group." *See* 110 Cong. Rec. 13,702 (statement of Sen. Karl Mundt). We have previously noted that "the primary impetus behind § 703(i) was concern that by enacting Title VII Congress would render unlawful otherwise permissible hiring preferences for Native Americans." *Malabed v. N. Slope Borough,* 335 F.3d 864, 871 (9th Cir.2003). The exemption was designed "to protect existing or future preference programs." *Id.; see also* 110 Cong. Rec. 13,702 (statement of Sen. Karl Mundt) (stating that Section 703(i), along with the exclusion of Indian tribes from Title VII's definition of "employer," "will assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs now in operation or later to be instituted"). But the legislative history and statutory text give little indication as to Congress's views, if any, on preferences for tribal members over Indians from other tribes, as distinct from general preferences for Indians over non-Indians.

The EEOC issued a policy statement in 1988 in which it concluded that Section 703(i) is limited to general Indian hiring preferences and does not, in itself, authorize preferential employment practices based on tribal affiliation —a statement to which we have accorded deference. *See Dawavendewa I,* 154 F.3d at 1121. But this statement does not end the inquiry. ***985** That Section 703(i) does not itself authorize or create an exemption for tribal hiring preferences on or near Indian reservations does not dispose of the question before us: whether Title VII's prohibition against national origin discrimination prohibits the tribal hiring preferences in the mineral leases.

2. Tribal Affiliation and National Origin

The correspondence between tribal membership, on the one hand, and national origin, on the other, is not self-evident. *See generally* Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood,* 37 Am. Indian L.Rev. 1 (2013). Tribal membership, often based on blood quantum and lineage, *see id.* at 4, incorporates notions of race and ethnicity that the drafters of Title VII explicitly understood the term "national origin" to exclude. The federal government's interactions with Indians have, in many cases, shaped their political structures and constituencies, such that even the notion of the tribe may lack direct correlation with actual or historical group politics. *See* Felix S. Cohen, *Handbook of Federal Indian Law* § 3.02[3], at 133 (Nell Jessup Newton ed., 2012); *see also id.* § 14.03[2][b], at 954 ("[T]he very concept of enrollment and maintenance of citizenship lists is largely an artifact of federal actions."); Carole Goldberg–Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life,* 28 Law & Soc'y Rev. 1123, 1131–33 (1994). Nonetheless, our decision in *Dawavendewa I* established that, at least in some cases, a tribal hiring preference can give rise to a Title VII national origin discrimination claim.

At issue in *Dawavendewa I* was the claim of a Hopi Indian who had been denied employment at a power station on a Navajo reservation, the Salt River Project ("SRP"), pursuant to a tribal hiring preference in the power company's lease agreement with the Navajo Nation. *Id.* at 1118. We held at the pleading stage that the plaintiffs had stated a Title VII national origin discrimination claim sufficient to survive a motion to dismiss. *Id.* at 1124. We observed that, in its implementing regulations, the EEOC has given the term "national origin" an expansive construction that could plausibly be read to encompass tribal affiliation. *Id.* at 1119. The EEOC "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (2012). We also drew on our own broad construction of the term. In *Pejic v. Hughes Helicopters, Inc.,* 840 F.2d 667 (9th Cir.1988), we had written: "Unless historical reality is ignored, the term 'national origin' must include countries no longer in existence. Given world history, Title VII cannot be read to limit 'countries' to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination." *Id.* at 673 (citation omitted).

In light of this, we held in *Dawavendewa I* that, "[b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII." 154 F.3d at 1120. We noted that "Native Americans' interests in self-governance" were not at issue. *Id.* We suggested that the presence of such interests would trigger a separate analysis, grounded in the Supreme Court's decision in *Mancari,* and its recognition that at least some forms of preferential treatment of Indians are based on political classifications rather than national origin. ***986** *Id.; see infra* Subsection III.A.3. We also held, giving EEOC's 1988 policy statement "due weight," that Section 703(i) did not authorize tribal hiring preferences. *Dawavendewa I,* 154 F.3d at 1121–22.

The EEOC contends that our analysis must begin and end with *Dawavendewa I.* But four years later, in a second appeal in that case, we limited the scope of what we had earlier written. In *Dawavendewa v. Salt River Project Agricultural Improvement & Power District* (*Dawavendewa II*), 276 F.3d 1150 (9th Cir.2002), we heard an appeal from the district court's dismissal of a claim for failure to join the Nation as a defendant under Rule 19. We affirmed. In doing so, we specifically rejected the plaintiffs' contention that we had previously held that Salt River Project's hiring practices violated Title VII. We wrote in *Dawavendewa II* that *Dawavendewa I*

> held only that a hiring preference policy based on tribal affiliation, as described in the complaint, stated a [national origin discrimination] claim upon which relief could be granted....

> [W]e did not address the merits of the Nation's proffered legal justifications in defense of the challenged hiring preference policy. In particular, *we declined to consider whether the Nation's 1868 Navajo Treaty, the federal policy fostering tribal self-governance, the [Navajo Preference in Employment Act], or any other legal defense justified SRP's hiring preference policy.*

Dawavendewa II, 276 F.3d at 1158 (emphasis added) (citation omitted). We observed that "[i]n appropriate situations, federal law yields out of respect for treaty rights or the federal policy fostering tribal self-governance." *Id.* As we explain below, this case presents such a situation.

3. Tribal Affiliation as Political Classification

In *Mancari,* non-Indian employees of the Bureau of Indian Affairs ("BIA") sued to enjoin the implementation of a provision of the IRA that granted appointment and promotion preferences to Indians seeking positions in the BIA. *See* 25 U.S.C. § 472. The plaintiffs argued that the preference was contrary to, and impliedly repealed by, the 1972 Equal Employment Opportunity Act's ("EEOA") prohibition against race-based discrimination in federal employment, and that it constituted invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Mancari,* 417 U.S. at 537, 547, 94 S.Ct. 2474. The Court rejected both arguments. *Id.* at 551, 553–54, 94 S.Ct. 2474

The Court held that the EEOA had not impliedly repealed the BIA employment preference. *Id.* at 551, 94 S.Ct. 2474. The Court noted that the "overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," and that the participation of Indians in the operation of the BIA was crucial to achieving that goal. *Id.* at 542–43, 94 S.Ct. 2474. The Court observed that Title VII explicitly exempts tribal employers from its coverage and permits the preferential hiring of Indians on or near Indian reservations. *Id.* at 547–48, 94 S.Ct. 2474. "It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference." *Id.* at 548, 94 S.Ct. 2474. The Court noted further that Congress had enacted Indian preferences in other legislation contemporaneous to Title VII, which suggested that ***987** it likely did not intend to repeal the Indian preference in the IRA by passing Title VII. *Id.* at 548–49, 94 S.Ct. 2474.

The Court also held that the Indian employment preference did not constitute invidious racial discrimination in violation of the Due Process Clause. The IRA reflected the congressional determination that "proper fulfillment of its trust [obligations] required turning over to the Indians a greater control of their own destinies." *Id.* at 553, 94 S.Ct. 2474. The Court reasoned that "[t]he preference ... is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554, 94 S.Ct. 2474. The Indian employment preference was not based on a racial designation but on a political preference that triggered only rational-basis review. *Id.* "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555, 94 S.Ct. 2474. The preference was "reasonable and rationally designed to further Indian self-government" and did not violate due process. *Id.*

The Court has reaffirmed *Mancari* on several occasions. The Court continues to distinguish between permissible differential treatment of Indian tribes based on political classifications, on the one hand, and impermissible differential treatment of groups based on racial or national origin classifications, on the other. In *Rice v. Cayetano,* 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), the Court stated,

> Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. As we have observed, "every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians."

Id. at 519, 120 S.Ct. 1044 (citations omitted) (alteration in original) (quoting *Mancari,* 417 U.S. at 552, 94 S.Ct. 2474). We have applied the distinction in our own cases. *See, e.g., Kahawaiolaa,* 386 F.3d at 1278; *see also Means,* 432 F.3d at 932–33 (applying *Mancari* and upholding against an

equal-protection challenge a law subjecting to tribal criminal jurisdiction a person who is not a member of the tribe, but is an enrolled member of a different Indian tribe).

We recognize that *Mancari* addressed a political classification providing a general Indian hiring preference rather than a tribe-specific preference. But *Mancari*'s logic applies with equal force where a classification addresses differential treatment between or among particular tribes or groups of Indians. Indeed, based on *Mancari,* the Court has specifically upheld differential treatment among Indians. In *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977), the Court addressed Congress's distribution of an award by the Indian Claims Commission for claims arising out of an illegal sale of Delaware tribal lands in the nineteenth century. Congress distributed funds to two federally recognized tribes-the Cherokee Delawares and the Absentee Delawares—and to members of those two tribes. *Id.* at 79–80, 97 S.Ct. 911. However, Congress did not distribute funds to the Kansas Delawares, an unrecognized tribe, or to its members, even though the Kansas Delawares, like Cherokee Delawares and Absentee Delawares, were descendants of the Delawares whose lands had been illegally sold. *Id.* at 79–82, 97 S.Ct. 911. In upholding the differentiation between the two groups of ***988** Delawares, the Court wrote that "the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.' " *Id.* at 85, 97 S.Ct. 911 (alteration in original) (quoting *Mancari,* 417 U.S. at 555, 94 S.Ct. 2474); *see also Kahawaiolaa,* 386 F.3d at 1279 ("Congress certainly has the authority to single out a constituency of tribal Indians in legislation dealing with Indian tribes and reservations." (internal quotation marks omitted)).

The Navajo tribal hiring preferences in this case are based on the policy considerations that undergird *Mancari.* As we have noted above, Congress intended the IMLA to be read in harmony with the IRA, which had been enacted only four years earlier. A key purpose of the IRA was the advancement of tribal self-government. "[T]he IMLA aimed to foster tribal self-determination by giving Indians a greater say in the use and disposition of resources found on Indian lands." *Navajo Nation,* 537 U.S. at 494, 123 S.Ct. 1079 (internal quotation marks and alteration omitted). Where the exploitation of mineral resources on a particular tribe's reservation is concerned, the federal government's responsibility necessarily runs to that tribe, not to all Indians.

We therefore have no difficulty concluding that the tribal hiring preferences here are based on a political classification within the meaning of *Mancari.* Peabody accords preference in hiring to members of the Navajo Nation, pursuant to the terms of Interior-approved leases. Interior viewed those preferential hiring provisions as useful in ensuring that the economic benefits flowing from the "most important resource" on the Navajo reservation accrued to the tribe and its members. Measures intended to preserve for the Nation and its members the fruits of the resources found on the tribe's own land are "rationally designed" to fulfill the federal government's trust obligations to the tribe.

This conclusion, however, does not completely answer the question before us. *Mancari* did not involve a claim brought directly under Title VII. Title VII was implicated only to the extent the plaintiffs claimed that the EEOA, an amendment to Title VII, impliedly preempted the BIA hiring preference. *See* 417 U.S. at 537, 94 S.Ct. 2474. The precise question before us is whether Title VII's specific prohibition on national origin discrimination extends to what the Supreme Court would later characterize in *Mancari* as a political classification. We conclude that Title VII does not prohibit differential treatment based on tribal affiliation, the political classification at issue here.

As we described above, Title VII contains two provisions concerning Indians: (1) an exclusion of tribal governments from the definition of "employer," and (2) a general exemption from Title VII for preferential hiring of Indians. The Indian preference exemption expressly permits the preferential hiring of "an Indian living on or near a reservation." 42 U.S.C. § 2000e–2(i). "There is no universally applicable definition" of the term "Indian." Cohen, *supra,* § 3.03[1], at 171. Title VII itself does not contain a definition of the term, but we noted in *Dawavendewa I* that it is "generally used to draw a distinction between Native Americans and all others." 154 F.3d at 1121.

The EEOC would have us infer from the Indian hiring preferences expressly authorized in Section 703(i) that Title VII allows only preferences that distinguish between Indians and non-Indians. *See* 42 U.S.C. § 2000e–2(i). We disagree with the EEOC's interpretation. Section 703(i) is an exemption from Title VII. The nature ***989** of the exemption helps us understand the reach of Title VII's prohibitions. The term "Indian" in Section 703(i) of Title VII describes a broad nonpolitical class. The term covers any Indian living on or near a reservation; qualification as an Indian under Section

703(i) is not based on the political classification of tribal affiliation. The Indian preference exemption contained in Section 703(i) is therefore necessary to clarify that Title VII's prohibition against racial or national origin discrimination does not extend to preferential hiring of Indians living on or near reservations.

Congress was plainly aware that Title VII could have ramifications for Indian communities, and it saw clearly the need to mitigate those possible effects. For that reason, Congress excluded tribal employers from Title VII's scope and exempted general Indian hiring preferences. *See* 110 Cong. Rec. 13,702 (statement of Sen. Karl Mundt) (stating that Section 703(i), along with the exclusion of Indian tribes from Title VII's definition of "employer," "will assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs now in operation or later to be instituted"). However, Congress did not carve out from Title VII's prohibitions any similar exemption for preferences based on tribal affiliation. That Congress could have created such an exemption or exception, but saw no need to do so, suggests that it did not understand Title VII to reach tribal affiliation because such affiliation is a political classification. *See Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616–17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied....").

Title VII is a general antidiscrimination statute. Both the text and the legislative history show that Congress anticipated possible effects of Title VII on federal Indian policy and crafted provisions specifically designed to preserve the status quo. Interior's approval of mineral leases containing tribal hiring preferences is a well-established practice that long predates the enactment of Title VII. Tribal hiring preferences were, and are, intended to further the policy goals embodied in the IRA and the IMLA. Nothing indicates that Congress viewed Title VII as a recalibration of its policy toward tribal communities that had been articulated in its prior legislation. Nor is there any suggestion that Congress viewed Title VII as a specific disapproval of Interior's longstanding and settled practice of approving tribal hiring preferences in mineral leases. *Cf. Dames & Moore v. Regan,* 453 U.S. 654, 686, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) ("[L]ong-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.") (alterations in original) (quoting *United States v. Midwest Oil Co.,* 236 U.S. 459, 474, 35 S.Ct. 309, 59 L.Ed. 673 (1915)).

We therefore conclude that Title VII does not reach the tribal hiring preferences in the Peabody leases and affirm the district court's grant of summary judgment against the EEOC.

B. Motion to Supplement the Record

The EEOC argues that the district court erred in denying its motion to supplement the record. On the eve of oral argument in the district court, the EEOC sought to include in the record a declaration and documents from a former EEOC investigator who interviewed former Peabody hiring officials about hiring practices in 1999. The EEOC sought to use this information to demonstrate that Peabody gave hiring preferences to Indians who ***990** were not affiliated with the Navajo Nation, and thereby made hiring decisions based on national origin rather than tribal membership. The district court denied the motion as untimely.

The district court did not abuse its discretion in denying leave to supplement the record. There is no discernible reason why the EEOC could not have sought to introduce this evidence much earlier in the proceedings. *See* Fed.R.Civ.P. 6(b)(1)(B), (c)(1) (providing that motions must be served at least fourteen days prior to the hearing, unless the moving party has failed to act because of excusable neglect). At the time of the EEOC's eleventh-hour motion, the motions to dismiss and for summary judgment had been pending for several months. The information, collected in 1999, had been in the EEOC's possession for more than a decade.

We also note that the information is relevant only to an entirely new theory of relief. From the beginning of this litigation, the EEOC had argued that Peabody's contractual hiring practices violate Title VII because the leases give hiring preference to members of the Nation. By seeking to introduce the supplemental information, the EEOC sought to argue that Peabody makes individual hiring decisions based on national origin criteria, rather than on tribal membership. In the circumstances, we find no abuse of discretion in the district court's decision prohibiting the EEOC from raising a new theory at such a late stage in this lengthy litigation. We express no opinion on the legal merit of the EEOC's new theory, even assuming it could be supported by admissible evidence.

C. Record-keeping Claim

In addition to its Title VII national origin discrimination claim, the EEOC alleged in its complaint that Peabody had violated the record-keeping requirements of Title VII, 42 U.S.C. § 2000e–8(c), by failing to "make and preserve records relevant to the determination of whether unlawful employment practices have been or are being committed." The district court granted the defendants' motions for summary judgment and dismissed the EEOC's claims with prejudice, but it did not specifically mention the record-keeping claim.

Although the EEOC states in its opening brief on appeal that it "continues to assert" the record-keeping claim, the brief is devoid of any argument in support of that claim. Generally, we do not consider claims that are not "specifically and distinctly argued" in the opening brief. *United States v. Ullah,* 976 F.2d 509, 514 (9th Cir.1992) (internal quotation marks omitted). We see no reason to deviate from our usual practice in this case. We therefore conclude that the EEOC has waived its record-keeping claim on appeal.

Conclusion

We hold that the district court correctly granted summary judgment to the defendants and third-party defendants and that the EEOC has waived on appeal its record-keeping claim. We also hold that the district court acted within its discretion in denying the EEOC's motion to supplement the record.

AFFIRMED.

All Citations

773 F.3d 977, 125 Fair Empl.Prac.Cas. (BNA) 286, 2014 Daily Journal D.A.R. 15,456

Footnotes

1 The previous opinions in this case are *EEOC v. Peabody Coal Co.* (*Peabody I*), 214 F.R.D. 549 (D.Ariz.2002); *EEOC v. Peabody W. Coal Co.* (*Peabody II*), 400 F.3d 774 (9th Cir.2005); *EEOC v. Peabody W. Coal Co.* (*Peabody III*), No. CV 01–01050, 2006 WL 2816603 (D.Ariz. Sept. 30, 2006); *EEOC v. Peabody W. Coal Co.* (*Peabody IV*), 610 F.3d 1070 (9th Cir.2010); and *EEOC v. Peabody W. Coal Co.* (*Peabody V*), No. 01–CV–01050, 2012 WL 4339208 (D.Ariz. Sept. 20, 2012). Other issues pertaining to Peabody's operations on the Nation's land have also been the subjects of litigation, in this court and elsewhere. *See United States v. Navajo Nation,* 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003); *Peabody Coal Co. v. Navajo Nation,* 373 F.3d 945 (9th Cir.2004); *Navajo Nation v. Peabody Holding Co.,* 209 F.Supp.2d 269 (D.D.C.2002); *see also Clinton v. Babbitt,* 180 F.3d 1081, 1083–86 (9th Cir.1999).

80 S.Ct. 543
Supreme Court of the United States

FEDERAL POWER COMMISSION, Petitioner,
v.
TUSCARORA INDIAN NATION.
POWER AUTHORITY OF STATE OF NEW YORK, Petitioner,
v.
TUSCARORA INDIAN NATION.

Nos. 63, 66.
|
Argued Dec. 7, 1959.
|
Decided March 7, 1960.
|
Rehearing Denied April 18, 1960.

See 362 U.S. 956, 80 S.Ct. 858.

Synopsis

Proceeding to review order of Federal Power Commission granting license to New York Power Authority to build a dam that would flood lands of the Tuscarora Indians. The United States Court of Appeals for the District of Columbia Circuit, 105 U.S.App.D.C. 146, 265 F.2d 338, remanded the case to the commission with instructions to amend the license to exclude specifically the power of the Authority to condemn lands of the Tuscarora Indians for reservoir purposes. The Supreme Court granted certiorari. The Supreme Court, Mr. Justice Whittaker, held that certain lands, purchased and owned in fee simple by the Tuscarora Indian Nation and lying adjacent to a natural power site of the Niagara River near the town of Lewiston, New York, may be taken for the storage reservoir of a hydraulic power project, upon the payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in 16 U.S.C.A. ss 836,836a.

Reversed.

Mr. Justice Black, Mr. Chief Justice Warren and Mr. Justice Douglas dissented.

Attorneys and Law Firms

****545 *100** J. Lee Rankin, Washington, D.C., Sol. Gen., for petitioner Federal power comm.

Mr. Thomas F. Moore, Jr., New York City, for petitioner Power Authority of New York.

Mr. Arthur Lazarus, Jr., Washington, D.C., for respondent.

Opinion

Mr. Justice WHITTAKER delivered the opinion of the Court.

The ultimate question presented by these cases is whether certain lands, purchased and owned in fee simply by the Tuscarora Indian Nation and lying adjacent to a natural power site on the Niagara River near the town of Lewiston, New York, may be taken for the storage reservoir of a hydroelectric power project, upon the payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in Public Law 85—159, approved August 21, 1957, 71 Stat. 401, 16 U.S.C.A. ss 836, 836a.

The Niagara River, an international boundary stream and a navigable waterway of the United States, flows from Lake Erie to Lake Ontario, a distance of 36 miles. Its mean flow is about 200,000 cubic feet per second. The river drops about 165 feet at Niagara Falls and an additional 140 feet in the rapids immediately above and below the falls. The 'head' created by these great falls, combined with the large and steady flow of the river, makes the Lewiston power site, located below the rapids, an extremely favorable one for hydroelectric development.

***101** For the purpose of avoiding 'continuing waste of a great natural resource and to make it possible for the United States of America and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes,' the United States and Canada entered into the Treaty of February 27, 1950, [1] providing for a flow of 100,000 cubic feet per second over Niagara Falls during certain specified daytime and evening hours of the tourist season (April 1 to October 31) and of 50,000 cubic feet per second at other times, and authorizing the equal division by the United States and Canada of all excess waters for power purposes. [2]

In consenting to the 1950 Treaty, the Senate imposed the condition that 'no **546 project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress.' 1 U.S.T. 694, 699. To that end, a study was made and reported to Congress in 1951 by the United States Army Corps of Engineers respecting the most feasible plans for utilizing all of the waters available to the United States under the 1950 Treaty, and detailed plans embodying other studies were prepared and submitted to Congress prior to June 7, 1956, by the Bureau of Power of the Federal Power Commission, the Power Authority of New *102 York, and the Niagara Mohawk Power Corporation. [3] To enable utilization of all of the United States' share of the Niagara waters by avoiding waste of the nighttime and week-end flow that would not be needed at those times for the generation of power, all of the studies and plans provided for a pumping-generating plant to lift those waters at those times into a reservoir, and for a storage reservoir to contain them until released for use —through the pumping-generating plant, when its motors (operating in reverse) would serve as generators—during the daytime hours when the demand for power would be highest and the diversion of waters from the river would be most restricted by the treaty. Estimates of dependable capacity of the several recommended projects varied from 1,240,000 to 1,723,000 kilowatts, and estimates of the needed reservoir capacity varied from 22,000 acre-feet covering 850 acres to 41,000 acre-feet covering 1,700 acres. The variations in these estimates were largely due to differing assumptions as to the length of the daily period of peak demand.

Although there was 'no controversy as to the most desirable engineering plan of development,' [4] there was serious disagreement in Congress over whether the project should be publicly or privately developed and over marketing preferences and other matters of policy. That disagreement continued through eight sessions of Committee Hearings, during which more than 30 proposed bills were considered, in the Eighty-first to Eighty-fifth Congresses, [5] and delayed congressional authorization of the project for seven years.

*103 On June 7, 1956, a rock slide destroyed the Schoellkopf plant. [6] This created a critical shortage of electric power in the Niagara community. It also required expansion of the plans for the Niagara project if the 20,000 cubic feet per second of water that had been reserved for the Schoellkopf plant was to be utilized. Accordingly, the Power Authority of New York prepared and submitted to Congress a major revision of the project plans. Those revised plans, designed to utilize all of the Niagara waters available to the United States under the 1950 Treaty, provided for an installed capacity of 2,190,000 kilowatts, of which 1,800,000 kilowatts would be dependable power for 17 hours per day, necessitating a storage reservoir of 60,000 acre-feet capacity covering about 2,800 acres. [7]

**547 *104 Confronted with the destruction of the Schoellkopf plant and the consequent critical need for electric power in the Niagara community, Congress speedily composed its differences in the manner and terms prescribed in Public Law 85—159. approved August 21, 1957. 71 Stat. 401. By s 1(a) of that Act, Congress 'expressly authorized and directed' the Federal Power Commission 'to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.' By s 1(b) of the Act the Federal Power Commission was directed to 'include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act,' seven conditions which are of only collateral importance here. [8] The concluding section of the Act, s 2, provides: 'The license issued under the terms *105 of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.'

Thereafter, the Power Authority of the State of New York, a municipal corporation created under the laws of that State to develop the St. Lawrence and Niagara power projects, applied to the Federal Power Commission for the project license which Congress had thus directed the Commission to issue to it. Its application embraced the project plans that it had submitted to the Eighty-fifth Congress shortly before its approval of Public Law 85—159. [9] The project was scheduled to be completed in 1963 at an estimated cost of $720,000,000.

**548 Hearings were scheduled by the Commission, of which due notice was given to all interested parties, including the Tuscarora Indian Nation, inasmuch as the application contemplated the taking of some of its lands for the reservoir. The Tuscarora Indian Nation intervened and objected to the taking of any of its lands upon the ground 'that the applicant lacks authority to acquire them.' At the hearings, it was shown that the Tuscarora lands needed for the reservoir—

then though to be about 1,000 acress—are part of a separate tract of 4,329 acres purchased in fee simple by the Tuscarora Indian Nation, with the assistance of Henry Dearborn, then Secretary of War, from the Holland Land Company on November 21, 1804, with the ***106** 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. [10]

After concluding the hearings, the Commission, on January 30, 1958, issued its order granting the license. It found that a reservoir having a usable storage capacity of 60,000 acre-feet 'is required to properly utilize the water resources involved.' Although the Commission found that the Indian lands 'are almost entirely underveloped ***107** except for agricultural use,' it did not pass upon the Tuscaroras' objection to the taking of their lands because it then assumed that 'other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands.' But the Commission did direct the licensee to revise its exhibit covering the reservoir, to more definitely show the area and acrease involved, and to resubmit it to the Commission for approval within a stated time.

In its application for rehearing, the Tuscarora Indian Nation contended, among other things, that the portion of its lands sought to be taken for the reservoir was part of a 'reservation,' as defined in s 3(2), and as used in s 4(e), of the Federal Power Act, [11] and therefore could not lawfully be taken for reservoir purposes in the absence of a finding by the Commission 'that the license ****549** will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.' By its order of March 21, 1958, denying that application for rehearing, the Commission found that '(t)he best location of the reservoir would require approximately 1,000 acres of land owned by Intervener,' and it held that the Indian lands involved 'are not part of a 'reservation' referred to in Section 4(e) as defined in Section 3(2) of the (Federal Power) Act and the finding suggested by Intervener is not required.' On May 5, 1958, the Commission issued its order approving the licensee's revised exhibit which precisely delineated the location, area, and acreage to be embraced by the reservoir—which included 1,383 acres of the Tuscaroras' lands.

On May 16, 1958, the Tuscarora Indian Nation filed a petition for review in the Court of Appeals for the District of Columbia Circuit challenging the license issued by the Commission on January 30, 1958, insofar as it ***108** would authorize the taking of Tuscarora lands. [12] By its opinion and interim judgment of November 14, 1958, the Court of Appeals held that the Tuscarora lands sought to be taken for the reservoir constitute a part of a 'reservation' ***109** within the meaning of ss 3(2) and 4(e) of the Federal Power Act, and that the Commission may not include those lands in the license in the absence of a s 4(e) finding that their taking 'will not interfere or be inconsistent with the purpose for which such reservation was created or acquired,' and the court remanded the case to the Commission that it might 'explore the possibility of making that finding.' 105 U.S.App.D.C. 146, 265 F.2d 338, 343.

Upon remand, the Commission held extensive hearings, exploring not only the matter of the making of the finding held necessary by the Court of Appeals but also the possibility of locating the reservoir on other lands. In its order of February ****550** 2, 1959, the Commission found that the use of other lands for the reservoir would result in great delay, severe community disruption, and unreasonable expense; that a reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States' share of the water of the Niagara River, as required by Public Law 85—159; that removal of the reservoir from the Tuscarora lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet and result in a loss of about 300,000 kilowatts of dependable capacity. But it concluded that, although other lands contiguous to their reservation might be acquired by the Tuscaroras, [13] ***110** the taking of the 1,383 acres of Tuscarora lands for the reservoir 'would interfere and would be inconsistent with the purpose for which the reservation was created or acquired.' That order was transmitted to the Court of Appeals which, on March 24, 1959, after considering various motions of the parties, entered its final judgment approving the license except insofar as it would authorize the taking of Tuscarora lands for the reservoir, and remanded the case to the Commission with instructions to amend the license 'to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes.' 105 U.S.App.D.C., at page 152, 265 F.2d at page 344.

Because of conflict between the views of the court below and those of the Second Circuit, and of the general importance of the questions involved, we granted certiorari. 360 U.S. 915, 79 S.Ct. 1435, 3 L.Ed.2d 1532.

The parties have urged upon us a number of contentions, but we think these cases turn upon the answers to two questions, namely, (1) whether the Tuscarora lands covered by the Commission's license are part of a 'reservation' as defined

and used in the Federal Power Act, 16 U.S.C. s 791a et seq., 16 U.S.C.A. ss 791a et seq., and, if not, (2) whether, those lands may be condemned by the licensee, under the eminent domain powers conferred by s 21 of the Federal Power Act, 16 U.S.C. s 814, 16 U.S.C.A. s 814. We now turn to a consideration of those questions in the order stated.

I.

A Commission finding that 'the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired' is required by s 4(e) ***111** of the Federal Power Act, 16 U.S.C. s 797(e), 16 U.S.C.A. s 797(e), only if the lands involved are within a 'reservation' in the sense of that term as defined and used in that Act. That by generally accepted standards and common understanding these Tuscarora lands may be part of a 'reservation' is not at all decisive of whether they are such within the meaning of the Federal Power Act. Congress was free and competent artificially to define the term 'reservations' for the purposes it prescribed in the Act. And we are bound to give effect to its definition ****551** of that term, for it would be idle for Congress to define the sense in which it used it 'if we were free in despite of it to choose a meaning for ourselves.' Fox v. Standard Oil Co., 294 U.S. 87, 96, 55 S.Ct. 333, 337, 79 L.Ed. 780. By s 3(2) of the Federal Power Act, 16 U.S.C. s 796(2), 16 U.S.C.A. s 796(2), Congress has provided:
's 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

'(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from proviate appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.' (Emphasis added.)

The plain words of this definition seem rather clearly to show that Congress intended the term 'reservations,' wherever used in the Act, to embrace only 'lands and interests in lands owned by the United States.'

Turning to the definition's legislative history, we find that it, too, strongly indicates that such was the congressional intention. In the original draft bill of the Federal ***112** Water Power Act of 1920, as proposed by the Administration and passed by the House in the Sixty-fifth and Sixty-sixth Congresses, the term was defined as follows:
"Reservations' means lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the publicland laws, and lands and interest in lands acquired and held for any public purpose.' [14]

It is difficult to perceive how congressional intention could be more clearly and definitely expressed. However, after the bill reached the Senate it inserted the words 'national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other' (emphasis added) at the beginning of the definition. [15] When the bill was returned to the House it was explained that the Senate's 'amendment recasts the House definition of 'reservations.'' [16] The bill as enacted contained the definition as thus recast. It remains in that form, except for the deletion of the words 'national monuments, national parks,' which was occasioned by the Act of March 3, 1921 (41 Stat. 1353), 16 U.S.C.A. s 797 note, negating Commission authority to license any project works within 'national monuments or national parks,' and those words were finally deleted from the definition by amendment in 1935. 49 Stat. 838. It seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its 'recasting' only specified, as illustrative, some of the 'reservations' on 'lands and interests in lands owned by the United States.'

Further evidence that Congress intended to limit 'reservations,' for the 'purpose of this Act' (s 3), to those ***113** located on 'lands owned by the United States' or in which it owns an interest is furnished by its use of the term in the context of s 4(e) of the Act. By that section Congress, after authorizing the Commission to license projects ****552** in streams or other bodies of water over which it has jurisdiction under the Commerce Clause of the Constitution (Art. I, s 8, cl. 3), authorized the Commission to license projects 'upon any part of the public lands and reservations of the United States.' Congress must be deemed to have known, as this Court held in Federal Power Comm. v. State of Oregon, 349 U.S. 435, 443, 75 S.Ct. 832, 837, 99 L.Ed. 1215, that the licensing power, 'in relation to public lands and reservations of the United States springs from the Property Clause' of the Constitution—namely, the '* * * Power to dispose of and make all needful Rules and Regulations respecting the

Territory or other Property belonging to the United States * * *.' Art. IV, s 3, cl. 2. In thus acting under the Property Clause of the Constitution, Congress must have intended to deal only with 'the Territory or other Property belonging to the United States.' Ibid.

Moreover, the Federal Power Act's plan of compensating for lands taken or used for licensed projects is explicable only if the term 'reservations' is confined, as Congress evidently intended, to those located on 'lands owned by the United States' or in which it owns a proprietary interest. By s 21, 16 U.S.C. s 814, 16 U.S.C.A. s 814, licensees are authorized to acquire 'the lands or property of others necessary to the' licensed project 'by the exercise of the right of eminent domain' in the federal or state courts, and, of course, upon the payment of just compensation. But, despite its general and all-inclusive terms, s 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States, because s 10(e) of the Act, 16 U.S.C. 803(e), 16 U.S.C.A. s 803(e), expressly provides that 'the licensee shall pay to the United States reasonable annual charges * * * for recompensating it for ***114** the use, occupancy, and enjoyment of its lands or other property' (emphasis added) devoted to the licensed project. It therefore appears to be unmistakably clear that by the language of the first proviso of that section saying, in pertinent part, 'That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations (these italicized words being lifted straight from the s 3(2) definition of 'reservations') the Commission shall * * * fix a reasonable annual charge for the use thereof * * *,' Congress intended to treat and treated only with structures, lands and interests in lands owned by the United States, for, as stated, the section expressly requires the 'reasonable annual charges' to be paid to the United States for the use, occupancy, and enjoyment of 'its lands or other property.' (Emphasis added.)

This analysis of the plain words and legislative history of the Act's definition of 'reservations' and of the plan and provisions of the Act leaves us with no doubt that Congress, 'for purposes of this Act' (s 3(2), intended to and did confine 'reservations,' including 'tribal lands embraced within Indian reservations' (s 3(2), to those located on lands 'owned by the United States' (s 3(2), or in which it owns a proprietary interest.

The Court of Appeals did not find to the contrary. Indeed, it found that the Act's definition of 'reservations' includes only those located on lands in which they United States 'has an interest.' But it thought that the national paternal relationship to the Indians and the Government's concern to protect them against improper alienation of their lands gave the United States the requisite 'interest' in the lands here involved, and that the result 'must be the same as if the phrase 'owned by the United States, (etc.)' were not construed as a limitation upon the term 'tribal lands (etc.).'' 105 U.S.App.D.C. at page 150, 265 F.2d at page 342. ***115** We do not agree. The national 'interest' in Indian welfare and protection 'is not to be expressed ****553** in terms of property * * *.' Heckman v. United States, 224 U.S. 413, 437, 32 S.Ct. 424, 56 L.Ed. 820. The national 'paternal interest' in the welfare and protection of Indians is not the 'interests in lands owned by the United States' required, as an element of 'reservations,' by s 3(2) of the Federal Power Act. (Emphasis added.)

Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation and no 'interest' in them is 'owned by the United States,' we hold that they are not within a 'reservation' as that term is defined and used in the Federal Power Act, and that a Commission finding under s 4(e) of that Act 'that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired' is not necessary to the issuance of a license embracing the Tuscarora lands needed for the project.

II.

We pass now to the question whether the portion of the Tuscarora lands here involved may be condemned by the licensee under the provisions and eminent domain powers of s 21 of the Federal Power Act. Petitioners contend that s 21 is a broad general statute authorizing condemnation of 'the lands or property of others necessary to the construction, maintenance, or operation of any' licensed project, and that lands owned by Indians in fee simple, not being excluded, may be taken by the licensee under the federal eminent domain powers delegated to it by that section. Parrying this contention, the Tuscarora Indian Nation argues that s 21, being only a general Act of Congress, does not apply to Indians or their lands.

The Tuscarora Indian Nation heavily relies upon Elk v. Wilkins, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643. It is true that in that case the ***116** Court, dealing with the question whether a native-born American Indian was made a citizen of the United States by the Fourteenth Amendment of the Constitution, said: 'Under the constitution of the United

States, as originally established * * * General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.' 112 U.S. at pages 99—100, 5 S.Ct. at page 44. However that may have been, 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. In Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 55 S.Ct. 820, 79 L.Ed. 1517, the funds of a restricted Creek Indian were held and invested for him by the Superintendent, and a question arose as to whether income from the investment was subject to federal income taxes. In an earlier case, Blackbird v. Commissioner, 38 F.2d 976, the Tenth Circuit had held such income to be exempt from federal income taxation. But in this case the Board of Tax Appeals sustained the tax, the Tenth Circuit affirmed, and the Superintendent brought the case here. This Court observed that in the Blackbird case the Tenth Circuit had said that to hold a general act of Congress to be applicable to restricted Indians would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with. That is precisely the argument now made here by the Tuscarora Indian Nation. But this Court, in affirming the judgment, said:
'This does not harmonize with what we said in Choteau v. Burnet (1931), 283 U.S. 691, 693, 696, 51 S.Ct. 598, 599, 600, 75 L.Ed. 1353:

"The language of (the Internal Revenue Act of 1918) subjects the income of 'every individual' to tax. Section 213(a) includes income 'from any ***117** source whatever.' The intent of Congress was to levy the ****554** tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. * * * The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject matter.'

'The court below properly declined to follow its quoted pronouncement in Blackbird's Case. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. See Irwin v. Gavit, 268 U.S. 161, 45 S.Ct. 475, 69 L.Ed. 897; Heiner v. Colonial Trust Co., 275 U.S. 232, 48 S.Ct. 65, 72 L.Ed. 256; Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 55 S.Ct. 50, 79 L.Ed. 211; Pitman v. Commissioner, 10 Cir., 64 F.2d 740. The purpose is sufficiently clear.' 295 U.S. at pages 419—420, 55 S.Ct. at page 821.

In Oklahoma Tax Comm. v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612, this Court, in holding that the estate of a restricted Oklahoma Indian was subject to state inheritance and estate taxes under general state statutes, said: 'The language of the statutes does not except either Indians or any other persons from their scope.' (319 U.S., at page 600, 63 S.Ct. at page 1285.) 'If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences.' 319 U.S. at page 607, 63 S.Ct. at page 1288.

See, e.g., Shaw v. Gibson-Zahniser Oil Corporation, 276 U.S. 575, 581—582, 48 S.Ct. 333, 335—336, 72 L.Ed. 709; United States v. Ransom, 263 U.S. 691, 44 S.Ct. 230, 68 L.Ed. 508; Kennedy v. Becker, 241 U.S. 556, 563—564, 36 S.Ct. 705, 707—708, 60 L.Ed. 1166; Choate v. Trapp, 224 U.S. 665, 673, 32 S.Ct. 565, 568, 56 L.Ed. 941.

***118** The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See s 4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians —'tribal lands embraced within Indian reservations.' See ss 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. The Court of Appeals recognized that this is so. 105 U.S.App.D.C., at page 151, 265 F.2d at page 343. Section 21 of the Act, by broad general terms, authorizes the licensee to condemn 'the lands or property of others necessary to the construction, maintenance, or operation of any' licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.

The Tuscarora Indian Nation insists that even if its lands are embraced by the terms of s 21 of the Federal Power Act, they still may not be taken for public use 'without the express consent of Congress referring specifically to those lands,' because of the provisions of **555 25 U.S.C. s 177, 25 U.S.C.A. s 177. [17] That section, in pertinent part, provides: 'No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any *119 Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *'

The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent. See, e.g., United States v. Hellard, 322 U.S. 363, 64 S.Ct. 985, 88 L.Ed. 1326; United States v. Candelaria, 271 U.S. 432, 441—442, 46 S.Ct. 561, 562-563, 70 L.Ed. 1023; Henkel v. United States, 237 U.S. 43, 51, 35 S.Ct. 536, 539, 59 L.Ed. 831; United States v. Sandoval, 231 U.S. 28, 46—48, 34 S.Ct. 1, 5—6, 58 L.Ed. 107. But there is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; 'nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State * * *.' United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 211, 63 S.Ct. 534, 537, 87 L.Ed. 716.

As to the Tuscaroras' contention that s 177 prohibits the taking of any of their lands for the reservoir 'without the express and specific consent of Congress,' one thing is certain. It is certain that if s 177 is applicable to alienations effected by condemnation proceedings under s 21 of the Federal Power Act, the mere 'expressed consent' of Congress would be vain and idle. For s 177 at the very least contemplates the assent of the Indian nation or tribe. And inasmuch as the Tuscarora Indian Nation withholds such consent and refuses to convey to the licensee any of its lands, it follows that the mere consent of Congress, however express and specific, would avail *120 nothing. Therefore, if s 177 is applicable to alienations effected by condemnation under s 21 of the Federal Power Act, the result would be that the Tuscarora lands, however imperative for the project, could not be taken at all.

But s 177 is not applicable to the sovereign United States nor, hence, to its licensees to whom Congress has delegated federal eminent domain powers under s 21 of the Federal Power Act. The law is now well settled that:
'A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect.' United States v. Wittek, 337 U.S. 346, 358—359, 69 S.Ct. 1108, 1114, 93 L.Ed. 1406.

In United States v. United Mine Workers of America, 330 U.S. 258, 272—273, 67 S.Ct. 677, 686, 91 L.Ed. 884, the Court said:

> 'There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.'

See, e.g., Leiter Minerals, Inc., v. United States, 352 U.S. 220, 224—225, 77 S.Ct. 287, 290, 1 L.Ed.2d 267; United States v. Wyoming, 331 U.S. 440, 449, 67 S.Ct. 1319, 1324, 91 L.Ed. 1590; **556 United States v. Stevenson, 215 U.S. 190, 30 S.Ct. 35, 54 L.Ed. 153; United States v. American Bell Telephone Co., 159 U.S. 548, 553—555, 16 S.Ct. 69, 71—72, 40 L.Ed. 255; Lewis v. United States, 92 U.S. 618, 622, 23 L.Ed. 513; United States v. Herron, 20 Wall. 251, 263, 22 L.Ed. 275; Dollar Savings Bank v. United States, 19 Wall. 227, 239, 22 L.Ed. 80.

This Court has several times applied, in combination, the rules (1) that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary, and (2) that general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect. It did so in Henkel v. United States, 237 U.S. 43, 35 S.Ct. 536 (sustaining the right of the United States to take Indian lands for reservoir purposes under the general Reclamation Act of June 17, 1902, 32 Stat. 388), in *121 Spalding v. Chandler, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (sustaining the power of the Government to convey a strip of land through a track owned by an Indian tribe to one Chandler for the use of the State of Michigan in constructing a canal, even though the conveyance was in derogation of a treaty with the Indian tribe), and in Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed.

295. There, this Court sustained the right of a licensee of the Government to take so much of the undescribed fee lands of an Indian tribe as was necessary for the licensed project, though in derogation of the terms of a treaty between the United States and the Indian tribe, [18] saying:

'It would be very strange if the national government, in the execution **557 of its rightful authority, could exercise *122 the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it, provided only that they are not taken without just compensation being made to the owner.,' 135 U.S. at pages 656—657, 10 S.Ct. at page 971.

*123 See also Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299; Missouri, Kansas & Texas R. Co. v. Roberts, 152 U.S. 114, 117—118, 14 S.Ct. 496, 497, 38 L.Ed. 377; Beecher v. Wetherby, 95 U.S. 517, 24 L.Ed. 440; Kohl v. United States, 91 U.S. 367, 23 L.Ed. 449.

In the light of these authorities we must hold that Congress, by the broad general terms of s 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras (see notes 10 and 18); and that 25 U.S.C. s 177, 25 U.S.C.A. s 177 does not apply to the United States itself nor prohibit it, or its licensees under the Federal Power Act, from taking such lands in *124 the manner provided by s 21, upon the payment of just compensation.

All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by others—but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by s 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project do not breach the faith of the **558 United States, or any treaty or other contractual agreement of the United States with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.

Reversed.

Mr. Justice BRENNAN concurs in the result.

Mr. Justice BLACK, whom the CHIEF JUSTICE and Mr. Justice DOUGLAS join, dissenting.

The Court holds that the Federal Power Act [1] authorizes the taking of 22% (1,388 acres) of the single tract which the Tuscarora Indian Nation has owned and occupied as its homeland for 150 years. [2] Admittedly this *125 taking of so large a part of the lands will interfere with the purpose for which this Indian reservation was created—a permanent home for the Tuscaroras. I not only believe that the Federal Power Act does not authorize this taking, but that the Act positively prohibits it. Moreover, I think the taking also violates the Nation's long-established policy of recognizing and preserving Indian reservations for tribal use, and that it constitutes a breach of Indian treaties recognized by Congress since at least 1794.

Whether the Federal Power Act permits this condemnation depends, in part, upon whether the Tuscarora Reservation is a 'reservation' within the meaning of the Act. For if it is, s 4(e) forbids the taking of any part of the lands except after a finding by the Federal Power Commission that the taking 'will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *.' [3] There is no such finding here. In fact, the Commission found that the inundation of so great a part of the Tuscarora Reservation by the waters *126 of the proposed reservoir 'will interfere and will be inconsistent with the purpose for which such reservation was created or acquired.' 21 F.P.C. 146, 148. If these Tuscarora homelands are 'tribal lands embraced within' an Indian reservation as used in s 3(2) [4] they constitute a 'reservation' **559 for purposes of s 4(e), and therefore the taking here is unauthorized because the requisite finding could not be made.

I believe the plain meaning of the words used in the Act, taken alone, and their meaning in the light of the historical background against which they must be viewed, require the conclusion that these lands are a 'reservation' entitled to the protections of s 4(e) of the Act. 'Reservation,' as used in s 4(e), is defined by s 3(2), which provides:
"reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other

lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks * * *.' (Emphasis supplied.)

The phrase 'tribal lands embraced within Indian reservations' surely includes these Tuscarora lands. They are tribal lands. They are embraced within the Tuscarora Indian Nation's reservation. The lands have been called a reservation for more than 150 years. They have been so described in treaties, Acts of Congress, court decisions, Indian agency reports, books, articles, ***127** and maps. In fact, so far as I can ascertain, they have never been called anything else, anywhere or at any time—until today. Even the Court of Appeals and the Federal Power Commission, and the briefs and record in this Court, quite naturally refer to this 10-square-mile tract of land as an Indian reservation. The Court itself seems to accept the fact that the Tuscarora Nation lives on a reservation according to (in its words) the 'generally accepted standards and common understanding' of that term.

The Court, however, decides that in the Federal Power Act Congress departed from the meaning universally given the phrase 'tribal lands embraced within Indian reservations' and defined the phrase, the Court says, 'artificially.' The Court believes that the words 'other lands * * * owned by the United States,' which follow, were intended by Congress to limit the phrase to include only those reservations to which the United States has technical legal title. By the Court's 'artificial' interpretation, the phrase turns out to mean 'tribal lands embraced within Indian reservations—except when 'the lands involved are owned in fee simple by the (Indians).'' [5]

Creating such a wholly artificial and limited definition, so new and disruptive, imposes a heavy burden of justification upon the one who asserts it. We are told that many tribes own their reservation lands. The well-known Pueblos of New Mexico own some 700,000 acres of land in fee. All such reservation lands are put in jeopardy by the Court's strained interpretation. The Court suggests no plausible reason, or any reason at all for that matter, why Congress should or would have sought artificially to place those Indians who hold legal title to their reservation ***128** lands in such a less-favored position. [6] The fact that the Tuscarora ****560** Nation holds technical legal title is fortuitous and an accidental circumstance probably attributable to the Indian land policy prevailing at the early date this reservation was established. Their lands, like all other Indian tribal lands, can be sold, leased or subjected to easements only with the consent of the United States Government. Congress and government agencies have always treated the Tuscarora Reservation the same as all others, [7] and there is no reason even to suspect that Congress wanted to treat it differently when it passed the Federal Power Act.

It is necessary to add no more than a word about the legislative history of this section which the Court relies on. The Court points out that the House version of the 1920 Federal Water Power Act (now called the Federal Power Act) defined 'reservations' as meaning only 'lands and interests in lands owned by the United States.' In this definition of 'reservations' the Senate inserted new words which included the present phrase 'tribal lands embraced within Indian reservations.' If the only ***129** Indian lands Congress sought to cover by this section were those to which the United States had title, the Senate addition served no purpose. For the House bill covered all 'lands * * * owned by the United States.' The only reason for the Senate additions, it seems to me, was to cover lands, like those of the Tuscarora Nation here, title to which was not in the United States Government.

The Court also undertakes to support its 'artificial' definition of 'tribal lands embraced within Indian reservations' by saying that the Congress knew, by a prior decision of this Court, that it was acting under Art. IV, s 3, cl. 2, of the Constitution, which gives Congress power, as the Court says, 'to deal only with 'the Territory or other Property belonging to the United States. ''' In the first place I do not understand how the Court can say with such assurance that the Congress was acting only under that clause, as there is no evidence whatsoever that Congress expressed itself on this matter. Moreover, it seems far more likely to me that in this phrase regulating Indian tribes Congress was acting under Art. I, s 8, cl. 3, which empowers Congress 'To regulate Commerce with * * * the Indian Tribes.'

Even accepting for a moment the Court's 'artificial' definition, I think the United States owns a sufficient 'interest' in these Tuscarora homelands to make them a 'reservation' within the meaning of the Act. Section 3(2) does not merely require a finding in order to take 'tribal lands embraced within Indian reservations'; the same finding is required in order to take 'other * * * interests in lands owned by the United States' whether tribal or not. Or, again accepting the Court's conception, if the phrase 'tribal lands embraced within Indian reservations' must be modified by the words which follow 'lands owned by the United States,' it must also be modified

by the words 'interests in lands owned by the United States,' which also follow. Read this way, the ***130** section defines 'reservations' as tribal lands in ****561** which the United States owns 'interests.' Thus again a finding under s 4(e) is required even under the Court's own technical approach if the United States owns 'interests' in the lands. I think it does.

Certainly the words Congress used, 'interests in lands,' are not surplusage; they have some meaning and were intended to accomplish some purpose of their own. The United States undoubtedly controls (has 'interests in') many lands in this country that it does not own in fee simple. This is surely true as to all Indian tribal lands, even though the Indians own the fee simple title.[8] Such lands cannot be sold or leased without the consent of the United States Government. The Secretary of the Interior took this position about this very reservation in 1912 when the Tuscaroras desired to lease a part of their lands to private individuals for limestone quarrying.[9] And, of course, the long-accepted concept of a guardian-ward relationship between the United States and its Indians, with all the requirements of fair dealing and protection that this involves, means that the Indians are not free to treat their lands as wholly their own.[10] Anyone doubting the ***131** extent of ownership interest in these lands by the United States would have that doubt rapidly removed should he take a deed from the Tuscarora Nation without the consent of the Government.[11] I cannot agree, therefore, that this all but technical fee ownership which the United States has in these lands is inadequate to constitute the kind of 'interests in lands owned by the United States' which requires a s 4(e) finding before condemnation.

After the Court concludes that because of its interpretation of the definition of 'reservations' in s 3(2) a finding is not required by s 4(e) to take the Tuscarora lands, it goes on to find the necessary congressional authorization to take these lands in the general condemnation provisions of s 21. 16 U.S.C. s 814, 16 U.S.C.A. s 814. I believe that this is an incorrect interpretation of the general power to condemn under s 21, both because Congress specifically provided for the taking of all Indian reservation lands it wanted taken in other sections of the same Act, and because a taking under s 21 is contrary to the manner in which Congress has traditionally gone about the taking of Indian lands—such as Congress here carefully prescribed in s 4(e). Congress has been consistent in generally exercising this power to take Indian lands only in accord with prior treaties, only when the Indians themselves consent to be moved, and only by Acts which either specifically refer to Indians or by their terms must include Indian lands. ****562** None of these conditions is satisfied here if s 21 is to be relied upon. The specific and detailed provisions of s 10(e), 16 U.S.C. s 803(e), 16 U.S.C.A. s 803(e), upon which the Court relies, only emphasize to me the kind of care ***132** Congress always takes to protect the just claims of Indians to reservations like this one.

The cases which the Court cites in its opinion do not justify the broad meaning read into s 21. Many of those cases deal with taxation—federal and state. The fact that Indians are sometimes taxed like other citizens does not even remotely indicate that Congress has weakened in any way its policy to preserve 'tribal lands embraced within Indian reservations.' Moreover, cases dealing with individuals who are not Indians are not applicable to tribal reservations. For example, Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 48 S.Ct. 333, 72 L.Ed. 709, cited by the Court, did not involve tribal lands. That case only held that a State may tax the production of an oil company even though it was derived from oil company lands leased from an Indian. The owner there was an individual Indian, not a tribe, and the lands were not and never had been a part of an Indian reservation, but rather had been purchased for this single Indian with the royalties he obtained from his own original restricted allotted lands. In Henkel v. United States, 237 U.S. 43, 35 S.Ct. 536, which involved the taking of Indian lands for the vast western reclamation project, the Court not only found that it had been 'well known to Congress' that Indian lands would have to be taken, 237 U.S. at page 50, 35 S.Ct. at page 539, but the treaty with the Indians involved in that case contained a specific consent by the Indians to such a taking. 29 Stat. 356, quoted 237 U.S. at 48, 49, 35 S.Ct. at 538. There was no provision even resembling this in the Treaty of 1794 with the Tuscaroras. Other cases relied on by the Court, such as Spalding v. Chandler, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469, and Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 10 S.Ct. 965, all involved statutes that made it clear that Congress was well aware it was authorizing the taking of Indians' lands—unlike the history of s 21 of the Federal Power Act and the 1957 Niagara Power Act, 71 Stat. 401, 16 U.S.C. ss 836, 836a, 16 U.S.C.A. ss 836, 836a, involved here.

***133** All that I have said so far relates to what the Court calls the 'plain words' of the statute. I interpret these 'plain words' differently than the Court. But there are other more fundamental and decisive reasons why I disagree with the Court's interpretation of the Federal Power Act as it relates to Indians. The provisions in s 4(e) which protect Indian reservations against destruction by condemnation cannot be properly construed unless considered as a part of a body of

Indian laws built up throughout this Nation's history, and extending back even to the Articles of Confederation. It is necessary to summarize briefly a part of that history.

The experience of the Tuscarora Nation illustrates this history as well as that of any Indian tribe.[12] When this ****563** country was discovered the Tuscaroras lived and owned their homelands in the area that later became North Carolina. Early settlers wanted their lands. The Tuscaroras did not want to give them up. Numerous conflicts arose because of this clash of desires. Finally, about 1710, there was a war between the Tuscaroras and the colonists in North and South Carolina. The Indians were routed. A majority of their warriors were killed. Hundreds of their men, women and children were captured and sold into slavery. Nearly all of the remainder ***134** of the tribe fled. They found a home in distant New York with the Iroquois Confederation of Nations. With their acceptance into the Confederation about 1720 it became known as the Six Nations. Historical accounts indicate that about 1780 those Tuscaroras who had supported America in the Revolution were compelled to leave their first residence in New York because of the hostility of Indians who had fought with the British against the Colonies.[13] They migrated to the Village of Lewiston, New York, near Niagara Falls and settled in that area as their new home. They have remained there ever since —nearly 180 years. When their legal right to this land came into question about 1800 the Seneca Indians and the Holland Land Company both 'thought their claim so just'[14] that they gave the Tuscarora Nation deeds to three square miles of the area they had been occupying for about 20 years. With the assistance of Presidents Washington and Jefferson and the Congress, the Tuscaroras were able, through the Secretary of War, to sell their vast North Carolina lands for $15,000. With this money, held by the Secretary of War as trustee, additional lands adjoining those received from the Seneca Indians and the Holland Land Company were obtained for the Tuscarora Nation and the title held in trust by the Secretary of War from 1804 to 1809. The Secretary supervised the payments to the Holland Land Company, from which the additional 4,329 acres were obtained, and when payments were completed he conveyed these lands to the Tuscarora Nation.[15] The 1,383 acres of the Tuscarora ***135** Reservation involved today is a part of this purchase. Despite all this and the Government's continuing guardianship over these Indians and their lands throughout the years the Court attempts to justify this taking on the single ground that the Indians, not the United States Government, now own the fee simple title to this property.

In 1838 the Government made a treaty with the Tuscaroras under which they were to be removed to other parts of the United States.[16] The removal was to be ****564** carried ***136** out under the authority of a Congressional Act of 1830, 4 Stat. 411, which provided a program for removing the Indians from the Eastern United States to the West. Section 3 of that Act provided authority 'for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them * * *.' The same Act also provided 'That nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes.' Id., s 7.

The Tuscarora Nation then had such a treaty with the United States, which had been in existence since 1764 and is still recognized by Congress today.[17] The treaty ***137** was made with all the Six Nations, at a time when the Tuscarora Nation had been a member for over 70 years, and one of their representatives signed the treaty.[18] In Article III of the Treaty the United States Government made this solemn promise:
****565** 'Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.'
This article of the 1794 Treaty substantially repeated the promise given the Tuscaroras in the prior 1784 Treaty, 7 Stat. 15, made before our Constitution was adopted, that 'The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.'

Of course it is true that in 1794, when the Treaty was signed, the Tuscarora Nation did not yet have the technical legal title to that part of the reservation which the Government was later able to obtain for it. But the solemn pledge of the United States to its wards is not to be construed like a money-lender's mortgage. Up to this ***138** time it has always been the established rule that this Court would give treaties with the Indians an enlarged interpretation; one that would assure them beyond all doubt that this Government does not engage in sharp practices with its wards.[19] This very principle of interpretation was applied in the case of The New

York Indians, 5 Wall. 761, 768, 18 L.Ed. 708, where the Court said, about this treaty:

'It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guarantees given by the United States, and which her faith is pledged to uphold.'

After the Treaty of 1838 was signed, in which the Tuscaroras agreed to go west, they decided not to do so, and the Government respected their objections and left them with their land. They have, since that time, held it as other Indians have throughout the Nation. This has been in accord with the settled general policy to preserve such reservations against any kind of taking, ***139** whether by private citizens or government, that might result in depriving Indian tribes of their homelands against their will.[20] ****566** President Jackson, in 1835, explained the purpose of the removal and reservation program as ***140** meaning that, 'The pledge of the United States has been given by Congress that the country destined for the residence of this people shall be forever 'secured and guaranteed to them.'[21] This policy was so well settled that when the Missouri compromise bill was being discussed in Congress in 1854 Texas Senator Sam Houston used this picturesque language to describe the Government's promise to the Indians:

'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.'[22]

It was to carry out these sacred promises made to protect the security of Indian reservations that Congress adopted s 4(e) which forbids the taking of an Indian reservation for a power project if it will 'interfere * * * with the purpose for which such reservation was created or acquired * * *.' But no such finding was made or could be made here.

There can be no doubt as to the importance of this power project. It will be one of the largest in this country and probably wil have cost over $700,000,000 when it is completed. It is true that it will undoubtedly cost more to build a proper reservoir without the Tuscarora lands, and that there has already been some delay by reason of this controversy. The use of lands other than those of the tribe will cause the abandonment of more homes and the removal of more people. If the decision in this case depended exclusively upon cost and inconvenience, the Authority undoubtedly would have ***141** been justified in using the Tuscarora lands. But the Federal Power Act requires far more than that to justify breaking up this Indian reservation.

These Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. ****567** Cogent arguments can be made that it would be better for all concerned if Indians were to abandon their old customs and habits, and become incorporated in the communities where they reside. The fact remains, however, that they have not done this and that they have continued their tribal life with trust in a promise of security from this Government.

Of course, Congress has power to change this traditional policy when it sees fit. But when such changes have been made Congress has ordinarily been scrupulously careful to see that new conditions leave the Indians satisfied. Until Congress has a chance to express itself far more clearly than it has here the Tuscaroras are entitled to keep their reservation. It would be far better to let the Power Authority present the matter to Congress and request its consent to take these lands. It is not too late for it to do so now. If, as has been argued here, Congress has already impliedly authorized the taking, there can be no reason why it would not pass a measure at once confirming its authorization. It has been known to pass a Joint Resolution in one day where this Court interpreted an Act in a way it did not like. See Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 639—640, 69 S.Ct. 322, 326, 93 L.Ed. 288. Such action would simply put this question of authorization back into the hands of the Legislative Department of the Government where the Constitution wisely reposed it.[23]

***142** It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life.[24] The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

There may be instances in which Congress has broken faith with the Indians, although examples of such action have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I

regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.

All Citations

362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584, 33 P.U.R.3d 18

Footnotes

1 1 U.S.T. 694.

2 The excess flow of water available for power purposes under the 1950 Treaty was estimated to fluctuate between 44,000 and 210,000 cubic feet per second, depending on the flow, the time of year, and the time of day. S.Rep. No. 539, 85th Cong., 1st Sess., p. 4.
The 1950 Treaty superseded the Boundary Waters Treaty of January 11, 1909 (Treaty Series 548, 36 Stat. 2448) which limited diversions of water by Canada to 36,000, and by the United States to 20,000, cubic feet per second. Beginning in 1921, the waters available to the United States under that treaty were utilized by Niagara Mohawk Power Corporation in its Schoellkopf hydroelectric plant, under a federal license expiring in 1971. The rated capacity of that plant was 360,000 kilowatts.

3 S.Rep. No. 539, 85th Cong., 1st Sess., pp. 5—6.

4 Ibid.

5 Hearings were held before the Senate Committee on Public Works, or its Subcommittee, in the Eighty-second, Eighty-third and Eighty-fourth Congresses, and in the first session of the Eighty-fifth Congress; before the House Committee on Public Works in the first sessions of the Eighty-first and Eighty-second Congresses, and in the first and second sessions of the Eighty-fourth Congress. Joint hearings were held by the House Committee and a Subcommittee of the Senate Committee in the Eighty-third Congress, first session. Reports on these bills were S.Rep. No. 2501, 83d Cong., 2d Sess.; H.R.Rep. No. 713, 83d Cong., 1st Sess.; S.Rep. No. 1408, 84th Cong., 2d Sess.; H.R.Rep. No. 2635, 84th Cong., 2d Sess. The Committee Reports on the bill which was finally enacted were S.Rep. No. 539, 85th Cong., 1st Sess.; H.R.Rep. No. 862, 85th Cong., 1st Sess.

6 See note 2.

7 The Report of the Senate Committee on Public Works of June 27, 1957, reporting out the bill that was finally adopted, contained the following statement:
'The proposals by the Power Authority of the State of New York at present contemplate a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. They anticipate that in order to achieve this amount of firm capacity pump-storage and pumping-generating facilities will be required.' S.Rep. No. 539, 85th Cong., 1st Sess., p. 5.
The Report of the House Committee on Public Works of July 23, 1957, contained the following statement:
'As a result of the (Schoellkopf) disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required.' H.R.Rep. No. 862, 85th Cong., 1st Sess., p. 7, U.S.Code Cong. and Adm.News 1957, p. 1591.

8 Those seven conditions resolved the previously disputed issues which had so long delayed congressional authorization of the project. By those conditions, at least 50% of the project power must be made available to public bodies and nonprofit cooperatives 'at the lowest rates reasonably possible,' and 20% of that amount must be made available for use in neighboring States. Niagara Mohawk Power Corporation was given the right to purchase 445,000 kilowatts for a designated period to supply, and 'restore low power costs to,' the customers of its Schoellkopf plant, in exchange for relinquishment of its federal license. The Power Authority of New York was authorized to construct independent transmission lines to reach its preference customers

and to control the resale rates to distributors purchasing power from it. The project was required to bear the United States' share of the cost of remedial works in the river, and, within a designated maximum sum, the cost of a scenic drive and a park.

9 The plans embraced by the application for the license consisted, in general, of (1) the main generating plant on the east bank of the river, (2) a pumping-generating plant, located a short distance east of the main generating plant, (3) a storage reservoir, adjacent to the pumping-generating plant, having a usable storage capacity of 60,000 acre-feet, and covering about 2,800 acres, (4) a water intake structure on the east bank of the river about three miles above the falls, and (5) a water conveyance system extending from the intake to a forebay at the pumping-generating plant, and from the latter to a forebay at the main generating plant.

10 Because the proceeds of the sale of the Tuscaroras' North Carolina lands ($15,000) were payable in three equal annual installments and were to be used, so far as necessary, for the payment of the purchase price of the New York lands ($13,752.80), which was also payable in three substantially equal annual installments, the latter lands were conveyed on November 21, 1804, by deed of the Holland Land Company (which acknowledged receipt of the first installment of the purchase price, and reserved a lien to secure the two unpaid installments of the purchase price) to Henry Dearborn 'in Trust' for the 'Tuscarora Nation of Indians and their Assigns forever . . . the said Henry Dearborn and his Heirs (to) grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscarora Nation of Indians shall at any time hereafter direct and appoint.' After collection of the remaining installments of the purchase price of the Tuscaroras' North Carolina lands and, in turn, remitting to the Holland Land Company so much thereof as was necessary to pay the balance of the purchase price for the New York lands, Henry Dearborn conveyed the New York lands to the 'Tuscarora Nation of Indians and their Successors and Assigns for ever,' in fee simple free and clear of encumbrances, on January 2, 1809. The Tuscarora Indian Nation has ever since continued to own those lands under that conveyance.

In addition to the 4,329 acres purchased from the Holland Land Company in 1804, the Tuscaroras' reservation embraces two other contiguous tracts containing 1,920 acres. The first, a tract of 640 acres, was ceded to the Tuscaroras by the Holland Land Company in June 1798. The second, a tract of 1,280 acres, was ceded to them by the Holland Land Company in 1799. Those tracts are not involved in this case.

11 As amended, 49 Stat. 838, 16 U.S.C. ss 796(2) and 797(e), 16 U.S.C.A. ss 796(2), 797(e).

12 Meanwhile, on April 15, 1958, the Power Authority of New York commenced so-called 'appropriation' proceedings under s 30 of the New York State Highway Law, McKinney's Consol.Laws, c. 25, and also under Art. 5, Tit. 1, of the New York Public Authorities Law, McKinney's Consol.Laws, c. 43—A, to condemn the 1,383 acres of Tuscarora lands for reservoir use.

On April 18, 1958, the Tuscarora Indian Nation filed a complaint in the United States District Court for the Southern District of New York against the Power Authority and the Superintendent of Public Works of New York, seeking (1) a declaratory judgment that the Power Authority had no right or power to take any of its lands without the express and specific consent of the United States, and (2) a permanent injunction against the appropriation or condemnation of any of its lands. The court issued a temporary restraining order. The action, being a 'local' one, was then transferred to the District Court for the Western District of New York. After hearing, that court on June 24, 1958, denied the relief prayed, dissolved the restraining order, and dismissed the complaint on the merits. Tuscarora Nation of Indians v. Power Authority of the State of New York, D.C., 146 F.Supp. 107.

On appeal, the Second Circuit affirmed in part and reversed in part. It held that the Power Authority was authorized under Public Law 58—159 and the Federal Power Act and by the Commission's license thereunder of January 30, 1958, to take the part of the Tuscarora lands needed for the reservoir, but that they could be taken only by a condemnation action in a state or federal court in the district where the property is located under and in the manner provided by s 21 of the Federal Power Act (16 U.S.C. s 814, 16 U.S.C.A. s 814), and not by 'appropriation' proceedings under the New York laws referred to. Tuscarora Nation of Indians v. Power Authority of the State of New York, 2 Cir., 257 F.2d 885. The Tuscarora Indian Nation's petition to this Court for a writ of certiorari was denied on October 13, 1958. 358 U.S. 841, 79 S.Ct. 66, 3 L.Ed.2d 76. The

Superintendent of Public Works of New York, a respondent in the Second Circuit proceedings, has appealed to this Court from so much of the judgment as denied a right to acquire the Tuscarora lands by appropriation proceedings under the New York laws. 362 U.S. 608, 80 S.Ct. 960.

13 In making the statement referred to in the text the Commission was doubtless alluding to the fact that in May 1958, the Power Authority offered the Tuscaroras $1,500,000 for the 1,383 acres, or in excess of $1,000 per acre, plus payment for, or removal to or replacing on other lands, the 37 houses located on these 1,383 acres and offered to construct for them a community center building, involving a total expenditure of about 2,400,000, which offer, the Commission says, has never been withdrawn.

The Tuscarora Indian Nation tells us in its brief that:

'What the Government unfortunately fails to point out is that the Power Authority's 'offer' was and still is an empty gesture since, as the court below and the Court of Appeals for the Second Circuit both ruled, the Tuscarora Nation is prohibited by law from selling its lands without the consent of the United States expressed in an act of Congress. 25 U.S.C. ss 177, 233 (25 U.S.C.A. ss 177, 233).'

14 See H.R.Rep. No. 715, 65th Cong., 2d Sess., p. 22; S.Rep. No. 180, 66th Cong., 1st Sess., p. 10.

15 See S.Rep. No. 180, 66th Cong., 1st Sess., p. 10; 59 Cong.Rec. 1103.

16 See H.R.Rep. No. 910, 66th Cong., 2d Sess., p. 7.

17 The Tuscaroras also rely upon 25 U.S.C. s 233, 25 U.S.C.A. s 233, which confers, subject to qualifications, jurisdiction upon the courts of New York over civil actions between Indians and also between them and other persons, and contains a pertinent proviso 'That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York.'

18 The Tuscarora Indian Nation argues that its lands in question should be regarded as subject to and protected from condemnation by the Treaty of Fort Stanwix Of October 22, 1784 (7 Stat. 15), the unratified Treaty of Fort Harmar of January 9, 1789 (7 Stat. 33), and the Treaty of Canandaigua of November 11, 1794 (7 Stat. 44). But the record shows that the first two of these treaties related to other lands and, principally at least, to other Indian nations, and that the last treaty mentioned, though covering the lands in question, was with another Indian nation (the Senecas) which, pursuant to the Treaty of Big Tree of September 15, 1797 (7 Stat. 601) and with the approbation of the United States, sold its interest in these lands to Robert Morris and thus freed them from the effects of the Treaty of Canandaigua of 1794, Robert Morris, in turn, conveyed these lands to the Holland Land Company and it, in turn, conveyed the part in question to the Tuscarora Indian Nation, and its title rests upon that conveyance, free of any treaty.

It appears from the record that, as earlier stated (see note 10), the Tuscaroras, save for a few of them who remained on their lands 'on the Roanoke' in North Carolina, moved from their North Carolina lands to reside with the Oneidas in central New York—at a point about 200 miles east of the lands now owned by the Tuscaroras in Niagara County, New York—in 1775. The Tuscaroras had no proprietary interest in the Oneidas' lands in central New York but were there as 'guests' of the Oneidas or as 'tenants at will or by sufferance.' Hough, Census of the State of New York, 1857, p. 510; New York Senate Document No. 24, 1846, p. 68. They came to be recognized, however, as members of the Five Nations which thereafter became known as the Six Nations (the others being the Oneidas, the Mohawks, the Onondagas, the Cayugas and the Senecas). The Senecas occupied a vast area in western New York, including the lands here in question. A few Tuscaroras fought with the Senecas on the side of the British and after their defeat at the battle of Elmira in 1779, they went to reside with the Senecas in the vicinity of Fort Niagara in about 1780. Other Tuscaroras then moved to that place. Just when they did so is not known with certainty and it appears that the most that can be said is that they were there prior to 1797. The Tuscaroras had the same kind of tenure, i.e., guests or tenants at will or by sufferance, with the Senecas as they had earlier had with the Oneidas in central New York. One of their chiefs described their situation as 'squatters upon the territory of another distinct nation.'

By the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the unratified Treaty or Fort Harmar of 1789 (7 Stat. 33) with the Six Nations, the United States promised to hold the Oneidas and the Tuscaroras secure in the lands upon which they then lived—which were the lands in central New York about 200 miles east of the

lands in question. By the same treaties the United States promised to secure to the Six Nations a tract of land in western New York in the vicinity of the Niagara River. By the Treaty of Canandaigua of 1794 (7 Stat. 44) between the United States and the Six Nations, which superseded the prior treaties (except, by Article VI, the United States remained bound to pay the Tuscaroras $4,500 per year for the purchase of clothing), it was recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the lands now owned by the Tuscaroras, was secured to the Senecas.

Under the 1786 Hartford Compact between New York and Massachusetts, New York was recognized to have sovereignty over those lands and Massachusetts to own the underlying fee to those lands and the right to purchase the Senecas' interest in them. In 1794, Massachusetts sold the fee and the right to purchase the Senecas' right to occupy these western New York lands, including the lands now owned by the Tuscaroras, to Robert Morris, who, in turn, sold those lands and rights to the Holland Land Company with the covenant that be would buy out the Senecas' rights of occupancy for and on behalf of the Holland Land Company. And at the Treaty of Big Tree of 1797 (7 Stat. 601), Morris, with the approbation of the United States, purchased the Senecas' rights of occupancy in the lands here in question for the Holland Land Company. Thus the lands in question were entirely freed from the effects of all then existing treaties with the Indians, and the Tuscaroras' title to their present lands derives, as earlier stated, from the Holland Land Company (see note 10 for further details) and has never since been subject to any treaty between the United States and the Tuscaroras.

1 41 Stat. 1063, as amended, 16 U.S.C. ss 791a—828c, 16 U.S.C.A. ss 791a—828c.

2 While the petitioners have argued that Congress authorized this taking in the 1957 Niagara Power Act, 71 Stat. 401, 16 U.S.C. ss 836, 836a, 16 U.S.C.A. ss 836, 836a, the Court does not accept this argument. Neither do I. There is absolutely no evidence that Congress was in any way aware that these Tuscarora lands would be required by the Niagara Power Project. The petitioners have also argued that Congress impliedly authorized this taking in the 1957 Act because in fact the Tuscarora lands are indispensable to the Niagara Power Project. But the record shows that the reservation lands are not indispensable. The Federal Power Commission first found that 'other lands are available.' 19 F.P.C. 186, 188. And see 105 U.S.App.D.C. 146, 151, 265 F.2d 338, 343. On remand the Commission refused to find that the Indian lands were indispensable, although it did find that use of other lands would be much more expensive. 21 F.P.C. 146. And see 21 F.P.C. 273, 275. That other lands are more expensive is hardly proof that the Tuscarora lands are indispensable to this $700,000,000 project.

3 Section 4(e) contains the general grant of power for the Federal Power Commission to issue licenses for federal power projects. The part that is of crucial significance here reads:

'(l)icenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations * * *.' Title 16 U.S.C. s 797(e), 16 U.S.C.A. s 797(e), enacted as s 4(d) in the Federal Water Power Act of 1920, 41 Stat. 1063, was re-enacted in the 1935 amendments, 49 Stat. 838, as s 4(e) and is referred to as such throughout.

4 Section 3, 16 U.S.C. s 796, 16 U.S.C.A. s 796, is the general definitions section of the Federal Power Act, and was first enacted in the Federal Water Power Act of 1920, 41 Stat. 1063. Section 3(2) defines the term 'reservations.'

5 The Court's opinion states: 'Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation * * * we hold that they are not within a 'reservation' * * *.'

6 In United States v. Candelaria, 271 U.S. 432, 440, 46 S.Ct. 561, 562, 70 L.Ed. 1023, and United States v. Sandoval, 231 U.S. 28, 39, 34 S.Ct. 1, 3, 58 L.Ed. 107, this Court has held that the Pueblos' fee simple ownership of their lands has no effect whatsoever on the United States' rights and responsibilities towards these Indians and their lands. See The New York Indians, 5 Wall. 761, 767, 18 L.Ed. 708, for a similar holding as to Seneca Indian lands in New York governed by the same treaty under which the Tuscaroras assert their

rights in this case. And see also United States v. Hellard, 322 U.S. 363, 366, 64 S.Ct. 985, 987, 88 L.Ed. 1326 ('The governmental interest * * * is as clear as it would be if the fee were in the United States'); State of Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; Heckman v. United States, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820.

7 See, e.g., Report of the Commissioner of Indian Affairs, H.R.Exec.Doc. No. 1, Pt. 5, Vol. I, 45th Cong., 2d Sess. 397, 558—564 (1877). See also 64 Stat. 845, 25 U.S.C. s 233, 25 U.S.C.A. s 233, which specifically subjects all New York tribes to Rev.Stat. s 2116 (1875), 25 U.S.C. s 177, 25 U.S.C.A. s 177, which bans alienation of their lands without the consent of Congress. And see generally notes 6, supra, 9, 11, 16, 17, 20, infra.

8 The Court of Appeals held the United States had an adequate s 3(2) 'interest in' the Tuscarora Reservation to require a s 4(e) finding. 105 U.S.App.D.C. 146, 150, 265 F.2d 338, 342. See notes 6, supra, and 16, infra.

9 See 51 Cong.Rec. 11659—11660, 14561—14562. And see note 16, infra.

10 See, e.g., Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 657, 10 S.Ct. 965, 971, 34 L.Ed. 295; Elk v. Wilkins, 112 U.S. 94, 99, 5 S.Ct. 41, 44, 28 L.Ed. 643; Ex parte Crow Dog, 109 U.S. 556, 569, 3 S.Ct. 396, 27 L.Ed. 1030; Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25. See also United States v. Candelaria, 271 U.S. 432, 442, 46 S.Ct. 561, 563, where this Court pointed out that the same concept had applied under Spanish and Mexican law. And see also United States v. Kagama, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 ('duty of protection'), and Chief Justice Marshall's leading opinion in Johnson v. M'Intosh, 8 Wheat. 543, 591, 5 L.Ed. 681 ('Indians (are) to be protected * * * in the possession of their lands').

11 In United States v. Candelaria, 271 U.S. 432, 46 S.Ct. 561, for example, this Court held that the United States could set aside a deed from the Pueblos of lands to which the Indians had fee simple title, even though the issue in the case had been settled by otherwise applicable principles of res judicata in prior litigation to which the Indians, but not the United States, had been a party. See note 9, supra.

12 For general discussions of the Tuscaroras' history see Hodge (editor), Handbook of American Indians (1910), Pt. 2, 842—853, Smithsonian Institution Bureau of American Ethnology, Bulletin 30, H.R.Doc. No. 926, Part 2, 59th Cong., 1st Sess.; Cohen, Handbook of Federal Indian Law (1941), 423; Morgan, League of the Iroquois (1904), I, 23, 42, 93, II, 77, 187, 305; Cusick, Ancient History of the Six Nations (1848), 31—35; H.R.Doc. No. 1590, 63d Cong., 3d Sess. 7, 11—15 (1915); H.R.Exec.Doc. No. 1, Pt. 5, Vol. I, 45th Cong., 2d Sess. 562—563 (1877). And see statements in New York Indians v. United States, 30 Ct.Cl. 413 (1895); Tuscarora Nation of Indians v. Power Authority of New York, D.C.W.D.N.Y. 1958, 164 F.Supp. 107; People ex rel. Cusick v. Daly, 1914, 212 N.Y. 183, 190, 105 N.E. 1048, 1050.

13 See Handbook of American Indians, op. cit., supra, note 12, at 848; Wilson, Apologies to the Iroquois (1960), 135.

14 Letter from Theophile Cazenove to Joseph Ellicott, May 10, 1798, 1 Bingham (editor), Holland Land Company's Papers: Reports of Joseph Ellicott (Buffalo Hist. Soc. Pub. Vol. 32, 1937) 21, 23.

15 In addition to the general histories cited, note 12, supra, this particular transaction is described in various letters and speeches of the Tuscaroras and the Secretary of War. See Letters Sent by the Secretary of War Relating to Indian Affairs (National Archives, Record Group 75, Interior Branch), Vol. A, 18—19, 22—23, 113—114, 117—119, 147—148, 402, 425—426, 438—439, Vol. B, 29, 274, 421; 6 Buffalo Hist. Soc. Pub. 221; and letter from Erastus Granger to Secretary of War Henry Dearborn, July 20, 1804, in Buffalo Hist. Soc. manuscript files. The deeds are recorded in the Niagara County Clerk's Office, Lockport, New York, Nov. 21, 1804, Liber B, pp. 2—7; Jan. 2, 1809, Liber A, p. 5. '(I)n 1804 Congress authorized the Secretary of War to purchase additional land for these Indians.' From a Department of Interior letter, H.R.Doc. No. 1590, 63d Cong., 3d Sess. 7. And see the Court's note 10, and Fellows v. Blacksmith, 19 How. 366, 15 L.Ed. 684.

16 Treaty of January 15, 1838, 7 Stat. 550, 554 (Article 14, 'Special Provisions For The Tuscaroras').
The interest of the government in Indian lands was a part of the law of Spain, Mexico, Great Britain and other European powers during pre-Colonial days. United States v. Candelaria, 271 U.S. 432, 442, 46 S.Ct. 561, 563; United States v. Kagama, 118 U.S. 375, 381, 6 S.Ct. 1109, 30 L.Ed. 228; Worcester v. Georgia, 6 Pet. 515, 551—552, 8 L.Ed. 483; Cherokee Nation v. State of Georgia, 5 Pet. 1, 17—18, 8 L.Ed. 25. The original

Articles of Confederation provided for congressional control of Indian affairs in Article 9. A similar provision is in the Commerce Clause of the present Constitution. One of the first Acts of the new Congress was the so-called Non-Intercourse Act of July 22, 1790, 1 Stat. 137, which provided, in s 4, 'That no sale of lands made by any Indians * * * shall be valid * * * unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.' The similar provision is presently found in 25 U.S.C. s 177, 25 U.S.C.A. s 177, as modified by s 2079, Rev.Stat. 25 U.S.C. s 71, 25 U.S.C.A. s 71.

17 Treaty of November 11, 1794, 7 Stat. 44. Article VI of that Treaty provides:
'(B)ecause the United States desire, with humanity and kindness, to contribute to their comfortable support * * * the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President (April 23, 1792); making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing cloathing (etc.) * * *.'
Every Congress until the 81st indicated that their $4,500 annual appropriation rested upon 'article 6, treaty of November 11, 1794.' E.g., 62 Stat. 1120, 80th Cong., 2d Sess. Subsequent Congresses simply appropriated a total amount for Indian treaty obligations including 'treaties with Senecas and Six Nations of New York * * *.' E.g., 63 Stat. 774, 81st Cong., 1st Sess. In 1951 the 82d Cong., 1st Sess., appropriated simply 'such amounts as may be necessary after June 30, 1951' for this purpose. 65 Stat. 254. At the hearings it was explained that this provision 'would have the effect of being permanent law insofar as making the funds available without having to be included in each annual appropriation act. * * * (I)t is a treaty obligation and has always been paid by the Government in full. * * * These treaties have been in existence for many, many years.' Director D. Otis Beasley, Division of Budget and Finance, Department of the Interior, Hearings on Interior Department Appropriations for 1952, before the Subcommittee on Interior Department of the House Committee on Appropriations, 82d Cong., 1st Sess., Pt. 2, 1747, 1764.

18 'Kanatsoyh, alias Nicholas Kusik,' signed the 1764 Treaty as a Tuscarora, but is not so identified there. However, he also signed the Treaties of December 2, 1794, 7 Stat. 47, and January 15, 1838, 7 Stat. 550, for the Tuscarora Nation and is listed there as a 'Tuscarora.' It has never even been hinted, until the Court's note 18 today, that the Tuscarora Nation is for some reason not included in this November 11, 1794, Six Nations' Treaty.

19 The Kansas Indians, 5 Wall. 737, 760, 18 L.Ed. 667 ('enlarged rules of construction are adopted in reference to Indian treaties'); Worcester v. State of Georgia, 6 Pet. 515, 582, 8 L.Ed. 483 ('The language used in treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction') (concurring opinion); Tulee v. State of Washington, 315 U.S. 681, 684—685, 62 S.Ct. 862, 864, 86 L.Ed. 1115 ('in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people'). And see Spalding v. Chandler, 160 U.S. 394, 405, 16 S.Ct. 360, 364, 40 L.Ed. 469; Elk v. Wilkins, 112 U.S. 94, 100, 5 S.Ct. 41, 44, 28 L.Ed. 643; Ex parte Crow Dog. 109 U.S. 556, 572, 3 S.Ct. 396, 406, 27 L.Ed. 1030; United States v. Rogers, 4 How. 567, 572, 11 L.Ed. 1105.

20 The origins of this policy extend into pre-Colonial British history. As Chief Justice Marshall said in Worcester v. State of Georgia, 6 Pet. 515, 547, 8 L.Ed. 483, in speaking of the Indian land policy,
'The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them.'
Chief Justice Marshall quoted at the same place similar language from a speech made to the American Indians by the British Superintendent of Indian affairs in 1763. This principle has been consistently recognized by this Government and this Court. Spalding v. Chandler, 160 U.S. 394, 403, 16 S.Ct. 360, 364, 40 L.Ed. 469; United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 197, 23 L.Ed. 846; The New York Indians, 5 Wall. 761, 768, 18 L.Ed. 708; Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25; Johnson v. M'Intosh, 8 Wheat. 543, 5 L.Ed. 681. And see 48 Stat. 987, 25 U.S.C. s 476, 25 U.S.C.A. s 476; 25 U.S.C. ss 311—328, 25 U.S.C.A. ss 311—328 and 25 CFR s 161.3(a).

The age and scope of this doctrine of guardianship and fairness to the Indians is well illustrated in a statement made by President Washington, December 29, 1790, responding to an address by the chiefs and councilors of the Seneca Nation:

'I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.

'Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.' 4 American State Papers (Indian Affairs, Vol. I, 1832) 142; 31 Washington, Writings (United States George Washington Bicentennial Comm'n ed. 1939) 179, 180.

21 Seventh Annual Message, Dec. 7, 1835, 3 Richardson, Messages and Papers of the Presidents 1789—1897, 147, 172.

22 Cong.Globe, 33d Cong., 1st Sess., App. 202. See 1 Morison and Commager, The Growth of the American Republic (1950), 621.

23 See, e.g., United States v. Hellard, 322 U.S. 363, 367, 64 S.Ct. 985, 988, 88 L.Ed. 1326 ('the power of Congress over Indian affairs is plenary'); United States v. Sandoval, 231 U.S. 28, 45—46, 34 S.Ct. 1, 5, 58 L.Ed. 107; Tiger v. Western Investment Co., 221 U.S. 286, 315, 31 S.Ct. 578, 586, 55 L.Ed. 738 ('It is for that body (Congress), and not the courts'); Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 ('Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning * * * not * * * the judicial department of the government'); United States v. Rogers, 4 How. 567, 572, 11 L.Ed. 1105.

24 'As we understand the position of the tribe, they do not complain so much of a possible lease or license for the use of the lands as they complain of a possible permanent loss of part of their homelands.' Letter from Under Secretary of the Interior Bennett to Federal Power Commission Chairman Kuykendall, December 19, 1958, relating to the taking of these Tuscarora lands for the Niagara Power Project.

751 F.2d 1113
United States Court of Appeals,
Ninth Circuit.

Raymond J. DONOVAN, Secretary of Labor,
United States Department of Labor, Petitioner,
v.
COEUR d'ALENE TRIBAL FARM, Respondent.

No. 84–7031.
|
Argued and Submitted Nov. 7, 1984.
|
Decided Jan. 15, 1985.

Synopsis

The Secretary of Labor appealed a decision of the Occupational Safety and Health Review Commission vacating citations and penalties against Indian tribal farm. The Court of Appeals, Sneed, Circuit Judge, held that the Occupational Safety and Health Act applied to commercial activities carried on by Indian tribal farm.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1114** Sandra D. Lord, U.S. Dept. of Labor, Washington, D.C., for petitioner.

Gary T. Farrell, Dellwo, Rudolf & Schroeder, Spokane, Wash., for respondent.

On Petition for Review of a Decision of the Occupational Safety and Health Review Commission.

Before WRIGHT, SNEED, and ALARCON, Circuit Judges.

Opinion

SNEED, Circuit Judge:

The Secretary of Labor appeals a decision of the Occupational Safety and Health Review Commission vacating citations and penalties assessed against the Coeur d'Alene Tribal Farm. We reverse the Commission's decision and hold that the Occupational Safety and Health Act applies to the commercial activities carried on by the Coeur d'Alene Tribal Farm.

I.

FACTS AND PROCEEDINGS BELOW

The Coeur d'Alene Indian Tribe (the Tribe) occupies a 350,000 acre reservation in northern Idaho. Although the Tribe is organized under federal law, it has no formal treaty with the United States government.

The Coeur d'Alene Tribal Farm (the Farm) is a commercial enterprise wholly owned and operated by the Tribe. The Farm produces grain and lentils exclusively for sale on the open market both within and outside Idaho. It employs approximately twenty workers, some of whom are non-Indians. The Farm manager is himself a non-Indian. Apart from its tribal ownership, the Farm is similar in its operation and activities to other farms in the area.

In October, 1978, a compliance officer from the Occupational Safety and Health Administration (OSHA) conducted a consensual inspection of two grain elevators on the Farm. He issued citations for 21 alleged violations and proposed a $185 fine. The Farm has not disputed the facts on which the citations were based.

***1115** The Farm did, however, challenge OSHA's authority to conduct health and safety inspections and has argued that Congress did not intend the Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1982) (the Act), to apply to the Farm. The dispute was referred to an Administrative Law Judge (ALJ) who affirmed the citations and proposed penalty. The Farm petitioned the Occupational Safety and Health Review Commission (the Commission) for review, which the Commission granted on the issue of the Act's applicability to tribal enterprises. The Commission remanded the case to the ALJ in light of its decision in *Navajo Forest Products Industries,* 8 O.S.H.Cas. (BNA) 2094, *aff'd,* 692 F.2d 709 (10th Cir.1982). The ALJ reaffirmed its decision and the Farm again petitioned for and was granted review on the issue of the Act's applicability to tribal enterprises.

On November 16, 1983, the Commission reversed the ALJ's decision and vacated the citations. From this decision the Secretary of Labor appeals.

II.

DISCUSSION

The Occupational Safety and Health Act is a statute of general applicability and broad remedial purpose designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ...." 29 U.S.C. § 651(b) (1982). The Act's coverage is comprehensive and we believe that its definition of employer clearly includes the Coeur d'Alene Tribal Farm. [1] The Farm, however, contends that its inherent sovereign powers bar application of the Act to its activities absent an express congressional decision to that effect. We disagree.

No one doubts that the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises. But neither is there any doubt that Congress has the power to modify or extinguish that right. Unlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance. *See Rice v. Rehner,* 463 U.S. 713, 103 S.Ct. 3291, 3295, 77 L.Ed.2d 961 (1983). *Cf. National League of Cities v. Usery,* 426 U.S. 833, 426 U.S. 833, 49 L.Ed.2d 245 (1976). The issue raised on this appeal is whether Congress *intended* to exercise its plenary authority over Indian tribes. More precisely, it is whether congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject.

A. *The General Rule*

The Secretary relies on *FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), 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.* at 116, 80 S.Ct. at 553. The Farm may be correct when it argues that this language from *Tuscarora* is dictum, but it is dictum that has guided many of our decisions. As Judge Choy, writing for himself in *United States v. Farris,* 624 F.2d 890 (9th Cir.1980), *cert. denied,* 449 U.S. 1111, 101 S.Ct. 919, 66 L.Ed.2d 839 (1981), has said: "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." [2] *Id.* at 893. Many of our decisions have upheld the application of general federal laws to Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude Indians. *See, e.g., Confederated Tribes of* ***1116** *Warm Springs Reservation of Oregon v. Kurtz,* 691 F.2d 878 (9th Cir.1982), *cert. denied,* 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 792 (1983) (holding that absent a "definitely expressed exemption" tribes and their members are subject to federal excise taxes); *United States v. Fryberg,* 622 F.2d 1010 (9th Cir.), *cert. denied,* 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980) (holding that Eagle Protection Act abrogates treaty hunting rights); *Fry v. United States,* 557 F.2d 646 (9th Cir.1977), *cert. denied,* 434 U.S. 1011, 98 S.Ct. 722, 54 L.Ed.2d 754 (1978) (holding that Indian logging operations are subject to federal taxes); *United States v. Burns,* 529 F.2d 114 (9th Cir.1975) (holding that federal gun control law applies to Indians, citing *Tuscarora*). *See also Navajo Tribe v. NLRB,* 288 F.2d 162 (D.C.Cir.), *cert. denied,* 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961) (holding that National Labor Relations Act applies to employers located on reservation lands). In short, we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here.

B. *The Exceptions*

The above cases and the principles on which they rest suggest that the Occupational Safety and Health Act should apply to the Farm. There are, however, three exceptions to this principle. 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 ...." *Farris,* 624 F.2d at 893–94. In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

The Farm argues that it is saved from the strictures of OSHA under the first two of these exceptions. We believe that neither is applicable in this case.

(1) *The "Aspects of Tribal Self-government" Exception*

First, the Farm argues that the 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. The Farm's argument proves far too much. To accept it

would bring within the embrace of "tribal self-government" all tribal business and commercial activity. Our decisions do not support an interpretation of such breadth. For example, if the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to reservation activities even without a "clear" expression of congressional intent. *See, e.g., Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz,* 691 F.2d 878 (9th Cir.1982), *cert. denied,* 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 792 (1983). We believe 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. *See Farris,* 624 F.2d at 893.

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.*

In a variation on the general theme of tribal self-government rights, the Farm argues that the Tribe's right to exclude non-Indians, including OSHA inspectors, from ***1117** its reservation is a "fundamental aspect" of tribal sovereignty that cannot be infringed without a clear expression of congressional intent. We have never employed this "fundamental aspect of sovereignty" formulation of the tribal self-government exception to the general rule that federal statutes ordinarily apply to Indians, and we decline to do so now.

The Farm looks for support for this variation of the general theme to the Supreme Court's recent decision in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), which, it argues, overrules *Tuscarora* (and presumably our own rule as well), at least to the extent that *Tuscarora* allows Congress to silently or implicitly infringe sovereign tribal rights to exclude non-Indians from tribal lands. *Merrion,* the Farm says, requires that any modification of the fundamental sovereign right to exclude non-Indians be clearly expressed. We believe that this argument misconstrues the Supreme Court's decision.

It is true that *Merrion* recognizes that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands ...." *Merrion,* 455 U.S. at 141, 102 S.Ct. at 904. However, to assume that this language bars the application of the Act to Indian tribes in the absence of clearly expressed congressional intent to that effect, ignores the fact that the issue of tribal sovereignty in *Merrion* arose in a context very different from the one presented here. *Merrion* discussed the tribal power to tax non-Indians who enter reservations for commercial purposes and said that the right to exclude and tax non-Indians was a "hallmark" of sovereignty. It in no way addressed Congress' ability to modify those rights through the exercise of its plenary powers. Unlike the Secretary in this case, the non-Indian petitioners in *Merrion* could point to no statute of general applicability that even appeared to modify the tribe's sovereign power to tax or exclude. *See Merrion,* 455 U.S. at 149–52, 102 S.Ct. at 908–10.

(2) *The "Treaty Rights" Exception*

The Farm also appears to argue that the Act cannot apply to its activities absent a clear expression of congressional intent because application of the Act would infringe treaty rights. Indeed, the Tenth Circuit's recent holding in *Donovan v. Navajo Forest Products Industries,* 692 F.2d 709 (10th Cir.1982), in which the Act was held *not* to apply to a tribal enterprise, arguably depended on the finding that the Navajo Tribe's right to exclude non-Indians was explicitly protected by a treaty with the United States government.[3] The Tenth Circuit stressed that "*Tuscarora* did not ... involve an Indian treaty. Therein lies the distinguishing feature between the case at bar and the *Tuscarora* line of cases, which stand for the rule that under statutes of general application Indians are treated as any other person, unless Congress expressly excepts them therefrom." *Navajo Forest,* 692 F.2d at 711. We also "presume[ ] that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians." *Farris,* 624 F.2d at 893.

In this case, however, there is no treaty between the Coeur d'Alene Tribe and the United States government. Nor can the Farm point to any document to which the United States is a signatory that specifically guarantees the Tribe's right to exclude non-Indians. Even the "ratified articles of agreement" to which the Farm refers have no such provision. Thus, the Farm cannot avail itself of the "treaty rights" exception and must rely exclusively on the "aspects of tribal self-

government" exception. As already indicated, that exception ***1118** is also unavailable under the facts of this case.

(3) *The "Other Indications" Exception*

The Farm does not argue, and we do not believe, that the legislative history of the Occupational Health and Safety Act or the surrounding circumstances of its passage indicate any congressional desire to exclude tribal enterprises from the scope of its coverage.

REVERSED.

All Citations

751 F.2d 1113, 12 O.S.H. Cas. (BNA) 1169, 1984-1985 O.S.H.D. (CCH) P 27,162

Footnotes

1 The Farm is an "organized group of persons ... engaged in a business affecting commerce who has employees ...." *See* 29 U.S.C. § 652 (1982). Congress expressly excluded only "the United States or any State or political subdivision of a State" from the broad definition of "employer" in the Act. *Id.*

2 Both Judges Browning and Kennedy wrote separately in *Farris,* but neither disagreed with Judge Choy's statement of basic principle that generally applicable federal statutes ordinarily apply to Indian tribes and their activities.

3 The Tenth Circuit's decision in *Navajo Forest* may rest in part on that court's belief that application of the Act to the tribal enterprise would "dilute the principles of tribal sovereignty and self-government recognized in the treaty." *Navajo Forest,* 692 F.2d at 712. It is not clear whether these "principles" would by themselves have had sufficient force to bar application of the Act. To whatever extent the Tenth Circuit's decision is not tied to the existence of an express treaty right, we disagree with it.

382 F.3d 892
United States Court of Appeals,
Ninth Circuit.

Kurt SNYDER, a married man, individually, and on behalf of all other similarly situated employees of the Navajo Nation; Division of Navajo Public Safety; Darrell Boye, a married man, individually; Larry Etsitty, Sr., a single man, individually; Sarah Habaadih, a single woman, individually; Jones R. Begay, a married man, individually; Johnny Peshlakai, a married man, individually; Ronald Platerio, a married man, individually; Rex Butler, a married man, individually; Tyrone benally, a single man, individually; Charlene Bahe, a single woman, individually; Kenny James, a married man, individually; Rosalyn Benally, a single woman, individually; Leroy Butler, a married man, individually; Lucy Lane, a married woman, individually; Dale Dennison, a married man, individually; Randall Tomasyo; a married man, individually; and on behalf of all other similarly situated employees of the Navajo Nation, Plaintiffs–Appellants,
v.
The NAVAJO NATION, Defendant–Appellee.
Kurt Snyder, a married man, individually, and on behalf of all other similarly situated employees of the Navajo Nation; Division of Navajo Public Safety; Darrell Boye, a married man, individually; Larry Etsitty, Sr., a single man, individually; Sarah Habaadih, a single woman, individually; Jones R. Begay, a married man, individually; Johnny Peshlakai, a married man, individually; Ronald Platerio, a married man, individually; Rex Butler, a married man, individually; Tyrone Benally, a single man, individually; Charlene Bahe, a single woman, individually; Kenny James, a married man, individually; Rosalyn Benally, a single woman, individually; Leroy Butler, a married man, individually; Lucy Lane, a married woman, individually; Dale Dennison, a married man, individually; Randall Tomasyo; a married man, individually; and on behalf of all other similarly situated employees of the Navajo Nation; Antonio Cooke; Evelyn Smiley; Mary Fernando; Katie Belone; Louis Anderson; Esther Charley; Louis St. Germaine; Ernest D. Yazzie; Salvantis Begay; Rosina Ford; Otis Desiderio, Robert H. James; Frederick L. Price; Raymond K. Barlow; Henry C. Platerio, Jr.; Fayetta Dale; Wallace Billie; Kara Tilden; Bernadine Dobson; Raymond Butler, Jr.; Division of Navajo Public Safety, Plaintiffs–Appellants,
v.
The Navajo Nation; United States of America, Defendants–Appellees.

Nos. 02–16632, 03–15395.
|
Argued and Submitted Feb. 9, 2004.
|
Filed June 10, 2004.
|
Amended Sept. 2, 2004.

Synopsis

Background: Indian tribe's law enforcement officers sued tribe and United States for violations of Fair Labor Standards Act (FLSA). The United States District Court for the District of Arizona, Earl H. Carroll, J., dismissed claims, and officers appealed.

Holdings: The Court of Appeals, Schroeder, Chief Judge, held that:

FLSA's overtime pay provision did not apply to law enforcement officers employed by Indian tribe, and

provision of Indian Self-Determination and Education Assistance Act (ISDEAA), deeming tribal members employed under self-determination contracts to be federal employees for purposes of tort liability, did not make them federal employees for purposes of FLSA.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***894** Edward D. Fitzhugh, Law Offices of Edward D. Fitzhugh, Tempe, AZ, for the plaintiffs-appellants.

Dana L. Bobroff, The Navajo Nation Department of Justice, Window Rock, AZ, and Catherine Y. Hancock, Assistant

Attorney General, Department of Justice, Washington, DC, for the defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding. D.C. Nos. CV–02–00308–EHC, CV–02–01627–EHC.

Before SCHROEDER, Chief Judge, TALLMAN, and CALLAHAN, Circuit Judges.

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

ORDER

The Opinion filed June 10, 2004, is amended as follows:

Slip Opinion page 7727, lines 17–18, delete ", and more narrow than," and lines 30–31, delete "This case is easier, because" and insert "Here,"

With the above amendments, the panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

OPINION

SCHROEDER, Chief Judge:

Appellants in these consolidated appeals are law enforcement officers of the Navajo Nation Division of Public Safety ("DPS") who filed actions against both the Navajo Nation and the United States claiming violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219. The district court dismissed the claims against the Navajo Nation, holding that law enforcement was an intramural matter within the meaning of *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir.1985), and that the FLSA therefore did not apply to plaintiff law enforcement officers. The court also dismissed the claims against the United States. The tribal law enforcement officers appeal both dismissals. We affirm.

The FLSA establishes various employee protections and employment standards including premium pay for overtime work. Appellants claim the tribe and United States are in violation of this act because Appellants are regularly required to work overtime and the tribe makes only delayed, sporadic and partial payments for overtime. Appellants also assert that they should receive the same compensation as law enforcement officers employed by the Bureau of Indian Affairs ("BIA") who do similar work.

Claims Against the Tribe

The FLSA is a statute of general applicability. *Rutherford Food Corp. v.* ***895** *McComb,* 331 U.S. 722, 727, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). Such generally applicable statutes typically apply to Indian tribes. *Fed. Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). There is an exemption, however, where the law would interfere with tribal self-government. The exemption protects "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene Tribal Farm,* 751 F.2d at 1116; *EEOC v. Karuk Tribe Housing Auth.,* 260 F.3d 1071, 1078 (9th Cir.2001) (hereinafter "*Karuk* "); *See also EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.,* 986 F.2d 246, 249–51 (8th Cir.1993) (holding that the ADEA was not applicable because the tribe's right of self-government would be affected in the intramural matter of on reservation tribal employment); *Nero v. Cherokee Nation of Okla.,* 892 F.2d 1457, 1463 (10th Cir.1989) (holding that race discrimination statutes did not apply to a tribe's designation of tribal membership criteria).

In *Coeur d'Alene Tribal Farm,* we explained that the tribal self-government exception applied to intramural matters and we specifically mentioned, as examples, conditions of tribal membership, inheritance rules, and domestic relations. 751 F.2d at 1116. In *Karuk,* we followed *Coeur d'Alene Tribal Farm* and held that the employment of a tribal member, by the tribe's housing authority, on the reservation was an intramural matter and that federal age discrimination statutes did not apply. 260 F.3d at 1079–80. While we have not cabined the intramural exception to those listed in *Coeur d'Alene Tribal Farm,* we have been careful to allow such exemptions only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated.

In *NLRB v. Chapa De Indian Health Program, Inc.,* 316 F.3d 995 (9th Cir.2003) (hereinafter "*Chapa De* "), we considered whether the National Labor Relations Act applied to tribes and tribal organizations. *Id.* at 998. We determined that a financially independent, nonprofit tribal organization, which contracted to provide services to the tribe as well as others, and operated outside a reservation, was not exempt. *Id.* at 1000. *Chapa De* recognized that despite the relationship between self-government and health services, the commercial nature of the labor relations involved left the activity outside the ambit of the intramural matters exception. *Id.* at 999–1000. There, as have other circuits, we were careful to distinguish between what is a governmental function and what is primarily a commercial one. *Id.; Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 180–81 (2d Cir.1996).

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. 29 U.S.C. §§ 207(k), 207(*o*). Tribal law enforcement clearly is a part of tribal government and is for that reason an appropriate activity to exempt as intramural. *See Reich v. Great Lakes Indian Fish and Wildlife Comm'n,* 4 F.3d 490, 492–94 (7th Cir.1993) (noting that state and local police have no federal entitlement to time and a half for overtime and that Congressional failure to include tribal or Indian police in the exemption was likely a mere oversight).

Appellants argue that these officers' activities are not intramural because they are not performed exclusively on the reservation. ***896** Appellants claim that incidental contacts and travel off the reservation preclude application of the intramural affairs exception. They rely, for example, on officers' visits with law enforcement agencies in the states the reservation borders.

There is no question that tribal officers travel off the reservation to assist other agencies engaging in investigation of crimes that affect the reservation and Navajo citizens. The FBI, United States Attorney's Offices, and federal court-houses to which DPS officers travel are necessarily located off the reservation.

When officers travel to provide information or to testify in such locations, however, they do so because of a crime that occurred on the reservation or directly affected the interests of the tribal community. Thus, such services performed off-reservation nevertheless relate primarily to tribal self-government and remain part of exempt intramural activities. Such travel does not relate to any non-government purpose. Nor does it provide primary benefits to persons with no interest or stake in tribal government. *See, e.g., Chapa De,* 316 F.3d at 999–1000. Indeed, none of the officers' official travel is aimed at benefiting any private organization or nonmember. Employed by an arm of the tribal government, officers serve the tribe's governmental need for law enforcement to promote the welfare of the tribe and its members.

Our decision is entirely consistent with the only other circuit opinion to consider the applicability of the FLSA to tribal law enforcement. *See Great Lakes Indian Fish and Wildlife Comm'n,* 4 F.3d at 492–495. In that case, the Seventh Circuit held that the FLSA did not apply to law enforcement activities of wildlife officers employed by a consortium of thirteen Indian tribes to enforce usufructuary treaty rights relating to property located outside the reservation. *Id.* The officers in that case worked almost exclusively off the reservation. *Id.* at 494. Even so, the court reasoned that the investigation and enforcement of tribal property rights off the reservation was at least equal to if not more important to the Indians than the exercise of their right to occupancy within the reservation. *Id.* at 495. Here, we deal only with incidental off-reservation travel directly related to the investigation of possible criminal conduct on the reservation. If the off-reservation enforcement of tribal rights in *Great Lakes* did not bring the officers within the purview of the FLSA, then the incidental off-reservation travel by these plaintiffs does not either.

Appellants also point out that at least some of the plaintiffs are not Navajo, suggesting this may be a material fact. Yet the non-Navajo officers represent fewer than four percent of those employed by the Navajo DPS. The rest are tribal members. 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 and its decision to dismiss the tribe.

Claims Against the United States

The claims against the United States are in reality claims against the tribe, which is appellants' true employer. Appellants have joined the United States only through a

tenuous link. It involves the tribe's self-determination contract and a statutory provision that limits the tort liability of the tribe for employees' torts.

The Indian Self–Determination and Education Assistance Act of 1975 ("ISDEAA"), Public Law 93–638, authorizes federal agencies to contract with Indian tribes to provide services on the reservation. 25 U.S.C. §§ 450–450n. The purpose ***897** of the ISDEAA is to increase tribal participation in the management of programs and activities on the reservation. Congress wanted to limit the liability of tribes that agreed to these arrangements. Congress therefore provided that the United States would subject itself to suit under the Federal Tort Claims Act ("FTCA") for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA. Pub.L. No. 101–512, Title III, § 314, 104 Stat.1959 (codified at 25 U.S.C. § 450f note) (hereinafter § 314).

The Navajo Nation contracted with the BIA to provide law enforcement on the Navajo Reservation under a self-determination contract, or so-called "638 Contract." Thus, the United States arguably agreed to assume liability under the FTCA for tribal officers' torts. Appellants, however, do not assert a tort claim against the United States under the FTCA. The ISDEAA would not appear to apply.

Appellants seize upon a provision in the ISDEAA, that states that Indian contractors are deemed to be a part of the BIA and that any civil action "shall be deemed to be an action against the United States...." § 314. Appellants assert that the provision means they are employees of the BIA for all purposes and can properly bring their FLSA suit against the United States under 29 U.S.C. § 216(b). Congress, however, did not intend section 314 to provide a remedy against the United States in civil actions unrelated to the FTCA. *See generally Demontiney v. United States,* 255 F.3d 801, 807(9th Cir.2001); *FGS Constructors, Inc. v. Carlow,* 64 F.3d 1230, 1234 (8th Cir.1995); *Comes Flying v. United States,* 830 F.Supp. 529, 530–31 (D.S.D.1993); General Accounting Office Report No. 00–169, Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self–Determination Contracts 6, 16 (July 2000) (GA Report). The United States is therefore an inappropriate party to this action. The district court reached the correct result when it dismissed the claims against the United States.

AFFIRMED.

All Citations

382 F.3d 892, 04 Cal. Daily Op. Serv. 8144, 2004 Daily Journal D.A.R. 10,931

End of Document

692 F.2d 709
United States Court of Appeals,
Tenth Circuit.

Raymond J. DONOVAN, Secretary of Labor, Petitioner,
v.
NAVAJO FOREST PRODUCTS
INDUSTRIES and Occupational Safety and
Health Review Commission, Respondents.

No. 80–2251.
|
Nov. 8, 1982.

Synopsis

Secretary of Labor petitioned for review of an order of the Occupational Safety and Health Review Commission, which concluded that Occupational Safety and Health Act did not apply to an Indian tribal business enterprise owned and operated by the Navajo Tribe on the Navajo Reservation. The Court of Appeals, Barrett, Circuit Judge, held that application of OSHA to Indian tribal business enterprise would constitute abrogation of article of Navajo Treaty relating to exclusion of non-Indians not authorized to enter upon Navajo Reservation and would dilute principles of tribal sovereignty and self-government recognized in treaty.

Affirmed.

Attorneys and Law Firms

***709** Allen H. Feldman, Counsel for Appellate Litigation, U.S. Dept. of Labor, Washington, D.C. (James E. White, Regional Sol., T. Timothy Ryan, Jr., Acting Sol. of Labor, ***710** Benjamin W. Mintz, Associate Sol. of Labor, and Mark J. Lerner, Atty., with him on the brief), for petitioner.

Jan T. Chilton, San Francisco, Cal. (Kurt W. Melchior, San Francisco, Cal., with him on the brief), of Severson, Werson, Berke & Melchior, San Francisco, Cal. (George J. Ahlmann and L. Lanning Sigler of Ahlmann & Sigler, Navajo, N.M., with him on the brief), for respondent Navajo Forest Products Industries.

Before BARRETT, McKAY and SEYMOUR, Circuit Judges.

Opinion

BARRETT, Circuit Judge.

We are called upon in this appeal to decide whether the Congress intended the Occupational Safety and Health Act of 1970 (OSHA) to apply to the Indian tribal business enterprise known as Navajo Forest Products Industries (NFPI) which is owned and operated by the Navajo Tribe on the Navajo Reservation. The Secretary of Labor seeks review of the decision of the Occupational Safety and Health Commission (Commission) which adopted the findings/conclusions of the administrative law judge (ALJ) that Congress did not intend OSHA to apply in this case. Our jurisdiction vests pursuant to 29 U.S.C.A. § 660(b).

NFPI is the oldest of a number of business enterprises formed, owned and operated by the Navajo Tribe located on the Navajo Reservation in Navajo, New Mexico. NFPI is an arm or instrumentality of the Tribal government. The enterprise is engaged in the business of manufacturing wood products, including logging operations and the operation of a sawmill, molding plant, etc. NFPI conducts day-to-day operations which are supervised by its general manager who, in turn, is appointed and responsible to a nine-member management board. The board is appointed by the Navajo Tribe's advisory committee which is ultimately responsible for the operations of the business enterprise. The committee is part of the Navajo Tribal Council, the Tribe's legislative body. The 74-member Tribal Council is elected by popular vote. NFPI has employees who handle products which move between points both outside of and within the State of New Mexico.

NFPI is wholly owned and operated by the Navajo Tribe. Its primary purposes are to expand the enterprise into a fully integrated timber conversion facility, provide employment for the Navajo people, provide additional income to the Tribe and generally promote the advancement of social, economic and educational goals for the Navajos. The enterprise has been in existence for twenty years. Today the enterprise employs 650 workers, of whom only 25 are non-Indians. Through June of 1977, NFPI's net sales amounted to $97.6 million and its aggregate net profits amounted to $11.5 million. It paid Navajos $34.4 million in wages. The Tribe realized $17.3 million in stumpage fees, and returned $2.7 million of the Tribe's capital contributions.

The Secretary's compliance officers inspected NFPI's facilities in May and October, 1976, and, based thereon, the

Secretary issued a citation to NFPI, charging one serious and 53 other-than-serious violations. The Secretary proposed a penalty of $4,040.00. NFPI contested the citation, asserting, among other grounds, that the Secretary lacked jurisdiction over an Indian tribal enterprise conducted and carried on on the tribal reservation. The ALJ found, following full hearing, that OSHA did not apply to NFPI. He ordered that the citation and proposed penalties be vacated. On the Secretary of Labor's petition, the ALJ's decision was reviewed by the Occupational Safety and Health Review Commission, pursuant to 29 U.S.C.A. § 659(c). Both the ALJ and the Commission found/concluded, notwithstanding the Secretary's strong reliance on *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), that OSHA did not apply to NFPI because there exists no legislative intent in OSHA or its legislative history to abrogate the treaty entered into between the United States Government and the Navajo Indian Tribe; thus, to apply OSHA to NFPI would violate the Navajo Treaty. We agree.

***711** I.

The Secretary contends that the Commission erred in finding that although NFPI meets OSHA's literal definition of "employer" because it is engaged in a business affecting commerce, that it is nonetheless not subject to OSHA based on the right of sovereignty reserved to the Navajo Tribe by the treaty and the absence of any indication that Congress intended Section 8(a)(1) of the Act to override treaty rights.

Section 8(a)(1), 29 U.S.C.A. § 657(a)(1) provides:

> (a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer.

Article II of the treaty between the United States of America and the Navajo Tribe of Indians, dated June 1, 1868, 15 Stat. 667, states as follows:

> [T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

NFPI contends that the only federal employees permitted by this provision to enter the reservation are those "authorized by law to enter upon Indian reservations in discharge of duties imposed by law", and that the history and purpose of the inclusion of this language demonstrates that the only federal personnel authorized to enter the reservation are those *specifically* so authorized to deal with Indian affairs. The Secretary's counter contention is that the application of Article II as an exclusion in this case is unwarranted "as a matter of law and policy because: (1) NFPI is an employer within the literal meaning of the Act; (2) Federal laws of general application apply to Indians, according to *Tuscarora, supra;* (3) there is no reason to apply any exception to *Tuscarora* based upon the treaty since application of the Act to NFPI would not interfere with the Tribe's treaty rights; and (4) assuming *arguendo* that application of the OSH Act to NFPI would be inconsistent with the Navajo Treaty, the comprehensive OSH Act abrogates, or modifies, the treaty." [Opening Brief for Secretary, p. 11].

As to the Secretary's first contention, i.e., that NFPI is an "employer" within the literal meaning of OSHA, the parties agree that such is the case. We move next to the Secretary's reliance on *Federal Power Commission v. Tuscarora Indian Nation, supra.*

The Secretary contends that *Tuscarora* is one of a long line of cases in which general federal statutes have been applied to Indians. The Secretary relies on this language in *Tuscarora:* "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." 362 U.S. at p. 116, 80 S.Ct. at p. 553. The Court, in *Tuscarora,* applied this rule in upholding the taking of tribal lands by the New York State Power Authority pursuant to the federal statutory scheme applicable to the Federal Power Commission, which, like OSHA, applied generally. *Tuscarora* did not, however, involve an Indian treaty. Therein lies the distinguishing feature between the case at bar and the *Tuscarora* line of cases, which stand for the rule that under statutes of general application Indians are treated as any other person, unless Congress expressly excepts them therefrom. *Tuscarora,* 362 U.S. at pp. 115–18, 80 S.Ct. at pp. 552–54. The *Tuscarora* rule does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights. This was the basic "anchor" of the Commission's ruling in the instant case, with which we agree.

The Navajo treaty language set forth in Article II makes it clear, in our view, that ***712** in order to achieve an end to conflict and ensure peace, the United States Government agreed to leave the Navajos alone on their reservation to conduct their own affairs with a minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the reservation. That, in our view, is the plain, unambiguous meaning of the Navajo treaty language contained in Article II, *supra.*

Indian treaties have not been interpreted narrowly. They have been construed so as to recognize generously the full obligation of the United States to protect the interests of a dependent people. *Peoria Tribe of Indians of Oklahoma, et al. v. United States,* 390 U.S. 468, 88 S.Ct. 1137, 20 L.Ed.2d 39 (1968). All doubtful expressions contained in Indian treaties should be resolved in the Indians' favor. *Choctaw Nation, et al. v. Oklahoma, et al.,* 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). And, absent explicit statutory language otherwise, the courts have almost universally refused to find congressional abrogation of treaty rights. *Washington, et al. v. Washington State Commercial Passenger Fishing Vessel Ass'n., et al.,* 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). The two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Indian tribes thus retain all aspects of tribal sovereignty not specifically withdrawn. *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

The Navajo Treaty recognizes the Indian sovereignty of the Navajos and their right of self-government. We agree with the Commission that the application of OSHA to NFPI would constitute abrogation of Article II of the Navajo Treaty relating to the exclusion of non-Indians not authorized to enter upon the Navajo Reservation. Furthermore, it would dilute the principles of tribal sovereignty and self-government recognized in the treaty. The Navajos have not voluntarily relinquished the power granted under Article II of the treaty. Neither has that power been divested by congressional enactment of OSHA; to so imply would be to dilute the recognized "attributes of [Indian tribal] sovereignty over both their members and their territory," *United States v. Mazurie, et al.,* 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), and the retained powers of self-government not divested by Congress, relinquished by treaty or held to be inconsistent with a superior interest of the United States. *Oliphant v. Suquamish Indian Tribe, et al.,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

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. *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); *Morton, Secretary of the Interior, et al. v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Our review of the legislative history of OSHA does not support the Secretary's contention that nothing in the Navajo Treaty or principles of Indian sovereignty and self-government bar the application of OSHA to NFPI.

II.

The breadth and scope of the power of Indian tribes to exclude non-Indians from territory reserved for the tribe was spelled out definitively by the Supreme Court in the case of *Merrion, et al. DBA Merrion & Bayless, et al. v. Jicarilla Apache Tribe, et al.,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). The Court observed that *an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management.* 455 U.S. at p. 141, 102 S.Ct. at p. 903. Significantly, the Court did not limit this power to those cases where the Indian Reservation is occupied under exclusionary language similar to that contained in Article II of the Navajo Treaty. In fact, *Merrion* dealt with an Indian Reservation created by executive order which simply set apart

the reservation lands "for ***713** the use and occupation of the Jicarilla Apache Indians". 455 U.S. at p. 134 n. 3, 102 S.Ct. at p. 900 n. 3 (Stevens, J., dissenting). Thus, it contained no express language similar to that contained in Article II of the Navajo Treaty restricting entry upon the reservation lands to only those non-Indians "*authorized* to enter upon Indian reservations in discharge of duties imposed by law, or the *orders* of the President ...." [Emphasis supplied]. The Jicarilla Treaty had never been entered into by the United States and the Congress did not enact special legislation relating to the Jicarilla Apache Tribe.

The *Merrion* Court recognized, of course, that the federal government, by congressional action, may apply constraints upon or even take away the inherent power of Indian tribes to exclude non-Indians from reservation lands. Both the majority opinion and the dissent in *Merrion* agreed that Indian tribes, as an attribute of their sovereignty, have the inherent power to exclude non-Indians from tribal lands. The majority opinion, in part, states that "the dissent correctly notes that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax." 455 U.S. at p. 141, 102 S.Ct. at p. 904. The majority, in footnote 12, favorably endorsed the following interpretation set forth in the United States Solicitor for the Department of the Interior's revision of F. Cohen's Handbook of Federal Indian Law entitled Federal Indian Law 438 as "the present state of the law", to wit:

> "Over tribal lands, *the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.* But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority."
>
> 455 U.S. at p. 146 n. 12, 102 S.Ct. at p. 906 n. 12. [Emphasis supplied in *Merrion*].

The dissenting justices in *Merrion* observed:

> Incident to this basic power to exclude, the tribes exercise limited powers of governance over nonmembers, though those nonmembers have no voice in tribal government. Since a tribe may exclude nonmembers entirely from tribal territory, the tribe necessarily may impose conditions on a right of entry granted to a nonmember to do business on the reservation.
>
> 455 U.S. at p. 159, 102 S.Ct. at p. 913. (Stevens, J., dissenting).

Thus *Merrion,* in our view, limits or, by implication, overrules *Tuscarora, supra,* at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora* that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at p. 116, 80 S.Ct. at p. 553.

The majority opinion in *Merrion* cited *Washington, et al. v. Confederated Tribes of the Colville Indian Reservation, et al.,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) for the footnote observation that "Federal limitations on tribal sovereignty can also occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests." 447 U.S. at p. 147 n. 13, 102 S.Ct. at p. 907 n. 13. *Colville* identified those "overriding national interests" as follows:

> This Court has found such a divestiture [of tribal powers] in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.
>
> 447 U.S. at pp. 153, 154, 100 S.Ct. at pp. 2081, 2082.

***714** There has been no such overriding interest of the National Government advanced in the case at bar which would justify the application of OSHA to NFPI.

The United States retains legislative plenary power to divest Indian tribes of any attributes of sovereignty. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). 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, supra,* settled that issue in favor of the tribes.

WE AFFIRM the Commission's decision.

All Citations

692 F.2d 709, 10 O.S.H. Cas. (BNA) 2159, 1982 O.S.H.D. (CCH) P 26,305

End of Document

871 F.2d 937
United States Court of Appeals,
Tenth Circuit.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant-Appellee,
v.
The CHEROKEE NATION, Respondent-Appellant.

No. 88-2092.
|
March 28, 1989.
|
Rehearing Denied July 28, 1989.

Synopsis

Equal Employment Opportunity Commission sought to judicially enforce administrative subpoena duces tecum directed at Cherokee Nation concerning employment records of former tribal employees. The United States District Court for the Eastern District of Oklahoma, Frank Howell Seay, Chief Judge, found ADEA applicable and enforced the subpoena. On appeal, the Court of Appeals, McKay, Circuit Judge, held that: (1) ADEA did not apply to Indian tribes, and (2) normal rules of statutory construction do not apply whenever Indian treaty rights are involved.

Reversed.

Tacha, Circuit Judge, dissented with opinion.

Attorneys and Law Firms

***937** James G. Wilcoxen, Wilcoxen & Wilcoxen, Muskogee, Okl., for respondent-appellant.

John F. Suhre, Atty. (Charles A. Shanor, Gen. Counsel, Gwendolyn Young Reams, Associate Gen. Counsel, Vella M. Fink, Asst. Gen. Counsel, with him on the brief), E.E.O.C., Washington, D.C., for applicant-appellee.

Before McKAY, LOGAN, and TACHA, Circuit Judges.

McKAY, Circuit Judge.

I.

At issue in this case is the jurisdictional authority of the Equal Employment Opportunity Commission (EEOC) over the Cherokee Nation pursuant to the ADEA, *as amended,* 29 U.S.C. § 621-34 (1982). The dispute was precipitated by EEOC's attempt judicially to enforce an administrative subpoena duces tecum directing the Cherokee Nation to produce documents of several former tribal employees. The subpoena was issued as part of an EEOC ***938** investigation of an age discrimination charge filed by complainant, Mrs. Louise Gossett, against the Cherokee Nation's Director of Health and Human Services.

The Cherokee Nation resisted the EEOC's assertion of authority, maintaining that tribal sovereign immunity precluded EEOC jurisdiction absent specific congressional intent to bring tribes under ADEA coverage. The district court examined the ADEA and its prototype-Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e(b) (1982)-and concluded that principles of statutory construction led to the conclusion that Congress intended the ADEA to apply to Indian tribes. [1] Therefore the EEOC was entitled to have its administrative subpoena enforced.

II.

In *Donovan v. Navajo Forest Products Indus.,* 692 F.2d 709 (10th Cir.1982) we held that OSHA, a statute of general applicability, was nevertheless not applicable to a tribal business enterprise operating in the reservation for two reasons: First, because its enforcement would violate treaty provisions which recognized the tribe's right to exclude non-Indians from tribal lands. 692 F.2d at 712. Second, because enforcement "would dilute the principles of tribal sovereignty and self-government recognized in the treaty." *Id.*

This second basis for our holding in *Navajo Forest Products*-the treaty-protected right of self-government-is likewise at issue in the case before us. [2] The treaty's language clearly and unequivocally recognizes tribal self-government with only two express exceptions, neither of which is at issue in this case. We believe that the reasoning in *Navajo Forest Products* is equally applicable to the case at bar. Consequently, we hold that ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government. [3]

III.

Like the Supreme Court, we have been "extremely reluctant to find congressional abrogation of treaty rights" absent explicit statutory language. *See United States v. Dion,* 476 U.S. 734, 739, 106 S.Ct. 2216, 2220, 90 L.Ed.2d 767 (1986). We are also mindful that we should not "construe statutes as abrogating treaty rights in a 'backhanded way'; in the absence of explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' Indian treaty rights are too fundamental to be easily cast aside." *Id.* (citations omitted).

***939** In its carefully reasoned opinion, the district court attempted to determine congressional intent by comparing the statute on which ADEA was modeled, Title VII, which provides an express exclusion of tribes from the statute's coverage, with the ADEA, which is completely silent on the subject. [4] The court then applied normal rules of construction to reach its holding.

While normal rules of construction would suggest the outcome which the district court adopted, the court overlooked the fact that normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue. *See, e.g., Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985) ("[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.... The Court has applied similar canons of construction in nontreaty matters."); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 152, 102 S.Ct. 894, 909, 71 L.Ed.2d 21 (1982) ("[I]f there [is] ambiguity ... the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' ") (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143-44, 100 S.Ct. 2578, 2583-84, 65 L.Ed.2d 665 (1980)).

We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.,* by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests. *Cf. Merrion,* 455 U.S. at 148-49 n. 11, 102 S.Ct. at 906-08 n. 11 ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence [in the Tribe's Constitution] is that the sovereign power to tax remains intact."). We conclude that, in this case, the bases for inferring congressional intent were not so clear as to overcome the burden which the EEOC was required to carry.

REVERSED.

TACHA, Circuit Judge, dissenting.

Because I believe that there is clear indication of congressional intent to apply the Age Discrimination in Employment Act of 1967 (ADEA) to Indian tribes, I respectfully dissent.

Indian tribes possess inherent powers of sovereignty that predate the coming of the Europeans to this continent. *See United States v. Wheeler,* 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978). Their incorporation within the territory of the United States, and their acceptance of its protection, however, "necessarily divested them of some aspects of [that] sovereignty." *Id.* at 323, 98 S.Ct. at 1086. In addition to the implicit divestment of sovereign powers by virtue of tribal dependence upon the United States, other sovereign powers were explicitly yielded by treaties or removed by Congress. *Id.* at 322-23, 98 S.Ct. at 1085-86. "The Indian tribes [however] retain all aspects of tribal sovereignty not specifically withdrawn." *Donovan* ***940** *v. Navajo Forest Prods. Indus.,* 692 F.2d 709, 712 (10th Cir.1982).

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign

> powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Wheeler, 435 U.S. at 323, 98 S.Ct. at 1086.

The laws of the United States recognize both sovereign immunity from suit and tribal self-government as aspects of the inherent sovereignty retained by Indian tribes. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-60, 98 S.Ct. 1670, 1676-77, 56 L.Ed.2d 106 (1978); *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-43, 100 S.Ct. 2578, 2582-83, 65 L.Ed.2d 665 (1980). Both of these aspects of tribal sovereignty, however, whether or not established by treaty, are "subject to the superior and plenary control of Congress." *Martinez,* 436 U.S. at 58, 98 S.Ct. at 1676-77; *see also Bracker,* 448 U.S. at 143, 100 S.Ct. at 2583. "The United States retains legislative plenary power to divest Indian tribes of any attributes of sovereignty." *Navajo Forest Prods.,* 692 F.2d at 714. The issue in this case is whether, by enacting the ADEA, Congress has exercised its power to divest the Cherokee Nation of the aspects of tribal sovereignty here claimed.

In determining whether Congress has exercised such power, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress ... cautions that we tread lightly in the absence of clear indications of legislative intent." *Martinez,* 436 U.S. at 60, 98 S.Ct. at 1677-78. The majority notes that the courts have been " 'extremely reluctant to find congressional abrogation of treaty rights' absent explicit statutory language." *Majority opinion* at 938 (quoting *United States v. Dion,* 476 U.S. 734, 739, 106 S.Ct. 2216, 2220, 90 L.Ed.2d 767 (1986)). The Supreme Court, moreover, has stated that "Congress' intention to abrogate Indian treaty rights [must] be clear and plain." *United States v. Dion,* 476 U.S. 734, 738, 106 S.Ct. 2216, 2220, 90 L.Ed.2d 767 (1986).

The majority apparently interprets the "clear intent" language of *Dion* to *require* explicit language applying the statute to Indian tribes either on the face of the statute or in its legislative history. [1] In my view *Dion* cannot be read as restrictively as the majority suggests.

In *Dion,* the Supreme Court stated that it has "enunciated ... different standards over the years for determining how such a clear and plain intent must be demonstrated." *Id.* at 739, 106 S.Ct. at 2220. Although an "[e]xplicit statement by Congress is *preferable* for the purpose of ensuring legislative accountability," the Court has not "rigidly interpreted that preference ... as a *per se* rule." *Id.* (emphasis added).

> [W]here the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

Id. at 739-40, 106 S.Ct. at 2220 (citation omitted) (quoting F. Cohen, *Handbook of Federal Indian Law* 223 (1982)); *see Martinez,* 436 U.S. at 61, 98 S.Ct. at 1678 ("structure of statutory scheme" and "legislative history" did not support "intrusion into tribal sovereignty").

***941** The majority finds that the ADEA provisions are ambiguous because they neither expressly include nor exclude Indian tribes from coverage. *Majority opinion* at 939 n. 4. The majority dismisses any analysis of Title VII in its review of the ADEA and therefore holds that the ambiguous provisions of the ADEA must be construed to the benefit of the Indians since there is no indication of contrary congressional intent. *Majority opinion* at 938-39. I am convinced, however, that discerning the legislative intent behind the relevant provisions of the ADEA here requires a comparison with the corresponding provisions of Title VII, in light of the fact that Congress was clearly aware of and relied upon Title VII's provisions when promulgating the ADEA. [2] In making such a comparison it becomes clear that any impingement upon tribal sovereignty by enforcement of the ADEA was intended by Congress.

I begin by examining the ADEA's definition of "employer" for purposes of the Act:

> 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). Congress utilized a similar definition in Title VII, which was enacted prior to the ADEA, except that definition expressly excludes "an Indian tribe" from qualifying as an employer for purposes of Title VII. *See* 42 U.S.C. § 2000e(b).

When interpreting a statute, Congress' intent as expressed in that statute is determinative. In discerning that intent, "we must presume that Congress acts with deliberation, rather than by inadvertence, when it drafts a statute." *United States v. Motamedi,* 767 F.2d 1403, 1406 (9th Cir.1985). Because Title VII and the ADEA are devoted to the common purpose of proscribing employment discrimination, and the ADEA's definition of employer is patterned after the definition in Title VII, those definitional provisions should be construed *in pari materia. Cf. Kennedy v. Whitehurst,* 690 F.2d 951, 956-57 (D.C.Cir.1982) (pointing to indications that the ADEA's enforcement provision for federal employment discrimination should be read *in pari materia* with Title VII). Further, when Congress explicitly enumerates certain exceptions to a statutory scheme, we may not imply additional exceptions without evidence of legislative intent to do so. ***942** *See Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910, 64 L.Ed.2d 548 (1980). Finally, we must be mindful that the ADEA is a remedial statute and therefore should be liberally construed in favor of its beneficiaries. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 765, 99 S.Ct. 2066, 2076, 60 L.Ed.2d 609 (1979) (Blackmun, J., concurring).

The definition of employer in the ADEA was patterned after the definition of employer in Title VII, with the important exception that Title VII explicitly excludes Indian tribes from the definition. [3] The omission of the Indian tribe exclusion in the ADEA, in light of the clear congressional reliance on Title VII's provisions, *see supra* note 2, evidences congressional intent on the face of the statute to include Indian tribes in the definition of employer for the purposes of the ADEA. Congress has carefully enumerated the exceptions to ADEA coverage, and I find no basis to imply a further exception for Indian tribes.

Furthermore, the Supreme Court has recognized that there is some purpose for the exclusion of Indian tribes from the definition of employer under Title VII-to enable Indian tribes to be free to give preference to Indians in tribal government employment. *Morton v. Mancari,* 417 U.S. 535, 548, 94 S.Ct. 2474, 2481, 41 L.Ed.2d 290 (1974); *see* 110 Cong.Rec. 13,701-03 (1964) (comments by Sen. Mundt regarding amendment to exclude Indian tribes from compliance with Title VII). I find no comparable reason for Congress to carve out an exception for Indian tribes under ADEA.

The majority bases its decision, in part, on *Navajo Forest Prods.,* 692 F.2d 709, in which we held that the Occupational Safety and Health Act (OSHA) did not apply to an Indian tribal business owned and operated by the Navajo tribe on the Navajo Reservation because its application would be in derogation of Navajo treaty rights. *Majority opinion* at 937-39. That case is not apposite. The definition of employer utilized in OSHA is not patterned after the Title VII definition, and in *Navajo Forest Products* we found nothing in OSHA's legislative history to conclude that Congress intended to abrogate tribal sovereignty. *Navajo Forest Prods.,* 692 F.2d at 712.

My review of the legislative history supports the conclusion that any limitations on the Cherokees' right to self-government here were intended by Congress when promulgating the ADEA. I would hold that the EEOC has jurisdiction over Indian tribes for purposes of enforcing the ADEA and that the subpoena issued in this case is enforceable. I, therefore, respectfully dissent.

All Citations

871 F.2d 937, 49 Fair Empl.Prac.Cas. (BNA) 1074, 49 Empl. Prac. Dec. P 38,875, 57 USLW 2568

Footnotes

1 The district court's determination is a question of law, which we review *de novo.* *Matter of Tri-State Equip., Inc.,* 792 F.2d 967, 970 (10th Cir.1986).

2 Article V of the Treaty of New Echota, December 29, 1835, 7 Stat. 478, provides in pertinent part:

The United States hereby covenant and agree ... [to] *secure to the Cherokee Nation the right by their national councils 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 own country* belonging to their people or such persons as have connected themselves with them; provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade intercourse with the Indians....

(emphasis added).

3 The EEOC relies on the broad dictum in *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960), to support its claim that the ADEA, as a statute of general applicability, applies to all persons including Indians. This argument is inapposite since it is well established that the so-called *Tuscarora* rule *is not applicable* to treaty cases such as this one. *See, e.g., Phillips Petroleum Co. v. United States Environmental Protection Agency,* 803 F.2d 545, 556 (10th Cir.1986) (The *Tuscarora* "rule of construction can be rescinded where a tribe raises a specific right under a treaty ... which is in conflict with the general law to be applied...."); *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1116 (9th Cir.1985) (Although *Tuscarora* represents the general rule, there is an exception when "the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties.' "). In fact, in *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,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). 692 F.2d at 712-13.

4 The language of the ADEA neither expressly includes nor excludes Indian tribes from coverage. In contrast, Congress has shown that it knows how to extend the ADEA's coverage when it chooses to do so. The original version of the ADEA expressly *excluded* states from the Act's definition of "employer". Age Discrimination in Employment Act of 1967, Pub.L. No. 90-202, § 11(b), 81 Stat. 602, 605. However, in 1974 Congress amended the Act, this time explicitly *including* states in the Act's coverage. *See* 29 U.S.C. § 630(b).

1 Although the majority parenthetically notes that congressional intent to abrogate Indian treaty rights could be manifested with the requisite clarity through the enactment of a "comprehensive statutory plan," *majority opinion* at 939, it fails to show why the ADEA, either alone or in conjunction with other civil rights legislation such as Title VII, is not such a comprehensive plan.

2 There is much evidence to indicate that Congress had an acute awareness of Title VII's provisions when promulgating the ADEA. During consideration of Title VII there were unsuccessful efforts to include age as one of the protected categories in that legislation. 110 Cong.Rec. 2596-99 (1964) (amendment to include age as protected category under Title VII offered by Rep. Dowdy; amendment rejected by vote of 94 to 123); 110 Cong.Rec. 9911-16, 13,490-92 (amendment to include age as protected category under Title VII offered by Sen. Smathers; amendment rejected by vote of 28 to 63); *see also* *EEOC v. Wyoming,* 460 U.S. 226, 229, 103 S.Ct. 1054, 1056, 75 L.Ed.2d 18 (1983) (noting that amendments to include age in Title VII were rejected). Title VII instead included a provision directing the Secretary of Labor to study potential age discrimination in the workplace and to make recommendations for combating the problem if it existed. Civil Rights Act of 1964, Pub.L. No. 88-352, § 715, 78 Stat. 241, 265 (superseded by Equal Employment Opportunity Act of 1972, § 10, Pub.L. No. 92-261, 86 Stat. 103, 111). The Secretary's report led to the enactment of the ADEA. *See* J. Kalet, *Age Discrimination in Employment Law* 1-2 (1986). Commentators have noted that the ADEA is

effectively a hybrid of Title VII's general scheme and the Fair Labor Standards Act's remedial devices. J. Kalet, *Age Discrimination in Employment Law* 1-3. *See generally* 2 H. Eglit, *Age Discrimination* § 16.01 (1988). "Because Title VII had already established a framework within which the ban on employment discrimination could be enforced, the Title VII enforcement scheme and proof considerations were followed extensively in the drafting of the ADEA." J. Kalet, *Age Discrimination in Employment Law* 2.

3 The definition of employer in the ADEA as enacted is taken almost verbatim from the original definition in Title VII. The relevant language from § 701(b) of Title VII as originally enacted reads:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five 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, or a State or political subdivision thereof*....
>
> Civil Rights Act of 1964, Pub.L. No. 88-352, § 701(b), 78 Stat. 241, 253 (emphasis added).

The relevant language from § 11(b) of the ADEA as originally enacted reads:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ... *but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.*
>
> Age Discrimination in Employment Act of 1967, Pub.L. No. 90-202, § 11(b), 81 Stat. 602, 605 (emphasis added).

276 F.3d 1186
United States Court of Appeals,
Tenth Circuit.

NATIONAL LABOR RELATIONS BOARD, Plaintiff–Appellant,
and
Local Union No. 1385, Western Council of Industrial Workers, Intervenor–Appellant,
v.
PUEBLO OF SAN JUAN, Defendant–Appellee.
National Right to Work Legal Defense Foundation, Amicus Curiae.

Nos. 99–2011, 99–2030.
|
Jan. 11, 2002.

Synopsis

National Labor Relations Board (NLRB) brought action for declaratory and injunctive relief challenging Indian tribal government's ordinance prohibiting union security agreements for companies engaged in commercial activity on tribal lands. Union intervened as plaintiff. The United States District Court for the District of New Mexico, Martha Vazquez, J., 30 F.Supp.2d 1348, entered summary judgment in favor of tribal government. NLRB and union appealed. The Court of Appeals, 228 F.3d 1195, affirmed. On rehearing en banc, the Court of Appeals, Holloway, Senior Circuit Judge, held that National Labor Relations Act (NLRA) did not preempt tribal government from enacting right-to-work ordinance.

Affirmed.

Briscoe, Circuit Judge, concurred and filed opinion.

Lucero, Circuit Judge, concurred in part and filed opinion.

Murphy, Circuit Judge, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***1188** Nancy E. Kessler Platt, Supervisory Attorney, (Leonard R. Page, Acting General Counsel, John H. Ferguson, Associate General Counsel, Frederick L. Feinstein, General Counsel, Linda Sher, Associate General Counsel, Margery E. Lieber, Assistant General Counsel, and Eric G. Moskowitz, Deputy Assistant General Counsel, with her on the brief) of the National Labor Relations Board, Washington, DC, for Plaintiff–Appellant.

Lee Bergen (Wayne H. Bladh, Daniel I.S.J. Rey–Bear, Thomas J. Peckham, with him on the brief) of Nordhaus, Haltom, Taylor, Taradash & Bladh, Albuquerque, NM, for Defendant–Appellee.

Harlan Bernstein of Jolles & Bernstein, PC, Portland, OR, Matthew E. Ortiz of Catron, Catron & Sawtell, PA, Santa Fe, NM, Michael T. Garone of Jolles, Bernstein & Garone, Portland, OR, and Morton S. Simon of Simon, Oppenheimer & Ortiz, Santa Fe, NM, on the briefs for Intervenor–Appellant.

Mickey D. Barnett, Law Offices of Mickey D. Barnett, P.A., Albuquerque, NM, and John C. Scully, Springfield, VA, filed an amicus curiae brief for the National Right to Work Foundation.

Before TACHA, Chief Judge, HOLLOWAY, Senior Circuit Judge, SEYMOUR, Circuit Judge, BRORBY, Senior Circuit Judge, and EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges.

ON REHEARING EN BANC

HOLLOWAY, Senior Circuit Judge.

In 1996 the San Juan Pueblo tribal council enacted a right-to-work ordinance and also adopted a lease containing similar right-to-work provisions. These actions were challenged by the instant declaratory judgment and injunction suit brought by the National Labor Relations Board (NLRB or the Board) and Local Union No. 1385 of the Western Council of Industrial Workers (the Union) as an intervenor. After rejection of this suit by the district court, the Board and the intervening Union brought this appeal from the district court's decision granting summary judgment in favor of the Pueblo.

I

The relevant facts are undisputed. San Juan Pueblo is a federally-recognized Indian tribe located in New Mexico. Most of its 5,200 members live on tribal lands that ***1189**

are held in trust by the United States for the Pueblo. The Pueblo is governed by a tribal council, which is vested with legislative authority over tribal lands. Through federally-approved leases, the Pueblo leases certain portions of its tribal land to non-tribal businesses as a source of generating tribal income and as a means of employment for tribal members. The origins of this case lie in a labor dispute involving a lumber company operating on leased lands since August, 1996. The history of the leases as well as the dispute, which has now been settled, is described in the District Court's opinion. *NLRB v. Pueblo of San Juan,* 30 F.Supp.2d 1348, 1350–51 (1998).

On November 6, 1996, the San Juan Pueblo Tribal Council enacted Tribal Ordinance No. 96–63 which it amended on February 4, 1998. The ordinance in substance is a so-called "right-to-work" measure. The Pueblo asserts that the ordinance is a valid exercise of its inherent sovereign authority. *Id.* at 1351. As amended, the ordinance prohibits the making of agreements containing union-security clauses covering any employees, whether tribal members or not. Section 6(a) of the ordinance reads:

> No person shall be required, as a condition of employment or continuation of employment on Pueblo lands, to: (i) resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization; (ii) become or remain a member of a labor organization; (iii) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (iv) pay to any charity or other third party, in lieu of such payments any amount equivalent to or a pro-rata portion of dues, fees, assessments or other charges regularly required of members of a labor organization; or (v) be recommended, approved, referred or cleared through a labor organization.

Supplemental Brief on Rehearing en Banc (NLRB) at 4. The ordinance prohibits employers and unions from entering into agreements requiring employees to maintain membership in or pay dues to a union, called union security agreements. The Pueblo's lease with the lumber company similarly provides:

> Lessee will not enter into any contract or other arrangement which would require a Tribal member to be a member of a union, league, guild, club, or association (hereinafter collectively referred to as "union") in order to be entitled to all of the priorities to be accorded him pursuant to this Property Lease. Tribal members will not be required to join or maintain membership in, or pay any dues or assessments to, any union in order to be hired and benefit from the priorities stated in this Lease.

Brief on Appeal for the NLRB, at 5. The "priorities" mentioned in the lease refer to terms of employment for employees who are tribal members. *Id.* at 5 n. 3.

On January 12, 1998, the NLRB filed the instant suit in the United States District Court for the District of New Mexico by its Complaint for Preliminary and Permanent Injunction and for a Declaratory Judgment, alleging that the ordinance and lease provisions, insofar as they prohibit compliance with union-security agreements, are preempted by federal law. Specifically, the Board argued that these provisions are invalid under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, [1] due to preemption by ***1190** the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (hereinafter the NLRA). Leave to intervene was granted to the Union upon the parties' stipulation.

The district court issued a Memorandum Opinion and Order on November 30, 1998, granting the Pueblo's motion for summary judgment and denying such motions of the NLRB and the Union. *NLRB v. Pueblo of San Juan,* 30 F.Supp.2d 1348. On appeal, a divided panel affirmed the district court's decision. We granted petitions of the NLRB and the Union for rehearing *en banc* which we have held. We now affirm the district court's decision.

II

A

The Pueblo's sovereign authority to regulate labor relations and inherent limitations on that authority

The central question before us is whether, in light of the United States Constitution's Supremacy Clause, and Congress' plenary power over Indian affairs,[2] the NLRA prevents the Pueblo from enacting a "right-to-work law" or entering into a lease with provisions making prohibitions similar to those in right-to-work laws.[3] We believe the question of the validity of the lease provisions here is subsumed within the larger question of the validity of the ordinance. Because this is a question of law, we review the district court's order de novo. *Mt. Olivet Cemetery Ass'n v. Salt Lake City,* 164 F.3d 480, 486 (10th Cir.1998). The burden falls on the NLRB and the Union, as plaintiffs attacking the exercise of sovereign tribal power, "to show that it has been modified, conditioned or divested by Congressional action." *Southland Royalty Co. v. Navajo Tribe,* 715 F.2d 486, 488 (10th Cir.1983). As noted in *Southland Royalty,* " '[a]mbiguities in federal law have been construed generously in order to comport with ... tribal notions of sovereignty and with the federal policy of encouraging tribal independence.' " *Id.* at 490.

In their challenges to the district court's decision and our panel's ruling, the NLRB and the Union argue that § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), clearly protects the rights of a union and an employer to enter into union security agreements meeting the requirements of § 8(a)(3). Moreover the NLRB and the Union maintain that Congress intended by the force of the Wagner and Taft Hartley Acts to preempt state and local regulation of union security clauses with the narrow exception of § 14(b), 29 U.S.C. § 164(b), allowing only states or ***1191** territories to prohibit otherwise permitted union shop provisions. Appellant's Opening Brief at 9–10. We disagree and instead are convinced by the Pueblo's argument that, as an Indian tribe, it retains the sovereign power to enact its right-to-work ordinance, and to enter into the lease agreement with right-to-work provisions, because Congress has not made a clear retrenchment of such tribal power as is required to do so validly.

We begin by noting what the district court also took pains to point out, namely, that the general applicability of federal labor law is not at issue. *NLRB v. San Juan Pueblo,* 30 F. Supp.2d at 1351. Furthermore, the Pueblo does not challenge the supremacy of federal law. The ordinance, as amended, does not attempt to nullify the NLRA or any other provision of federal law. The suggestion that tribes, including those that have already enacted right-to-work laws,[4] might "enact ordinances allowing precisely what generally applicable federal law prohibits"[5] finds no support in this record. Furthermore, there is no danger that the Pueblo and the State of New Mexico might enact conflicting laws, since state right-to-work laws are of no effect in federal enclaves such as Indian reservations, *see Lord v. Local Union No.2088, IBEW,* 646 F.2d 1057, 1062 (5th Cir.1981) (finding state right-to-work law inapplicable in federal enclave in spite of § 14(b) of the NLRA), *cert. denied,* 458 U.S. 1106, 102 S.Ct. 3483, 73 L.Ed.2d 1366 (1982); *New Mexico Fed'n of Labor v. City of Clovis,* 735 F.Supp. 999, 1002–03 (D.N.M.1990) (indirectly noting the inapplicability of state right-to-work laws in federal enclaves).

Rather, the central question here is whether the Pueblo continues to exercise the same authority to enact right-to-work laws as do states and territories, or whether Congress in enacting §§ 8(a)(3) and 14(b) of the NLRA, 29 U.S.C. §§ 158(a)(3) and 164(b), intended to strip Indian tribal governments of this authority as a sovereign. Pursuant to the Supremacy Clause, the federal government has the power to preempt state and municipal authority in a particular field. *Wardair Canada, Inc. v. Florida Dep't of Revenue,* 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986). Likewise, Congress in the exercise of its plenary power over Indian affairs may divest Indian tribes of their inherent sovereign authority, *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), a point the Pueblo does not dispute.

Indian tribes are not states for constitutional purposes, and the preemption analysis is not exactly the same. *See Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 181 (2d Cir.1996) ("[T]ribes are not states under OSHA ... and thus, OSHA does not preempt tribal safety regulations in the same manner in which it preempts state laws."). We need not delineate precisely the scope of federal preemption of tribal laws here, however. A well-established canon of Indian law states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). The Supreme Court has also

explained that this canon means that "doubtful expressions of legislative intent must be resolved in favor of the Indians." *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 506, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). The canon applies to other statutes, even where they do not mention ***1192** Indians at all. *EEOC v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir.1989) (construing the Age Discrimination in Employment Act).

In resolving questions of preemption of state law, the test is one of congressional intent. *Wardair Canada,* 477 U.S. at 6, 106 S.Ct. 2369. In order to find preemption of tribal laws, similarly it is necessary to determine whether Congress intended to divest the San Juan Pueblo of its power as a sovereign to pass right-to-work laws. The burden to show such congressional intent to divest the Pueblo of its power to enact its right-to-work ordinance and to enter into the lease agreement rests upon the Union and the NLRB. *See EEOC v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir.1989) (requiring party arguing preemption to carry burden of presenting clear evidence of Congressional intent); *Southland Royalty Co. v. Navajo Tribe,* 715 F.2d 486, 488 (10th Cir.1983) (tribe's general authority as sovereign included power to tax and the burden on those attacking that power was to show that it had been modified, conditioned or divested by Congressional action). We find no showing here that satisfies the burden of the Board and the Union to demonstrate congressional intent to preempt the Pueblo's authority to enact the ordinance and enter into the lease agreement. In sum, from §§ 8(3) and 14(b) of the NLRA as they now stand, we find that the Board and the Union are reduced to arguing that there is *implied* preemption of tribal sovereign authority to enact a right-to-work ordinance or to enter into the challenged lease agreement. However implied preemption of such sovereign authority does not suffice. *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) ("... [T]he proper inference from silence ... is that the sovereign power ... remains intact.").

Indian tribes are neither states, nor part of the federal government, nor subdivisions of either.[6] Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. *See McClanahan,* 411 U.S. at 172, 93 S.Ct. 1257 ("[T]he ... Indian [tribes'] ... claim to sovereignty long predates that of our own Government."). The Pueblo, like all Indian tribes, need not rely on a federal delegation of powers. "Indian tribes consistently have been recognized ... by the United States, as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Felix Cohen, *Handbook of Federal Indian Law* 232 (1982) (footnotes omitted) (citing *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832)). Tribes retain those attributes of inherent sovereignty not withdrawn either expressly or necessarily as a result of their status. *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). "[U]ntil Congress acts, the tribes retain their existing sovereign powers." *Id.* We are persuaded that those powers include the authority to adopt the ordinance challenged here by the NLRB and the Union and to enter the lease agreement.

In addition to broad authority over intramural matters such as membership, tribes retain sovereign authority to regulate ***1193** economic activity within their own territory, *see, e.g., Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (recognizing "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction..."); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152–53, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (observing that tribes possess broad civil jurisdiction over the activities of nonmembers on reservation land in which the tribes have a significant interest, and that there was no evidence that Congress had departed from that view). *But see Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) (holding that tribal interest in tourism activity by nonmember hotel guests on non-Indian owned land within the reservation was inadequate to support the tribal power to tax).

However, courts have described the tribes' status as necessarily resulting in the loss of their power to "engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Colville,* 447 U.S. at 153–54, 100 S.Ct. 2069 (citations omitted). Courts have likewise found divestiture of tribal power to tax or regulate certain activities by non-Indians where such activities do not directly affect tribal political integrity, economic security, health, or welfare. *See, e.g., Atkinson Trading Co.,* 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) (imposition of hotel occupancy tax on non-Indian guests of non-Indian owned hotel on non-Indian land served by federal and state highways on a reservation); *Strate v. A–1 Contractors,* 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (civil jurisdiction over a case arising from

an accident between nonmembers on a state right-of-way on a reservation); *Rice v. Rehner,* 463 U.S. 713, 736, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983) (liquor sales on a reservation, where the federal government and states had long exercised concurrent regulatory authority over such trade); *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (non-Indian fishing and hunting on non-Indian land on a reservation).

In general the cases where, absent congressional guidance, tribes have been found to lack regulatory authority have been those involving nonmembers' activity on non-Indian-owned fee land that was found to have no direct effect on the tribe. "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," and may also "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." *Montana v. United States,* 450 U.S. at 565–66, 101 S.Ct. 1245. *See also* William Canby, *American Indian Law* 275–76 (1998) (summarizing recent federal precedents regarding limitations on tribal regulatory jurisdiction). These limiting precedents, however, are not applicable here, where the NLRB seeks a declaratory judgment prohibiting the application of the ordinance to all persons everywhere on the reservation, and where the only instance of regulation cited pertains to consensual commercial dealings between the Pueblo and its members on the one hand, and a lumber company operating on lands leased from the tribe on the other.

***1194** B

Whether a valid divestiture has been made of the Pueblo's sovereign authority to regulate labor relations by enactment of the right-to-work ordinance or adoption of the lease containing right-to-work provisions

The retained sovereign authority of Indian tribes is subject to divestiture by Congress. Divestiture may occur by treaty or statute, *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), the latter being relied on by the Board and the Union here. Divestiture may also occur necessarily as a result of tribal status, *id.,* or where it is "inconsistent with overriding national interests." *Merrion,* 455 U.S. at 148 n. 13, 102 S.Ct. 894. However, divestiture is disfavored as a matter of national policy, *EEOC,* 871 F.2d at 939, and will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority. We have explained that

> [w]e believe that unequivocal Supreme Court precedent dictates that *in cases where ambiguity exists* (such as that posed by the ADEA's silence with respect to Indians), ... *and there is no clear indication of congressional intent to abrogate Indian sovereignty rights* (as manifested, e.g., by the legislative history, or the existence of a comprehensive statutory plan), *the court is to apply the special canons of construction to the benefit of Indian interests.*

Id. (emphasis added).

Indian interests, as the Supreme Court has interpreted them, include tribal sovereignty, *see White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143–44, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (looking to "traditional notions of sovereignty and with the federal policy of encouraging tribal independence" for guidance in interpreting ambiguous or vague federal enactments), and maintaining tribal authority over civil matters on tribal territory, *see, e.g., Williams v. Lee,* 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (upholding a tribe's authority over a business transaction involving a non-Indian on a reservation, and pointing out that "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations"). Doubtful or ambiguous expressions, therefore, are to be construed as leaving tribal sovereignty undisturbed.

The Government has assumed trust responsibility for Indians and tribes, including the pueblos. *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913). The canons of construction favoring Indians reflect this. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."). Rules of statutory construction generally "provide for a

broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." Cohen at 225. *See, e.g., Santa Clara Pueblo v. Martinez* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (construing Indian Civil Rights Act narrowly so as to avoid limiting tribal sovereignty); *Bryan v. Itasca County,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (upholding right of Indians to be free of state taxation in spite of provisions of Public Law 280). We further note that the canon requiring resolution of ambiguities in favor of Indians is to be given the "broadest possible scope," remembering that "[a] canon of construction is not a license to disregard clear expressions of ... congressional intent." *DeCoteau v. Dist. County Court,* 420 U.S. 425, 447, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

***1195** Where tribal sovereignty is at stake, the Supreme Court has cautioned that "we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo,* 436 U.S. at 60, 98 S.Ct. 1670. The Court's teachings also require us to consider tribal sovereignty as a " 'backdrop,' against which vague or ambiguous federal enactments must always be measured," and to construe "[a]mbiguities in federal law ... generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache,* 448 U.S. at 143–44, 100 S.Ct. 2578. Courts are consistently guided by the "purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490, 496 (7th Cir.1993). We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.

Statutes are entitled to the presumption of non-preemption. *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). This is especially true in the context of Indian tribal law. As noted, it is well established that federal statutes are to be construed liberally in favor of Indians and tribes, and that any ambiguities or doubtful expressions of legislative intent are to be resolved in their favor. *Montana v. Blackfeet,* 471 U.S. at 766, 105 S.Ct. 2399; *South Carolina v. Catawba,* 476 U.S. at 506, 106 S.Ct. 2039. Indian tribes, like states, are entitled to comity. *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d at 496. Furthermore, both the legislative and executive branches have declared that federal Indian policy favors tribal self-government. On this point the Supreme Court has spoken clearly and emphatically: "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government.... This policy reflects the fact that Indian tribes retain attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 14, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) (internal quotation and citations omitted). *See also generally,* President's Message to Congress, The American Indians, 116 Cong.Rec. 23131 (July 8, 1970) (declaring previous termination policy a failure and announcing a new direction in Indian policy, favoring increased tribal autonomy). [7]

The 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, 79 S.Ct. 269. Preempting tribal laws divests tribes of their retained sovereign authority, running counter to this policy and not benefitting Indians. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 484, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (stating the "general rule that ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians," i.e., in favor of tribal sovereignty). 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.

***1196** We turn now to the arguments made by the Board and the Union that Congress has divested the Pueblo of its sovereign authority to enact the right-to-work ordinance and enter into the lease. All parties agree that neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes. We must decide what is the proper inference to draw from this silence. The NLRB cites *Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616–17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980): "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." The Board argues that this rule, akin to the well-known principle *expressio unius est exclusio alterius,* is a "settled principle of statutory construction" which is applicable in this case. Supp. Brief of the NLRB at 16. While this "settled principle" may find application in other types of cases, in matters of Indian law "*expressio unius ...* " must often be set aside. *El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 487, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999).

The Board argues that, while " 'legal ambiguities' can sometimes be 'resolved to the benefit of the Indians,' *DeCoteau v. District County Court,* 420 U.S. 425, 447, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), courts cannot ignore a statute's *plain* language...." Supp. Brief at 17. We disagree, however, with the implied contention that silence establishes this statute's plain intent to preempt tribal authority. Silence as to tribes can constitute a latent or intrinsic ambiguity that only becomes apparent when other facts are considered. *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d at 493–94. In the context of Indian law, appeals to "plain language" or "plain meaning" must give way to canons of statutory construction peculiar to Indian law. *Id.* at 493 (finding that the "plain meaning" canon was parried by the canon "that not only treaties but (other) statutes as well are to be construed so far as is reasonable to do in favor of Indians."). We note further that it is congressional intent, and not merely the naked words of a statute, that controls. *South Carolina v. Catawba,* 476 U.S. at 507 n. 16, 106 S.Ct. 2039. Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory. *See Kerr–McGee Corp. v. Farley,* 915 F.Supp. 273, 277 (D.N.M.1995), *aff'd* 115 F.3d 1498 (10th Cir.1997), *cert. denied,* 522 U.S. 1090, 118 S.Ct. 880, 139 L.Ed.2d 868 (1998) (observing that congressional silence is to be interpreted in favor of Indians).

The correct presumption is that silence does not work a divestiture of tribal power. *Merrion,* 455 U.S. at 148 n. 14, 102 S.Ct. 894 ("[T]he proper inference from silence ... is that the sovereign power to tax remains intact."); *El Paso Natural Gas,* 526 U.S. 473 at 487, 119 S.Ct. 1430, 143 L.Ed.2d 635 (concluding that tribes should be treated like states because the Price Anderson Act's silence as to tribes was probably attributable to congressional inadvertence). *But see Chickasaw Nation v. United States,* 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (affirming this circuit's denial of a tax exemption for tribes on their gaming operations, and reaching this conclusion on the basis of the special canon disfavoring implied tax exemptions, evidence of congressional intent, and strong statutory language); *Confederated Tribes of the Warm Springs Reservation v. Kurtz,* 691 F.2d 878 (9th Cir.1982) (concluding that express tax exemptions for states, their political subdivisions, and the District of Columbia did not provide the clear statutory guidance required to find a tax exemption for a tribe), *cert. denied,* ***1197** 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 792 (1983). In neither of these latter cases, however, was a tribe's sovereign authority to enact and enforce laws at stake, as is the case here.

The NLRB points out that, "at the time that [§ 14(b)] was enacted, Congress was aware that there existed some twelve States with laws prohibiting union security...." [8] Supp. Brief (NLRB) at 12. The Board goes on to argue that "the legislative history indicates that it was these State laws which Congress intended to preserve," and that "[t]he legislative history repeatedly refers to State laws and only State laws prohibiting union security...." *Id.* However, we are not convinced that Congress did not merely intend to preserve the existing state laws, since in including § 14(b) it recognized the authority of *all* states—and territories as well—to enact their own right-to-work laws if they wished, not just the twelve states that had already done so. The NLRA embraces the possibility that many of the states might be governed by right-to-work laws enacted by sovereign governments. Furthermore, the Act embraces diversity of legal regimes respecting union security agreements at the level of "major policy-making units." *New Mexico Fed'n of Labor,* 735 F.Supp. at 1003.

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949), is instructive. *Algoma* arose before the enactment of § 14(b). The Court there held that "§ 8(a)(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." *Id.* at 307, 69 S.Ct. 584. Relying on strong legislative history, the Court quoted from, among others, Senator Wagner, who stated that "[t]he provision will not change the status quo." *Id.* at 310, 69 S.Ct. 584 (citations and quotations omitted). The Court concluded that the Wagner Act had not swept aside state authority to regulate union security measures, but was enacted, as to these matters, simply to express Congress' judgment that closed shops were not illegal where authorized, and not to declare national policy that they were desirable. The Court found this view of § 8(a)(3) supported by the subsequent enactment of § 14(b) in the Taft–Hartley Act. *Id.* at 313–14, 69 S.Ct. 584.

Thus the tribe is not preempted by § 8(a)(3) from enacting a right-to-work law for business conducted in its reservation. What Congress has not taken away by § 8(a)(3) it need not give back (by § 14(b)) in order for the tribe to continue to have authority to pass a right-to-work law. Although the Supreme Court has characterized § 8(a)(3) as "articulat[ing] a national policy that certain union-security agreements are valid as a matter of federal law," *Oil, Chemical & Atomic Workers, Int'l Union v. Mobil Oil Corp.,* 426 U.S. 407, 416,

96 S.Ct. 2140, 48 L.Ed.2d 736 (1976), the Court has also made it clear that § 8(a)(3) was not intended by Congress to be preemptive. *See id.* at 417, 96 S.Ct. 2140 (noting § 14(b) of the NLRA "was designed to make clear that § 8(a)(3) left the States free to pursue their own more restrictive policies in the matter of union-security agreements") (internal quotations omitted); *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 101, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963) (noting § 14(b) of the NLRA was enacted to "mak[e] clear and unambiguous the purpose of Congress not to preempt the field"); *see also Algoma Plywood,* 336 U.S. at 307, 69 S.Ct. 584 (describing the predecessor to § 8(a)(3) as "merely disclaim[ing] a national policy hostile to the closed shop ***1198** or other forms of union-security agreement").

The Court has explained that, in enacting § 14(b), "Congress left the States free to legislate in that field ... [and thus] *intended to leave unaffected the power to enforce those laws.*" *Schermerhorn,* 375 U.S. at 102, 84 S.Ct. 219 (emphasis added). When Congress enacted § 14(b), it did not grant new authority to states and territories, but merely recognized and affirmed their existing authority. Congress' silence as to the tribes can therefore hardly be taken as an affirmative divestment of their existing "general authority, as sovereign[s], to control economic activity" on territory within their jurisdictions. *See Merrion,* 455 U.S. at 137, 102 S.Ct. 894.

III

The effect of the Tuscarora case

The NLRB and the Union further urge us to find preemption on the basis of *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). There a tribe owned property that the Court held was subject to condemnation under the Federal Power Act in order to create a reservoir. The tribe had been using the property as a reservation,[9] but the *Tuscarora* opinion held that Congress had never designated it as such, either by statute or treaty. *Id.* at 121 n. 18, 80 S.Ct. 543.

The Court noted that Congress appeared to have intended that Act to be generally applicable to "lands owned or occupied by any person or persons, including Indians." *Id.* at 118, 80 S.Ct. 543. The Tuscarora Indian Nation had relied on a rule set out in *Elk v. Wilkins,* 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884) that "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Tuscarora,* 362 U.S. at 116, 80 S.Ct. 543. The Court explained that, although at one time individual Indians had been considered exempt from laws that did not specifically include them, the rule had since been modified. The Court cited *Superintendent of Five Civilized Tribes v. Comm'r,* 295 U.S. 418, 55 S.Ct. 820, 79 L.Ed. 1517 (1935), in which a restricted[10] Creek Indian's investment income was held to be subject to federal income tax under the broad terms of the 1928 Revenue Act, and *Oklahoma Tax Comm'n v. United States,* 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943), in which the State of Oklahoma was held to have authority to impose its non-discriminatory estate tax on Indians and non-Indians alike. *Tuscarora* at 116–17, 80 S.Ct. 543. The Court said "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, 80 S.Ct. 543.

However *Tuscarora* dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land. Proprietary interests and sovereign interests are separate: One can own land without having the power to govern it by policy determinations as a ***1199** sovereign, and a government may exercise sovereign authority over land it does not own. *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.

In *Phillips Petroleum Co. v. U.S. Environmental Protection Agency,* 803 F.2d 545 (10th Cir.1986), we dealt with property rights and reached the conclusion that tribal ownership did not prevent a generally applicable federal statute from regulating activity to ensure the safety of ground water under tribally-owned land. There, the Osage tribal government's *property interest* was regulated by the Safe Drinking Water Act of 1974 (SDWA), but its *sovereign authority* was not. Far from attempting to exercise its sovereign authority to enact a competing regulation, the tribe supported the federal regulation and indicated its approval by tribal resolution; it was a third party (Phillips Petroleum) that challenged the

application of the regulation. *Id.* at 556. Furthermore, the facts differ significantly between that case and the instant one. There, the statute gave delegated authority to the Environmental Protection Agency to promulgate regulations governing underground injection, which threatened to pollute groundwater and endanger the nation's drinking water supply. *Id.* at 547–48.

Other cases have applied the *Tuscarora* principle to Indian tribal governments acting in proprietary capacities. *See, e.g., Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126 (11th Cir.1999); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174 (2d Cir.1996); *Smart v. State Farm Ins.,* 868 F.2d 929 (7th Cir.1989); and *Donovan v. Navajo Forest Products Industries,* 692 F.2d 709 (10th Cir.1982).

Thus *Tuscarora* is not persuasive here. We are convinced it 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. In spite of the Board's attempts to bring to our attention multiple cases where the rule was applied to a tribe *qua* sovereign, no citations were found to be apposite. [11] Supp. Brief of the Board at 23 n. 22. Further, *Tuscarora* does not control where, as here, the law is not generally applicable as the exceptions of § 14(b) show. The exception to § 8(a)(3) recognized in § 14(b) indicates that Congress did not intend "inclusion within its general ambit as the norm," *Smart,* 868 F.2d at 933. In view of Congress' intention with regard to this statute, and the federal policy that has long recognized tribal sovereignty, we do not think that *Tuscarora* may be applied to divest a tribe of its sovereign authority without clear indications of such congressional intent which are lacking here. We therefore are convinced that § 8(a)(3)'s proviso permitting union security agreements does not support divestment of the Pueblo's sovereign authority to enact the right-to-work ordinance.

***1200** The exemption of § 8(a)(3) contemplates that federal law, and particularly the provisions of § 8(a)(3), may conflict with that of other sovereigns, but intends that federal law give way. *Oil, Chemical & Atomic Workers,* 426 U.S. at 417, 96 S.Ct. 2140, (recognizing "a conflict sanctioned by Congress with directions to give the right of way to state laws."). We recognize that § 14(b) should not be read as granting states and territories general power to supplant federal labor law; states and territories may not, for instance, enact laws that exempt their territory from other federal labor regulations. *See id.* at 413 n. 7, 96 S.Ct. 2140 (finding no suggestion in § 14(b)'s language or legislative history that types of laws not mentioned in § 14(b) might be permissible). However neither the Board nor the Union contests the Pueblo's assessment of its right-to-work law as being similar to state right-to-work laws. Brief for Appellee Pueblo of San Juan at 6. There is therefore no showing before us that the Pueblo's right-to-work ordinance is a kind of law that a state or territory might not be permitted to enact and enforce.

Like states and territories, the Pueblo has a strong interest as a sovereign in regulating economic activity involving its own members within its own territory, and it therefore may enact laws governing such activity. *Merrion,* 455 U.S. at 137, 102 S.Ct. 894. *Merrion* illustrates the exercise of sovereign authority (there, to tax) and that sovereign authority exercised was recognized to be "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 137, 102 S.Ct. 894 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)). The legislative enactment of the Pueblo's right-to-work ordinance was also clearly an exercise of sovereign authority over economic transactions on the reservation. This distinguishes the Pueblo's exercise of sovereign authority here from a congressional enactment like that in *Tuscarora* which did not affect tribal legislative policy but instead impacted proprietary interests. This distinction demonstrates why the *Tuscarora* principle, that Indians' proprietary interests may be affected even when Indians are not specifically mentioned, does not apply here where the matter at stake "is a fundamental attribute of sovereignty" and "a necessary instrument of self-government and territorial management ... [which] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Merrion,* 455 U.S. at 137, 102 S.Ct. 894.

IV

In sum, we are convinced that Congress did not intend by its NLRA provisions to preempt tribal sovereign authority to enact its right-to-work ordinance and to enter into the lease agreement. The Board and the Union had the burden to establish such intent of preemption, but they did not satisfy their burden. Since they failed to do so, we uphold the tribal right-to-work ordinance. Similarly we see no reason to hold invalid the lease provisions entered into by the Tribe. Accordingly, the decision of the district court is

AFFIRMED.

BRISCOE, Circuit Judge, concurring.

I concur. Applying the *Tuscarora/Coeur d'Alene* analytical framework outlined in Judge Murphy's dissent, which I believe to be controlling in this case, [1] the outcome, ***1201** in my view, turns on the effect of § 8(a)(3) of the NLRA. Although the Supreme Court has characterized § 8(a)(3) as "articulat[ing] a national policy that certain union-security agreements are valid as a matter of federal law," *Oil, Chemical & Atomic Workers, Int'l Union v. Mobil Oil Corp.,* 426 U.S. 407, 416, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976), the Court has also made it clear that § 8(a)(3) was not intended by Congress to be preemptive. *See id.* at 417, 96 S.Ct. 2140 (noting § 14(b) of the NLRA "was designed to make clear that § 8(a)(3) left the States free to pursue their own more restrictive policies in the matter of union-security agreements") (internal quotations omitted); *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 101, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963) (noting § 14(b) of the NLRA was enacted to "mak[e] clear and unambiguous the purpose of Congress not to preempt the field"); *see also Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.,* 336 U.S. 301, 307, 69 S.Ct. 584, 93 L.Ed. 691 (1949) (describing the predecessor to § 8(a)(3) as "merely disclaim[ing] a national policy hostile to the closed shop or other forms of union-security agreement"). Based upon these statements, I therefore agree with the majority that § 8(a)(3) does not preempt tribes from enacting right-to-work laws for business conducted on their reservations.

LUCERO, Circuit Judge, concurring.

I join Judge Briscoe's concurrence. I write separately to note my recognition of the potential analytical tension between Parts I, II, and IV of the majority opinion, which I have also elected to join, and the approach set forth in Judge Briscoe's concurrence. Under either approach, the result reached today is mandated by two United States Supreme Court cases, *Retail Clerks International Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 101, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963), and *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* 336 U.S. 301, 307, 69 S.Ct. 584, 93 L.Ed. 691 (1949). These cases do not permit us to entertain the interpretation or result advocated by appellants in this case.

MURPHY, Circuit Judge, dissenting:

A majority of this court concludes that Congress did not divest Native American Indian tribes of the power to enact right-to-work laws when it passed §§ 8(a)(3) and 14(b) of the National Labor Relations Act ("NLRA"). The majority supports this conclusion by invoking the general proposition that Congress cannot abrogate Indian self-governance by silence. It then goes on to conclude, however, that Congress, *by its silence,* implicitly granted Indian tribes the right to enact such laws when it passed § 14(b). Because I disagree with the majority's conclusion that § 8(a)(3) did not divest Indian tribes of their power to enact right-to-work laws and with its subsequent conclusion that § 14(b) implicitly granted Indian tribes the same power to enact right-to-work laws granted to states and territories, I respectfully dissent.

It is beyond debate that Indian tribes do not "possess[ ] ... the full attributes of sovereignty." *United States v. Kagama,* 118 U.S. 375, 381, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *see also Merrion v. Jicarilla Apache Tribe,* 617 F.2d 537, 541 (10th Cir.1980), *aff'd,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). Tribes, rather, are quasi-sovereign governments, possessing only "those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the exercise of its plenary authority over them, or not inconsistent with the superior interest of the United States as a sovereign nation." *Merrion,* 617 F.2d at 541. The Union and ***1202** the NLRB do not argue that the Pueblo of San Juan ("Pueblo") never possessed the power to enact a right-to-work law or that any such power has either been relinquished by treaty or is inconsistent with the superior status of the United States. Rather, both simply argue that the Pueblo's power has been divested by the exercise of congressional plenary authority over Indian tribes.

The majority does not dispute that Congress retains plenary power over Indian tribes and may exercise that power to divest tribes of their sovereignty. *See* op. at 1191. Further, the majority correctly points out that the burden is on the NLRB and the Union to demonstrate that the Pueblo's power to enact the ordinance at issue here has been "modified, conditioned or divested by Congressional action." *Southland Royalty Co. v. Navajo Tribe of Indians,* 715 F.2d 486, 488 (10th Cir.1983). The majority then concludes that Appellants have not met their burden of showing that Congress intended to divest the Pueblo of the power to enact the ordinance. The NLRB and the Union, however, have met their burden by demonstrating that the NLRA constitutes comprehensive federal regulation of labor relations. The Pueblo then fails to offer any proof that Congress did not intend for § 8(a)(3) to apply to Indian tribes.

Congress' clear intention to apply a federal statute to Indian tribes can be demonstrated in one of two ways. Congress, of course, may expressly limit tribal sovereignty by including specific language to that effect in the federal statute. Alternatively, congressional intent to abrogate Indian sovereignty can be discerned from legislative history or from the "existence of a comprehensive statutory plan." *EEOC v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir.1989). The conclusion that Congress can abrogate Indian sovereignty by implication is firmly supported by statements made by the Supreme Court in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). In *Tuscarora,* the Court declared that "it is now well settled by many decisions of this Court that a general [federal] statute in terms applying to all persons includes Indians and their property interests." *Id.* Though *dicta,* this language indicates the Court's position that the case law supports a presumption that federal statutes of general applicability apply to Indian tribes. *See Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings....").

The Ninth Circuit has expounded on the Court's statement in *Tuscarora,* articulating three exceptions to the general presumption in favor of applicability.

> 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....

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir.1985) (quotations omitted). These exceptions provide Indian tribes with the opportunity to rebut the presumption that they are included in federal statutes of general application.

In *Donovan v. Navajo Forest Products,* this court opined that *Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 152, 102 S.Ct. 894 (1982) "limits or, by implication, overrules *Tuscarora.*" 692 F.2d 709, 713 (10th Cir.1982). If *Merrion* did limit the ***1203** application of *Tuscarora,* those limits are entirely consistent with the exceptions articulated by the Ninth Circuit in *Coeur d'Alene.* Reading *Merrion* as consistent with *Tuscarora* is supported by the opinions issued by this court after *Merrion* and *Navajo Forest Products* in which the court invokes the *Tuscarora* presumption and then considers the *Coeur d'Alene* exceptions. *See Nero v. Cherokee Nation,* 892 F.2d 1457, 1462–63 (10th Cir.1989); *EEOC v. Cherokee Nation,* 871 at 939; *Phillips Petroleum Co. v. EPA,* 803 F.2d 545, 555–56 (10th Cir.1986). Thus, this court, together with several other circuits, has embraced the *Tuscarora/Coeur d'Alene* approach.

In *EEOC v. Cherokee Nation,* a divided panel of this court concluded that the Age Discrimination in Employment Act ("ADEA") did not apply to Indian tribes. *See* 871 F.2d at 939. Both the majority and the dissenting judge, however, acknowledged that clear congressional intent to abrogate tribal sovereignty could be manifested by the existence of a comprehensive statutory plan. *See id.; id.* at 940 n. 1, 941–42 (Tacha, J., dissenting) (examining legislative history and an analogous federal statute to support the conclusion that the tribe's right to self-government was limited by the ADEA). It is unclear whether the majority based its holding on its view that the ADEA was not a comprehensive federal plan or its conclusion that a treaty between the Cherokee Nation and the United States overcame the *Tuscarora* presumption. *See id.* at 939, 938 n. 3.

This court has also invoked the *Tuscarora* presumption to conclude that Congress intended to include Indian tribes within the reach of the Safe Water Drinking Act of 1974 ("SWDA") even though tribes were not expressly mentioned. *See Phillips Petroleum,* 803 F.2d at 556 ("The conclusion that the SWDA empowered the EPA to prescribe regulations for Indian lands is also consistent with the presumption that Congress intends a general statute applying to all persons to include Indians and their property interests."); *id.* at 556 n. 14. The court's holding was supported, in large part, by its conclusion that the SWDA "clearly establish[ed] national policy with respect to clean water." *Id.* at 555. The court determined that this national policy would be thwarted if Indian tribes were not covered by the SWDA. It then noted that there was no showing that the SWDA conflicted

with a specific right granted to the tribe either by statute or treaty. *See id.* at 556. The majority believes *Phillips Petroleum* differs from this case because, unlike the Pueblo, the Indian tribe in *Phillips Petroleum* did not oppose the application of the SWDA. Under the analysis employed by the *Phillips Petroleum* court, however, the outcome would be the same regardless of whether the issue of tribal sovereignty was raised by an Indian or by a non-Indian. Certainly the majority cannot be suggesting that the outcome in *Phillips Petroleum* would have been different had the theory of tribal sovereignty been raised by the affected tribe rather than Phillips Petroleum. The importance of *Phillips Petroleum* is that it squarely supports the proposition that cases involving comprehensive federal statutes of general applicability should be analyzed by applying *Tuscarora/Coeur d'Alene.*

Other circuit courts of appeal have also concluded that tribes' sovereign powers can be divested by comprehensive federal regulatory schemes that are silent as to their application to Indians. *See, e.g., Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians,* 166 F.3d 1126, 1128–30 (11th Cir.1999) (concluding that the ADA applies to Indian tribes); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 177–82 (2d Cir.1996) (holding that OSHA applied to an Indian tribe); *Smart v. State Farm* ***1204** *Ins. Co.,* 868 F.2d 929, 932–36 (7th Cir.1989) (applying ERISA to an employee benefits plan established and operated by an Indian tribe); *Coeur d'Alene Tribal Farm,* 751 F.2d at 1116 (holding that OSHA applied to a tribe's commercial activities). These cases all discussed *Tuscarora* and the exceptions articulated by the Ninth Circuit.

The majority distinguishes *Tuscarora* and its progeny by concluding that the Pueblo's sovereign power to govern by enacting legislation, as opposed to its power to protect any proprietary interests it holds, can never be divested by implication. *See* op. at 1192–93 ("[I]mplied preemption of such sovereign authority does not suffice."). The majority's position, however, is purely visceral; the majority offers no logical, precedential, or authoritative support for the proposition that a tribe's sovereign power to enact *general legislation* is afforded more protection than any other aspect of its sovereignty. Further, the majority's position conflicts with *Merrion v. Jicarilla Apache Tribe.*

In *Merrion,* the Supreme Court addressed the question of whether Congress implicitly divested an Indian tribe of its power to impose a severance tax, a power of self-governance. *See* 455 U.S. at 150–52, 102 S.Ct. 894. Although the Court ultimately concluded that there was no indication the tribe's power had been abrogated by Congress, it clearly engaged in the very analysis repudiated by the majority in this case. The Court first examined two federal statutes to determine whether they contained any references to Indian tribes. *See id.* at 149–50, 102 S.Ct. 894. It then examined whether any particular provision in the statutes "deprived the Tribe of its authority to impose the severance tax." *Id.* at 149, 102 S.Ct. 894. The Court concluded that the first statute contained express language indicating congressional intent that it not apply to Indian tribes. *See id.* at 150, 102 S.Ct. 894. As to the second statute, the Court noted that although it authorized state taxation of royalties from mineral production on Indian lands, it did not mention tribal authority to tax. *See id.* at 151, 102 S.Ct. 894. In rejecting the claims that the statute transferred the Indian power to tax mineral production to the states, the Court stated as follows:

> This claim not only lacks any supporting evidence in the legislative history, it also deviates from settled principles of taxation: different sovereigns can enjoy powers to tax the same transactions. Thus, the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax.

Id.

Although the Court concluded that Congress had not implicitly divested the tribe of its power to impose the severance tax at issue in that case, *Merrion* clearly stands for the proposition that Congress can divest an Indian tribe of a "power of self-government" by implication. 455 U.S. at 152, 102 S.Ct. 894 ("We find no 'clear indications' that Congress has *implicitly deprived* the Tribe of its power to impose the severance tax." (emphasis added)). The Court did *not* conclude that Congress could *never* divest a tribe of such powers by implication.

Like the Supreme Court, this court has also recognized that Congress can divest Indian tribes of sovereign powers of self-government by implication. *See Nero,* 892 F.2d at 1462–63. In *Nero,* this court concluded that a federal statute of general applicability did not divest a tribe of its sovereign power to determine tribal membership and thus exclude plaintiffs from participating in tribal elections and Indian benefits programs.

See id. at 1463. The court arrived at this conclusion by applying ***1205** the *Tuscarora/Coeur d'Alene* analysis. It apparently assumed that the federal statute was one of general applicability but then concluded that the statute could not be invoked against the tribe because it would impinge on the tribe's right of self-governance over tribal membership, a purely intramural matter. *See id.* at 1462–63.

The Supreme Court has consistently and unequivocally stated that Congress has plenary authority to divest Indian tribes of *any and all* aspects of their sovereignty, whether those powers were retained by the tribes or established by treaty. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is *subject to complete defeasance*." *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (emphasis added). "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *see also United States v. Dion,* 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986) (holding that rights granted to a tribe by treaty may be abrogated by Congress). Even powers over purely intramural tribal matters can be divested by treaty or statute. *See Wheeler,* 435 U.S. at 322 n. 18, 98 S.Ct. 1079.

The *Tuscarora/Coeur d'Alene* test accommodates notions of both tribal and federal sovereignty. Pursuant to the exceptions first articulated by *Coeur d'Alene,* congressional power to implicitly divest an Indian tribe of sovereign powers is limited in only two circumstances: when the federal statute strips the tribe of its power to regulate purely intramural matters or when the statute divests the tribe of powers guaranteed by treaty. Only in those two situations must congressional divestiture be express. Congress can divest Indian tribes of any and all other aspects of their sovereignty by implication, including their power to regulate the activities of non-members, unless the tribe can demonstrate that Congress did not intend the federal statute to apply to them.

The majority's attempt to distinguish the *Tuscarora/Coeur d'Alene* analysis on the basis that it only applies when a federal statute affects property interests and does not apply when a tribe merely invokes its general legislative powers is illogical. If the majority is correct, an Indian tribe, in almost every instance, could avoid the application of a comprehensive, generally applicable federal statute simply by exercising its general legislative powers and enacting an ordinance that either declares the tribe to be exempt from the federal statute or which directly conflicts with the federal statute. By holding that Congress can never implicitly divest tribes of their power to enact laws that conflict with generally applicable federal statutes, the majority effectively bestows upon Indian tribes sovereign powers far greater than those possessed even by the states. As a result of the majority opinion, tribes will now have unfettered power to enact ordinances that directly conflict with any federal statute of general application. For example, the Pueblo could enact an ordinance legalizing the closed shop, a form of compulsory unionization the majority acknowledges was "outlawed in 1947 by the Taft Hartley Act's amendment of the NLRA." See op. at 1190 n. 3. The Pueblo could also enact legislation declaring its members to be exempt from all federal tax laws. Such an ordinance would effectively preempt the application of all federal tax laws until Congress remedied the situation by expressly including Indian tribes within the reach of the federal tax laws. This certainly cannot be the rule.

***1206** Both the Seventh and the Second Circuits have rejected the majority's reasoning on this very basis. In *Smart,* a member of the Chippewa Tribe argued that ERISA did not apply to an employee benefit plan maintained by the tribe because it affected tribal sovereignty. *See* 868 F.2d at 935. The Seventh Circuit disagreed, stating:

> A statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe's ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived. Any federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government.

Id. Similarly, the Second Circuit addressed a nearly identical argument, concluding:

> When taken to its logical limits, it would preclude the application of any federal legislation, silent as to Indians,

> that in some way affects the political integrity, economic security, or health and welfare of a tribe. Such a test greatly expands the niche the federal government has carved out for Indian tribes; that of a sovereign with limited powers, dependent on, and subordinate to the federal government.

Mashantucket Sand & Gravel, 95 F.3d at 179 (quotation omitted).

Merrion and *Nero* stand for the proposition that the *Tuscarora/ Coeur d'Alene* analysis should be applied to determine whether Congress has, by implication, divested an Indian tribe of any powers it retains. The approach adopted by the Ninth Circuit in *Coeur d'Alene* is consistent with both *Tuscarora* and *Merrion* and provides courts with an appropriate and workable framework within which to analyze the impact of all generally applicable federal statutes on all aspects of Indian sovereignty. The exceptions articulated in *Coeur d'Alene* appropriately limit the *Tuscarora* presumption by preserving tribal sovereignty over purely intramural matters even in the face of comprehensive federal regulation. A limited notion of tribal self-governance preserves federal supremacy over Indian tribes while providing heightened protection for tribal regulation of purely intramural matters. Any concerns about abrogating tribal powers of self-governance by implication are fully addressed by the *Coeur d'Alene* exceptions. The majority has offered no rationale for its position that tribes' powers to enact general legislation occupy the same heights as their more vital powers to regulate purely intramural matters such as tribal membership and domestic affairs.

Congress divested the Pueblo of the power to enact the ordinance at issue here. The Pueblo does not dispute that the NLRA establishes a national labor policy. *See Barrentine v. Arkansas–Best Freight Sys., Inc.,* 450 U.S. 728, 735, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) ("The national policy favoring collective bargaining and industrial self-government was first expressed in the National Labor Relations Act of 1935. It received further expression and definition in the Labor Management Relations Act, 1947." (citation omitted)); *Phillips Petroleum,* 803 F.2d at 555 (using the NLRA as an example of a statute that established a national policy); *Navajo Tribe v. NLRB,* 288 F.2d 162, 164 (D.C.Cir.1961) ("Congress has adopted a national labor policy, superseding the local policies of the States and the Indian tribes, in all cases to which the National Labor Relations Act applies."). Relying on *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* however, the majority concludes that § 8(a)(3) does not prohibit right-to-work laws like the one at issue here. *See* 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949).

***1207** *Algoma* cannot be read for the proposition that § 8(a)(3) had no effect on an Indian tribe's power to enact a right-to-work ordinance. In *Algoma,* the Court interpreted § 8(3) of the Wagner Act, which permitted the closed shop before it was amended by the Taft–Hartley Act of 1947. [1] *See id.* at 307–09, 69 S.Ct. 584. Addressing the concern that § 8(3) could be interpreted as outlawing the closed shop, the Court stated, "§ 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." *Id.* at 307, 69 S.Ct. 584. The Court, in part, relied on language from a Senate Report indicating that § 8(3) "deals with the question of the closed shop." *Id.* The Court then quoted a statement made by Senator Wagner that § 8(3) "will not change the status quo.... [W]herever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation." *Id.* at 310, 69 S.Ct. 584. Thus, the language in *Algoma* relied upon by the majority stands only for the proposition that § 8(3) of the Wagner Act did not prohibit states from outlawing closed shops. The "status quo" referred to by the Court was the states' powers to regulate closed shops.

Even assuming that § 8(3) of the Wagner Act had no effect on the rights of all sovereigns to fully regulate union security agreements, the majority fails to acknowledge that § 8(3) was amended by the Taft–Hartley Act of 1947. *See* ch. 120, § 8(a)(3), 61 Stat. 136, 140–41 (1947) (current version at 29 U.S.C. § 158(a)(3)). As amended, the statute regulates more than the closed shop. Section 8(a)(3)

> add[ed] new conditions, which, as presently provided in § 8(a)(3), require that there be a 30 day waiting period before any employee is forced into a union, that the union in question is the appropriate representative of the employees, and that an employer not discriminate against an employee if he has reasonable grounds for believing that membership in the union was not available to the employee

> on a nondiscriminatory basis or that the employee's membership was denied or terminated for reasons other than failure to meet union-shop requirements as to dues and fees.

Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 100, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). Because *Algoma* did not resolve the question of whether § 8(a)(3) of the Taft–Hartley Act, the statute at issue here, preempted state right-to-work laws, the Court took the question up in *Schermerhorn.* Acknowledging that § 8(a)(3) of the Taft–Hartley Act imposed additional federal restrictions on union security agreements not found in § 8(3) of the Wagner Act, the Court, referring to § 8(a)(3), stated, "In other words, Congress undertook *pervasive regulation* of union-security agreements, raising in the minds of many whether it thereby preempted the field ... and put such agreements beyond *state* control." ***1208** *Id.* at 100–01, 84 S.Ct. 219 (emphases added and citation omitted). Although the Court ultimately concluded that the state law at issue in *Schermerhorn* was not preempted by § 8(a)(3), its holding was premised on § 14(b) of the Taft Hartley Act, which restored to the states and territories a power otherwise preempted by § 8(a)(3). *See id.* at 102, 84 S.Ct. 219. The exception carved out by § 14(b), however, is extremely narrow; it only permits states and territories to enact legislation prohibiting union security agreements otherwise *allowed* under § 8(a)(3). Section 14(b) does *not* permit even states and territories to enact legislation allowing what § 8(a)(3) prohibits, *e.g.,* the closed shop.

In 1976, the Court unambiguously reiterated its belief that § 8(a)(3) constitutes pervasive federal regulation of union security agreements, stating:

> Section 8(a)(3) of the National Labor Relations Act permits employees as a matter of federal law to enter into agreements with unions to establish union or agency shops. Section 14(b) of the Act, however, allows individual States and Territories to exempt themselves from § 8(a)(3) and to enact so-called "right-to-work" laws prohibiting union or agency shops.

Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 409, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976) (citations and footnote omitted). The Court went on to state, "§ 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law." *Id.* at 416, 96 S.Ct. 2140. This most recent pronouncement by the Court supports the proposition that Congress intended to regulate union security agreements when it enacted § 8(a)(3) of the Taft–Hartley Act, restoring a small portion of that regulatory power only to states and territories when it enacted § 14(b). Thus § 8(a)(3), the statute at issue here, did alter the status quo as it existed before the passage of the Taft–Hartley Act and does constitute pervasive federal regulation of union security agreements.

The ordinance in this case clearly conflicts with the NLRA. Section 8(a)(3) states that employers and unions are not precluded by the NLRA from entering into an agreement requiring employees to become union members within thirty days after beginning employment. *See* 29 U.S.C. § 158(a)(3). The ordinance enacted by the Pueblo specifically prohibits what § 8(a)(3) otherwise allows, *i.e.,* the right of "employers as a matter of federal law to enter into agreement with unions to establish union or agency shops." *Oil, Chem. & Atomic Workers, Int'l Union,* 426 U.S. at 409, 96 S.Ct. 2140. Thus, the ordinance is clearly contrary to federal law. Congressional intent to divest the Pueblo of its power to enact the ordinance is thus presumed under *Tuscarora.*

None of the exceptions first articulated in *Coeur d'Alene* apply in this case to overcome the *Tuscarora* presumption. The Pueblo has not identified any treaty with the United States that permits it to enact the ordinance. Additionally, § 8(a)(3) does not touch on the Pueblo's "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene,* 751 F.2d at 1116 (quotation omitted). Section 8(a)(3) regulates the relationship between employers and their employees. In no sense does § 8(a)(3) impact purely intramural tribal matters which "generally consist of conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe." *Mashantucket Sand & Gravel,* 95 F.3d at 181. Section 8(a)(3) does not regulate tribal membership, domestic relations, or tribal rules of inheritance, those areas recognized by the Supreme Court as constituting rights of internal self-governance. *See* ***1209** *Wheeler,* 435 U.S. at 322 n. 18, 98 S.Ct. 1079 (acknowledging that even the power to regulate tribal membership, domestic relations, or rules of inheritance can be divested by treaty or statute). In this case, § 8(a)(3) merely curtails the Pueblo's power to

regulate the relationship between a non-tribal employer and its employees, both Indian and non-Indian. Although § 8(a)(3) does implicate the Pueblo's power to regulate economic activity on its land, as discussed above, this power, like almost all other powers retained by Indian tribes, can be divested by implication. *See Merrion,* 455 U.S. at 152, 102 S.Ct. 894 (examining whether a tribe's power to impose a tax had been divested by implication). Because § 8(a)(3) does not affect the Pueblo's power to regulate purely intramural matters, the second *Coeur d'Alene* exception does not apply.

Finally, the Pueblo has failed to show that "Congress intended [§ 8(a)(3)] not to apply to Indians on their reservations." *Coeur d'Alene,* 751 F.2d at 1116 (quotation omitted). The majority believes that congressional intent is embodied in § 14(b), which specifically exempts only states and territories from the application of § 8(a)(3). To support this conclusion, the majority relies on the rule of construction that statutes are to be interpreted in favor of Indian sovereignty. Rules of statutory construction, however, can be invoked only when the statute at issue is ambiguous. *See Chickasaw Nation v. United States,* 208 F.3d 871, 880 (10th Cir.2000), *aff'd,* 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001). Section 14(b) is not ambiguous; it expressly provides that only states and territories may enact legislation prohibiting what § 8(a)(3) otherwise allows. Further, § 14(b)'s silence as to Indian tribes does not render it ambiguous. To conclude otherwise would eviscerate the *Tuscarora* presumption whenever a federal statute of general application contains a limited exception. Under the majority's reasoning, no federal statute containing even the most narrow exception would apply to Indian tribes; congressional failure to specifically include Indian tribes in the exception would, standing alone, constitute proof that Congress intended by that failure to include them. If this were the rule, the general *Tuscarora* presumption that federal statutes of general application apply to Indian tribes would be swallowed by the narrow and specific *Coeur d'Alene* exception in almost every case. For this reason, the majority's approach goes too far. The existence of a statutory exception, standing alone, is insufficient to render a federal statute ambiguous or trigger the application of canons of construction favoring Indian tribes.

The majority's conclusion is fatally undercut by a recent Supreme Court decision. In *Chickasaw Nation v. United States,* two Indian tribes argued that they were exempted from paying federal taxes related to their gaming activities. *See* 534 U.S. at —— – ——, 122 S.Ct. at 531–32. The tribes asserted that they were entitled to the same exemption from taxation expressly granted to the states. *See id.* The Court disagreed, basing its conclusion on the plain, unambiguous language of the federal statute which did not expressly grant Indian tribes an exemption from the federal taxes granted to the states. *See id.* at 532–33. In light of its conclusion that the statute was unambiguous, the Court refused to apply the canon of statutory construction favoring Indian tribes stating, "to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote." *Id.* at 535.

The majority attempts to distinguish *Chickasaw Nation* on the basis that it did not involve a tribe's power to enact and enforce laws. The broad concepts of statutory interpretation articulated in *Chickasaw* ***1210** *Nation,* however, are not confined to the narrow issue before the Court. *Chickasaw Nation* must be read for the broad proposition that courts may not engage in judicial lawmaking by invoking general rules of statutory construction to rewrite otherwise clear and unambiguous statutes. Further, as already explained, a tribe's power to enact legislation that does not impact purely intramural matters is entitled to no more protection than any other tribal power. Accordingly, the Court's analysis in *Chickasaw Nation* applies with equal force to this case. The majority has circumvented congressional intent embodied in the clear and unambiguous language of § 14(b) by invoking a canon of statutory construction. The majority's statement that "in the context of Indian law, appeals to 'plain language' or 'plain meaning' must give way to canons of statutory construction peculiar to Indian law," directly conflicts with the Court's holding in *Chickasaw Nation.* See op. at 1196.

The majority also relies on *El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999), to support its conclusion that congressional silence implicitly grants Indian tribes the same exemptions and exceptions from federal law afforded states. *See* op. at 1196. In *El Paso,* however, the Court concluded that Congress had *implicitly divested* Indian tribal courts of their power to adjudicate tort claims arising from nuclear accidents, an aspect of their self-governance. *See El Paso,* 526 U.S. at 485–87, 119 S.Ct. 1430. The Court's holding in *El Paso* is completely consistent with the *Tuscarora* presumption. Read together, *El Paso* and *Chickasaw Nation* clearly stand for the proposition that while Indian tribes can be *divested* of powers of self-governance by implication, those powers cannot be *restored* by congressional silence. The majority reaches the opposite conclusion, thereby turning the law on its head.

There is no evidence in this record of congressional intent to include or exclude tribes from the exemption recognized in § 14(b). The majority necessarily equates this lack of evidence with freedom to legislate by invocation of a canon of construction favoring Indian tribes. The proper conclusion from this lack of evidence of legislative intent, however, is that application of the third *Coeur d'Alene* exception is precluded. Because Indian tribes are not specifically named in § 14(b) and because the Pueblo has not offered any other proof that Congress intended § 8(a)(3) should not apply to Indian tribes, none of the exceptions articulated in *Coeur d'Alene* are present in this case. Thus, Congress implicitly divested the Pueblo of the power to enact the ordinance and I would, accordingly, reverse the order of the district court.

All Citations

276 F.3d 1186, 169 L.R.R.M. (BNA) 2129, 145 Lab.Cas. P 11,225, 146 Lab.Cas. P 10,090

Footnotes

1 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, art. VI, cl. 2.

2 Congress' power over Indian matters derives from the Constitution's Indian Commerce Clause, in art. I, § 8, cl. 3, and its treaty power, art. II, § 2, cl. 2. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 n. 7, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

3 A "right-to-work" law, as the term is used here, is a statute which § 14(b) of the NLRA permits states and territories to enact to invalidate agreements establishing "union shops." A closed shop, originally permitted under the NLRA, is created when an employer and a union agree that only people who are already union members may be hired. This was outlawed in 1947 by the Taft Hartley Act's amendment of the NLRA, 29 U.S.C. § 158(a)(3). A union shop is created when an employer and a union agree to require employees, as a condition of their continued employment, to have membership in a labor union "on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158(a)(3). Such an agreement between an employer and a union is a union security agreement. Provided they comply with other requirements of 29 U.S.C. § 158, and provided no right-to-work law forbids them, the NLRA permits union shops and union security agreements.

4 These include the Navajo Nation, the Crow Tribe, and the Osage Tribe. *Amicus Curiae* brief of the National Right to Work Foundation in Support of Appellee Pueblo of San Juan at 17.

5 NLRB brief at 12.

6 As we have previously explained,

> Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.

Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir.1959).

7 This address by President Nixon has been identified as having "clearly set the current direction of federal policy." William Canby, *American Indian Law* 30 (1998) (citing Cong.Rec. 23258).

8 On September 25, 2001, Oklahoma voters approved a state right-to-work question, bringing the total to 22 such states.

9 The lands involved were owned in fee simple by the Tuscarora Indian Nation and no "interest" in them was "owned by the United States" so that they were not within a "reservation" as that term was defined in § 3(2) of the Federal Power Act.

10 In keeping with the guardian-ward relationship, the allotted property of certain Indians was subject to the supervision of the United States and could not be freely alienated. They were referred to as "restricted" Indians. *See Chouteau v. Comm'r of Internal Revenue,* 38 F.2d 976, 977 (10th Cir.1930) (plaintiff Mary Blackbird "is a restricted full-blood Osage. Her property is under the supervising control of the United States."). *See also* Cohen at 650–51 (discussing restrictions).

11 In *Tuscarora,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584, the rule was applied to the tribe as a property owner and not as a sovereign authority. In *Nero v. Cherokee Nation of Oklahoma,* 892 F.2d 1457, 1462–63 (10th Cir.1989), we found that a generally applicable rule did *not* apply to the tribe as sovereign.

1 I agree with Judge Murphy that the majority "offers no logical, precedential, or authoritative support" for its attempt to draw a distinction between a tribe's proprietary and sovereign interests. Dis. at 1204.

1 Section 8(3) of the Wagner Act read as follows:

> 8. It shall be an unfair labor practice for an employer—
>
> ....
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the Nation Industrial Recovery Act ... or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

ch. 372, § 8(3), 49 Stat. 449, 452 (1935).

600 F.3d 1275
United States Court of Appeals, Tenth Circuit.

Steven DOBBS; Naomi Dobbs,
Plaintiffs–Appellants–Cross–Appellees,
v.
ANTHEM BLUE CROSS AND BLUE SHIELD, a Colorado Insurance Company,
Defendant–Appellee–Cross–Appellant.
Southern Ute Indian Tribe, Amicus Curiae.

Nos. 07–1398, 07–1402
|
March 31, 2010.

Synopsis

Background: Beneficiaries of group health insurance policy purchased under employee benefit plan established by Indian tribe brought suit against health insurer in state court, asserting state law causes of action. Insurer removed action and moved to dismiss all claims on basis of Employee Retirement Income Security Act (ERISA) preemption. The United States District Court for the District of Colorado, Lewis T. Babcock, J., dismissed claims, and beneficiaries appealed. The Court of Appeals, Deanell Reece Tacha, Chief Judge, 475 F.3d 1176, vacated and remanded. On remand, insurer renewed motion to dismiss. The District Court, Babcock, J., 2007 WL 2439310, granted motion. Beneficiaries appealed.

Holdings: The Court of Appeals, Lucero, Circuit Judge, held that:

Pension Protection Act (PPA) section which amended ERISA's exception for governmental plans to include plans established and maintained by Indian tribal government applied retrospectively;

remand was warranted for factual determination as to whether subject plan was a "governmental plan" within meaning of amended ERISA definition; and

the *Woodworker's* rule did not apply to beneficiaries' claims so as to save them from preemption.

Reversed and remanded.

Briscoe, Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***1277** Shawn Mitchell, Broomfield, CO, for the Appellants–Cross–Appellees.

John R. Mann, Kennedy Childs & Fogg, P.C., Denver, CO, (Dean A. McConnell ***1278** with him on the brief), for Appellee–Cross–Appellant.

Thomas H. Shipps and Patricia A. Hall, Maynes, Bradford, Shipps & Sheftel, LLP, Durango, CO, Monte Mills, Legal Department, Southern Ute Indian Tribe, Ignacio, CO, and Nancy Williams Bonnett, Pietzsch, Bonnett & Womack, P.A., Phoenix, AZ, filed a brief on behalf of Amicus Curiae in favor of the Appellee–Cross–Appellant.

Before HENRY, Chief Circuit Judge, BRISCOE, and LUCERO, Circuit Judges.

Opinion

LUCERO, Circuit Judge.

This case comes to us on appeal for the second time. Steven and Naomi Dobbs' state law claims against Anthem Blue Cross and Blue Shield ("Anthem") were initially dismissed by the district court as preempted by the Employee Retirement Income Security Act ("ERISA"). On the first appeal, we vacated the court's disposition, holding that the Dobbs' claims would not be preempted if the insurance plan at issue qualified as a "governmental plan" under an amended statutory definition. We remanded to allow the district court to make that factual determination. On remand, the court determined that the plan qualified as a governmental plan under the amended definition, but dismissed the Dobbs' claims on the ground that the amended definition does not apply retrospectively.

We exercise jurisdiction under 28 U.S.C. § 1291. Because we decided on the first appeal that the amended definition applied to the Dobbs' claims, we reverse the district court's contrary conclusion and remand for fact-finding consistent with this opinion.

I

In September 2004, the Dobbs filed suit against Anthem in Colorado state court. Their complaint alleged five state law causes of action arising from Anthem's alleged failure to comply with the terms of a health insurance policy issued to Steven Dobbs through his employer, the Southern Ute Indian Tribe. Anthem removed the action to the United States District Court for the District of Colorado and contemporaneously filed a motion to dismiss based on ERISA preemption.

The district court granted Anthem's motion in part. It dismissed four of the five claims, rejecting the Dobbs' argument that the statutory exception from ERISA preemption for "governmental plan[s]" included those established by tribal governments. However, the court initially declined to dismiss the Dobbs' fraud-as-to-benefits claim, reasoning that under *Woodworker's Supply, Inc. v. Principal Mutual Life Insurance Co.,* 170 F.3d 985 (10th Cir.1999), ERISA does not preempt state law claims predicated upon misrepresentations that induced plan participation. *Id.* at 991. The district court later reconsidered that ruling and dismissed the fraud claim as well. The Dobbs appealed.

While the first appeal was pending, Congress passed the Pension Protection Act of 2006 ("PPA"), Pub.L. No. 109–280, 120 Stat. 780. Section 906(a)(2)(A) of the PPA 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.

§ 906(a)(2)(A), 120 Stat. at 1051 (codified as amended at 29 U.S.C. § 1002(32)).

In deciding the Dobbs' first appeal, this court noted that "[t]he amendment's legislative history suggests that Congress expanded ***1279** the definition to clarify the legal ambiguity regarding the status of employee benefit plans established and maintained by tribal governments." *Dobbs v. Anthem Blue Cross & Blue Shield,* 475 F.3d 1176, 1178 (10th Cir.2007) [hereinafter *Dobbs I*]. We recognized, however, that the amended definition of "governmental plan" may not cover the Dobbs' plan "[b]ecause the amended provision makes a distinction between 'essential governmental functions' and 'commercial activities.' " *Id.* We accordingly remanded to the district court to engage in the necessary factual analysis, concluding that "[i]f the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Id.* at 1179.

On remand, the district court found that "the Dobbses' plan meets the new definition of a governmental plan under ERISA, as amended." However, it ruled that Congress intended § 906(a)(2)(A) of the PPA to apply only prospectively. It further rejected arguments that either the mandate rule or the law of the case doctrine required it to apply the amended definition of governmental plan to the events at issue. It thus reiterated its conclusion that ERISA preempted the Dobbs' claims. This appeal followed.

II

A

We review de novo a district court's dismissal for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). *Dias v. City & County of Denver,* 567 F.3d 1169, 1178 (10th Cir.2009). ERISA preempts state law claims that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). However, it expressly exempts from preemption claims related to "governmental plan[s]" as defined in § 1002(32). *See* § 1003(b)(1). At the time of the events relevant to the Dobbs' claims, § 1002(32) defined "governmental plan" as "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." § 1002(32) (2002). Section 906(a)(2)(A) of the PPA, however, amended the definition of governmental plan to include certain plans established by tribal governments. *See* § 906(a)(2)(A), 120 Stat. at 1051. In this appeal, the Dobbs do not dispute that their insurance plan is an employee benefit plan within the meaning of ERISA or that four of their five

claims "relate to" that plan for ERISA purposes. [1] They argue only that the amended definition of governmental plan should apply to the events at issue, even though they occurred before Congress amended the statute.

B

We must first determine whether *Dobbs I* decided that § 906 of the PPA applied retrospectively. If so, we are bound by that decision. *In re Smith,* 10 F.3d 723, 724 (10th Cir.1993). Moreover, if the first appeal decided the issue then the district court was bound by its determination under the law of the case doctrine, *see Homans v. City of Albuquerque,* 366 F.3d 900, 904 (10th Cir.2004), and under the general rule that a district court is bound by decisions made by its circuit court.

The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." ***1280** *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). "The doctrine is based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided" and to discourage forum-shopping by litigants. *McIlravy v. Kerr–McGee Coal Corp.,* 204 F.3d 1031, 1035 (10th Cir.2000) (quotation omitted). Thus "the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Id.* at 1034.

The district court apparently concluded that the *Dobbs I* retrospectivity holding was not law of the case because the panel did not expressly reach the preemption issue. However, the law of the case doctrine applies to "issues previously decided, either explicitly or by necessary implication." *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9,* 10 F.3d 700, 705 (10th Cir.1993) (citation omitted). An issue may be implicitly resolved by a prior appeal in three circumstances:

> (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated.

McIlravy, 204 F.3d at 1036 (quotation omitted).

In *Dobbs I,* we decided by necessary implication that § 906 of the PPA applies retrospectively. First, resolution of the issue was a necessary step in resolving the earlier appeal. Noting that Congress had altered the definition of "governmental plan" after the resolution of proceedings in the district court, *Dobbs I,* 475 F.3d at 1177–78, we determined that the Dobbs' plan might qualify as a governmental plan under the new language but remanded to the district court to engage in a "fact-specific analysis of the plan at issue," *id.* at 1178. We concluded that "[i]f the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Id.* at 1179.

By expressly remanding only the fact-specific analysis and concluding that this analysis alone would determine if ERISA preempted the Dobbs' claim, *Dobbs I* necessarily decided that the new language of the PPA applied to those claims. [2] Had we not made that determination, there would ***1281** be no logical reason for us to remand only the fact-specific analysis; such analysis becomes relevant and determinative only if § 906 of the PPA applies retrospectively. [3] Thus, deciding the retrospectivity question was a "necessary step in resolving the earlier appeal." *McIlravy,* 204 F.3d at 1036 (quotation omitted).

Second, the panel decided that § 906 applies retrospectively by necessary implication because a contrary "resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal." *McIlravy,* 204 F.3d at 1036 (quotation omitted). To reiterate, we held in the prior appeal that "[i]f the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Dobbs I,* 475 F.3d at 1179. The district court found that the Dobbs' plan meets the new definition, but held ERISA preempts their claim. In doing so, it directly contravened the instruction from *Dobbs I* and thus abrogated that decision. [4]

C

The Tenth Circuit recognizes three "exceptionally narrow" circumstances in which the law of the case doctrine does not apply: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *McIlravy,* 204 F.3d at 1035 (internal quotation omitted). None apply here: No new evidence on the issue was presented to the district court, and there has not been a contrary applicable decision.

We further conclude that the prior panel's decision was not clearly erroneous.[5] Anthem correctly argues that we ***1282** presume an amendment does not apply retrospectively absent an indication of contrary intent by Congress. *See Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). In determining whether a statute applies retrospectively, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280, 114 S.Ct. 1483. If not, we ask whether applying the statute to the events at issue would have retroactive effects. *Id.* "Statutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' " *Fernandez–Vargas v. Gonzales,* 548 U.S. 30, 37, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006) (quoting *Landgraf,* 511 U.S. at 280, 114 S.Ct. 1483). "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf,* 511 U.S. at 280, 114 S.Ct. 1522.

Under *Landgraf,* we first look to whether Congress has expressly prescribed the proper reach of § 906. Congress has given contradictory indications. On the one hand, § 906(c) states that "[t]he amendments made by this section shall apply to any year beginning on or after the date of the enactment of this Act." 120 Stat. at 1052. However, the Dobbs persuasively argue that this provision is merely intended to distinguish § 906 from numerous other sections of the PPA that became effective beginning at subsequent "plan years," and thus does not address the issue of retrospectivity at all. *See, e.g.,* PPA § 101(d), 120 Stat. at 789; PPA § 103(c), 120 Stat. at 816; PPA § 110(e), 120 Stat. at 820.

Moreover, § 906(b) states that it is merely a "clarification" rather than a substantive change in the law—seemingly contradicting § 906(c). Although we have acknowledged that it is "hazardous ... to assume from the enactment of a 'clarifying' amendment that Congress necessarily was merely restating the intent of the original enacting Congress," *Fowler v. Unified Sch. Dist., No. 259,* 128 F.3d 1431, 1436 (10th Cir.1997), a true clarification applies retrospectively, *see, e.g., United States v. Aptt,* 354 F.3d 1269, 1276 (10th Cir.2004) ("[A] subsequent amendment to the Guidelines can sometimes be given retroactive effect if the changes are clarifying rather than substantive." (quotation omitted)); *Andrews v. Deland,* 943 F.2d 1162, 1172 n. 7 (10th Cir.1991) (A court's decision may apply retrospectively when it is a clarification of a rule rather than a change in the substantive law). "When Congress enacts a statute using a phrase that has a settled judicial interpretation, it is presumed to be aware of the prior interpretation." *Ford v. Ford Motor Credit Corp. (In re Ford),* 574 F.3d 1279, 1283 (10th Cir.2009); *see also Comm'r v. Keystone Consol. Indus.,* 508 U.S. 152, 159, 113 S.Ct. 2006, 124 L.Ed.2d 71 (1993). Congress' use of the term "clarification" therefore indicates an intent that the amendment apply retrospectively. Due to the contrary indications from Congress, we cannot conclude Congress clearly and expressly prescribed the proper reach of § 906.[6] Given the ***1283** holding of *Dobbs I,* we may not hold that § 906 applies only prospectively absent an unambiguous statutory command. *See McIlravy,* 204 F.3d at 1035.

We therefore turn to the second step of the *Landgraf* analysis: We must ask if § 906 of the PPA would have retroactive effect if applied retrospectively.[7] That is, we examine whether the amendment "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf,* 511 U.S. at 280, 114 S.Ct. 1522. Notably, "[a] statute does not operate [retroactively] merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations. Rather, the court must determine whether the new provision attaches new legal consequences to events completed before its enactment." *Hem v. Maurer,* 458 F.3d 1185, 1190 (10th Cir.2006).

Our precedent exempting Indian tribes from the preemptive reach of federal regulatory schemes leads us to conclude that the prior panel's determination that ERISA was always intended to exclude tribal plans was not clearly erroneous. "Tribes retain those attributes of inherent sovereignty not withdrawn either expressly or necessarily as a result of their

status" until Congress acts to withdraw those powers. *NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1192 (10th Cir.2002) (en banc). This respect for sovereignty has lead to the "well-established canon of Indian law that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " *Id.* at 1191 (quoting *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)). "The canon applies to other statutes, even where they do not mention Indians at all." *Pueblo of San Juan,* 276 F.3d at 1191–92.

In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization. [8] *Compare Pueblo of San Juan,* 276 F.3d at 1200 (National Labor Relations Act does not preempt tribal government from enacting right-to-work ordinance), *EEOC v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir.1989) (Age Discrimination in Employment Act does not apply to Indian tribes), and *Donovan v. Navajo Forest Prods. Indus.,* 692 F.2d 709, 714 (10th Cir.1982) (Occupational Safety and Health Act does not apply to business operated by an Indian tribe in part because its application would dilute principles of tribal self-government), *with Osage Tribal Council ex rel. Osage Tribe of Indians v. Dep't of Labor,* 187 F.3d 1174, 1180–81 (10th Cir.1999) (Congress expressly abrogated tribal sovereign immunity in Safe Drinking Water Act). Although our early cases relied ***1284** in part on treaties that expressly protected Indian tribes' sovereignty, *see, e.g., Donovan,* 692 F.2d at 711–12, we later recognized that a treaty was not a necessary prerequisite to exemption, *see, e.g., Pueblo of San Juan,* 276 F.3d at 1191.

Applying certain federal regulatory schemes to Indian tribes would impinge upon their sovereignty by preventing tribal governments from freely exercising their powers, including the "sovereign authority to regulate economic activity within their own territory." *Id.* at 1192–93. For this reason, ERISA would not apply to insurance plans purchased by tribes for employees primarily engaged in governmental functions unless Congress expressly or necessarily preempted Indian tribal sovereignty. Applying ERISA to such plans would prevent tribal governments from purchasing insurance plans for governmental employees in the same manner as other government entities, thus treating tribal governments as a kind of inferior sovereign. We do not assume Congress intended to infringe on Indian tribal sovereignty in this manner absent an express statement or strong evidence of congressional intent.

Anthem argues that the pre-PPA definition of governmental plan could not have covered tribal plans because a tribe is not the "Government of the United States, ... the government of any State or political subdivision thereof, or ... [an] agency or instrumentality of any of the foregoing." § 1002(32) (2002). It is true that an Indian tribal government does not fit into any of the articulated categories. However, we have held that "normal rules of construction do not apply when ... matters involving Indians[ ] are at issue." *Cherokee Nation,* 871 F.2d at 939; *see also Blackfeet Tribe,* 471 U.S. at 766, 105 S.Ct. 2399; *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 152, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). "[I]n cases where ambiguity exists," including those where there is silence with respect to Indian tribal governments, "and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights ..., the court is to apply the special canons of construction to the benefit of Indian interests." *Cherokee Nation,* 871 F.2d at 939. Thus, for example, we interpreted the Age Discrimination in Employment Act's express exemption for "the United States or a corporation wholly owned by the Government of the United States," 29 U.S.C. § 630(b), to exempt Indian tribes. *Cherokee Nation,* 871 F.2d at 939. Similarly, we held that Congressional silence exempted Indian tribes from the National Labor Relations Act. *Pueblo of San Juan,* 276 F.3d at 1200. [9]

***1285** We thus conclude that § 906(a)(2)(A) is at least arguably a clarification rather than a substantive amendment, and thus applies retrospectively to the events at issue. We recognize that Anthem's position may well have carried the day had the retrospectivity of § 906 been a matter of first impression, and the dissent reaches this conclusion after engaging in a de novo analysis. However, because the prior appeal determined that § 906 of the PPA applies retrospectively and none of the *McIlravy* exceptions to the law of the case doctrine apply, we are bound by the holding of *Dobbs I. See McIlravy,* 204 F.3d at 1035–36.

D

Our conclusion that § 906(a)(2)(A) of the PPA applies retrospectively does not resolve the ultimate ERISA preemption question. That question turns on whether the Dobbs' plan is a "governmental plan" under 29 U.S.C. § 1002(32), as amended. Although the district court concluded that the Dobbs' plan fell within the amended definition, it applied an erroneous interpretation of § 1002(32). We therefore remand again for the district court to make the

factual determination of whether the Dobbs' plan qualifies as a governmental plan using the proper definition.

As amended, § 1002(32) defines "governmental plan" to include "a plan which is established and maintained by an Indian tribal government," but only when "all of the participants" in the plan are employees "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)." Thus a plan qualifies as a governmental plan 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.

On remand from *Dobbs I,* the district court ruled that the Dobbs' plan was a "governmental plan" because it was "established and maintained by an Indian tribal government" and Steven Dobbs' job duties—assisting in the management of the Tribal treasury—related to essential government functions. This analysis misunderstands the test under § 1002(32). Rather than looking to Mr. Dobbs' duties, the court must determine whether *all plan participants* are employees "substantially all of whose services ... are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)." § 1002(32).

Unfortunately, we cannot resolve this issue on appeal. As noted in *Dobbs I,* "[t]he determination of whether a tribal plan qualifies as a governmental plan under § 1002(32) requires a fact-specific analysis of the plan at issue and the nature of its participants' activities." 475 F.3d at 1178. As on the first appeal, we must remand to allow the district court to determine whether the Dobbs' plan qualifies as a governmental plan under § 1002(32).

III

The Dobbs further argue that ERISA does not preempt their fraud-as-to-benefits claim under the rule set forth in *Woodworker's.* There, we held that ERISA preemption does not extend to employers' claims against insurance companies that arise from pre-contractual misrepresentations of plan terms. *Woodworker's,* 170 F.3d at 989–90. In such cases, the employer sues the insurance company "in its role as a seller of insurance, not as an administrator of an employee benefits plan." *Id.* at 991. ***1286** Moreover, at the time of the fraud, the insurance company could not yet be a plan fiduciary, one of the four principal ERISA entities, because the employer had not yet purchased a plan. *Id.*

Arguably, this reasoning could apply to an individual employee's claim against a plan fiduciary that misrepresented the terms of a plan: At the time of the alleged misrepresentation, the insurance company could be acting in its role as a seller of insurance, and the employee would not be a plan beneficiary if she had not yet purchased the plan.

Nevertheless, we conclude that *Woodworker's* is inapposite here. The Dobbs initially styled their fraud-as-to-benefits claim similarly to the claim in *Woodworker's,* asserting that Anthem "represented that its Blue Preferred policy allowed insureds to see any Blue Cross Blue Shield Preferred Provider and receive coverage at in-network levels," but that "[t]he statements were false." However, the Dobbs further allege in this claim that "Anthem refused to provide the highest level of benefits *under the Policy[ ]* even when the Dobbs met Anthem's requirements and condition[s]." In other words, the improper conduct for which the Dobbs seek relief is not Anthem's misrepresentation of the terms of the insurance plan, but Anthem's failure to abide by those terms. The Dobbs fail to cite any discrepancies between Anthem's representations and the terms of the plan. Instead, they claim only that Anthem promised to provide the "highest level of benefits" at "in-network" rates to plan members who used Preferred Providers, but did not actually do so. Indeed, the basis of their claim for bad faith breach of an insurance contract is that "[u]nder the policy, Anthem should have made an in-network determination regarding [the Dobbs' son's] treatment ... and should have paid the claims at in-network levels."

As a result, *Woodworker's* does not apply to the Dobbs' claims. If their plan is not a governmental plan within the meaning of § 1002(32), then the Dobbs' claims are subject to ERISA preemption.

IV

For the foregoing reasons, we **REVERSE** the decision of the district court and **REMAND** for factfinding consistent with this opinion.

BRISCOE, Circuit Judge, concurring in part and dissenting in part:

I concur in part and dissent in part. I respectfully disagree with Part II of the majority opinion.[1] In my view, the law of the case does not prevent us from reaching the question of whether the Pension Protection Act ("PPA") applies retroactively. Additionally, I would conclude that the PPA applies only prospectively and that the pre-PPA version of ERISA did not include Indian tribes under the governmental plan exemption. And, as a result, I would conclude that we need not address whether the district court erred in determining whether the Dobbses' plan qualifies as a governmental plan under 29 U.S.C. § 1002(32), as amended. I agree with Part III of the majority opinion, but write separately to emphasize why the Dobbses' fraudulent inducement claim is preempted by ERISA. Accordingly, I would affirm the judgment of the district court.

I

A

The law of the case doctrine does not bar us from considering the issue of retroactivity. ***1287** The majority concludes that "[i]n *Dobbs I,* we decided by necessary implication that § 906 of the PPA applies retrospectively." Maj. Op. at 1290. I respectfully disagree. "The law of the case doctrine is not an inexorable command but a rule to be applied with good sense." *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694, 711 (10th Cir.2004) (quotation omitted).

In *Dobbs I,* the Dobbses appealed "the [d]istrict [c]ourt's dismissal of all claims, arguing that their state-law claims against Anthem [were] not preempted by federal law." *Dobbs v. Anthem Blue Cross & Blue Shield,* 475 F.3d 1176, 1177 (10th Cir.2007) (hereinafter "*Dobbs I* "). We stated:

> The threshold question in this case is whether federal or state law applies to an employee benefit plan established and maintained by a tribe for the benefit of its employees. If federal law applies, the next question is whether it preempts the state-law causes of action in this case. *We do not reach the second issue concerning preemption because we remand the case so that the [d]istrict [c]ourt can consider the first question in light of a recent change in federal law.*

Dobbs I, 475 F.3d at 1177 (internal citation and footnote omitted; emphasis added). We recognized that "[b]ased on the Dobbses' complaint, we do not have enough information to determine whether the benefit plan meets the requirements of § 1002(32) and therefore remand the case to the [d]istrict [c]ourt for consideration in light of the amended definition." *Id.* at 1178. "In light of the amended definition of 'governmental plan' under ERISA," we vacated the district court's previous order and remanded the case to the district court "for further proceedings consistent with this opinion." *Id.* at 1179. On remand, the district court concluded that although the Dobbses' benefit plan met the new definition of governmental plan, the new definition does not apply retroactively. By deciding whether the PPA applies retroactively, the district court did not violate the law of the case.

In *Dobbs I,* we stated that we did not reach the preemption issue because we were remanding to allow the district court to consider "whether federal or state law applies to an employee benefit plan established and maintained by a tribe for the benefit of its employees ... in light of a recent change in federal law." 475 F.3d at 1177. Thus, we allowed the district court to consider the effect of the PPA in the first instance. Because we declined to reach the issue of the effect of the PPA, the law of the case did not bar the district court from considering that issue on remand. *See United States v. Wittig,* 575 F.3d 1085, 1097 (10th Cir.2009) ("The law of the case does not extend to issues a previous court declines to decide.").

According to the majority, the prior panel decided the effect of the PPA by necessary implication because "(1) resolution of the issue was a necessary step in resolving the earlier appeal; [and] (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal...." *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9,* 10 F.3d 700, 707 (10th Cir.1993). I conclude that neither situation applies to the case at bar.

The resolution of the retroactivity issue was not a necessary step in resolving the earlier appeal. We resolved the earlier

appeal by directing the district court to consider whether federal or state law applied to the benefits plan in light of the PPA. The majority relies heavily on our statement in *Dobbs I* that: "[i]f the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." ***1288** 475 F.3d at 1179. According to the majority, this means that we "expressly remand[ed] only the fact-specific analysis and conclud[ed] that this analysis alone would determine if ERISA preempted the Dobbs' claim...." Maj. Op. at 1280. I disagree. We explicitly did not reach the preemption issue. *See Dobbs I,* 475 F.3d at 1177 ("We do not reach the [preemption issue] because we remand the case so that the District Court can consider [whether federal or state law applies] in light of a recent change in federal law."). Therefore, our statement that "[i]f the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem," *id.* at 1179, is best understood as dicta, which "is not subject to the law of the case doctrine." *Homans v. City of Albuquerque,* 366 F.3d 900, 904 n. 5 (10th Cir.2004). Further, we did not remand to the district court simply to conduct factfinding; rather, we issued a broader remand. *See Pittsburg County* 358 F.3d at 711 (noting that the law of the case did not apply because "the remand to the district court was general, stating only that the remand was 'for further proceedings consistent with this opinion.' "). We remanded to the district court to consider in the first instance whether state or federal law applied in light of the PPA.[2] "When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." *Guidry,* 10 F.3d at 706 (quotations omitted).

Additionally, I disagree with the majority's conclusion that the district court "directly contravened the instruction from *Dobbs I* and thus abrogated that decision." Maj. Op. at 8–9. To the contrary, the district court did what we directed it to do—it considered whether federal law applied in light of the enactment of the PPA. Thus, the district court did not abrogate *Dobbs I.* Accordingly, I would conclude that the prior panel did not decide by necessary implication that the PPA applied retroactively, and I would turn to the merits of the issues before this court.

In summary, I differ from the majority's views in these regards. The majority takes a very narrow reading of *Dobbs I,* relying entirely on a single sentence: "If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Dobbs I,* 475 F.3d at 1179. But the majority seems to ignore the other language that suggests a broader remand, e.g., "We do not reach the [preemption issue] because we remand the case so that the District Court can consider [whether federal or state law applies] in light of a recent change in federal law." *Id.* at 1177. Ultimately, the majority appears to start from the conclusion that we decided the "retrospectivity" question and remanded only for factual analysis. For example, the majority reasons: "We did not issue a broad mandate to reconsider our determination that the PPA applies retrospectively," Maj. Op. at 1280 n.2, but this begs the question—it assumes that we made that ***1289** determination in the first place. Further, the majority suggests that we answered the retrospectivity issue when we remanded "only the fact-based analysis 'to the District Court for consideration in light of the amended definition.' " Maj. Op. at 1281 n.3 (quoting *Dobbs I,* 475 F.3d at 1178). If that is indeed the majority's interpretation, that is a rather strained reading of "for consideration in light of the amended definition." Moreover, we issued a rather generic, open-ended mandate, which stated: "In light of the amended definition of 'governmental plan' under ERISA, we VACATE the District Court's order and REMAND for further proceedings consistent with this opinion." *Dobbs I,* 475 F.3d at 1179.

Reading *Dobbs I* as a whole, I conclude that we remanded the case to the district court for consideration in light of a change in federal law, not simply to conduct fact-finding. Because we did not remand only the factual analysis, we did not decide by implication that the PPA applies retrospectively. Consequently, the law of the case doctrine does not apply.

B

Even if the law of the case doctrine is applicable, it does not bar us from considering the issue of retroactivity. "We have routinely recognized that the law of the case doctrine is discretionary, not mandatory, and that the rule merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power." *Kennedy v. Lubar,* 273 F.3d 1293, 1299 (10th Cir.2001) (quotations omitted). One well-recognized exception to the law of the case doctrine is "when the decision was clearly erroneous and would work a manifest injustice." *McIlravy v. Kerr–McGee Coal Corp.,* 204 F.3d 1031, 1035 (10th Cir.2000) (quotation omitted). If, as the majority concludes, the prior

panel implicitly decided that the PPA "applies retrospectively to the events at issue," Maj. Op. at 1285, that decision was clearly erroneous. As explained more fully in the discussion that follows, based on the plain text of the statute, the PPA is unambiguously prospective only, and prior to the PPA, ERISA applied to pension plans established and maintained by Indian tribes. [3]

Further, this clear error could work a manifest injustice by depriving Anthem of the "opportunity to present [its] dispositive defense [of preemption]—a defense that fully vindicates [Anthem's] right to be free from a trial and an adverse damage award." *See Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 216 F.3d 764, 789 (9th Cir.2000) (exercising its discretion to depart from the law of the case where the prior panel's clear error would work a manifest injustice by depriving the defendants of their statute of limitations defense). Additionally, by concluding that the PPA has retroactive effect, there could be serious economic consequences for insurers such as Anthem who would be open to substantial liability under state law causes of action. *Cf. Mendenhall,* 213 F.3d at 469 (prior panel's error would work a manifest injustice when the failure to cap attorneys' fees threatened "adverse fiscal consequences" to the U.S. Treasury that "could prove substantial"). Accordingly, I would exercise our discretion to depart from the law of the case.

***1290 II**

A

Prior to the PPA, ERISA defined "governmental plan" in relevant part as "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." ERISA, Pub.L. No. 93–406, § 3(32), 88 Stat. 829, 837 (1974) (current version at 29 U.S.C. § 1002(32)). In August 2006, however, Congress amended the definition of "governmental plan" under ERISA to include certain plans established and maintained by Indian tribes. The amended definition provides:

> 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)[.]

PPA, Pub.L. No. 109–280, § 906(a)(2)(A), 120 Stat. 780, 1051 (codified as amended at 29 U.S.C. § 1002(32)).

Therefore, if the new definition applies to the Dobbses' plan, then the plan will fall within the exception to ERISA preemption, and their state law claims would not be preempted by ERISA. Anthem, however, contends that the Dobbses' plan is not encompassed within the new definition because the new definition does not apply retroactively.

The Supreme Court has recently explained the proper sequence of analysis regarding retroactivity of statutes:

> We first look to whether Congress has expressly prescribed the statute's proper reach, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying our normal rules of construction. If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment. If the answer is yes, we then apply the presumption against retroactivity by construing the statute

> as inapplicable to the event or act in question owing to the absence of a clear indication from Congress that it intended such a result.

Fernandez–Vargas v. Gonzales, 548 U.S. 30, 37–38, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006) (internal quotations, citations, and alterations omitted). Thus, our first inquiry is whether Congress "has expressly prescribed the statute's proper reach." *Id.* at 37, 126 S.Ct. 2422.

The stated effective date of the PPA amendment to the definition of governmental plan is as follows: "Effective Date.—The amendments made by this section shall apply to any year beginning on or after the date of the enactment of this Act." PPA § 906(c), 120 Stat. 780, 1052. The date of enactment of the PPA was August 17, 2006. Pub.L. No. 109–280, 120 Stat. 780, 1172.

The plain language of this effective date provision dictates that the amended definition shall apply to any "year" beginning on or after August 2006. To determine what "year" means, we look first to the text to discern the meaning. *See* ***1291** *Wright v. Fed. Bureau of Prisons,* 451 F.3d 1231, 1234 (10th Cir.2006) (stating that for issues of statutory construction, we should "interpret the words of the statute in light of the purposes Congress sought to serve" and that we should begin with "the language employed by Congress," and "read the words of the statute in their context and with a view to their place in the overall statutory scheme" (internal quotation omitted)); *Colorado High Sch. Activities Ass'n v. Nat'l Football League,* 711 F.2d 943, 945 (10th Cir.1983) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation omitted)).

Anthem contends that "year" unambiguously means "plan year" and that therefore the clear language of the statute is that it applies prospectively to plan years established and maintained after August 2006. The Dobbses contend that Congress used the phrase "plan year" in other portions of the statute, and that if Congress had intended to mean "plan year," it would have said so. The Dobbses argue that "year" is more broad, and means that the PPA's change to the definition of governmental plan applies to any "issues" "in the present year" that arise "under earlier 'plan years.' " Appellants' Br. at 33–34.

The majority appears to find the Dobbses' argument persuasive, *see* Maj. Op. at 1281–82, but I cannot square the Dobbses' argument with the text of the statute. The text of section 906(a) of the PPA amends the definition for governmental plans (and therefore the exception from preemption) to include certain pension plans "established and maintained by an Indian Tribal government." PPA § 906(a)(2)(A). The effective date states that this amended definition, and therefore exception from preemption, applies "to any year beginning on or after" August 2006. *Id.* § 906(c). "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 257, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (footnote omitted).

I conclude this language unambiguously states that the new definition applies only to governmental plans beginning on or after August 17, 2006. *See Lockheed Corp. v. Spink,* 517 U.S. 882, 896–97, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996) ("Where, as here, the temporal effect of a statute is manifest on its face, there is no need to resort to judicial default rules, and inquiry is at an end." (internal quotation omitted)). No party has pointed to any legislative history that would provide otherwise. *See Colorado High Sch. Activities Ass'n,* 711 F.2d at 945 ("If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." (internal quotations omitted)).[4] It is not the province of this court to revise a statute when the express language of the statute is clear. *See Reames v. Oklahoma ex rel. Okla. Health Care Auth.,* 411 F.3d 1164, 1173 (10th Cir.2005).

***1292** Additionally, I disagree with the majority's contention that Congress has given contrary indications regarding the proper reach of subsection 906(a) of the PPA. The majority concludes that subsection 906(b) uses the term "clarification" and thus, Congress "indicate[d] an intent that the amendment apply retrospectively." Maj. Op. at 1282. To be sure, "[w]hen Congress enacts a statute using a phrase that has a settled judicial interpretation, it is presumed to be aware of the prior interpretation." *Ford v. Ford Motor Credit Corp. (In re Ford),* 574 F.3d 1279, 1283 (10th Cir.2009). But Congress did not use the term "clarification" in subsection 906(a), which amended ERISA's definition of "governmental plan." Congress used the term "clarification" only in subsection 906(b), which does not apply to ERISA.[5]

Although subsection 906(b) may make "clarifying rather than substantive" changes, Maj. Op. at 1282 n.6, it does not follow that subsection 906(a) is a clarification. Subsection 906(a)—the only relevant subsection that amends ERISA—does not use the term "clarification." Thus, I see no contrary indications from Congress or tension within section 906: subsection 906(a) amends the definition of governmental plans to include certain plans of Indian tribes, and subsection 906(b) is a "clarification" of the Internal Revenue Code.

Congress "has expressly prescribed the statute's proper reach," as prospective from the effective date, and thus, our retroactivity analysis is at an end. *Landgraf,* 511 U.S. at 280, 114 S.Ct. 1483. As a result, the amended statutory definition of governmental plan in the PPA does not apply to the case at bar.

Moreover, I disagree with the majority's analysis at the next step of the *Landgraf* analysis, whether the PPA would have retroactive effect. The majority concludes that because of "[o]ur precedent exempting Indian tribes from the preemptive reach of federal regulatory schemes ... the prior panel's determination that ERISA was always intended to exclude tribal plans was not clearly erroneous." Maj. Op. at 1283. First, the prior panel's decision in *Dobbs I* does not reach this conclusion explicitly. Second, as discussed more fully below, I think our precedent is clear that prior to the PPA, ERISA applied to plans established or maintained by Indian tribes.

Further, the PPA did not simply amend the definition of "governmental plan" to include all plans established and maintained by Indian tribes. Rather, the PPA included a very specific kind of tribal plan. [6] It must be a plan where "all of the participants of which are employees of such entity substantially all of whose services as ***1293** 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)." PPA § 906(a)(2)(A). There is no suggestion that ERISA was always intended to exclude this specific formulation of tribal plan. Thus, I cannot conclude that the PPA merely clarified the definition of "governmental plan." Expanding an exemption to ERISA preemption is a profound change in existing law, with effects on the providers of employee benefit plans such as Anthem. Accordingly, I would adhere to the presumption that "[i]f the statute would operate retroactively, ... it does not govern absent clear congressional intent favoring such a result." *Landgraf,* 511 U.S. at 280 114 S.Ct. 1483.

However, this conclusion does not end the inquiry because the Dobbses have also argued that even if the PPA does not apply retroactively, the earlier version of ERISA would not preempt their claim. They contend that our circuit does not construe federal regulatory statutes to cover tribal governments unless Congress expresses its intent to cover tribes. The majority also relies on our precedent exempting Indian tribes from certain federal regulatory schemes, but the majority does so under its inquiry into whether the PPA has retroactive effect or if it is merely a clarification. Regardless of the context, I would conclude that our precedent clearly establishes that prior to the enactment of the PPA, ERISA applied to plans established or maintained by Indian tribes.

B

The majority states that "[i]n this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." Maj. Op. at 1283. But our case law recognizes a distinction between cases where a tribe "has exercised its authority as a sovereign" and where a tribe acts "in a proprietary capacity *such as that of employer* or landowner." *NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1199 (10th Cir.2002) (en banc) (emphasis added).

When an Indian tribe is acting in its proprietary capacity, we apply the rule set forth in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). *See Pueblo of San Juan,* 276 F.3d at 1199. As the Supreme Court stated in *Tuscarora:* "a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116, 80 S.Ct. 543. We have recognized three exceptions to the *Tuscarora* rule:

> (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.

Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966, 984 (10th Cir.2005) (Lucero, J., concurring) (quoting *Nero v. Cherokee Nation of Okla.,* 892 F.2d 1457, 1462–63 (10th Cir.1989)).

Thus, to determine whether a generally applicable federal statute applies to an Indian tribe, we must first determine whether the tribe is exercising its sovereign authority or whether it is acting in its proprietary capacity. *See Pueblo of San Juan,* 276 F.3d at 1199. If the tribe is exercising its authority as a sovereign, the *Tuscarora* rule does not apply. *Id.* However, if the tribe is acting in its proprietary capacity, the *Tuscarora* rule does apply, *see id.,* and we must then determine whether there is an exception to that rule, *see Nero,* 892 F.2d at 1462–63.

***1294** Applying this framework to the case at bar, it is clear that the *Tuscarora* rule applies. The present case involves an Indian tribe acting in its proprietary capacity as employer or purchaser of insurance, not in its sovereign authority. *See Pueblo of San Juan,* 276 F.3d at 1199. Although we have previously held that certain federal regulatory schemes do not apply to Indian tribes as employers, those cases involved Indian treaties. *See EEOC v. Cherokee Nation,* 871 F.2d 937, 938 (10th Cir.1989) ("[W]e hold that ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government."); *Donovan v. Navajo Forest Prods. Indus.,* 692 F.2d 709, 710 (10th Cir.1982) (agreeing that to "apply OSHA to [the tribal entity] would violate the Navajo Treaty"). The majority attempts to wave away this critical distinction by citing *Pueblo of San Juan* for the proposition that we have since "recognized that a treaty [is] not a necessary prerequisite to exemption." Maj. Op. at 1284. But *Pueblo of San Juan* did not rely on the existence of a treaty because that case involved a Tribe's inherent sovereign authority: the authority to enact its own laws in its territory. *See* 276 F.3d at 1195 ("In the absence of clear evidence of congressional intent ... 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."). Where a tribe's sovereign authority is not at issue, such as when it is acting as an employer, we do not apply *Pueblo of San Juan,* but we apply the *Tuscarora* rule.

The majority does not identify precisely what sovereign authority it believes is at stake. The majority refers to the "sovereign authority to regulate economic activity within their own territory." Maj. Op. at 1284 (quoting *Pueblo of San Juan,* 276 F.3d at 1192–93). But the case at bar involves no *regulation* of economic activity. *Cf. Pueblo of San Juan,* 276 F.3d at 1195 (discussing tribes' "retained sovereign authority to pass right-to-work laws and be governed by them"). The majority also suggests that "[a]pplying ERISA to such plans would prevent tribal governments from *purchasing* insurance plans for governmental employees in the same manner as other government entities, thus treating tribal governments as a kind of inferior sovereign." Maj. Op. at 1284 (emphasis added). Thus, the majority shifts from a tribe's sovereign authority to regulate economic activity to its ability to act as a purchaser of insurance, without clarifying how the purchasing of insurance plans is a sovereign authority. Moreover, our inquiry is whether sovereign authority is at issue, not whether the federal government treats different sovereigns differently, or even somehow as an "inferior sovereign." *In Pueblo of San Juan,* we recognized that the *Tuscarora* rule "does not apply ... where the matter at stake is a fundamental attribute of sovereignty and a necessary instrument of self government and territorial management...." 276 F.3d at 1200 (quotations omitted). Here, there is no sovereign authority at stake, and therefore, the *Tuscarora* rule applies.

Applying the *Tuscarora* rule to this case, I would conclude that prior to the PPA, ERISA applied to Indian tribes. The Seventh Circuit was faced with the same question in *Smart v. State Farm Insurance Co.,* 868 F.2d 929 (7th Cir.1989), prior to the enactment of the PPA. In that case, a member of an Indian tribe (the insured) sued the insurer alleging that the insurer failed to pay claims for medical expenses. 868 F.2d at 930. The insured claimed that ERISA did not apply to "an employee benefits plan established and operated by an Indian Tribe for Tribe employees...." *Id.* The Seventh Circuit recognized that "ERISA is clearly a statute of general application, one that envisions inclusion ***1295** within its ambit as the norm." *Id.* at 933. Then, the *Smart* court applied the *Tuscarora* rule and its exceptions—the same exceptions that this circuit recognizes. *See id.* at 934–36; *Nero,* 892 F.2d at 1462–63 (recognizing the three exceptions to the *Tuscarora* rule). First, the court was unable "to uncover a single specific treaty or statutory right that would be affected by application of ERISA." *Smart,* 868 F.2d at 935. Similarly, neither the Dobbses nor the majority have identified a treaty or statutory right that would be affected by application of ERISA.

The Seventh Circuit in *Smart* then turned to whether ERISA would interfere with the Tribe's "self-governance in intramural affairs." *Id.* The Court stated:

> The application of ERISA to this case would not impermissibly upset the Tribe's self-governance in intramural matters. ERISA does not broadly and completely define the employment relationship—even less so than the federal withholding tax. It is only applied to an employment relationship if the employer decides to offer an employee benefit plan. Even then, ERISA merely requires reporting and accounting standards for the protection of the employees. Moreover, the activity underlying this challenge to ERISA is the Tribe's subscription of services and pooling of risks with [the insurer], an outside, non-Indian agent. ERISA is instructive on how a covered health insurance plan operates vis-á-vis the beneficiaries and the trustee, not between the [health center] and [the plaintiff]. In sum, plaintiff has failed to demonstrate how ERISA will intrude upon Tribal self-governance; ERISA merely imposes beneficiary protection while in no way limiting the way in which the Tribe governs intramural matters.

Id. at 935–36 (footnotes omitted). Again, neither the Dobbses nor the majority have identified or discussed how ERISA would upset tribal self-governance in intramural matters.

Finally, the Seventh Circuit concluded that the plaintiff was "unable to point to any evidence of congressional intent that ERISA is not applicable to Tribe employers and Indians." *Id.* at 936. In the case at bar, the Dobbses argue that there is such evidence because Congress defined a governmental plan to include any "instrumentality" of a "State or political subdivision thereof...." 29 U.S.C. § 1002(32). The Seventh Circuit rejected a similar argument that the then-effective version of ERISA indicated "Congress' unwillingness to have ERISA apply to sovereigns generally, and thus Indian tribes should also be similarly exempt...." 868 F.2d at 936. The court noted that there are "significant differences between states and their political subdivisions on one hand and Indian Tribes on the other." *Id.* The majority appears to agree that "an Indian tribal government does not fit into any of the articulated categories" under ERISA prior to the PPA. Maj. Op. at 1284.

I find the Seventh Circuit's analysis of ERISA under the *Tuscarora* rule and its exceptions to be very persuasive, particularly where the Dobbses have made nearly identical arguments to those made by the plaintiffs in *Smart. See also Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.,* 939 F.2d 683, 686 (9th Cir.1991) (holding that ERISA applies to a tribally owned and operated mill). The majority appears to disagree, relying on our "presumption against extending federal regulatory schemes to Indian tribal governments...." Maj. Op. at 1284 n.9. But our presumption, articulated in *Pueblo of San Juan,* is a presumption against extending certain federal laws and regulatory schemes to Indian tribal governments acting in their *sovereign authority.* Because ***1296** this is not a case involving a tribe's sovereign authority, I would agree with the Seventh Circuit's application of the *Tuscarora* rule, and I would conclude that ERISA applied to plans established or maintained by Indian tribes prior to the PPA. Following this rationale, I would also conclude that the district court correctly ruled on remand that the pre-PPA version of ERISA did not exempt the Dobbses' claim from ERISA coverage.

III

Although I agree with Part III of the majority opinion, I write separately to emphasize why the Dobbses' fraudulent inducement claim is preempted by ERISA.

The Dobbses' amended complaint alleged in part as follows:

> 81. Through literature ... Anthem represented that its Blue Preferred policy allowed insureds to see any Blue Cross Blue Shield Provider and receive coverage at in-network levels....
>
> 82. The statements were false.
>
> 83. Anthem knew or should have known its statements were false.
>
> 84. Anthem refused to provide the highest level of benefit under the Policy-even [sic] when the Dobbs met Anthem's requirements and conditions.

85. Anthem's refusal to provide the promised service and benefits has caused the Dobbs significant economic and noneconomic damages.

App. at 11. I agree with the majority that the Dobbses' claim, although styled as "fraudulent inducement," appears to be a claim for benefits: the Dobbses alleged that "Anthem refused to provide the highest level of *benefit under the Policy,*" and Anthem refused "to provide the promised service *and benefits* ...." *Id.* (emphasis added).

"[T]he allocation of benefits under an employee benefits plan goes to the core of ERISA, and so such claims are usually preempted." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.,* 170 F.3d 985, 991 (10th Cir.1999); *see also Variety Children's Hosp., Inc. v. Century Med. Health Plan, Inc.,* 57 F.3d 1040, 1042 (11th Cir.1995) (finding preemption "where state law claims of fraud and misrepresentation are based upon the failure of a covered plan to pay benefits"). Moreover, the fraudulent inducements claims are preempted because the "factual basis for ... plaintiff[s'] state law claim[ ] directly concerns the alleged improper administration of the benefit plan." *Settles v. Golden Rule Ins. Co.,* 927 F.2d 505, 509 (10th Cir.1991).

Further, the Dobbses' claim could affect the structure, administration, or benefits provided by the plan. *Cf. Airparts Co. v. Custom Benefit Servs. of Austin, Inc.,* 28 F.3d 1062, 1066 (10th Cir.1994) ("Plaintiffs make no claim based on any rights under the plan; there is no allegation that any of the plan's terms have been breached."). "What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefits plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." *Id.* at 1065 (quotation omitted). The Dobbses' action, which is based on Anthem's alleged refusal to provide benefits under the policy, could "interfere with the calculation of benefits owed to an employee," and thus, is preempted. *See Monarch Cement Co. v. Lone Star Indus., Inc.,* 982 F.2d 1448, 1452 (10th Cir.1992) (quotation omitted).

I would affirm the district court's ruling that the PPA does not apply retroactively to the plan in question and that the pre-amendment version of ERISA preempts ***1297** the Dobbses' state law claims. Given that conclusion, I would not reach whether the district court properly conducted its fact finding.

All Citations

600 F.3d 1275, 48 Employee Benefits Cas. 2473

Footnotes

1 The Dobbs contend their fraud-as-to-benefits claim is not preempted under *Woodworker's,* 170 F.3d at 989–91. We address that contention in Part III, *infra.*

2 The dissent contends that our previous decision directed the district court not only to conduct the fact-specific analysis, but also to "consider in the first instance whether state or federal law applied in light of the PPA." (Dissenting Op. 1288.) To the extent the dissent is asserting that we remanded the retrospectivity question, it is incorrect. We instructed the district court to consider whether ERISA preempted the Dobbs' state law claims applying the *amended definition* of governmental plan. *See Dobbs I,* 475 F.3d at 1178 ("Based on the Dobbses' complaint, we do not have enough information to determine whether the benefit plan meets the requirements of § 1002(32) and therefore *remand the case to the District Court for consideration in light of the amended definition.*" (emphasis added)); *id.* at 1179 ("If the Dobbses' benefit plan meets the *new definition* of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." (emphasis added)). We did not issue a broad mandate to reconsider our determination that the PPA applies retrospectively.

Contrary to the dissent's assertions, our present opinion does not rely exclusively on a single sentence from the prior panel opinion to reach this conclusion. Although our analysis does focus on the prior panel's explicit directive to the district court, our interpretation considers and is consistent with all the language in the prior

decision. In contrast, the dissent's interpretation is plainly inconsistent with the prior panel's express directive and its remand to conduct the fact-specific analysis.

3 The dissent asserts that the statement, "If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem," 475 F.3d at 1179, is "best understood as dicta" and thus not subject to the law of the case doctrine. (Dissenting Op. 1288.) Under the dissent's reading, *Dobbs I* "explicitly did not reach the preemption issue." (*Id.*)

Like the district court, the dissent conflates § 906's retrospectivity with the fact-bound question of whether the Dobbs' plan qualifies as a governmental plan under the new definition of that term. We answered the first question in the affirmative, remanding only the fact-based analysis "to the District Court for consideration in light of the amended definition." *Dobbs I,* 475 F.3d at 1178.

4 The dissent disagrees with our determination that the district court abrogated the *Dobbs I* decision, concluding that the "the district court did what we directed it to do—it considered whether federal law applied in light of the enactment of the PPA." (Dissenting Op. 1288.) But, as discussed in footnotes 2 and 3, *supra, Dobbs I* did not remand that broad question to the district court. Rather, it instructed the district court that ERISA will not preempt the Dobbs' claims "[i]f the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32)." 475 F.3d at 1179. By ignoring this mandate, the district court abrogated the prior panel decision.

5 We question whether we may permissibly endorse a district court order that rejects a prior panel decision as clearly erroneous. *See In re Smith,* 10 F.3d at 724 ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."). However, because the *Dobbs I* holding was not clearly erroneous, we need not attempt to reconcile *McIlravy* and *In re Smith.* The dissent does not attempt to distinguish *In re Smith,* but appears willing to ignore a prior panel decision as clearly erroneous. (*See* Dissenting Op. 1288–89 & n.3.)

6 The dissent contends that § 906(b) of the PPA should not impact our analysis of § 906(a). (Dissenting Op. at 1290–91.) We disagree. Section 906(b) expressly states that the textual changes it makes are clarifying rather than substantive. Our reasoning does not rely on any particular clarification made by that subsection, but instead highlights the tension between § 906(b) and § 906(c) on the question of whether § 906 should apply retrospectively. This tension prevents us from concluding that Congress clearly and expressly prescribed the reach of § 906 as a whole.

7 In the interests of clarity, we will differentiate between statutes that operate retrospectively and statutes that operate retroactively. For our purposes, a retrospective statute applies to pre-enactment events. A retroactive statute is one that attaches legal rights, duties, responsibilities, or consequences to pre-enactment events. The cases to which we cite do not make this distinction and generally use the terms interchangeably.

8 The district court cited to *Phillips Petroleum Co. v. U.S. Environmental Protection Agency,* 803 F.2d 545, 556 (10th Cir.1986), for the proposition that "[f]ederal statutes of general application apply to Native Americans and their property interests." We have distinguished, however, between cases in which an Indian tribe exercises its property rights and cases in which it "exercise[s] its authority as a sovereign." *Pueblo of San Juan,* 276 F.3d at 1199. In the first set of cases, *Phillips Petroleum* applies; in the second, it does not. *Pueblo of San Juan,* 276 F.3d at 1199.

9 Anthem notes that other courts interpreted the pre-PPA definition of "governmental plan" to not cover Indian tribal governments. *See Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.,* 939 F.2d 683, 685–86 (9th Cir.1991); *Smart v. State Farm Ins., Co.,* 868 F.2d 929, 936 (7th Cir.1989). Given the Tenth Circuit presumption against extending federal regulatory schemes to Indian tribal governments absent express authorization or strong evidence of congressional intent, however, it is at least plausible that a pre-

amendment panel of this court would have held that the exemption for "governmental plan[s]" covered Indian tribal governments.

Anthem also argues that, in a 2006 Notice, the Internal Revenue Service ("IRS") concluded that § 906 of the PPA substantively changed, rather than clarified, the definition of governmental plan. *See* I.R.S. Notice 2006–89, 2006–2 C.B. 772. Although the Notice states that § 906 "changed" the definition of governmental plan, the Notice gives no indication that the IRS actually considered whether the amendment was a clarification or whether it should apply retrospectively. Even if it did, we need not defer to the IRS' interpretation of a statute it does not administer. *Francis v. Reno,* 269 F.3d 162, 168 (10th Cir.2001).

1 Part I of the majority opinion sets out the factual background and procedural history of the case. Parts II and III contain the legal analysis pertaining to the issues raised. Parts II and III are the focus of this separate opinion.

2 Moreover, the parties did not argue the retroactivity issue in *Dobbs I.* Indeed, neither party even alerted us to the enactment of the PPA while *Dobbs I* was pending, and we found it necessary to remind the parties of the importance of filing a notice of supplemental authority under Federal Rule of Appellate Procedure 28(j). *See Dobbs I,* 475 F.3d at 1179. Under these circumstances, it is particularly troubling that the majority concludes that we are bound by the law of the case. *Cf. Mendenhall v. Nat'l Transp. Safety Bd.,* 213 F.3d 464, 469 (9th Cir.2000) (departing from the law of the case when the prior panel clearly erred "for want of proper briefing").

3 The majority contends that I reach this conclusion "after engaging in a de novo analysis." Maj. Op. at 1285. Because the law of the case doctrine does not bar our consideration, I would review the retroactivity issue de novo. Nonetheless, I would reach the same conclusion under clear error analysis, as I have a "clear conviction of error with respect to a point of law on which [the] previous decision was predicated." *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2d Cir.1981) (quotation omitted).

4 If anything, the legislative history supports the conclusion that the PPA as enacted should be applied only prospectively. An earlier version of the bill provided for the effective date as follows: "The amendments made by this subtitle shall apply to any year beginning before, on, or after the date of the enactment of this Act." S. 1783, 109th Cong. § 1314 (2005). However, the ultimate version that was passed stated: "any year beginning on or after the date of the enactment of this Act." PPA § 906(c). At the very least, the legislative history is hardly an expression of clear legislative intent that the PPA should be applied retroactively.

5 Subsection 906(b) of the PPA, as originally enacted, amended ERISA at 29 U.S.C. § 1321 to include certain Indian tribal pension plans. However, Congress enacted technical corrections to the PPA in 2008. Following these technical corrections, subsection 906(b) amends only the Internal Revenue Code, not ERISA. *See* Pub.L. No. 110–458, § 109(d)(2), 122 Stat. 5092, at 5112.

6 The legislative history suggests that Congress originally considered a version of the PPA that amended ERISA to include in 29 U.S.C. § 1321(b) the following language: "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), an agency or instrumentality of an Indian tribal government or subdivision thereof, or an entity established under Federal, State, or tribal law that is wholly owned or controlled by any of the foregoing." S. 1783, 109th Cong. § 1313(b) (2005) ("Pension Security and Transparency Act of 2005"). But the enacted version of the PPA included a much more specific formulation. *See* PPA § 906(a).

631 F.3d 1150
United States Court of Appeals, Tenth Circuit.

Robert NANOMANTUBE, Plaintiff–Appellant,
v.
The KICKAPOO TRIBE IN KANSAS;
Kickapoo Tribe in Kansas Tribal Council;
Golden Eagle Casino, Defendants–Appellees.

No. 09–3347
|
Jan. 31, 2011.

Synopsis

Background: Former tribal employee brought Title VII employment discrimination action against Indian tribe, as well as against tribe's governing body and unincorporated tribal casino at which employee worked. The United States District Court for the District of Kansas dismissed action based on tribal sovereign immunity, and employee appealed.

Holdings: The Court of Appeals, McKay, Circuit Judge, held that:

Congress did not abrogate tribal immunity with regard to Title VII, and

tribe's agreement to comply with Title VII, contained in single sentence in casino employee handbook, did not unequivocally waive tribal sovereign immunity.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***1151** A.J. Kotich (Glenn H. Griffeth with him on the briefs), Topeka, KS, for Plaintiff–Appellant.

Charley L. Laman of Laman Law Office, Glendale, AZ, for Defendants–Appellees.

Before TYMKOVICH, McKAY, and GORSUCH, Circuit Judges.

Opinion

McKAY, Circuit Judge.

In this case we are called upon to decide whether an Indian tribe's agreement to comply with the provisions of Title VII effects a waiver of the tribe's sovereign immunity from suit.

Robert Nanomantube filed this employment discrimination action against his former employer, the Kickapoo Tribe in Kansas, as well as the Tribe's governing body and the unincorporated tribal casino at which Mr. Nanomantube had served as the acting general manager. The district court dismissed the case for lack of jurisdiction based on tribal sovereign immunity, and this appeal followed. We review de novo the district court's decision to dismiss the case and its ruling on sovereign immunity. *See E.F.W. v. St. Stephen's Indian High Sch.,* 264 F.3d 1297, 1303 (10th Cir.2001).

"Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of ***1152** sovereign authority not derived from the United States, which they predate." *NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1192 (10th Cir.2002) (en banc). As a dependent sovereign entity, an Indian tribe is not subject to suit in a federal or state court unless the tribe's sovereign immunity has been either abrogated by Congress or waived by the tribe. *See Miner Elec., Inc. v. Muscogee (Creek) Nation,* 505 F.3d 1007, 1009–10 (10th Cir.2007). In either case, the waiver or abrogation of sovereign immunity "must be unequivocally expressed" rather than implied. *Native Am. Distrib. v. Seneca–Cayuga Tobacco Co.,* 546 F.3d 1288, 1293 (10th Cir.2008).

Mr. Nanomantube first suggests we should find the Tribe subject to suit because his Title VII claims do not implicate the tribal self-government concerns that inform the question of a tribe's regulatory or adjudicative authority over nonmembers of the tribe. *See Montana v. United States,* 450 U.S. 544, 565–66, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (discussing the extent of tribes' authority over the activities or conduct of nonmembers of the tribe). Mr. Nanomantube is conflating two different aspects of tribal sovereignty, and we have already rejected the notion that a tribe cannot "invoke its sovereign immunity from suit in an action that challenges the limits of the tribe's authority over non-Indians." *Miner,* 505 F.3d at 1012. Whether or not the Tribe could exercise regulatory or adjudicative authority over Mr. Nanomantube, the relevant inquiry in this case remains the "Supreme Court's

straightforward test to uphold Indian tribes' immunity from suit"—whether the tribe's immunity has either been abrogated by Congress or waived by the tribe. *Id.* at 1010.

It is clear that Congress did not abrogate tribal immunity with regard to Title VII. Indeed, rather than expressing any intention to abrogate tribal immunity, Congress specifically exempted Indian tribes from the definition of "employers" subject to Title VII's requirements. *See* 42 U.S.C. § 2000e(b). [1] Thus, the Tribe's sovereign immunity from suit remains intact unless the Tribe has clearly and unequivocally waived its sovereign immunity with respect to Title VII claims.

Mr. Nanomantube argues that the Tribe waived its sovereign immunity through a single sentence contained in the casino's employee handbook. Specifically, the handbook states: "The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991, and the Tribal Employment Rights Ordinance of the Kickapoo Tribe in Kansas." (Appellant's App. at 23.) Mr. Nanomantube notes that Title VII includes jurisdictional and enforcement provisions, and he argues that the Tribe, by agreeing to comply with the provisions of Title VII, thus unequivocally consented to be subject to enforcement proceedings brought in federal or state courts. For support, he relies on the Supreme Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), in which the Court found a clear waiver of tribal sovereign immunity based on a contract's choice-of-law and arbitration provisions. He also relies on our statement in *Native American Distributing* that "[i]t is also undisputed that the Seneca–Cayuga Tribe has unequivocally ***1153** waived its own immunity via the 'sue or be sued' clause in the Corporate Charter." 546 F.3d at 1293.

We are not persuaded that a tribe's agreement to comply with Title VII, without more, constitutes an unequivocal waiver of tribal sovereign immunity. In contrast to the *C & L* contract or the *Native American Distributing* charter, the Tribe's handbook in this case contained no reference to tribunals at which disputes could be resolved or legal remedies enforced. *Cf. C & L,* 532 U.S. at 419, 121 S.Ct. 1589 (noting that the contract provided for the application of Oklahoma law and for the enforcement of arbitral awards "in accordance with applicable law in any court having jurisdiction thereof"); *Native American Distributing,* 546 F.3d at 1290 (quoting the corporate charter's statement that the tribe's corporate entity could "sue and be sued ... in any court"); *see also id.* at 1293 n. 2 (declining to address whether this type of clause would function as a waiver of sovereign immunity in general, since this question was not in dispute in the present appeal). Rather, the Tribe simply agreed to comply with the provisions of Title VII, with no reference to any forum where this agreement could be enforced. Although some ambiguity may be created by the fact that Title VII includes jurisdictional and enforcement provisions, this ambiguity falls well short of creating an unequivocal expression of waiver.

We thus hold that the Tribe's agreement to comply with Title VII, like similar agreements to comply with other federal statutes, may "convey a promise not to discriminate," but it "in no way constitute[s] an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court." *Sanderlin v. Seminole Tribe of Fla.,* 243 F.3d 1282, 1289 (11th Cir.2001); *see also Nero v. Cherokee Nation of Oklahoma,* 892 F.2d 1457, 1460–61 (10th Cir.1989) (holding that the promise to ensure rights, although it may "place [ ] substantive constraints on the Tribe," does not constitute an unequivocal expression of waiver); *Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs,* 255 F.3d 801, 814 (9th Cir.2001) ("Moreover, Demontiney provides no support for the proposition that the Tribe's incorporation of [the Indian Civil Rights Act] into its constitution and bylaws shows an intent to waive sovereign immunity in federal court."); *Hagen v. Sisseton–Wahpeton Cmty. College,* 205 F.3d 1040, 1044 n. 2 (8th Cir.2000) ("Nor did the College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964.").

Because the Tribe's sovereign immunity from Title VII suits has been neither abrogated by Congress nor waived by the Tribe, the district court correctly dismissed Mr. Nanomantube's Title VII complaint for lack of jurisdiction. The court's judgment is accordingly **AFFIRMED.**

All Citations

631 F.3d 1150, 111 Fair Empl.Prac.Cas. (BNA) 610, 94 Empl. Prac. Dec. P 44,089

Footnotes

1 Because we affirm the dismissal of the case on sovereign immunity grounds, we need not and do not address the question of how this definitional exclusion might affect the merits of Mr. Nanomantube's Title VII claim.