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## Why are you receiving this Newsletter?

The attorneys of Stutz Artiano Shinoff & Holtz are committed to serving the needs of their clients as well as providing valuable educational services to the community.

To that end, this newsletter is devoted solely to pertinent developments in tribal law. Each newsletter will be prepared by attorneys experienced in tribal law and with a view toward explaining and highlighting recent Indian law developments specifically relevant to Southern California's Indian Tribes.

As with all legal matters, you should consult an attorney of your choosing before relying on any information contained herein.

## D.C. Circuit: Tribes Subject to National Labor Relations Act

In *San Manuel Indian Bingo and Casino v. NLRB* ("NLRB"), the D.C. Circuit delivered a blow to tribal sovereignty when it upheld a National Labor Relations Board ("Board") decision subjecting tribal enterprises to federal labor laws under the National Labor Relations Act ("Act"). *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

Historically, the Board had not considered tribal commercial enterprises as "employers" under the Act. Instead, it had traditionally found that tribal commercial enterprises fall under the

"political subdivision exemption." In *NLRB*, however, the Board made a radical shift and determined that certain tribal enterprises are now "employers." To get to this point, the Board declared, among other things, the Act is a "statute of general application," ignoring rooted principles of Indian law that find otherwise.

There is little doubt *NLRB* was poorly decided. Not only did the Board disregard nearly 30 years of its own precedent, it also turned established federal-Indian jurisprudence on its head. It is well accepted that where a congressional act is silent, it



is presumed the act does not apply to Indian tribes. This rule is deeply rooted in the law. The Board reasoned, however, that since nothing in the Act expressly exempted Indian tribes from its jurisdiction, tribes can be included.

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## Ninth Circuit Denies Membership Challenge; Leaves Open Waiver of Sovereign Immunity

Except in limited cases, an Indian tribe does not waive its sovereign immunity by bringing its own lawsuit. See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505. In *Alvarado v. Table Mountain Rancheria*, however, the Ninth Circuit Court of Appeals specifically addressed and failed to apply

this principle, relying instead on a more complex argument in deciding the case. *Alvarado*, No. 06-15351. Its refusal to decide the case on this sovereign immunity argument may show the beginnings of a trend away from this legal principle.

The case was published on November 29, 2007 and involved a tribal membership dispute. The Table

Mountain Rancheria Indian Tribe ("TMR") was terminated in the 1950's, and subsequently sued the federal government to regain its tribal status. The parties reached a settlement in 1983 which allowed the TMR to be recognized again as a tribe, and it enacted a constitution and tribal membership guidelines.

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## Tribes Subject to National Labor Relations Act (continued)

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Notwithstanding this flawed reasoning, the D.C. Circuit upheld the Board's decision.

***Taking a proactive approach to the unfortunate NLRB decision may help tribes avoid becoming the target of unfair labor claims, thus preventing costly and unwanted legal disputes.***

In addition to undermining tribal sovereignty, *NLRB* opens the door to a number of other potential issues. To name a few, the decision may ultimately interfere with pre-existing tribal-state compact obligations and may also conflict with the express language found in the Indian Gaming Regulatory Act. It is also unclear as to what effect *NLRB* will

have on Indian preference, OSHA, and other important laws impacting tribal enterprises. How far the Board and federal courts are willing to extend this troublesome decision is another area of concern for tribes. Although some believe *NLRB* may only have limited applicability, others contend its reach is broad and will, in time, disrupt the functioning of all tribal enterprises. There are unfair labor practice charges pending against the Foxwoods Resort Casino (Mashantucket Pequot Tribe) and the Soaring Eagle Casino & Resort (Saginaw Chippewa Tribe). We are closely monitoring those claims.

In any event, taking a proactive approach to the unfortunate decision may help tribes avoid becoming the target of unfair labor claims, thus preventing costly and unwanted legal disputes. To start, tribes may want to assess their rights and responsibilities under the National Labor Relations Act. Moreover,

tribes with on-reservation enterprises can consider drafting ordinances consistent with the Act. Similarly, tribes may wish to increase labor law training programs for managers of tribal businesses. This would perhaps alleviate the need for the Board to intervene in the event of a labor dispute.

Presently, there are national efforts aimed at devising strategies for tribes in the wake of *NLRB*. Tribal advocates have, for example, begun exploring the possibility of a congressional fix, and others are thoroughly analyzing how the Supreme Court would likely rule on a case involving the applicability of the Act to tribal enterprises. Moreover, a number of workgroups have been formed to provide assistance to tribal advocates and identify strategic allies who may provide amicus support in the event similar cases arise. We will continue to assess *NLRB* and provide updates on new developments.

## California Court Throws Out Suit Against Barona on Sovereign Immunity Grounds

Recently in *Lawrence v. Barona Valley Ranch Resort and Casino* ("Lawrence"), the California Court of Appeals held that Barona's limited waiver of sovereign immunity from liability did not constitute consent by the tribe to be sued in state court. *Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364.

*Lawrence* involved a Barona Valley Ranch Resort and Casino ("Barona") patron who sustained a personal injury while on casino property. Barona's Tort Claims Ordinance contained a limited waiver of sovereign immunity that permitted certain claims against the Tribe to be heard exclusively in the Barona Tribal Court. The patron filed a claim for damages and it was denied by the Tribe's insurance carrier. The patron then appealed the denial of their claim to the Barona Tribal Council (which was acting as the tribal court). The Tribal Council found no negligence on the Tribe's part and denied the appeal.

Following Barona's denial of the claim, the patron brought suit in a state court. The Superior Court granted the Tribe's motion to quash service of summons and complaint based on the finding the Tribe had not waived its sovereign immunity. The Court of Appeals affirmed.

Finding *Campo Band of Mission Indians v. Superior Court* controlling, the Court of Appeals determined, "Barona's waiver did not constitute a consent to suit in state court on negligence claims against it, but instead specified that the Barona Tribal Court was the exclusive forum for the resolution of such claims." The Court correctly noted that Barona's compact with the State of California contained a provision requiring the tribe to adopt a tort liability ordinance setting forth the terms and conditions under which it would waive its sovereign immunity for personal injury claims by casino patrons. This ordinance specified that the Barona Tribal Court was the exclusive forum for such claims.

As the number of individuals utilizing tribal enterprises grows, it is crucial the courts properly apply all principles of tribal sovereign immunity. Fortunately, in *Lawrence*, the state court

***"Barona's waiver did not constitute a consent to suit in state court on negligence claims against it, but instead specified that the Barona tribal court was the exclusive forum for the resolution of such claims."***

appeared to demonstrate a solid understanding of tribal sovereign immunity. *Lawrence* also highlights the vital importance of creating clear and unambiguous tribal Tort Claims Ordinances. By doing so, tribes can make certain they protect themselves from unwanted lawsuits that can impede their functioning as sovereign nations.

## Ninth Circuit Denies Tribal Membership Challenge (continued)

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The plaintiffs in *Alvarado* were individuals who were denied membership by the TMR. They sued the Tribe and various governmental entities claiming that they were denied membership despite meeting TMR's membership criteria. The plaintiffs argued that, although sovereign immunity would normally bar this suit, TMR had waived its immunity when it submitted to the jurisdiction of the federal court by suing in 1980 to regain its Indian status. The Tribe argued that sovereign immunity should bar this suit because, under the established law noted above, it did not waive its sovereign immunity by suing to protect its rights.

The Ninth Circuit, notably, failed to address the validity of the plaintiffs' argument that the tribe had waived its sovereign immunity. It reasoned: "We do not reach [the plaintiffs'] contention [that the Tribe waived sovereign immunity by suing], because even if it had merit, it would not mandate reversal."

Instead, it discussed the validity of the plaintiffs' other arguments on their merits. The court first held that the

plaintiffs could not sue to enforce the settlement because they were not claiming that anyone *breached* the Tribe's settlement with the government, just that they were wrongfully excluded from it.

***While at first glance, the case appears to be a victory for tribal sovereignty and a tribe's right to determine its own membership, there are troubling implications in the case.***

Second, it held that the settlement only guaranteed tribal *recognition* from the federal government, not tribal *membership* for anyone. In so holding, it affirmed the right of tribes, and only the tribes, to make their own determinations of membership.

While, at first glance, the case appears to be a victory for tribal sovereignty and a tribe's right to determine its own membership, there are troubling implications in the case. It seems odd that the court, when faced with a simple way of disposing of a case (on the grounds that the tribe did not waive sovereign immunity by bringing its own

lawsuit), chose instead to deal with the complex and substantive arguments raised by the plaintiffs.

On one hand, this could be the Ninth Circuit making a firm statement about the rights of the tribes to govern their own membership determinations. However, the court could have at least noted that, besides the fact that the TMR has the sole right to make its own membership decisions, the Tribe didn't waive its sovereign immunity by bringing its own lawsuit. Its failure to do so is, perhaps, most concerning because a different court may see the Ninth Circuit's failure to affirm this sovereign immunity argument as justification to abandon it.

Hopefully, *Alvarado* won't turn into a pyrrhic victory for tribes, sacrificing the right to bring lawsuits without waiving sovereign immunity for the right to determine tribal membership.

Tribes will need to keep apprised of further developments on whether a tribe waives sovereign immunity by bringing its own lawsuit. This issue is vitally important for a tribe's right to protect its legal interests by suing in court, while at the same time preserving its immunity as a sovereign nation.

### Other Cases We're Watching . . .

- *Plains Commerce Bank v. Long Family Land and Cattle Company*, No. 07-411, cert. granted January 4, 2008. Issue: "Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an 'other means' of regulating the conduct of a nonmember bank owning fee-land."
- *MacArthur v. San Juan County*, No. 07-701, Petition for certiorari was filed on November 13, 2007. Issue: "Do Article III courts have any subject matter jurisdiction to do anything other than give full force and effect to Navajo Nation Court civil law judgments, decrees, and orders of all types, including these orders?"
- *Carcieri v. Kempthorne*, No. 07-526, Petition for certiorari was filed on October 18, 2007. Issues: "(1) Does Indian Reorganization Act empower secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934? (2) Does act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land preclude secretary from creating Indian country there? (3) Does providing land "for Indians" in Indian Reorganization Act establish sufficiently intelligible principle upon which to delegate power to take land into trust?"

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