GODFREY & KAHN S.C.

Indian Nations Law *Flash*

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

Bizarre Sixth Circuit decision further confuses NLRB's jurisdiction over tribal enterprises

In its very odd July 1 decision in *Soaring Eagle Casino and Resort v. National Labor Relations Board*, all three judges on the three-judge panel concluded that the National Labor Relations Act (NLRA) should *not* apply to Soaring Eagle Casino and Resort, an enterprise owned and operated by the Saginaw Chippewa Tribe. Nonetheless, by a 2-1 vote, the judges held that the NLRA *would* apply to the enterprise because, they explained, they were bound by a 2-1 decision by a different three-judge panel in *NLRB v. Little River Band of Ottawa Indians*, decided just three weeks earlier.

Four of the six judges in the Sixth Circuit who have examined the issue, in two different cases, have concluded that the NLRA has no jurisdiction over the tribes. The tribes have lost both cases!

The *Soaring Eagle* decision is noteworthy not only for its internal contradiction but also for its novel legal analysis. The majority in the *Little River Band* case had adopted the *Coeur d'Alene* rule to analyze whether a federal law that does not mention tribes should nonetheless apply to them. Under *Coeur d'Alene*, a federal law of general applicability will apply to tribes unless it touches "exclusive rights of self-governance in purely intramural matters" or would violate a treaty. Courts applying the *Coeur d'Alene* rule invariably find that tribal casinos do not involve exclusive rights of self-governance in intramural matters because enterprise employees and patrons are often predominately non-members.

The *Soaring Eagle* panel rejected *Coeur d'Alene* and invoked instead the Supreme Court's *Montana v. United States* cases. Under *Montana,* tribes can exercise regulatory authority over non-Indians only in cases in which they "enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements" or, their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

According to the *Soaring Eagle* court, "if one of the [Montana] exceptions applies, the generally applicable federal statute should not apply to tribal conduct, and Congress must amend the statute for it to apply against the Tribe if Congress so desires." The relationship between the Tribe and its employees, the court reasoned, falls within the first *Montana* Exception. To apply the NLRA to the Tribe, the court concluded, would therefore, infringe the Tribe's right of self-government.

In support of its legal conclusion that the NLRA should not apply to the Tribe, the court cited the additional circumstances that the casino is on trust land, is part of the tribal

government and generates revenues that is crucial for the Tribe's governmental services. The linchpin of the decision, however, is the Court's use of the *Montana* exceptions to limit the sphere of the federal government's regulatory authority over tribes.

While the court's analytical framework would provide tribes with a large degree of freedom from federal regulation, its future is uncertain. The U.S. Supreme Court has never suggested in any of its *Montana* cases that the principles defining tribal authority over non-Indians have any bearing on federal authority over tribes. No previous appellate court has ever concluded that they do. By insisting that it must apply the *Coeur d'Alene* Rule followed in the *Little River Band* case, the *Soaring Eagle* court seems to leave its newly announced doctrine lifeless.

The *Soaring Eagle* panel also held that the provision in an 1855 treaty setting aside a reservation "for the exclusive use, ownership and occupancy" of the Saginaw Chippewa Tribe was an insufficient basis for barring the NLRA from exercising jurisdiction. The *Little River* panel had reached the same conclusion with respect to the well-established, non-treaty-based right of tribes to exclude outsiders.

A rehearing *en banc* would, under other circumstances, seem likely to determine whether the full Sixth Circuit agrees with the four judges who have opined that the NLRA should not apply or the two judges who have opined that it should. The most likely outcomes of such an *en banc* hearing include: (1) a holding consistent with the *Little River Band* majority that the NLRA applies to the Tribe under the *Coeur d'Alene* rule; or (2) a holding that the NLRA does not apply to the Tribe based on the *Montana* exceptions, consistent with the *Soaring Eagle* opinions. The latter result would almost certainly trigger review by the U.S. Supreme Court and probably a decision adverse to tribes.

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