



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 07 2011

Lafe Soloman, Acting General Counsel
National Labor Relations Board
1099 14th St., NW
Washington, DC 20570-0001

Dear Mr. Soloman:

Last week, I had the honor of attending the third annual White House Tribal Nations Conference, during which President Obama reiterated his deep commitment to making government work better to fulfill our trust responsibilities, support tribal self-determination, and empower Indian tribes to unlock the economic potential of their communities. Across several agencies of the federal government, we were able to highlight many initiatives underway that are strengthening our government-to-government relationship with tribes, protecting tribal sovereignty, and restoring greater control to tribes over their lands.

And so it is in this spirit that I write to encourage the NLRB to re-evaluate its position on tribal issues and to help advance the federal government's commitments to Indian country, particularly with regard to respecting tribes as sovereign governments.

In particular, I would like to address the NLRB's decision in the *San Manuel* case and the subsequent NLRB practice of bringing enforcement actions under the National Labor Relations Act (NLRA) against tribal nations exercising their sovereign authority to operate and regulate gaming facilities within tribal territorial jurisdictions. This letter is not the appropriate venue to argue the merits of the NLRB's *San Manuel* decision. Rather, I seek an opportunity to advance the Department's position on the applicability of the NLRA to Indian tribes, articulated by the Tenth Circuit Court of Appeals, that Indian nations acting within their jurisdictions are exempt from the NLRA. See *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283-84 (10th Cir. 2010); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). As stated by the Tenth Circuit: "[R]espect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs*, 600 F.3d at 1283.

Rather than advancing this position in a litigation context, I believe that there may be an opportunity to work together to address whether Congress intended the NLRA to apply to tribal government employers. It is undoubtedly within the NLRB's power to consider whether its original interpretation of the government employer exemption, 29 U.S.C. §152(2), as implicitly exempting tribal governments acting within their territorial jurisdictions, correctly interpreted

congressional intent, as Member Schaumber argued in his dissent in *San Manuel*. Tribal governments should be given at least the same exception as provided to state governments in the NLRA. I understand that in its regulations, the NLRB interprets the term “State” to include the District of Columbia and all territories and possessions of the United States. 29 C.F.R. § 102.7. The NLRB could—and should—include tribes in a similar manner.

I strongly recommend that we meet to discuss this important legal issue and policy topic. In the meantime, I would encourage your office to use its prosecutorial discretion to refrain from bringing unfair labor practice actions against tribal nations operating within tribal jurisdictions, and to seek voluntary adjournment of those actions already initiated, in order to respect our tribal nations and engage them on a government-to-government basis.

I stand ready to assist you on this initiative in any way that I can. Please call me at (202) 208-4423 if you would like to set up a meeting to discuss these ideas in greater detail.

Sincerely,



Patrice H. Kunesh
Deputy Solicitor – Indian Affairs

cc: Mark G. Pearce, NLRB Board Chairman
Craig Becker, NLRB Board Member
Brian Hayes, NLRB Board Member
Eric G. Moskowitz, NLRB Assistant General Counsel