The Newest Form of Indian Gaming: Gaming the Unions

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I. Introduction

Gaming on Indian reservations was a relatively settled area of Indian law until the National Labor Relations Board's (NLRB or Board) decision in *San Manuel Indian Bingo & Casino* (*San Manuel I*). In that decision, the Board overturned thirty years of its own precedent that previously precluded an application of the National Labor Relations Act (NLRA) to Indian casinos.[1] In *San Manuel Indian Bingo & Casino v. NLRB* (*San Manuel II*), the United States Court of Appeals, District of Columbia Circuit, affirmed the Board's decision and created a new dimension to Federal Indian law.[2]

Generating approximately $73 billion annually, the casino industry is a large source of revenue for tribal, state, and federal governments.[3] However, over the course of three years, the NLRB and the D.C. Circuit restructured the landscape of this industry and threatened its foundation. In the wake of these decisions, tribes who wish to keep their workplaces union free must now devise plans to keep their employees from organizing. The decisions create immediate issues for tribes such as uncertainty in the law, higher cost of operation, loss of control over resources, and uncertainty in state-tribe compacts.[4] Tribes may educate management and employees about unionization of the workplace, enact right-to-work and no-strike laws, or implement no-

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1 San Manuel Indian Bingo & Casino (*San Manuel I*), 341 N.L.R.B. 1055, 1059 (2004).

2 San Manuel Indian Bingo & Casino v. NLRB (*San Manuel II*), 475 F.3d 1306, 1318-19 (D.C. Cir. 2007).

3 *See* Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming Law and Policy 163 (2006) (stating annual gambling revenues increased from approximately $35 billion to $73 billion between the years of 1993 and 2003).

4 *See infra* Part III.A.

solicitation policies.[5] As an extreme remedy, some tribes may consider diversifying the industries that generate their revenue as a way to offset financial burdens caused by a unionized workplace.[6]

This Article gives a brief background of the *San Manuel I* and *II* decisions, explores the immediate implications of the decisions, and expands on existing recommendations as to how tribes may avoid union organization on their reservations.

II. Background

In *San Manuel I*, the Hotel Employees and Restaurant Employees International Union (HERE) brought an unfair labor complaint against the San Manuel Indian Bingo and Casino and the San Manuel Band of Serrano Mission Indians (San Manuel or Tribe).[7] San Manuel allowed a union, the Communications Workers of America (CWA), access to its casino facility to discuss possible organization of its workers, but the Tribe denied a similar opportunity to HERE.[8]

The Tribe operates the casino on its reservation to financially support its government and provide essential services to its members, as most of the reservation's land is not fit for development.[9] The casino has a 2300-seat bingo hall and over one thousand slot machines.[10] A few years ago, the Tribe boasted "[o]ver 1 BILLION Dollars in Cash and Prizes awarded since July 24th, 1986."[11] In order to run such a large-scale operation and generate such large revenues, the Tribe must employ people who are not members of the tribe and market to potential customers off the reservation.[12] The Tribe realized great benefits from owning the casino including "full employment, complete medical coverage for all members, government funding for scholarships, improved

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5 *See infra* Part III.B.

6 *See infra* Part III.B.

7 *San Manuel I*, 341 N.L.R.B. 1055, 1055 (2004).

8 *Id.*

9 *San Manuel II*, 475 F.3d 1306, 1308 (D.C. Cir. 2007).

10 *Id.*

11 *Id.*

12 *Id.*

housing, and significant infrastructure improvements to the reservation."[13]

However, despite thirty years of precedent favoring a ruling for San Manuel, the Board held that prior interpretations of the NLRA and the Indian Gaming Regulatory Act (IGRA) did not preclude application of the NLRA to the casino.[14] The Board dispensed with the prior test that used location as the determinate factor of whether Indian activity fell under the auspices of the NLRA.[15] The new approach implemented by the Board allows the NLRB to exercise discretionary jurisdiction on commercial Indian activity, but retains some of the traditional deference afforded to tribal self-governance.[16] The NLRB found that the Tribe engaged in predominantly commercial activity and, despite the casino being located on the reservation, was an *employer* under the definition found in section 2(2) of the NLRA; therefore, the Tribe was not exempt from the Act's requirements.[17] Based on this reasoning, the NLRB denied the Tribe's motion to dismiss the union's complaint.[18]

In *San Manuel II*, the D.C. Circuit denied San Manuel's petition for review of the NLRB judgment, and the court affirmed the Board's

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[13] *Id.*

[14] *San Manuel I*, 341 N.L.R.B. 1055, 1056-59, 1064 (2004).

[15] *Id.* at 1059.

[16] *See id.* at 1062-63 (explaining that in circumstances involving traditional tribal functions, "the Board should afford the tribes more leeway in determining how they conduct their affairs by declining to assert its discretionary jurisdiction").

[17] *Id.* at 1057-59. *But see San Manuel II*, 475 F.3d at 1310 ("[T]he NLRA was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers, and probably no member of that Congress imagined a small Indian tribe might operate like a closely held corporation, employing hundreds, or even thousands, of non-Indians to produce a product it profitably marketed to non-Indians."). *See also* Matthew L.M. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, FED. LAW., Mar.-Apr. 2008, at 26, 32 (2008) ("It should be noted that Congress had enacted [the NLRA] in 1935, one year after passing the Indian Reorganization Act, making it plausible (if not likely) that Congress never intended for the NLRA to apply to Indian tribes or their businesses. Because of the meager number of tribal businesses in 1935, Congress would not have considered the NLRA to be a burden on them.").

[18] *San Manuel I*, 341 N.L.R.B. at 1064.

decision.[19] The court recognized the conflicting precedent regarding the application of federal law to Indian tribes.[20] In favor of the Tribe, the court cited United States Supreme Court precedent stating, "(1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty . . . ."[21] However, another earlier Supreme Court case favors the Board's holding. The Court in *Federal Power Commission v. Tuscarora Indian Nation* provided "a general statute in terms applying to all persons includes Indians and their property interests."[22] Subsequent to *Tuscarora*, the Ninth Circuit Court of Appeals, in *Donovan v. Coeur d'Alene Tribe Farm*,[23] found 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 . . . ."[24]

The court examined the various precedents and found that, while the courts have "concern for maintaining tribal sovereignty . . . [,] tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint."[25] Thus, the court affirmed the Board's distinction between traditional actions of self-governance and commercial activity, and held that operating a casino is not

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[19] *San Manuel II*, 475 F.3d at 1318-19. The D.C. Circuit reviewed the Board's decision de novo "[b]ecause the Board's expertise and delegated authority does not relate to federal Indian law, [and thus the court] need not defer to the Board's conclusion." *Id.* at 1312 (citations omitted).

[20] *Id.* at 1311.

[21] *Id.* (citing County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

[22] Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). *But see San Manuel II*, 475 F.3d at 1311 ("*Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case.").

[23] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

[24] *Id.* (quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980)).

[25] *San Manuel II*, 475 F.3d at 1314.

a traditional intertribal, governmental function of San Manuel.[26] As a result, the court refused to apply any of the above-mentioned precedent because under a commercial classification, casino gaming falls within the NLRA and precludes a finding that the NLRA infringes on San Manuel's sovereignty and governmental function.[27]

The D.C. Circuit also affirmed the Board's holding that San Manuel constituted an employer under the NLRA because the Board's interpretation of the term was permissible.[28] Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a court must give deference to an agency's permissible statutory interpretation if Congress is not specific in the statute and leaves room for interpretation.[29] In the drafting of the NLRA, "Congress 'vest[ed] in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause.'"[30] Although the Tribe argued that it fell within the statute's exception for states under the Tenth Circuit Court of Appeals' holding in *NLRB v. Pueblo of San Juan*,[31] the court rejected this argument and deferred to the Board's use of the plain meaning of *state* in the statute.[32] Therefore, the court found that the Board had jurisdiction over the claim and classifying San Manuel as an employer was a reasonable application of the NLRA.[33]

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[26] *See id.* at 1315.

[27] *Id.*

[28] *Id.* at 1318.

[29] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[30] *San Manuel II*, 475 F.3d at 1316 (quoting NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963)).

[31] NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir. 2002) ("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.").

[32] *San Manuel II*, 475 F.3d at 1317; *see also* 29 U.S.C. § 152(2) (2009) ("The term 'employer' . . . shall not include . . . any State or political subdivision thereof . . . .").

[33] *San Manuel II*, 475 F.3d at 1316.

III. DISCUSSION

A. The Immediate Effects of San Manuel I *and* II *on Indian Tribes with Bingo Halls and Casinos*

The Indian gaming world changed as soon as the D.C. Circuit affirmed the Board's judgment in *San Manuel II*. The decision creates uncertainty in Indian gaming law, directly affects a tribe's control over its resources, affects state-tribe compacts, and increases the costs related to running a casino. National Indian organizations have already taken steps in the right direction by forming the Tribal Labor Ordinances Workgroup to handle the fallout from *San Manuel II*.[34]

San Manuel II conflicts with the purpose of previously enacted Federal Indian gaming law. Congress passed the IGRA[35] in 1988 to create stability between Indian tribes involved in gaming and federal and state government.[36] The IGRA's purpose is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments . . . [and] to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . . ."[37] In order to effectuate such a policy, the Act restricts monies generated from Indian gaming to specific purposes, such as funding government operations, providing for the welfare of the Tribe, and economic development.[38] However, *San Manuel II*'s distinction between commercial and self-governing activity directly hinders the policy goals of the IGRA. Tribes who run commercial enterprises to raise revenue for government services on their reservations are in the dark as to whether they are operating outside the self-government sphere,[39] and until the issue is relitigated, tribes will have to proceed

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34 D. Michael McBride, III & H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of* San Manuel Band of Indians v. National Labor Relations Board, 40 J. MARSHALL L. REV. 1259, 1292 (2007).

35 Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2009).

36 *Id.* § 2702.

37 *Id.* § 2702(1)-(2).

38 25 U.S.C. § 2710(b)(2)(B); *see also* McBride & Court, *supra* note 34, at 1263 (adding that funds must be used for purposes such as "law enforcement, clinics, roads, education, social services, tribal courts, sanitation and the like").

39 *See* Vicki J. Limas, *The Tuscarorganization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467, 470 (2008); *see also* Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Cannons of Construction*, 86 OR. L. REV. 413, 512 (2007)

with caution, hoping that other conduct involving non-Indian employees on reservations does not give rise to further labor complaints. The Board even recognized in *San Manuel I*, "such balancing, on a case-by-case basis, lacks the predictability provided by the former on-reservation/off-reservation approach, the process of litigation will mark the contours in due time."[40] Unfortunately, the D.C. Circuit failed to provide any further clarification of what constituted self-government or commercial activity,[41] leaving tribes to gamble with their own labor relations.

The *San Manuel I* and *II* decisions also affect the intergovernmental relationship between tribes and states in which they are located. For example, San Manuel entered into a labor compact with California "requiring San Manuel to adopt 'an agreement or other procedure acceptable to the State for addressing . . . [the] rights of Class III Gaming Employees.'"[42] The San Manuel Tribe's board regulated all employee-employer agreements, including salaries and benefits;[43] however, the Tribe and California will likely have to alter their compact in the wake of the *San Manuel I* and *II* decisions. States have become dependent on funds generated from the revenue sharing agreements between states and tribes to fund "public education, medical care for the poor, and infrastructure and road maintenance."[44] Tribes are equally dependent on the states because under the IGRA, successful operation of Indian casinos hinges on stable compacts between states and tribes.[45] The interdependence of the parties illustrates the importance of these compacts, and *San Manuel I* and *II* seem to undermine this interdependence. Since a congressional amendment to the IGRA is unlikely,[46] *San Ma-*

("The asserted classification between approved 'traditional' tribal activities and disapproved 'commercial' activities is inherently subjective and legally standardless.").

40 *San Manuel I*, 341 N.L.R.B. 1055, 1063 (2004); *see also* Petitioners' Opening Brief at *67, *San Manuel II*, 475 F.3d 1306, 1308 (D.C. Cir. 2007) (Nos. 05-1392, 05-1432) ("Tribes must plan their conduct to comply with the Act, and thus need clear rules defining when the Act applies.").

41 *See* Limas, *supra* note 39, at 470.

42 *San Manuel II*, 475 F.3d 1306, 1317 (2007) (citation omitted).

43 *San Manuel I*, 341 N.L.R.B. at 1056.

44 *See* RAND & LIGHT, *supra* note 3, at 164.

45 *See id.* at 169.

46 *See id.* at 170.

nuel I and *II* threaten the interests of both states and tribes across the country. However, there is *one* positive aspect of the decisions' effect on the state-tribe compacts. Federal jurisdiction over labor disputes that occur on Indian reservations may eliminate some of the bargaining power that states hold over tribes when negotiating these compacts, and this shift may empower tribes to negotiate for more favorable positions.[47]

Despite such a short passage of time, the industry is already realizing the fallout of *San Manuel II*. In November 2007 Foxwoods Resort Casino dealers elected, by a 1289 to 852 vote, to join the United Auto Workers Union (UAW).[48] The Mashantucket Pequot Tribe (Pequot Tribe), who runs the Foxwoods Resort, refused to bargain with the Union after the Union certified the vote on June 30, 2008.[49] The UAW filed a complaint against Foxwoods, and the Board found the Tribe was in violation of the NLRA and ordered the Pequot Tribe to cease and desist from its refusal to collectively bargain with the UAW.[50] The Board also required the Pequot Tribe to enter into a signed agreement with "[a]ll full-time and regular part-time licensed dealers . . . including poker dealers, table game dealers, and dual rate dealers."[51] Thus, the onslaught of unionization began, and unions are making efforts to organize employees at Indian casinos in California and Michigan.[52] Gaming is legal in forty-eight states and the District of Columbia.[53]

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[47] *See* John H. Douglas, *A Brave New World of Labor Relations in Tribal Gaming*, INDIAN GAMING, Jan. 2008, at 44, 47.

[48] *See* Associated Press, *Connecticut: Casino Dealers Vote to Unionize*, N.Y. TIMES, Nov. 26, 2007, http://www.nytimes.com/2007/11/26/nyregion/26mbrfs-FOXWOODS.html.

[49] Mashantucket Pequot Gaming Enter., 353 N.L.R.B. No. 32, at *2 (Sept. 30, 2008).

[50] *Id.*

[51] *Id.* at *4.

[52] Geoffrey M. Standing Bear, *Casino Management Should be Wary of Employer Penalties Under the NLRB*, April 11, 2008, at 2, *available at* http://www.okindiangaming.org/pdfs/nlraenforcmentissues.pdf. Geoffrey M. Standing Bear was the General Counsel to the Oklahoma Indian Gaming Commission at the time of the writing of this Article. *Id.*

[53] *States Roll the Dice on Legal Gambling: Former Taboo Falls Under the Weight of Budget Deficits*, CBSNEWS, Jan. 25, 2009, http://www.cbsnews.com/stories/2009/01/25/business/main4752432.shtml (explaining that in the forty-eight states that have legalized some form of gambling, the majority of the gambling revenues are generated from lotteries, racetracks, and slot and video poker machines).

Therefore, *San Manuel I* and *II* will likely have a large ripple effect throughout the country and on many casinos.

Furthermore, *San Manuel I* and *II* will significantly affect tribes financially—directly and indirectly increasing the costs of operating a casino. For instance, application of the NLRA may result in layoffs at casinos because "some of the [casino's] primary customers will cease to do business with the company because of the customer's policy not to deal with unionized organizations."[54] If an employer decides to fight union organization, the employer must bear the costs of consulting advisors and lawyers on how to implement anti-union policies and subsequently must educate management and employees.[55] Finally, if tribes do not change their polices, eventually they may be subjected to more lawsuits and forced to incur the costs of defending these lawsuits.[56] Thus, to avoid such lawsuits, tribes must take steps to avoid unfair labor practice complaints and, more generally, union organization in their casinos.[57] The financial burden that accompanies unionized workplaces directly affects a tribe's ability to govern its resources and matters within its reservation.[58]

Given the D.C. Circuit's en banc denial for rehearing and San Manuel's election not to petition the Supreme Court for a *writ of certiorari*, there is a great possibility that *San Manuel I* and *II* will be binding precedent for the foreseeable future with regards to the NLRA and Indian reservations.[59] San Manuel's decision not to seek review by the Supreme Court is indicative of fear that an affirming decision from the country's highest court may deliver a devastating blow to Indian sover-

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[54] Kevin J. Allis, *The NLRB San Manuel Indian Bingo & Casino Ruling Fallout: Dealing with Union Organizational Efforts*, INDIAN GAMING, May 2007 at 28, 30.

[55] *See infra* Part III.B.

[56] *See* Allis, *supra* note 54, at 28, 30 ("It is usually within the dawn of . . . organizing efforts that errors are made that could result in unwanted litigation.").

[57] *See infra* Part III.B.

[58] *See* Kaighn Smith Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations Within the Reservation*, 2008 MICH. ST. L. REV. 505, 541 (2008).

[59] *See* Order, *San Manuel II*, 475 F.3d 1306, 1306 (D.C. Cir. 2007) (Nos. 05-1392, 05-1432), *available at* http://www.narf.org/sct/sanmanuelvnlrb/orders_denying_hearing.pdf (unpublished order denying rehearing and rehearing en banc); Wildenthal, *supra* note 39, at 529-31.

eignty.[60] The effects of *San Manuel I* and *II* suggest that these are landmark decisions in Federal Indian law.[61]

B. How Tribes May Avoid the Implications of San Manuel I *and* II

Since San Manuel's opportunity to challenge the application of the NLRA expired with its decision not to seek a *writ of certiorari* from the Supreme Court,[62] tribes across the country must take steps to avoid the implications of *San Manuel I* and *II*. While this Article does not advocate for tribes to act outside the law, it does advocate for tribes to lawfully repel union organization on reservations if they so desire, within the bounds of the NLRA and case law.

The first step in avoiding unionization in the workplace is to address employer-employee relations.[63] Tribes should maintain adequate working conditions as well as competitive salaries and benefits.[64] Employees are most likely to seek union organization when relationships with employers are strained.[65] Employers must communicate openly with employees, consistently informing them of any change in policy.[66] To that end, tribal organizations may want to keep salaries competitive with those of other tribal casino employees around the country, provide desirable vacation and leave terms, or give employees the opportunity to present suggestions on how to improve workplace conditions.[67]

In conjunction with improving employer-employee relations, employers must make an effort to detect possible union organization.[68] Early detection is important because typically employers find out about possible organization too late in the process to make any effort to thwart

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60 *See* Wildenthal, *supra* note 39, at 530.

61 *See id.*

62 *Id.* at 529.

63 *See* Allis, *supra* note 54, at 28.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*; *see* Limas, *supra* note 39, at 485.

68 Allis, *supra* note 54, at 28.

organization.[69] The possibility of union organization at Indian casinos is likely to increase, and tribes must be aware of efforts by union salts[70] (Salts are "individuals, often paid union organizers, who seek employment with a non-union employer for the purpose of organizing its employees into a union"[71]). Tribes can make detection efforts a constructive exercise. While trying to detect union activity, employers should open the lines of communication and survey employees to find out how "to improve practices that will improve employee morale and the organization's well-being."[72] This process serves a dual purpose: taking the temperature of possible organization and showing employees that the employer is genuinely concerned with their well-being.

Once the tribe notices conduct that indicates possible union organization, tribes should consult advisors to assist in formulating a plan.[73] Once the employer formulates a plan, it must ensure that managers execute that plan in a consistent manner, without giving the appearance of impropriety or unfair labor practices.[74] If the tribe reaches this critical point, then the tribe will also likely have to take more extreme steps such as instituting no-solicitation policies, right-to-work and no-strike laws, or even diversifying their source of revenue by expanding into other industries.[75]

Tribal management should educate employees, continuously reinforce the benefits of a non-union work environment, and provide employees with literature describing the implications of converting the workplace into a union environment.[76] An employer may voice its position on unionization as long as the employer does not attempt to coerce

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69 D. Michael McBride III & Susan E. Huntsman, *Organized Labor Strategies for Indian Gaming Enterprises*, FED. LAW., Mar.-Apr. 2008, at 48, 49.

70 Danny W. Jarrett, *NLRB Asserts Jurisdiction in Indian Country*, ST. B. N.M. (State Bar of New Mexico/Employment & Labor Law Section, Albuquerque, N.M.), Dec. 2005, at 1, 5 n.25, *available at* http://www.nmbar.org/aboutsbnm/sections/employmentlaborlaw/enewsletters/nlrbassertsjurisdictioninindiancountry.pdf.

71 *Id.*

72 McBride & Court, *supra* note 34, at 1303.

73 McBride & Huntsman, *supra* note 69, at 49.

74 *See* 29 U.S.C. § 158(a) (2009).

75 *See infra* Part III.B (describing both legal and non-legal alternatives casino management could employ when faced with union organization of employees).

76 McBride & Court, *supra* note 34, at 1302.

employees in any way.[77] Tribes should let employees know that unionization of the workplace will end direct communications between casino management and employees.[78] In addition, tribes should inform employees that there is no guarantee of employment even after they join a union, and that in the event of a strike, the law does not require tribes to pay employees or give them benefits.[79]

Moreover, employers should try to educate employees about Indian culture—specifically, the culture of the tribe who runs the casino.[80] Since approximately two-thirds of the employees in Indian casinos are non-Indian,[81] there may be some social discord between employer and employee. Employee insight to tribal culture and the tribe's mission may create a level of understanding between employer and employee that did not previously exist. This understanding, coupled with open communication, may improve camaraderie and lead to a more cooperative and enjoyable workplace.

Tribes must also educate their management about the implications of *San Manuel I* and *II*. Prior to these decisions, tribal law and sovereign immunity protected casino managements' actions; however, this is no longer the case.[82] Employers must now advise their management of the NLRA regulations and penalties.[83] In addition to familiarizing management with the various activities prohibited under the NLRA,

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77 Allis, *supra* note 54, at 30.

78 *Id.*

79 *Id.*

80 *See* Wenona T. Singel, *Labor and Employment Laws in Indian Country: The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 501-02 (2008); *see also* McBride & Court, *supra* note 34, at 1303 ("Teaching cultural and tribe-specific sensitivity could go a long way in fostering understanding, acceptance and respect for the tribe and managing expectations from the beginning.").

81 *See* JONATHAN B. TAYLOR, INDIAN SELF-GOVERNMENT IN WASHINGTON: THE CHARACTER AND EFFECTS OF THE INDIAN ECONOMY IN WASHINGTON STATE 18 (2006), *available at* http://www.washingtonindiangaming.org/files/WIGA-Vol-2-Report-8-16-06-LoRes.pdf (noting that in Washington, non-Indian employees make up seventy percent of all tribal enterprise employees); Minnesota Indian Gaming Commission, Statewide Economic Impact: Vital Statistics, http://www.mnindiangaming.com/template_info.cfm?page=4 (last visited Dec. 20, 2009) (reporting that seventy-eight percent of Indian gaming employees are non-Indian).

82 *See* Standing Bear, *supra* note 52, at 1.

83 *Id.* at 2.

commonly referred to as T.I.P.S.,[84] tribes should educate management on how to convey the tribe's message and position to the employees.

Additionally, tribes should pursue the legal options available to them. Similar to private employers, tribes may enact no-solicitation polices in accordance with the NLRA.[85] Tribes may exclude union organizers from soliciting on their reservations.[86] Employers should also prohibit employees from distributing pro-union literature in work areas.[87] However, employers must make sure that they do not overstep the boundaries of such regulations. Tribes may not regulate employee activity during non-working-times, such as "lunch breaks, rest periods, and before and after work."[88] In addition, tribes must apply no-solicitation policies uniformly to all third parties.[89] Any mistakes in the application of these regulations will likely result in union organization or an unfair labor practice complaint.[90] No-solicitation policies will limit employee exposure to pro-union literature and limit union access to the workplace.[91] The negative effect of such polices is that tribes must also turn away solicitation from charitable and community organizations;[92] however, this sacrifice may be necessary to keep the workplace union free.

Tribes may also enact right-to-work laws under the NLRA.[93] Right-to-work laws allow employees to work without the employer

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84 McBride & Huntsman, *supra* note 69, at 51 (T.I.P.S. is "an acronym for the four major prohibitions concerning employers' conduct: an employer cannot threaten, interrogate, promise, or spy").

85 Allis, *supra* note 54, at 30.

86 Douglas, *supra* note 47, at 44.

87 *Id.*

88 Allis, *supra* note 54, at 30.

89 Douglas, *supra* note 47, at 44.

90 Allis, *supra* note 54, at 30.

91 *Id.* at 30-31.

92 *Id.*; *see* Hammary Mfg. Corp., 265 N.L.R.B. 57 (1982) (finding the employer violated the NLRA by enforcing a no-solicitation policy, but allowing non-union solicitation).

93 *See* 29 U.S.C. §§ 158(a)(3), 164(b) (2009); *see also* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir. 2002) ("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" (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982))).

forcing the employees into joining a union,[94] and many tribes have already enacted a form of a right-to-work statute.[95] Sections 8(a)(3) and 14(b) of the NLRA permit union security agreements and states to enact such statutes.[96] The Tenth Circuit's holding in *Pueblo of San Juan* provides the proper framework for allowing tribes to pass similar laws, as the court found that tribes fall within the NLRA's usage of the *state* or *territory* in this section of the statute.[97] If tribes enact right-to-work laws, then tribes may be able to regain some sovereignty lost under *San Manuel*.[98] However, Professor Wenona Singel doubts the effectiveness of tribes enacting right-to-work laws because they are "an inferior substitute for the implementation of comprehensive tribal labor policies."[99] Due to the NLRB's large backlog,[100] she suggests that tribes should campaign for jurisdiction over labor claims on the reservation, reasoning that tribal courts could handle labor disputes more efficiently than the NLRB.[101] Faster turnover and judicial economy aside, employees and employers may be more inclined to participate in alternative dispute resolution in the less adversarial setting of a tribal court. Moreover, handling labor disputes faster would ease tension between parties, while preserving employer-employee relationships. Although Indian jurisdiction over labor disputes may be something tribes can advocate for in future NLRA litigation, *San Manuel I* and *II* foreclose this option in the near future, and right-to-work laws, while not ideal, are a viable option for tribes in the battle against unionization.

In addition to right-to-work laws, tribes should enact no-strike laws to prevent unionization or work stoppages once employees have already organized.[102] Since the IGRA requires revenue from casinos go

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94 McBride & Court, *supra* note 34, at 1293.

95 Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 725 (2005) (citing tribal ordinances); *see also* McBride & Huntsman, *supra* note 69, at 50 ("By 2003, 22 states had right-to-work laws that give employees the option of employment without joining or contributing to a union . . . .").

96 *See* 29 U.S.C. §§ 158(a)(3), 164(b).

97 *Pueblo of San Juan*, 276 F.3d at 1200.

98 *See* Singel, *supra* note 95, at 727.

99 *Id.* at 728.

100 *Id.* at 729 (noting that, from the filing date, the Board averages over two years to finish a case).

101 *Id.*

102 *See* McBride & Huntsman, *supra* note 69, at 50.

to funding essential governmental operations, tribes should have the right to implement no-strike laws in order to prevent a shutdown of essential government operations.[103] Thirty-eight states implemented successful no-strike laws to prevent public employees from striking,[104] and tribes should use this tool to protect themselves from disruption in their casino operations.

Although Indian gaming generates large revenue for tribal governments,[105] when the above-mentioned legal avenues prove futile or unavailable, tribes should diversify the way they generate revenue, especially in light of *San Manuel I* and *II*.[106] Even the chair of the San Manuel Tribe, Deon Marquez, stated "[g]aming will go away . . . [and] [d]iversification is necessary to our success as a tribe."[107] In recent years, many tribes have diversified their business endeavors to include manufacturing, banking, assembly plants, printing businesses, hotels, and golf.[108] Just recently, the San Manuel Band of Serrano Mission Indians joined with three other tribes to build a Marriott hotel in Washington, D.C.,[109] signaling efforts to broaden their economic foundation. While tribes venturing into these other industries should be aware of *San Manuel I* and *II* and the NLRA, tribes can make their workplaces union free from the start—thereby, eliminating post hoc, patchwork solutions.

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[103] *Id.*

[104] AM. BAR ASS'N, PUBLIC SECTOR LABOR & EMPLOYMENT LAW FUNDAMENTALS, *available at* http://www.abanet.org/labor/annualconference/2007/materials/data/papers/v2/067.pdf (last visited Dec. 20, 2009); *see also* James Duff, Jr., Annotation, *Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage*, 37 A.L.R. 3d 1147, § 4 (2009) ("[T]he validity of [statutes that prohibit striking] has been recognized [in cases] either expressly or by clear implication.") (citations omitted); *see, e.g.*, N.Y. CIV. SERV. LAW § 210(1) (McKinney 2009) (prohibiting strikes).

[105] In 2006 tribal government revenue totaled $25.7 billion. NAT'L INDIAN GAMING ASS'N, THE ECONOMIC IMPACT OF INDIAN GAMING IN 2006 at 3, http://www.indiangaming.org/info/pr/press-releases-2007/NIGA_econ_impact_2006.pdf (last visited Dec. 20, 2009).

[106] *See* RAND & LIGHT, *supra* note 3, at 165.

[107] *Id.* at 166 (internal quotation marks omitted).

[108] *Id.* at 165.

[109] *Id.* at 165-66.

IV. Conclusion

San Manuel I and *II* present considerable challenges to Indian tribes across the country, calling into question their sovereignty, the stability of Federal Indian law, employer-employee relations, and presenting extensive financial obstacles. Instead of viewing these decisions as a defeat, it is incumbent on Indian tribes across the country to make an effort to avoid the wide-reaching arms of *San Manuel I* and *II* and the NLRA. Tribes may take the therapeutic approach, improving employer-employee relations and educating management and employees, or tribes may take the legal approach, enacting right-to-work laws, no-strike laws, and no-solicitation policies.[110] Whether tribes choose the former, the latter, or both, they must do so in stride, as the chance to challenge this issue in the courtroom may have passed with San Manuel's election not to seek Supreme Court review. Now tribes have the opportunity to make a stand by trying to avoid future labor complaints with the NLRB, because should another large-scale dispute arise, Congress may pass federal legislation further abridging tribal sovereignty.[111] However, if tribes succeed in avoiding unionization of casinos, they will likely succeed in avoiding unionization of other industries that they become involved with as well. While *San Manuel I* and *II* may not be the pro-tribal sovereignty decisions that tribes were hoping for, union avoidance by the aforementioned approaches may nonetheless equal a small victory for tribes.

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110 *See supra* Part III.B.

111 McBride & Court, *supra* note 34, at 1298.