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## GENERAL MEMORANDUM 13-032

### National Labor Relations Board Reaffirms that it has Jurisdiction over Tribal Casino Employees

On March 18, 2013, the National Labor Relations Board (Board; NLRB) reaffirmed its controversial position, first taken in 2004, that it has jurisdiction over Indian casinos. *Little River Band of Ottawa Indians and Local 406, International Brotherhood of Teamsters, No. 07-CA-051156*. Indian Country unanimously condemned the 2004 *San Manuel* decision, later upheld by the U.S. Court of Appeals for the D.C. Circuit, that the Board had the authority to step into a labor dispute between casino employees and tribal management. The Board's March 18 decision involved an effort by tribal employees at the Little River Casino Resort to form a union.

In the wake of the *San Manuel* decision, tribes have been advised by legal counsel to adopt their own labor relations laws with the goal of preempting federal labor law. The Little River Band did just that, but to no avail. Article 16 of the Tribe's Fair Employment Practices code narrows the right of employees to form labor unions, prohibits strikes, takes important bargaining issues such as hiring, layoffs, and change of duties off the negotiating table, and requires unions to obtain a tribal license. In 2008, the Teamsters Local 406 filed an unfair labor practices charge against the Tribe arguing that the tribal law violates the National Labor Relations Act. The Tribe argued that the NLRB did not have jurisdiction; that the *San Manuel* case did not apply; and that in any case, *San Manuel* was incorrectly decided. We note that at one point, President Obama's Interior Department Solicitor's office was considering filing a brief in favor of the Tribe, but backed off in 2012 and decided not to file a brief.

The Board agreed with the *San Manuel* ruling that "[T]he operation of a casino – which employs significant numbers of non-Indians and that caters to a non-Indian clientele – can hardly be described as 'vital' to the tribes' ability to govern themselves or as an 'essential attribute' of their sovereignty."

The NLRB decided the issue in favor of the Teamsters, relying on its 2004 *San Manuel* decision. The Tribe has the right to ask the U.S. Supreme Court to review the case. Since the U.S. Court of Appeals for the Tenth Circuit has ruled in favor of tribes in some arguably similar cases, there is a chance that the Supreme Court will agree to review this case.

The NLRB's decision, however, may not stand. There are only three members serving on the Board (all Democrats) and the U.S. Court of Appeals for the District of

Columbia Circuit ruled in *Noel Canning v. NLRB* that President Obama acted unconstitutionally when he made two of those appointments to the Board on January 4, 2012. The NLRB is appealing that decision to the U.S. Supreme Court and has said that in the meantime it will continue to operate as usual. If the Supreme Court ultimately upholds the D.C. Circuit's *Canning* decision, that would invalidate the *Little River Band* decision.

There is also the chance that Senate Republicans and Democrats may agree to finally confirm two Democrats and two Republicans to the Board. House Speaker John Boehner has urged that approach. There are also several Republican-led efforts to block the NLRB. A bill introduced by Representative Kline (R-MN), HR 1120, has moved through Committee but is unlikely to advance in the Senate even if it passes the House. Senator Lamar Alexander (R-TN) filed an amendment to the Senate Budget Resolution last week that would have blocked funding for NLRB actions taken without a valid quorum but that amendment never received a vote.

Please let us know if you have questions about this case. We will continue to monitor this case and other tribal cases that come before the National Labor Relations Board.

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