The Chickasaw Nation's Comments in response to
The Department of the Interior's "Dear Tribal Leader" letter of Sept. 8, 2017
(October 30, 2017)

Introduction

The Chickasaw Nation's Recovery from Repeated Challenges

Pursuant to a series of Nineteenth Century treaties, the Federal government forcibly removed the Chickasaw Nation from its aboriginal homelands to new lands west of the Mississippi River. Today, the Chickasaw Nation's treaty homeland spans thirteen counties in south-central Oklahoma.

For decades following this forced removal, the Chickasaw people worked to rebuild from comprehensive social, cultural, and economic trauma. In accord with the constitution they first ratified in the 1850s, the Chickasaw people built a Tribal republic and established a general government to provide for the public welfare throughout the new homeland. Throughout this era, the Chickasaw Nation oversaw extensive economic activity, including natural resource development, agriculture, and small businesses operated by Tribal citizens as well as non-citizens licensed to live and work within the Chickasaw Nation.

This remarkable Tribal recovery, however, did not immunize the Chickasaw from a second great challenge: Starting in the 1890s, the Federal government pursued a series of actions that culminated in the entry of the State of Oklahoma to the Union and the attendant dismantlement of the Chickasaw government and land base. The Chickasaw people ultimately met this second great challenge as they did the first: Building on the Federal government's policy shift toward support of tribal self-determination in the 1960s and 1970s, the Chickasaw people reestablished their constitutional government and rebuilt their Nation. Today, notwithstanding the loss of approximately 98% of its treaty land base, the Chickasaw Nation serves as a powerful economic engine for the revitalization of the treaty homeland promised nearly 200 years ago—a force for progress that benefits the entire region.

Tribal Economic Development Revenues Are Tribal *Government* Revenues

Chickasaw Nation economic development initiatives, today, encompass gaming, entertainment, and destination recreational amenities, as well as health care, banking, manufacturing, and a broad array of consulting and professional services. Given Federal law's limitation of inherent sovereign Tribal tax authority *as well as* the limited tax base of our treaty territory, our economic development initiatives are the fundamental source of financial support for the robust government programs and services we are able to provide to our citizens; furthermore, our initiatives create jobs and infrastructure investments that support not only our citizens but the broader communities of the treaty territory, State, and region. Today, we employ approximately 14,000 people and have an estimated impact on the regional economy of nearly $3 billion annually, an increase even from the 2012 economic impact study conducted by Oklahoma City University's Economic Research and Policy Institute (see attached).

These activities, whether conducted by the Tribe alone or with non-Tribal partners, are subject to Chickasaw Nation oversight, through either the Chickasaw Nation Executive Department or other Tribal agencies or commissions. While we have intergovernmental compacts with the State of Oklahoma that apply to much of these activities, periodic uncompacted intrusions by State and local regulatory or tax authorities can disrupt and chill development initiatives or otherwise siphon energies toward dispute resolution and management.

Support for Modernization of the Indian Trader Regulations

Guiding Principles for Modernization

We would welcome and support an administrative effort to modernize the Indian Trader regulations in a manner that supports tribal self-government and self-determination. Above all, we believe an appropriate modernization effort would—

- affirm Tribal rights as the ***primary regulators*** of Indian country initiatives that occur *either* in partnership with *or* under the auspices of tribal government; and

- protect Tribal rights to pursue Indian country economic development ***without regulatory or taxation intrusion*** by State or local governments.

Furthermore, consistent with central principles of Federal Indian law, we believe an appropriate modernization effort would—

- declare and affirm the Department's ***commitment to parity*** in the treatment of Tribal governments—namely, by shielding Tribal government actors from the administrative application of Federal regulatory systems developed for oversight of *private actors*, not *Tribal or other government actors*.

With respect to the parity principle, please note the Chickasaw Nation's treaties with the United States include specific protections from unauthorized regulatory trespass on sovereign rights to Tribal self-government. We have successfully asserted those rights to preempt, for example, regulatory trespass under the National Labor Relations Act. *E.g.*, Chickasaw Nation d/b/a Winstar World Casino *and* International Brotherhood of Teamsters Local 886, Cases 17-CA-025031 and 17-CA-025121 (attached). However, even a final victory remains only a partial one, since our obtaining it required a substantial defensive investment of time, money, and leadership focus—which resources could have otherwise been invested in progressive initiatives that brought tangible and material benefits to our citizens, our communities, and our broader economy.

We believe a modernization initiative built on these principles would boost Indian country economic development and bring jobs and investment to some of the poorest regions of the United States.

Specific Recommendations

If the Department moves forward with its Indian Trader regulation modernization effort, we would recommend incorporation of the following specific elements—

1. ***Delegate to Tribal governments the Federal law authority to license persons, companies, or other commercial entities doing business with Tribes or their citizens within Indian country***

The greatest leap forward in a sustainable Federal Indian policy stemmed from the government's embrace of Tribal self-determination during the Nixon-era. Congress's enactment of the Indian Self-Determination and Education Assistance Act provided principles and framework for the empowerment of Tribal peoples to administer Federal programs and paved the way for an end to the paternalism and stifling control of prior policy eras. In any effort to modernize the Indian Trader regulations, the Department should adhere to the self-determination policy and work to empower Tribes to play the primary regulatory role. For example, ***updated Indian Trader regulations should either delegate or defer to or otherwise incorporate Tribal regulatory oversight of persons, businesses, or other entities engaged in Indian country economic development***. Tribes will be in the best position to determine who is or who is not appropriate for doing business within their own communities and jurisdiction and will also be best positioned for the most responsive and least intrusive regulatory oversight.

2. ***Preempt State or local taxation or regulatory intrusion on Indian country economic development conducted by Tribal governments or otherwise under the auspices of Tribal governments***

The Supreme Court's decisions in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), and *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), correctly recognized the *Federal interest* in Indian country economic activity preempts State and local taxation and regulatory jurisdiction. Likewise, the Supreme Court has recognized the preemptive effect of *Tribal rights and interests* in self-government. *E.g.*, *Williams v. Lee*, 358 U.S. 217 (1959), a principle Congress incorporated to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, when it expressly affirmed the relationship between Tribal self-government and Tribal economic activity.

Such law notwithstanding, Tribes must continually seek to stem ever-more creative efforts by State and local authorities to tax or control Indian country activities. *E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 480 U.S. 163 (1989) (allowing imposition of State severance tax on oil and gas produced by non-Tribal company from Tribal reservation lands, notwithstanding lawful imposition of a Tribal tax on same on-reservation activity); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2nd Cir. 2013) (holding municipality may levy personal property tax on machines operated by Tribe as part of its IGRA gaming activity but which are owned by non-Tribal company). Tribal litigation losses in these instances contributed to an ever more complex set of precedent that chills Indian country economic activity, burdening such activity with dual taxation and potentially dual oversight

obligations. Even when Tribes prevail, such litigations again contribute to the investment of resources in conflict, not growth and progress.

Modernization of the Indian Trader regulations provides the opportunity to bring clarity and "bright lines" back to this area of the law. We would advocate, accordingly, that ***updated Indian Trader regulations should provide for an express preemption of inconsistent State and local taxation or regulatory jurisdiction***. Such preemptive scope should apply, at minimum, to economic development activity conducted (a) by a Tribe or by a person, business, or other entity subject to licensure by the Tribe; and (b) on land owned by the Tribe within treaty or reservation boundaries, by an American Indian subject to restrictions against alienation, or by the United States for the benefit of the Tribe or citizen or member of the Tribe.

3. *Preempt Federal regulatory intrusion on Tribal government activities unless pursuant to a state Congress expressly intended to apply to Tribal governments*

Confusion has long complicated whether Tribal governments are subject to federal statutes of "general applicability." Many general federal statutes apply, by their specific terms, to Tribal governments; others, however, are silent on the question. Where statutes are silent, the common law has failed to provide a uniform rule: On one hand, principles of Federal Indian law hold that Tribal sovereign rights cannot be set aside without Congress's expressly so providing, which puts the burden on Federal regulators; on the other hand, courts have held Tribal actors are subject to Federal laws unless application of the law would be inconsistent with Tribal sovereign rights, which puts the burden on the Tribe. The Chickasaw Nation's most recent engagement in this fight involved the National Labor Relations Act, but other Tribal governments are presently engaged in litigation regarding jurisdiction of the Consumer Financial Protection Bureau. Where statutory silence gives rise to conflict over the scope and effect of Federal regulatory jurisdiction, Tribal sovereignty is injured and Indian country economic activity is stifled.

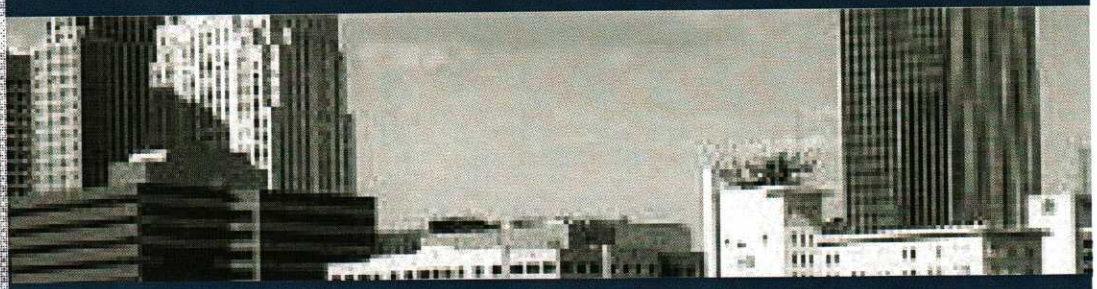
As an exercise of its fiduciary responsibilities to American Indian tribes and in support of stable economic development in Indian country, the Indian Trader regulations should be ***updated to affirm the Department's position that Tribal government economic development activity is not subject to Federal regulatory jurisdiction unless the statute under which such jurisdiction is asserted expressly so provides***. Such position can be well supported by the law and would provide Congress with "bright line" guidance that would be conducive to regulatory stability in Indian country.

Conclusion

American Indian Tribes operating with the United States look to Federal law to affirm our rights to self-government and self-determination. In that spirit, we look to the Federal trustee for help in ensuring we can pursue economic development without tax and regulatory intrusions that serve ends *other than* strengthening Tribal self-government, self-determination, and self-sufficiency. Under the Indian Trader regulatory system, the Federal trustee formerly wielded a strong hand in regulating Indian country economic activity; we have *no* desire for the trustee to return to that sort of paternalistic role, but we would welcome the exercise of clear Federal

authority to preempt unnecessary taxation or regulatory interference in Tribal economic development throughout Indian country.

If the Department proceeds, we would look forward to providing substantive engagement in accord with the principles and issues outlined in these comments.



Steven C. Agee
Economic Research & Policy Institute

Estimating the Oklahoma Economic Impact of the Chickasaw Nation

May 15, 2012

Economic Research & Policy Institute
Oklahoma City University
2501 N. Blackwelder
Oklahoma City, OK 73106

Executive Summary

The Chickasaw Nation is headquartered in Ada, Oklahoma and encompasses 7,648 square miles over 13 counties in south-central Oklahoma. According to the 2010 Census, there are just over 52,000 Chickasaw citizens throughout the United States[1]. Of the total population, tribal roles indicate that 31,326 reside in Oklahoma.

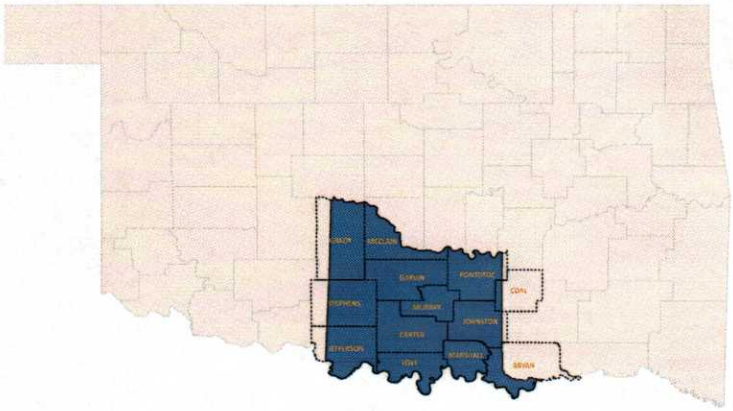
Tribal operations within the state consist of primarily government provision of services, operations of tribal-owned gaming centers and banks. The Economic Research and Policy Institute reviewed the expenditures and revenues of the Chickasaw Nation and the current production structure of the state economy to estimate the total contribution of tribal activities to the state. Among the key findings of this report are:

- The Nation employed 11,030 individuals nationwide in 2011 of which 10,015 were employed in Oklahoma.
- The Nation made direct payroll contributions of $318 million to Oklahoma residents, or $31,731 per employee[2].
- The Nation made direct payments of $119 million to Oklahoma entities in pursuit of medical care access, educational advancement, social services and economic development opportunities for Oklahoma residents and Chickasaw Nation citizens. Total government expenditures were $129 million.
- Chickasaw Nation business operations in Oklahoma, including gaming, banking and other retail generated $1.39 Billion in revenues – a significant source of economic output within the state.
- When analyzed in the context of the Oklahoma economy and accounting for spillover (multiplier) impacts, we estimate that these activities supported:
    - 15,958 jobs in the state
    - $525 million in state income
    - $2.43 billion in state production of goods and services

[1] See 2010 Census Brief: "The American Indian and Alaska Native Population: 2010," issued January 2012.
[2] Pay per employee is likely understated as some employees reside outside Oklahoma while working within the state. Payroll to these employees is considered a leakage while their employment within the state is included in reported employment numbers.

Introduction

In 2011, the Oklahoma Department of Commerce, along with several Native American Tribes commissioned a study to estimate the Oklahoma statewide economic impact of all Native American operations. The Economic Research and Policy Institute (ERPI) at Oklahoma City University, in cooperation with our tribal partners, will complete the final study in the spring of 2012. As a participant in the study, each tribe received a short description of their tribal specific impacts. This document outlines the impacts of the Chickasaw Nation.



Chickasaw Nation

Headquartered in Ada Oklahoma, the Chickasaw Nation encompasses portions of 13 counties in south central Oklahoma and has additional operations in New Mexico, Georgia and Texas. The Chickasaws were relocated to Oklahoma (Indian Territory) from parts of Kentucky, Tennessee, Mississippi and Alabama in the mid 1800s along with the Cherokees, Choctaws, Creeks and Seminoles. The Treaty of Doaksville called for their resettlement among the Choctaw tribe in 1837. Since 1856 when the Chickasaws separated from the Choctaws, they have managed their own governmental and business affairs.

Tribal operations of the Chickasaw Nation are classified into two broad categories: Business and Government Operations. While the Nation has offices in four states, the economic impact estimates within this report detail the Oklahoma specific impacts and therefore do not include any national or regional impacts occurring outside the state. Chickasaw Nation activities are summarized in Table 1.

Table 1: Chickasaw Nation Statewide Summary Information - 2011			
	Government Operations	Business Operations	Total
Employment	2,745	7,270	10,015
Payroll	$131,898,375	$185,889,437	$317,787,812
Revenues		$1,386,497,117	$1,386,497,117
Gov't Expenditures	$128,520,357		$128,520,357
Federal Road Expenditures	$7,286,958		$7,286,958

Note: All numbers reflect Oklahoma based production and employment only. Other tribal activity is not included in this analysis.

Business Activities

In 2011, the Nation received $1.39 billion in combined revenues from its Oklahoma operated business entities of which gaming accounted for 91.5% of the total. The Nation businesses employed 7,270 full and part time workers with a combined payroll of $186 million. CN business data is detailed in Table 2.

Table 2: CN Business Summary			
	Revenues	Payroll	Employment
Banking	$12,472,661	$3,110,095	48
Gaming and Other	$1,269,119,403	$175,819,949	6,534
Professional Services	$104,905,053	$6,959,393	688
Total	$1,386,497,117	$185,889,437	7,270

CN operated 17 gaming centers in south central Oklahoma including two of the largest in the state in the Winstar World Casino in Thackerville and the Riverwind Casino in Norman in 2011. Gaming operations accounted for $1.27 billion in direct revenues in 2011. Additionally, gaming operations provided 6,534 jobs and paid $176 million in payroll and benefits in 2011.

In addition to gaming, the Nation was involved in Banking and Professional Services. Chickasaw Banc Holding Company operated Bank 2 in Oklahoma City, which had revenues of over $12 million, provided 48 jobs and directed over $3 million in payroll to bank employees. Chickasaw Nation Industries (CNI) provided professional services for a variety of external clients including federal and state governmental entities. In 2011, CNI maintained 688 jobs and received over $105 million in revenue from statewide operations.

Chickasaw Nation Government

To maintain consistency across all tribal reports, we classified all government activities into Education, Medical, Social Services, Economic Development and General Operations categories. According to the Nation, Medical Services consumed the largest share of their total government budget in 2011 with expenditures totaling more than $57 million or 44%. Economic Development activities included all capital improvements and followed medical expenditures with $26 million in 2011. Government activities accounted for 2,745 employees paying out $132 million in payroll. Government data is summarized in Table 3.

Table 3: CN Government Summary

	Expenditures	Payroll	Employment
Education	$9,377,422	$9,623,897	200
Medical	$57,010,216	$58,508,668	1,218
Social Services	$19,162,062	$19,665,716	409
Economic Development	$25,723,108	$26,399,212	549
General Operations	$17,247,549	$17,700,882	368
Total	$128,520,357	$131,898,375	2,745

In addition to normal governmental activity, the Chickasaw Nation obtained and provided federal funding to the state for road and bridge projects within their tribal boundaries. In cooperation with the Oklahoma Department of Transportation, the nation participated in $7,286,958 worth of road improvements to infrastructure used by all Oklahomans. These additional monies provided external funding to improve infrastructure that otherwise would have been funded by Oklahoma taxpayers.

Impact Methodology

The methodology employed in this report is designed to estimate the contribution of an existing industry to the local economy.[3] The approach begins with a static description of expenditure flows between households and industries, capturing the reliance of one industry's output on other, supporting industries. For example, by examining the expenditures from the construction industry to the wholesale lumber industry we can derive an estimate of the reliance of the construction sector on wholesale lumber output. From these frozen-in-time expenditure

[3] In fact, while reports of this nature are commonly referred to as 'impact analysis', they are more correctly characterized as 'contribution analyses.

flows, we can derive economic multipliers specific to each industry. These multipliers estimate the combined, or total economic impact originating from an initial expenditure. In the context of this report, for example, the gaming and recreation output multiplier estimates the total impact to economic output stemming from an initial output change within the gaming sector. Similarly, multipliers for employment and income are derived and interpreted. This approach is valuable as it provides rich information at a relatively low computational cost. However, the methodology does invoke some restrictive assumptions, including constant prices and a fixed production process, and should not be confused with a computationally higher cost economic forecast.

Economic Impacts

Economic impacts are estimated for three categories: output (total production within a region; total revenue serves as a proxy for output), income, and employment (full-time equivalent). Data was provided by the Chickasaw Nation, analyzed in conjunction with publically available data from the Bureau of Economic Analysis, and impacts estimated using Implan multipliers for the state of Oklahoma.[4] All impacts include both the direct impacts from CN operations, multiplier impacts, and sum giving total impacts. For example, CN revenues from business operations combined with expenditures from in-state government operations and community development are estimated to have generated nearly $1.52 billion in output (this is the Nation's direct contribution to the local economy), and an additional $909 million in spillover production (the output of non-CN firms who directly or indirectly support CN operations), combining to generate $2.43 billion in local economic output. All other impacts are interpreted analogously. Table 4 provides the impact estimates. More detailed impact tables are provided in the appendix to this document.

Table 4: Chickasaw Nation Statewide Impacts - 2011

	Direct Impacts	Multiplier Impacts	Total Impacts
Output	$1,522,304,432	$909,483,659	$2,431,788,091
Payroll	$317,787,812	$206,849,817	$524,637,629
Employment	10,015.00	5,942.77	15,957.77

[4] Implan is a national vendor of economic multipliers. Refer to the Minnesota Implan Group and www.implan.com for additional information. When necessary, multipliers are adjusted to reflect local knowledge of economic conditions.

Conclusion

The Chickasaw Nation continues to be a source of economic activity in south central Oklahoma. The contributions analysis performed suggests the CN activities sustain 15,958 jobs, generating $525 million in payroll income, and over $2.43 billion in Oklahoma production of goods and services. All impact estimates provided in this report fail to include productivity gains originating with the provision of essential government services, as well as the significant economic and non-economic impacts stemming from CN philanthropic efforts. The Chickasaw Nation is and will continue to be a significant economic presence in the region.

Appendix: Impact Tables

Table 5: Chickasaw Nation Impacts - 2011			
	Direct	Multiplier Effect	Total
Output			
Education Services	$9,377,422	$5,835,264	$15,212,686
Medical Services	$57,010,216	$41,981,065	$98,991,281
Social Services	$19,162,062	$14,833,659	$33,995,721
Economic Development	$25,723,108	$22,271,171	$47,994,279
Government Operations	$17,247,549	$14,932,998	$32,180,547
Gaming and Other	$1,269,119,403	$717,620,846	$1,986,740,249
Banking	$12,472,661	$8,578,811	$21,051,472
Professional Services	$104,905,053	$77,928,612	$182,833,665
Federal Road Projects	$7,286,958	$5,501,234	$12,788,192
Total Output Impacts	$1,522,304,432	$909,483,659	$2,431,788,091
Employment			
Government	2,745.00	2,666.49	5,411.49
Business	7,270.00	3,276.28	10,546.28
Total Employment Impacts	10,015.00	5,942.77	15,957.77
Payroll			
Government	$131,898,375	$86,423,948	$218,322,323
Business	$185,889,437	$120,425,869	$306,315,306
Total Payroll Impacts	$317,787,812	$206,849,817	$524,637,629

Table 6: Chickasaw Nation Impacts (Output/Production)				
		Direct	Indirect	Total
Government				
	Education	$9,377,422	$5,835,264	$15,212,686
	Medical	$57,010,216	$41,981,065	$98,991,281
	Social Services	$19,162,062	$14,833,659	$33,995,721
	Economic Development	$25,723,108	$22,271,171	$47,994,279
	Government Operations	$17,247,549	$14,932,998	$32,180,547
	Federal Road Projects	$7,286,958	$5,501,234	$12,788,192
	Total Government	$135,807,315	$105,355,390	$241,162,705
Business Operations				
	Gaming and Other	$1,269,119,403	$717,620,846	$1,986,740,249
	Banking	$12,472,661	$8,578,811	$21,051,472
	Professional Services	$104,905,053	$77,928,612	$182,833,665
	Total Business	$1,386,497,117	$804,128,269	$2,190,625,386
Total Output Impacts		$1,522,304,432	$909,483,659	$2,431,788,091

Table 7: Chickasaw Nation Impacts (Employment)				
		Direct	Multiplier Effect	Total
Government				
	Education	200.29	67.84	268.12
	Medical	1,217.65	1,015.88	2,233.54
	Social Services	409.27	107.42	516.70
	Economic Development	549.41	883.17	1,432.58
	Government Operations	368.38	592.18	960.56
	Total Government	2,745	2,666	5,411
Business Operations				
	Gaming and Other	6,534	2,737	9,271
	Banking	48	93	141
	Professional Services	688	447	1,135
	Total Business	7,270	3,276	10,546
Total Employment Impacts		10,015	5,943	15,958

Table 8: Chickasaw Nation Impacts (Payroll)				
		Direct	Multiplier Effect	Total
Government				
	Education	$9,623,897	$3,880,005	$13,503,902
	Medical	$58,508,668	$23,706,627	$82,215,295
	Social Services	$19,665,716	$8,586,638	$28,252,354
	Economic Development	$26,399,212	$30,081,077	$56,480,289
	Government Operations	$17,700,882	$20,169,602	$37,870,484
	Total Government	$131,898,375	$86,423,948	$218,322,323
Business Operations				
	Gaming and Other	$175,819,949	$112,995,746	$288,815,695
	Banking	$3,110,095	$4,265,913	$7,376,008
	Professional Services	$6,959,393	$3,164,210	$10,123,603
	Total Business	$185,889,437	$120,425,869	$306,315,306
Total Payroll Impacts		$317,787,812	$206,849,817	$524,637,629

Chickasaw Nation d/b/a Winstar World Casino *and* International Brotherhood of Teamsters Local 886, affiliated with The International Brotherhood of Teamsters. Cases 17–CA–025031 and 17–CA–025121

June 4, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

At issue in this case is whether an Indian tribe, the Chickasaw Nation, in its capacity as operator of the WinStar World Casino, is subject to the Board's jurisdiction and, if so, whether it violated Section 8(a)(1) of the National Labor Relations Act by informing casino employees that because of the Nation's tribal sovereignty, they did not have the protection of the Act. Applying the test established by the Board in *San Manuel Indian Bingo & Casino,* 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007), we find that application of the Act would abrogate treaty rights, specific to the Nation, contained in the 1830 Treaty of Dancing Rabbit Creek. As a result, we decline to assert jurisdiction over the Nation, the Respondent here.

I. BACKGROUND

On September 5, 2012, the Board issued an unpublished Order granting a joint motion to approve a stipulation of facts agreed to by the General Counsel, the Respondent, and the Charging Party, and to transfer this proceeding to the Board for issuance of a Decision and Order.[1] The Board issued a Decision and Order on July 12, 2013, which is reported at 359 NLRB No. 163. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Tenth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Order granting the joint motion and of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the joint motion to approve the stipulation of facts and transfer this proceeding to the Board. We grant the motion, and we incorporate that unpublished Order by reference. We have also considered de novo the stipulated record and the briefs filed by the parties and by amicus curiae.[2]

II. FACTS

The Nation is a federally recognized Indian tribe. The Nation has executed a series of treaties with the United States, including the 1830 Treaty of Dancing Rabbit Creek (the 1830 Treaty) and the 1866 Treaty of Washington (the 1866 Treaty).

The Nation originally occupied a large tract of land in what is now the State of Mississippi. The Nation relinquished its rights to this land under the 1830 Treaty.[3] In exchange, the United States granted the Nation an area of

[1] Upon charges initially filed on December 10, 2010, February 22, 2011, and April 8, 2011, by International Brotherhood of Teamsters Local 886 (the Union), the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging violations of Sec. 8(a)(3) and (1) on May 10, 2011, against the Nation. On that same day, the Nation filed a complaint against the Board in the United States District Court for the Western District of Oklahoma (Civil Action No. 5:11-cv-506-W) requesting a preliminary injunction to prevent the Board from applying the Act to it. On July 11, 2011, the District Court entered an order granting the Nation's motion and enjoining the Board from proceeding to hearing on its complaint. The Board appealed to the United States Court of Appeals for the Tenth Circuit (No. 11–6209) and entered into settlement negotiations with the Nation. Pursuant to those negotiations, the Board, the Nation, and the Union agreed to jointly request that the District Court modify its injunction to permit the Board to proceed on the complaint alleging a single violation of the Act. The District Court issued an Order granting the request on June 20, 2012. An amended complaint was issued on July 10, 2012. The Nation filed a timely answer admitting in part and denying in part the allegations of the complaint and asserting as an affirmative defense that the Board lacks jurisdiction in this matter.

On July 19, 2012, the Nation, the Union, and the General Counsel filed with the Board a stipulation of facts. The parties agreed that the complaint, the answer, the stipulation, and the exhibits attached to the stipulation shall constitute the entire record in this proceeding, and they waived a hearing before and decision by an administrative law judge. On September 4, 2012, the Board issued an Order approving the stipulation and transferring the proceeding to the Board for issuance of a Decision and Order. The Board issued a corrected Order on September 5, 2012. The General Counsel and the Nation filed briefs. Amicus curiae briefs were filed by the National Congress of American Indians and the Choctaw Nation.

[2] The Nation has requested oral argument. The request is denied as the stipulated record and briefs adequately present the issues and the positions of the parties and amici.

[3] The original parties to the 1830 Treaty were the United States and the Choctaw Nation. The Chickasaw Nation became a party to the treaty in 1837. See *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465 fn. 15 (1995).

land located in what is today the State of Oklahoma. Article 4 of the 1830 Treaty provides:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Article 18 of the 1830 Treaty provides that "wherever well founded doubt shall arise" concerning the construction of the Treaty, "it shall be construed most favorably towards" the Nation.

III. ANALYSIS

In *San Manuel Indian Bingo & Casino,* supra, the Board set forth its standard for determining when it would assert jurisdiction over businesses owned and operated by Indian tribes on tribal lands. The Board found that the Act is a statute of "general application" that applies to Indian tribes, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Accordingly, the Board found it proper to assert jurisdiction, unless (1) the law "touche[d] exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there was "proof" in the statutory language or legislative history that Congress did not intend the Act to apply to Indian tribes.[4] 341 NLRB at 1059, citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). The Board also held that it would make a further inquiry to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction. 341 NLRB at 1062. Applying the principles announced in *San Manuel*, the Board recently asserted jurisdiction over tribally owned and operated casinos on Indian lands in *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), and *Soaring Eagle Casino & Resort*, 361 NLRB No. 73 (2014).

We are concerned here only with the second *San Manuel* exception, whether assertion of the Board's jurisdiction would abrogate rights guaranteed to the Nation by treaty. The Nation argues that applying the Act would abrogate two treaty-protected rights: (1) the right to exclude or place conditions on the presence of those permitted to enter tribal territory; and (2) the Nation's treaty right to self-government. The Nation further argues that specific language in the 1830 Treaty exempts the Nation from application of all federal laws except those enacted pursuant to Congress' power to legislate concerning Indian affairs. Amicus curiae Choctaw Nation joins the Nation in arguing that applying the Act to the Chickasaw Nation would abrogate guaranteed treaty rights of self-government and exclusion. It argues that the historical context in which the treaties were made demonstrates that the treaties were intended to assure that the tribes would remain sovereign nations in the western territory to which they had been forcibly removed, and that the Choctaw and Chickasaw Nations agreed to recognize the plenary power of the federal government only with respect to laws regulating Indian affairs.[5]

We find, in agreement with the Nation, that assertion of the Board's jurisdiction would abrogate treaty rights guaranteed to the Nation by the 1830 Treaty. Contrary to the analysis in the Board's now-vacated decision, we further find that the 1866 Treaty does not reflect an agreement by the Nation to be subject to a broader range of federal laws.[6]

1. The Rules of Construction Favoring Indian Tribes.

The Board has no special expertise in construing Indian treaties. We therefore look to the decisions of the federal courts to assist us in determining the extent of the Nation's treaty rights.

The Nation was compelled to enter into both of the treaties involved here and to cede territory to the United States. The history of these treaties is recited at length in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). As the Supreme Court there observed, "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." Id. at 630–631. For this reason, these

[4] In connection with this last exception, the Board found that there was no evidence in the language or legislative history of the Act indicating that Congress did not intend the Act to apply to Indian tribes. Id. at 1058–1059.

[5] Because we decline to assert jurisdiction based on the Nation's treaty rights, we do not address the additional arguments of the Nation and amici.

[6] We reject the argument that assertion of the Board's jurisdiction would abrogate the Nation's treaty-protected right to exclude or place conditions on the presence of those permitted to enter tribal territory. As we found in *Soaring Eagle*, 359 NLRB No. 92, slip op. at 7–8 (2013), incorporated by reference at 361 NLRB No. 73 (2014), treaty language devoting land to a tribe's exclusive use or possession is not sufficient to bar application of the Act.

treaties must be construed "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules." *United States v. Winans*, 198 U.S. 371, 380–381 (1905) (internal quotations omitted).

Moreover, it is a settled rule of federal Indian law that treaties with Indian tribes "should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985) (internal citations omitted). This rule is rooted in federal policy dating back to the Northwest Ordinance of 1787, which declared the policy of the United States that "[t]he utmost good faith shall always be observed towards the Indians." 32 J. Continental Cong. 340–341 (1787) (quoted in *Cohen's Handbook of Federal Indian Law* § 1.02[3] (Nell Jessup Newton, ed., 2012)) (hereafter "*Cohen's Handbook*").

2. The 1830 Treaty.

The 1830 Treaty was signed after years of attempts by the federal government to remove Indian tribes, including the Choctaw and Chickasaw Nations, from their ancestral lands.[7] In exchange for the Nation's relinquishing its rights to land in Mississippi, the United States promised to "secure to" the Nation expansive rights over its new territory. See *Atlantic & Pacific Railroad Co. v. Mingus*, 165 U.S. 413, 437 (1897) (stating that the 1830 Treaty granted the Nation "the powers of an almost independent government"). See also *Choctaw Nation v. Oklahoma*, 397 U.S. at 638–639 (Douglas, J., concurring) (explaining that title granted by 1830 Treaty was a fee simple, "not the usual aboriginal Indian title of use and occupancy").

Article 4 reflects the extent of the powers reserved to the Nation under the treaty. Not only does article 4 provide that no State shall ever have a right to pass laws for the government of the Nation, but it also secures the Nation from "all laws . . . except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs." Giving due consideration to the "enlarged rules of construction" to be used in interpreting Indian treaties,[8] recognized in article 18 of the 1830 Treaty itself, we find that this provision forecloses application of the Act, which is not a law enacted by Congress in legislation specific to Indian affairs. Such legislation is authorized by the Indian Commerce Clause of the Constitution, which states: "The Congress shall have Power To . . . regulate Commerce . . . with the Indian Tribes."[9] No party here argues that the Act was enacted pursuant to the Indian Commerce Clause or was passed as legislation over Indian affairs. As a result, we find that assertion of the Board's jurisdiction would abrogate the Nation's treaty right to be "secure" "from and against all laws" except those passed by Congress under its authority over Indian affairs.

3. The 1866 Treaty

We reject the view that however expansive the language of the 1830 Treaty, the Nation's autonomy was significantly curtailed by the later 1866 Treaty. Rather, we find that no provision of the 1866 Treaty undermines the Nation's treaty right to be "secure" "from and against all laws" except those passed by Congress under its authority over Indian affairs.

The Nation sided with the Confederacy during the Civil War, and the 1866 Treaty, signed after the end of the war, provided, essentially, for the surrender of a portion of the land grant and the freeing of the Indians' former slaves. Article 7 of the 1866 Treaty states that the Nation agrees "to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory." For the reasons that follow, we are not persuaded that Article 7 of the 1866 Treaty grants the federal government broad legislative authority over the Nation or that, as a statute of general applicability, the Act would fall into the category of legislation contemplated under the 1866 treaty.

The language in article 7 of the 1866 Treaty does not explicitly state that the Nation agrees to be subject to all federal laws of general applicability. Instead, the Nation agrees to only those laws "that Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory." This language is compatible with the Nation's earlier agreement, in the 1830 Treaty, to be subject to federal laws enacted by Congress only in legislation specific to Indian affairs; there is nothing in article 7 that compels a reading less favorable to the Nation.

Moreover, article 45 of the 1866 treaty provides that "all the rights, privileges, and immunities heretofore possessed by [the Nation] . . . or to which they were entitled

[7] For more discussion of the history of the 1830 Treaty as well as other removal treaties affecting the Five Civilized Tribes, see *Choctaw Nation v. Oklahoma*, 397 U.S. at 622–628; *Cohen's Handbook* § 1.03[4].

[8] In re *Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866) ("[E]nlarged rules of construction are adopted in reference to Indian treaties.").

[9] U.S. Const., Art. I, Sec. 8, cl. 3.

under the treaties and legislation heretofore made . . . shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty." Citing article 45, the Tenth Circuit has held that the 1866 Treaty "reaffirmed" the obligations of the United States set forth in article 4 of the 1830 Treaty. *Chickasaw Nation v. Oklahoma Tax Commission*, 31 F.3d 964, 978 (10th Cir. 1994), revd. on other grounds sub nom. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). These obligations include securing the Nation from and against all laws except (as relevant here) those passed by Congress under its authority over Indian affairs.

Thus, construing both treaties in the manner most favorable to the Nation, we find that the provisions of the 1866 Treaty are compatible with the rights guaranteed in the 1830 Treaty, and that article 45 of the 1866 Treaty strongly suggests that those rights remain in place.

IV. CONCLUSION

The National Labor Relations Act embodies important national policies and objectives, and the Board has broad responsibility to enforce them. We have no doubt that asserting jurisdiction over the Casino and the Nation would effectuate the policies of the Act. However, because we find that asserting jurisdiction would abrogate treaty rights specific to the Nation, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 4, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD