COMPETING SOVEREIGNS:
Circuit Courts' Varied Approaches to Federal Statutes in Indian Country

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The Federal Lawyer's April 2015 Indian Law issue detailed "jurisdictional hooks" that allow private parties to sue Indian tribes in employment-law cases.[1] The topic is an important one. Some federal laws expressly apply to tribes and allow suit, but Congress expressly exempted tribes from other laws. Where the text of a federal statute appears to apply nationwide (a "statute of general applicability") but neither includes nor excludes tribes, practitioners face a particularly difficult task. Federal circuit courts apply divergent, often-conflicting analyses to determine whether these silent statutes apply to tribes.

Practitioners looking to sue tribes must learn the schisms in this landscape. The April 2015 article correctly described the analysis in the U.S. Court of Appeals for the Ninth Circuit and those circuits that have embraced the Ninth Circuit test. But other circuit courts apply different tests and place greater emphasis on the protection of tribal sovereignty. And six circuits have either not yet addressed the question or have not yet settled on their approach. Understanding the historical background of this split informs what suits practitioners may decide to bring, how tribes respond to these suits, and how the U.S. Supreme Court may ultimately bring clarity to the question.

Foundational Inconsistencies in Federal Indian Law

Federal Indian law often struggles to balance the rights of competing tribal, state, and federal sovereigns. Indian tribes enjoyed and exercised inherent sovereign rights, including the right to govern their territories, long before the framers of the U.S. Constitution put pen to paper.[2] Early after the Revolutionary War, the United States began entering into peace treaties with these tribes. As the British Crown had before it, the fledgling nation engaged in an "extravagant … pretension of converting the discovery of an inhabited country into conquest[.]"[3] But it did so without the expense or bloodshed of continentwide war. By negotiating treaties with Indian tribes on a nation-to-nation basis, the United States acquired large swaths of territory without the expense of outright conquest.[4]

In exchange, the United States promised in these treaties to provide the tribes with certain goods and services, to reserve to them certain land parcels, and foremost, to respect the Indian tribes' sovereign independence.[5] The Constitution establishes that these treaties are the supreme law of the land.[6] They are also the foundation of the Supreme Court's "trust-responsibility" doctrine. The federal trust responsibility obligates the United States to protect and defend tribal treaty rights, lands, assets, and resources and to carry out the mandates of federal Indian law. The Court recognizes that tribes have kept their word and placed their faith in the United States to fulfill its bargain. In exchange, the United States has charged itself with "moral obligations [toward tribes] of the highest responsibility and trust[.]"[7] The United States has committed its "national honor" to fulfilling its treaty responsibilities.[8] Much of federal Indian law is built around this trust-responsibility doctrine.

Yet the Constitution also "grants Congress broad general powers to legislate in respect to Indian tribes[.]"[9] The Supreme Court has described this congressional power as "plenary and exclusive."[10] Using this power, Congress can both restrict tribal sovereignty and relax those restrictions. With the stroke of a pen, Congress can affect "major changes in the metes and bounds of tribal sovereignty."[11]

Taking the two doctrines together, in treaties, the federal government gave its word to tribes and *should* keep its word as a matter of national honor, but Congress *may* nevertheless break federal promises if it deems it expedient to do so. The tension between these rules is the root of the question this article addresses: How do courts treat generally applicable statutes when those statutes do not mention tribes?

The Supreme Court's Clear-and-Plain Rule

Congress is in the business of enacting nationwide legislation. But what happens when generally applicable federal legislation, if applied to Indian tribes, would divest the tribe of an inherent sovereign or treaty-protected right? "Indian tribes retain attributes of sovereignty over both their members and their territory to the extent that sovereignty has not been withdrawn by federal statute or treaty."[12] So where Congress has not abrogated them, tribes' preconstitutional rights and sovereign powers remain in place, unaffected by federal law.

Take the National Labor Relations Act as an example. The Act never mentions Indian tribes in its text or legislative history. But

the National Labor Relations Board (NLRB) has been particularly aggressive in asserting its jurisdiction in Indian country.

The Supreme Court protects tribes' inherent right to govern and regulate economic activity within their territories.[13] And many tribes retain the right to exclude unwanted persons from their territories, a right that includes the lesser power to condition entry into the reservation on, for example, compliance with tribal law.[14] But if the National Labor Relations Act applies to tribes in their Indian country, then the Act would abrogate both the right to self-govern and the right to exclude. Tribes' right to govern themselves would be abrogated because they could not legislate their own labor relations code or hear labor disputes in their own courts. Their right to exclude would be impaired because they could not regulate employees and labor organizers entering their reservations. Moreover, because tribes generally lack any effective tax base, they depend on commercial enterprises to generate the bulk of their governmental revenue. If labor strikes shut down those commercial operations, private actors could stop the flow of governmental revenue, crippling the tribal governments—and the police departments, fire departments, clinics, schools, heating assistance, and every other program those governments administer.

The National Labor Relations Act is the "supreme law of the land." But so are Indian treaties.[15] And the trust responsibility applies to federal agencies as well as it does federal courts.[16] The question for courts, then, is whether a federal statute that makes no mention of tribes can force such deep incursions into tribal sovereignty.

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To balance Congress's plenary power over Indian affairs against the United States' trust responsibility to tribes, the Supreme Court long ago drew this line: "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."[17] Put differently, a long line of Supreme Court cases "have required that Congress' intention to abrogate Indian treaty rights be clear and plain."[18] The same test applies to the inherent sovereign rights of tribes, even when those rights are not protected by treaty.[19]

The Supreme Court has applied this clear-and-plain test in a variety of circumstances. It has, for example, used the test to determine whether Congress changed the boundaries of Indian reservations,[20] to evaluate whether Congress abrogated treaty fishing rights,[21] and most recently to decide whether Congress had waived tribal sovereign immunity from suit.[22]

Most relevant here, the Court has several times applied the clear-and-plain rule to determine whether a "generally applicable" statute in fact applied to abrogate tribal and treaty rights. In *United States v. Dion*, the Court considered whether the Bald Eagle Protection Act could abrogate a tribal member's treaty-protected right to hunt eagles on an Indian reservation. The Court recognized Congress's power to abrogate tribal rights but repeated its rule that "[w]e have required that Congress' intention to abrogate Indian treaty rights be clear and plain."[23] Courts can find "clear and plain" congressional intention on the face of the statute or in its legislative history, but "what is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[24] Applying the test, the Bald Eagle Protection Act abrogated treaty rights because legislative history evinced Congress's intent to abrogate the hunting rights.[25] The Bald Eagle Protection Act abrogates treaty rights because Congress said it does.

Similarly, consider the "generally applicable" statute that affords federal courts jurisdiction over diversity cases, but says nothing about tribes.[26] In *Iowa Mutual v. LaPlante*, a litigant argued that the diversity-jurisdiction statute overrode a federal policy of encouraging tribal-court jurisdiction, divesting tribal courts of jurisdiction over diverse parties. The Supreme Court disagreed. It held that "[in] the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion."[27]

Thus, a silent statute (such as the employment statutes that the April *Federal Lawyer* article considered, including the Age Discrimination in Employment Act (ADEA),[28] Fair Labor Standards Act,[29] Family Medical Leave Act,[30] Worker Adjustment and Retraining Notification Act,[31] Occupational Safety and Health Act,[32] and Title III of the Americans with Disabilities Act[33]), no matter how generally applicable, *cannot* abrogate tribal rights. A silent statute necessarily lacks *any* evidence that Congress actually considered the conflict, let alone that it decided to resolve the conflict in derogation of tribal sovereignty. As the Supreme Court explained, where a federal statute does not say it applies to tribes, then regardless of how otherwise "generally applicable" the statute is, "the proper inference from silence" is that sovereign power "remains intact."[34]

The *Tuscarora* Dictum

A single sentence in one Supreme Court decision can be read to depart from the Court's otherwise unbroken application of the clear-and-plain rule. In *Federal Power Commission v. Tuscarora Indian Nation*, the Court addressed whether the Federal Power Act authorized condemnation of off-reservation fee land owned by a tribe. To reach its holding, the Court applied its typical clear-and-plain rule and found evidence that Congress intended that the Federal Power Act apply to tribes because it "specifically defines and treats with lands occupied by Indians[.]"[35] It allowed the Federal Power Act to

abrogate tribal rights because Congress said so.

But the Court also noted (in a statement that courts generally agree is dictum)[36] that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[37] Recent attempts to assert federal authority over tribes in Indian Country are all rooted in this single sentence. The "many decisions" the Court relied on were three.[38] Each of those three cases—like the statement itself—involved the rights of individual Indians, *not* the sovereign rights of tribes.

The distinction is important because "[t]he relevant comity is a duty of forbearance not to individual Indians but to Indian governments[.]"[39] Just as saying that U.S. laws are generally applicable to Californians *does not* address whether the same laws apply to the state of California itself, the Supreme Court's statement that laws are generally applicable to individual Indians *does not* address whether the same laws apply to Indian tribes.

The Supreme Court has looked at whether "generally applicable" statutes and federal policy divest tribal rights three times since *Tuscarora*. It held that the Bald Eagle Protection Act abrogates tribal rights because legislative history expresses that intent.[40] Congress said the statute should abrogate tribal rights, so it did. The Court also refused to apply the diversity statute[41] or national energy policies[42] to divest tribes of sovereign rights because the it found "no clear indications that Congress has implicitly deprived the Tribe of its power[.]"[43] Congress didn't address whether the statute abrogated tribal rights, so the Court couldn't apply the statute to abrogate the rights.

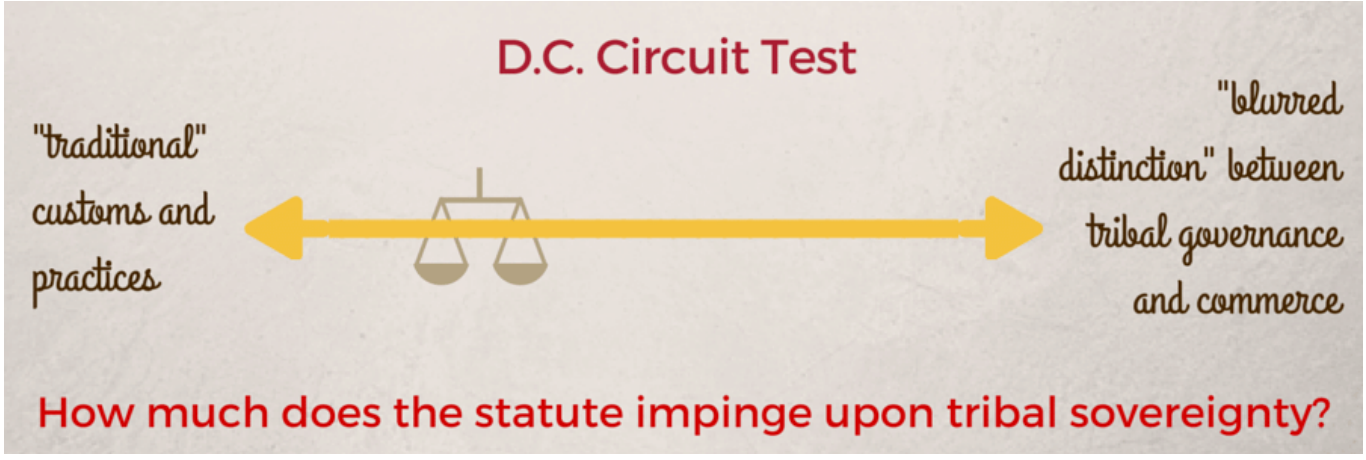
In each post-*Tuscarora* "generally applicable" case, the Court applied the clear-and-plain rule to determine whether the silent statute or policy could abrogate sovereign rights—just as it did in *Tuscarora*. None of the post-*Tuscarora* cases mentioned the *Tuscarora* dictum. Indeed, in the more than 50 years since the Court announced *Tuscarora*, *no* Supreme Court justice has *ever* relied on this dictum—whether writing for a majority, concurrence, or dissent. Instead, each time it describes its *Tuscarora* holding, the Court relies on the case's clear-and-plain analysis, *not* the single-sentence digression.[44] It explains that *Tuscarora* teaches that the Federal Power Act abrogates tribal rights because "Congress squarely considered and rejected" a role for tribal regulation,[45] and that *Tuscarora* "reaffirmed" the Court's reliance on the clear-and-plain rule.[46] Thus, Supreme Court jurisprudence remains unchanged: Silent statutes cannot undermine tribal rights. If Congress seeks to abrogate tribal rights, it must speak clearly and plainly.

Ninth Circuit Invention of the *Tuscarora/Coeur d'Alene* Rule

The law in the circuits is less certain. In 1985, 25 years after *Tuscarora*, Ninth Circuit jurisprudence turned a corner with *Donovan v. Coeur d'Alene Tribal Farm*. A compliance officer with the Occupational Safety and Health Administration (OSHA) issued a $185 fine against a tribe under the Occupational Safety and Health Act. When the Occupational Safety and Health Review Commission reversed the fine, refusing to apply the Act to the tribe, the Secretary of Labor appealed to the Ninth Circuit.[47]

The secretary argued that *Tuscarora*'s stray statement about "Indians and their property interests" governed the case. The Ninth Circuit agreed that the tribe "may be correct when it argues that this language from *Tuscarora* is dictum, but it is dictum that has guided many of our decisions."[48] That was true. The Ninth Circuit had often, appropriately, applied statutes of general applicability to individual Indians (who do not exercise sovereign rights and to whom the United States does not owe a trust responsibility). But then the Ninth Circuit made a jump. It said that "[m]any of our decisions have upheld the application of general federal laws to Indian tribes[.]"[49] The *Coeur d'Alene* Court string cited a slew of cases concerning individual Indians.[50] For example, the court relied on *U.S. v. Farris*, which applied the Organized Crime Control Act to Indians, not tribes.[51] In that case, Judge Herbert Choy, writing for himself, noted that "federal laws generally applicable throughout the United States apply with equal force to *Indians* on reservations. For example, even as to *Indians* on reservations, federal jurisdiction extends to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer."[52] But *Coeur d'Alene* recast Judge Choy's words. It wrote, "Both Judges [James] Browning and [Anthony] Kennedy wrote separately in *Farris,* but neither disagreed with Judge Choy's statement of basic principle that generally applicable federal statutes ordinarily apply *to Indian tribes* and their activities."[53] Even though the Supreme Court has never strayed from its clear-and-plain rule, the Ninth Circuit announced that the myriad cases concerning individual Indians mean that "we have not adopted the proposition that *Indian tribes* are subject only to those laws of the United States expressly made applicable to them."[54]

By jumping from applying silent laws to individual *Indians* to applying those laws to *Indian tribes*, the Ninth Circuit jettisoned both tribal sovereignty and the United States' trust responsibility to tribes. But the Ninth Circuit still had to square its new rule with the preceding century of federal Indian law. Having recast the *Tus-*



carora dictum as a new "rule," the Ninth Circuit invented judicial "exceptions"—never before seen in Supreme Court cases—to try to shoehorn the dictum into the Supreme Court's Indian-law decisions.[55] Unlike the clear-and-plain rule that *forbids* application of a silent statute to tribes, under the *Coeur d'Alene* test, the court *must* apply a silent statute to a tribe unless: (1) doing so would touch "exclusive rights of self-governance in purely intramural matters," (2) application of the statute would "abrogate rights guaranteed by Indian treaties," or (3) there is evidence that Congress intended to exempt Indians from application of the statute.[56] This is the analysis that the April 2015 *Federal Lawyer* article described.

Other circuits picked up the *Coeur d'Alene* test, and it is now firmly established in the Ninth, Second, and Eleventh circuits. Using this analysis, these courts have held that statutes as diverse as the National Labor Relations Act,[57] Occupational Safety and Health Act,[58] Americans with Disabilities Act,[59] and Employee Retirement Income Security Act[60] apply to tribes even though Congress gave no indication that any of these statutes should apply to Indian tribes.

It is remarkably difficult for tribal advocates to convince *Coeur d'Alene* courts to apply an exception. For example, when a tribe argued that applying the Occupational Safety and Health Act would compel it to allow OSHA inspectors onto its land in violation of its treaty-protected right to exclude unwanted persons from its territory, the Ninth Circuit refused to apply the exception. It held that the "Tribe's right of general exclusion" could not bar the specific OSHA inspector entries because the exception is limited to "subjects specifically covered in treaties[.]"[61] It would have taken a prescient negotiator to bargain for such rights even before the rise of the industrial health movement.

But Indian law also does not require such foresight. The Supreme Court makes no distinction between "general" and "specific" treaty rights. An Indian treaty is "not a grant of rights *to* the Indians, but a grant of rights *from* them—a reservation of those [rights] not granted."[62] These treaties protect all sovereign rights that the tribe does not expressly surrender, whether all those rights are listed or not. Thus, the Supreme Court has found a right to impose a severance tax on oil and gas in a treaty that did not mention oil, gas, or taxation[63] and riparian rights in a treaty that did not mention water.[64] Only the *Coeur d'Alene* treaty exception requires "specific" rights that would be abrogated by the federal law.

The few times that tribes have squeezed within the exceptions raise more questions than they answer. Most recently, the NLRB applied the *Coeur d'Alene* treaty exception to the Chickasaw Nation. It held that application of the National Labor Relations Act would abrogate a Treaty of Dancing Rabbit Creek right to be free from all federal laws except those "enacted by Congress in legislation specific to Indian affairs."[65] That analysis does not just exempt the Chickasaw Nation from application of the National Labor Relations Act but would also free them from compliance with numerous other federal laws including, for example, the Internal Revenue Code. Yet, in *Chickasaw Nation v. United States*, the Supreme Court refused to exempt the Chickasaw Nation from the Internal Revenue Code.[66] How can the NLRB's treaty interpretation fit with the Supreme Court's decision? The Ninth Circuit once refused to apply the Fair Labor Standards Act to tribal law enforcement, reasoning that officer-payment decisions are "intramural[.]"[67] It similarly reasoned that the ADEA should not apply to a tribe's employment of a tribal member.[68] But if a strike under the National Labor Relations Act can choke off revenue to an entire tribal government, including its police force, does it not also touch intramural affairs? And if the ADEA does not apply to a tribal-member worker but presumably would apply to its nonmember worker, must that tribe prescribe parallel regulations for its member and nonmember workers? By requiring tribes to fit within narrow exceptions that do not square with the federal trust responsibility or the rest of Indian law, the *Coeur d'Alene* test invites these anomalous results.

But adoption of the *Coeur d'Alene* test is not universal. Although the U.S. Court of Appeals for the Seventh Circuit initially followed *Coeur d'Alene*,[69] it has since retreated from the Ninth Circuit analysis.[70] The U.S. Courts of Appeals for the Eighth and Tenth circuits have avoided, if not outright rejected, *Coeur d'Alene*, giving fielty to the Supreme Court's exposition of federal Indian law. The U.S. Court of Appeals for the D.C. Circuit has created its own test that tries to split the difference. And two panels of the U.S. Court of Appeals for the Sixth Circuit are sharply split on the question of which test should govern.

Eighth and Tenth Circuits and the U.S. Supreme Court: Survival of the Clear-and-Plain-Statement Rule

In the years since *Tuscarora*, the Supreme Court and Eighth and Tenth circuits have continued to rely on the clear-and-plain rule to hold that various statutes that are silent as to tribes—the federal-court diversity-jurisdiction statute,[71] the National Labor Relations Act,[72] the Occupational Safety and Health Act,[73] and the ADEA[74]—cannot abrogate the sovereign rights of tribes acting within their reservations.

But the clear-and-plain rule does not always mean that the court must rule in favor of the tribe. For example, under the clear-and-plain rule, the Tenth Circuit has held that provisions of the Safe Drinking Water Act[75] and Employee Retirement Income Security Act[76] apply to tribes because Congress clearly and expressly indicated that they do. The Supreme Court has similarly applied provisions of the Federal Power Act[77] and Internal Revenue Code[78] to tribes because Congress clearly and plainly indicated that the statutes apply to tribes.

The importance of the test is not its outcome but its effectuation of the federal trust responsibility and respect for the Constitution's textual commitment of Indian affairs to Congress,[79] not agencies or courts. The Ninth Circuit shudders that a rule other than *Coeur d'Alene* means that "the enforcement of nearly all generally applicable federal laws would be nullified[.]"[80] But the U.S. Supreme Court responds that that complaint is one for Congress, not the courts: "The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress."[81] If federal policy demands that that tribal sovereignty should be limited, that "is fundamentally Congress's job, not ours[.]"[82]

D.C. Circuit Goes Rogue: the *San Manuel* Rule

The D.C. Circuit takes a third approach. For decades, the NLRB had refrained from exercising jurisdiction over tribes. It properly acknowledged its responsibility to assert jurisdiction over *nontribal* employers and individual Indians in Indian Country.[83] But it also recognized that under established principles of federal Indian law, *tribal* governmental employers were "implicitly exempt as employers within the meaning of the Act."[84] About 10 years ago, the NLRB

decided to "adopt a new approach" fueled by the *Tuscarora* dictum and *Coeur d'Alene* exceptions. It sought to enforce an order against the San Manuel Band of Serrano Mission Indians for what it believed were the tribe's unfair labor practices at the tribally owned casino that the tribe operated within its tribal territory.[85] The question for the D.C. Circuit was whether to apply the silent National Labor Relations Act to the tribe in derogation of the tribe's sovereign rights.[86]

The tribe argued the clear-and-plain rule while the NLRB argued for its application of the *Coeur d'Alene* test. The D.C. Circuit believed that it saw "conflicting Supreme Court canons of interpretation" but determined that it need not choose between the clear-and-plain rule and the *Tuscarora* dictum with *Coeur d'Alene* exceptions. Instead, it articulated a sliding scale of tribal sovereignty with "traditional customs and practices" occurring within the reservation on one end and "commercial enterprises that tend to blur any distinction between tribal government and a private corporation" at the other.[87] To determine whether a silent statute applies to a tribe, it places the challenged activity on this continuum and tries to quantify how much the statute would "imping[e] upon protected tribal sovereignty[.]"[88]

On the facts before it, it acknowledged that the tribe's operation of its casino was governmental and that application of the National Labor Relations Act to the tribe "will impinge, to some extent" on tribal sovereignty, but it nevertheless applied the Act to the tribe. It reasoned that any impairment of tribal sovereignty was "negligible[,]"[89] and its effect on governmental revenue would be "unpredictable, but probably modest[.]"[90]

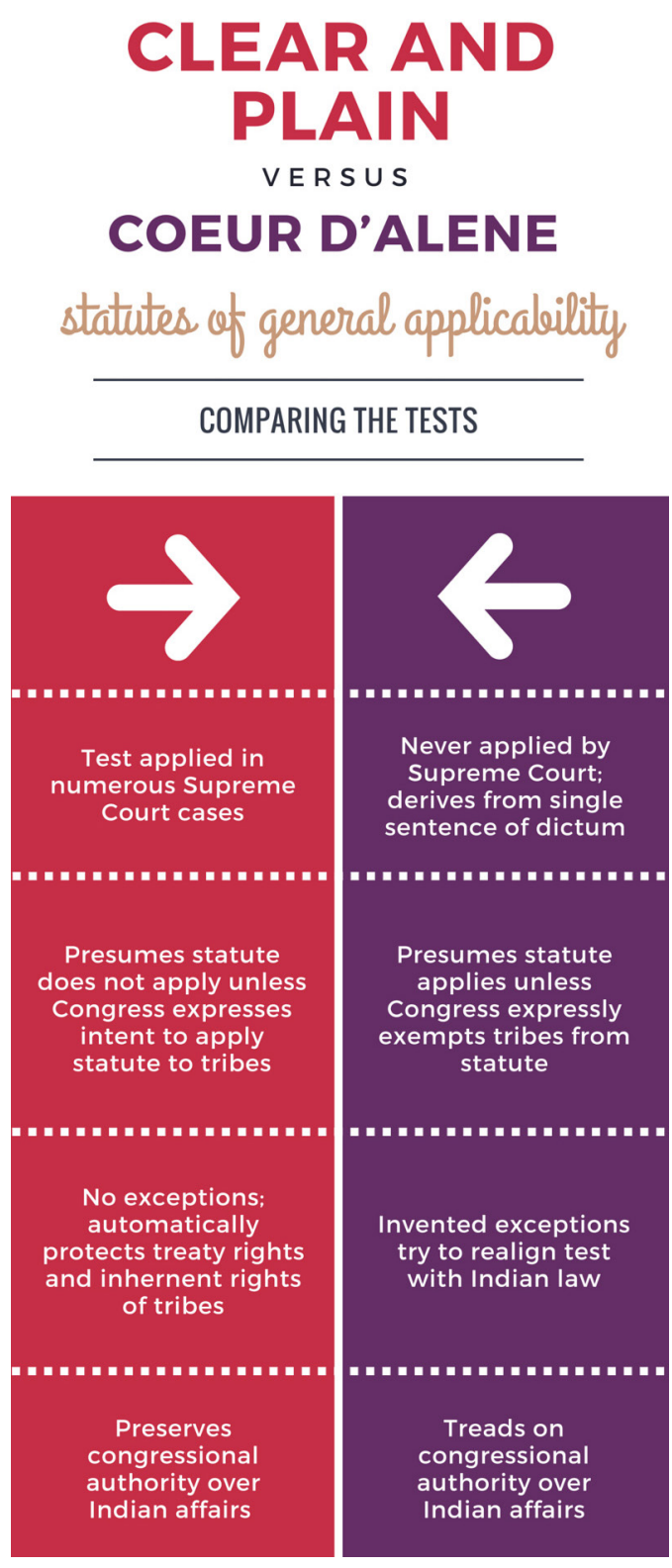
No other circuit-court case has ever applied this rule. Rightly so. It essentially asks a court to determine whether a tribe's activity is "Indian enough" and whether an incursion into tribal sovereignty or treaty rights is "big enough" to warrant protection. No Supreme Court precedent supports this result.

Sixth Circuit Drama: To *Coeur d'Alene* or Not To *Coeur d'Alene*

Against this backdrop, this year two parallel cases made their way to the U.S. Court of Appeals for the Sixth Circuit presenting substantially the same question: whether the National Labor Relations Act applies to the respective tribes. In both *NLRB v. Little River Band of Ottawa Indians* and *Soaring Eagle Casino & Resort v. NLRB*, the National Labor Relations Board used its modified *Coeur d'Alene* test to apply the Act to the tribes. In both, the tribes argued for application of the clear-and-plain rule.

The cases wound their way to the Sixth Circuit on parallel paths, and in June, while the *Soaring Eagle* panel still had its case under advisement, the *Little River* panel held that the Act applied to the Band. The lead opinion recognized that "federal Indian law and policy are areas over which the Board has no particular expertise[.]"[91] The court nevertheless decided on a split 2-1 vote to follow the Board's lead and "adopt the *Coeur d'Alene* framework to resolve th[at] case."[92] To reach this result, the Court focused on circuit-court treatment of statutes of general applicability[93] and emphasized a body of Indian law addressed to whether tribes have jurisdiction over non-members, not whether federal actors have jurisdiction over tribes.[94]

Judge McKeague, though, offered a full-throated dissent from the decision. He began that "[t]he sheer length of the majority's opinion ... betrays its error."[95] He traced the fanciful path of the dictum-turned-doctrine and called *Coeur d'Alene*



a house of cards. It should—and does—collapse when we notice what is inexplicably overlooked in the fifty-five years of adding card upon card to 'a thing said in passing.' Not only has the Supreme Court conspicuously refrained from approving it, but the 'doctrine' is exactly 180-degrees backward.[96]

Moreover, Judge McKeague noted his belief that the Little River decision created a circuit split,[97] perhaps signaling the need for *en banc* or *certiorari* review.

Barely three weeks later, the *Soaring Eagle* panel delivered their opinion. They similarly held that the NLRA applies to the tribe, but only did so because they were bound by Little River's adoption of *Coeur d'Alene*.[98] The 34-page *Soaring Eagle* decision outlined why,

> if writing on a clean slate, we would conclude that, keeping in mind "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area," *Santa Clara Pueblo*, 436 U.S. at 60, the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land. The NLRA, a statute of general applicability containing no expression of congressional intent regarding tribes, should not apply to the Casino and should not render its no-solicitation policy void.[99]

The opinion recognized that "[t]he *Coeur d'Alene* framework unduly shifts the analysis away from a broad respect for tribal sovereignty,"[100] and doubted that "*Tuscarora* can bear the weight placed on it by the *Coeur d'Alene* framework or the strain of the Court's more recent contrary pronouncements on Indian law."[101] But bound by *Little River*'s adoption of *Coeur d'Alene*, the court ruled against the tribe "[n]otwithstanding our preferred analytical framework[.]"[102]

In the end, four of the six judges who considered the question would *not* apply the NLRA to tribes, but the law of the circuit is to do just that. The question is ripe for *en banc* resolution.

Resolution of the Circuit Split

With three tests across eight circuits, the question of whether *Coeur d'Alene* should supplant over a century of Indian law is ripe for high-court resolution. As the Sixth Circuit cases continue, the Supreme Court may well face a certiorari petition that notes the three different tests that circuit courts apply to the question of whether silent statutes of general application apply to Indian tribes. That certiorari petition would ask the Court to resolve the question once and for all.

Conclusion

Conflicting principles of Indian law created a split in courts' treatment of whether a generally applicable statute that does not mention tribes nevertheless can apply to tribes. In the Second, Sixth (for now), Ninth, and Eleventh circuits, the tribe must essentially prove the federal statute doesn't apply. In the Eighth and Tenth circuits, the plaintiff must prove that it does. The law is up in the air in the remaining circuits. Unless and until the Supreme Court settles the circuit split, knowing what (if any) test a plaintiff's chosen venue applies may influence plaintiffs' filing decisions and tribes' defense strategies. Practitioners looking to sue a tribe must be mindful of this divergent law. ⊙

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Endnotes

[1]Gregory S. Arnold, *Employment Law in Indian Country: Finding the Private-Action Jurisdictional Hook Is Not Easy*, The Federal Lawyer, April 2015, at 3.

[2]*See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

[3]*Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823).

[4]Stephen L. Pevar, The Rights of Indians and Tribes 30 (4th ed. 2012).

[5]*Id.*

[6]U.S. Const. art. VI, cl. 2 (supremacy clause).

[7]*United States v. Jicarilla Apache Nation*, ___ S. Ct. ___, 131 S.Ct. 2313, 2324 (2011) (quotation omitted).

[8]*Id.*

[9]*United States v. Lara*, 541 U.S. 193, 200 (2004).

[10]*Id.* (quotation omitted).

[11]*Id.* at 202.

[12]*Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

[13]*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 (1983).

[14]*Merrion*, 455 U.S. at 144.

[15]U.S. Const. art. VI, cl. 2 (supremacy clause).

[16]*Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

[17]*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *see also United States v. Dion*, 476 U.S. 734, 738-39 (1986) (citing decisions announced from 1876 through 1979).

[18]*Dion*, 476 U.S. at 738.

[19]*Merrion*, 455 U.S. at 148 n.14 (1982).

[20]*E.g.*, *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977).

[21]*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

[22]*Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S.Ct. 2024 (2014).

[23]*Dion*, 476 U.S. at 738.

[24]*Id*. at 738–40.

[25]*Id*.

[26]28 U.S.C. § 1332.

[27]*Iowa Mut. Ins. Co.*, 480 U.S. at 17-18.

[28]29 U.S.C. §§ 621-634.

[29]29 U.S.C. §§ 201-262.

[30]29 U.S.C. §§ 2601-2654.

[31]29 U.S.C. §§ 2101-109.

[32]29 U.S.C. §§ 651-678.

[33]42 U.S.C. §§ 12181-12189.

[34]*Merrion*, 455 U.S. at 148 n.14.

[35]*Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960).

[36]E.g., *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) ("*Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case."); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (recognizing that the Ninth Circuit's analysis "borrowed a presumption[] from dictum in [*Tuscarora*]").

[37]*Tuscarora*, 362 U.S. at 116.

[38]*Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943) (holding that a state may impose inheritance tax on estate of tribal member); *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418 (1935) (holding that federal tax laws apply to earnings

of funds invested on behalf of individual tribe members); *Choteau v. Burnet*, 283 U.S. 691, 693 (1931) (applying the Internal Revenue Code to individual Indians because "[t]he language of [the Code] subjects the income of '*every individual*' to tax" (emphasis added) (footnote omitted)).

[39]*Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490, 494-95 (7th Cir. 1993).

[40]*Dion*, 476 U.S. at 740-45.

[41]*Iowa Mut. Ins. Co.*, 480 U.S. at 17-18.

[42]*Merrion*, 455 U.S. at 151-52 (1982).

[43]*Id.* at 152.

[44]*Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 248 n.21 (1985); *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765, 786 (1984).

[45]*Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands of Mission Indians*, 466 U.S. 765, 787 (1984).

[46]*Oneida Cnty.*, 470 U.S. at 248 n.21.

[47]*Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1114-15 (9th Cir. 1985).

[48]*Id.* at 1115.

[49]*Id.*

[50]The single case it cited regarding an Indian tribe, *Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), concerned the peculiar situation of conflicting canons of interpretation. Because the tribe did not argue the clear-and-plain rule that protects tribes from congressional silence, the court followed the contrary tax canon that requires exemptions to be definitely expressed. *Id.* at 880-81. The result is less a matter of Indian law than tax law.

[51]*U.S. v. Farris*, 624 F.2d 890 (9th Cir. 1980).

[52]*Id.* at 893 (quotation omitted, emphasis added).

[53]*Coeur d'Alene Tribal Farm*, 751 F.2d at 1115.

[54]*Id.* at 1115-16 (emphasis added).

[55]*Id.* at 1116.

[56]*Id.*

[57]*NLRB v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003).

[58]*Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.3d 182 (9th Cir. 1991).

[59]*Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999).

[60]*Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991). The 2006 Pension Protection Act amended ERISA's exception for governmental plans to "include[ ] a plan which is established and maintained by an Indian tribal government[,]" but before the amendment, ERISA made no mention of tribes. *See Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1279 (10th Cir. 2010).

[61]*Dep't of Labor v. OSHRC*, 935 F.2d 182, 186-87 (9th Cir. 1991).

[62]*United States v. Winans,* 198 U.S. 371, 381 (1905) (emphasis added).

[63]*Merrion*, 455 U.S. at 144-47.

[64]*Winters v. U.S.*, 207 U.S. 564, 575-77 (1908).

[65]*Id.* at *3.

[66]534 U.S. 84 (2001).

[67]*Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004).

[68]*EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001).

[69]*Smart v. State Farm Ins.*, 868 F.2d 929, 936 (7th Cir. 1989) (applying ERISA to a tribe).

[70]*Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495 (7th Cir. 1993) (deciding not to apply Fair Labor Standards Act to a tribal entity). *But see Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 671, 674 (7th Cir. 2010) (applying a *Coeur d'Alene*-type test to find that OSHA applied to tribal entity).

[71]*Iowa Mut. Ins. Co.*, 480 U.S. at 17–18.

[72]*See NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). Although some seek to limit the import of *San Juan* to right-to-work preemption questions, the Tenth Circuit characterized the case as holding that "Congressional silence exempted Indian tribes from the National Labor Relations Act." *Dobbs*, 600 F.3d at 1284.

[73]*Donovan v. Navajo Forest Prod. Ind.*, 962 F.2d 709 (10th Cir. 1982).

[74]*EEOC v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246 (8th Cir. 1993); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989).

[75]*Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986).

[76]*Dobbs*, 600 F.3d at 1279, 1283-85.

[77]*Tuscarora*, 362 U.S. at 118.

[78]*Chickasaw Nation v.* United States, 534 U.S. 84 (2001)

[79]U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. art. II, § 2, cl. 2 (Treaty Clause).

[80]*OSHRC*, 935 F.2d at 187.

[81]*Bay Mills Indian Community*, 134 S.Ct. at 2037.

[82]*Id.*

[83]E.g., *Navajo Tribe v. NLRB*, 288 F.2d 162, 164 (D.C. Cir. 1961) (upholding the Board's application of the Act to a private employer despite the employer's on-reservation location).

[84]*Fort Apache Timber Co.*, 226 NLRB 503, 506 (1976).

[85]*San Manuel Indian Bingo & Casino & Hotel Emps. & Rest. Emps. Int'l Union*, 341 NLRB 1055, 1057 (2004).

[86]*San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

[87]*Id.* at 1312–13.

[88]*Id.* at 1311.

[89]*Id.* at 1314.

[90]*Id.*

[91]*NLRB v. Little River Band of Ottawa Indians*, Case No. 14-2239 (June 9, 2015) ("*Little River*"), 7.

[92]*Id*. at 18.

[93]*Id.* at 12-13.

[94]*E.g., id.* at 8-11 (describing *Montana v. United States*, 450 U.S. 544 (1981) and its progeny), 17 ("[T]here is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other.").

[95]*Id.* at 25 (McKeague, J., dissenting).

[96]*Id.* at 38 (McKeague, J., dissenting).

[97]*Id.*

[98]*Soaring Eagle Casino and Resort v. NLRB*, Case No. 14-2405 (July 1, 2015), 17.

[99]*Id.* at 27.

[100]*Id.* at 32.