COMMENTS

ERISA AND INDIAN TRIBES: ALTERNATIVE APPROACHES FOR RESPECTING TRIBAL SOVEREIGNTY

KRISTEN E. BURGE *

I. INTRODUCTION

The economies of a number of Indian tribes throughout the United States have experienced tremendous growth and development over the past few years, often due to tribal gaming and related enterprises such as tourism. Indian tribal employers, such as the Ho-Chunk Nation in Wisconsin, are actively recruiting potential employees. They are looking to build upon their economic success and to continue raising revenue for their tribal operations. As Indian tribes continue to develop, operate, and own tribal businesses, the need for employees correspondingly increases, as do questions regarding employment issues in the tribal context.

The Ho-Chunk Nation and one of its casinos, Majestic Pines, were recently named the Jackson County "Employer of the Month" based on their contributions and strong presence in the community.[1] The Ho-Chunk Nation (the "Nation") has approximately 4,700 members and holds title to 2,000 acres of land.[2] The Nation is currently the largest employer in Jackson County with 708 employees in non-gaming positions and 460 employees in gaming positions.[3] At the "Employer of the Month" ceremony, representatives from the Nation were available to discuss employment opportunities with the Nation and provide information regarding the forty to fifty available positions.[4] However, with such opportunities came questions.

As tribal employers such as the Ho-Chunk Nation continue to grow and hire more employees, one of the leading questions is whether tribal employers will offer employee benefit plans. While employers are not required to establish benefit plans for their employees, many employers do so in order to attract and retain potential employees, especially with

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* B.A., Philosophy and Communication, University of Arizona, 1995; M.A., Philosophy, University of Wisconsin-Madison, 2001; J.D., University of Wisconsin Law School, Class of 2001. Special thanks to my husband, Del Laverdure, for his invaluable assistance on this Comment and his constant encouragement and support. Thanks also to my parents, Gerry and Vicky, and my sister, Kim, for all their love and support.

1. *Ho-Chunk Nation Chosen as Employer of the Month*, HOCAK WORAK, (Black River Falls, Wis.) Jan. 21, 2000, at 5.
2. *Id.*
3. *Id.*
4. *Id.*

the current shortage of qualified employees in today's tight job market.[5] However, if tribal employers establish employee benefit plans, the next issue is whether federal employment statutes, such as the Employee Retirement Income Security Act (ERISA),[6] apply to tribal employers.

Enacted in 1974, ERISA was designed to remedy certain defects in the private retirement system, while recognizing the voluntary nature of private retirement plans.[7] ERISA applies to any employee benefit plan established or maintained by an employer or an organization that represents employees and which is engaged in commerce or any industry/activity affecting commerce.[8] However, "governmental plans" are exempt from the Act.[9] A "governmental plan" is defined as a plan that is "established or maintained for its employees by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."[10] The exemption of federal, state, and local governments is at least partially based on the assumption that such plans could avoid underfunding difficulties because of their taxing authority; however, it has been recognized that the basis for this exemption was much more complex and included political considerations.[11]

ERISA is silent with respect to whether or not it applies to Indian tribes or tribal employers. Thus, the federal courts have been left with the

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5. For example, Potawatomi Bingo Casino has run frequent advertisements on several Madison and Milwaukee radio stations to recruit potential employees. The ad lists the advantages of working for Potawatomi Bingo Casino, including a comprehensive employee benefits package. The radio ad refers interested applicants to a Web site, betterworkhere.com, to get more information or to apply online. On its Web site, the Tribe lists the employee benefits offered for its employees, which include "medical, prescription drug, dental, and vision insurance. Group Term Life and non-occupational Short-term Disability insurance provided at no cost to the employee," as well as a 401(k) plan and various employee incentives, activities, and events. Potawatomi Bingo Casino, *Job Classifieds, at* http://www.betterworkhere.com/why.html (last visited Apr. 20, 2000).

6. 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1998).

7. H.R. Rep. No. 93-533 (1973).

> It is hereby declared to be the policy of this Chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

29 U.S.C. § 1001(b) (1994).

8. 29 U.S.C. §1003(a) (1994).

9. *Id.* § 1003(b)(1).

10. *Id.* § 1002(32).

11. H.R. Rep. No. 93-533 (1973); Bronislaw E. Grala, *Investments of Governmental Plans of States and Their Political Subdivisions*, 415 PRACTISING LAW INSTITUTE 391 (1998). This Comment does not address the desirability of the "governmental plan" exemption from ERISA, but rather only argues that tribal employers should be treated the same as other federal, state, and local governmental employers.

responsibility of interpretation. To date, the Supreme Court has not issued an opinion regarding ERISA's applicability to tribes or tribal employers. However, the Seventh and Ninth Circuits have addressed whether ERISA is applicable to Indian tribal employers and both have held that ERISA applies.[12] In *Smart v. State Farm Insurance Co.*, the Seventh Circuit held that ERISA governed a group health policy issued by a non-tribal insurer for the tribe's employees at a health center owned and operated by the tribe and located on the reservation.[13] The court characterized the fundamental issue as whether Congress intended ERISA to apply to Indian tribal employers.[14] The court reasoned that ERISA was presumed to include Indian tribes unless Congress explicitly excluded them.[15]

The Ninth Circuit reached the same result in *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*. The court found that the application of ERISA would not interfere with exclusive tribal rights of self-governance and therefore held that ERISA was applicable to the tribal employer.[16] In finding that ERISA applies to tribal employers, the Seventh and Ninth Circuits relied on dicta in the Supreme Court's opinion in *Federal Power Commission v. Tuscarora Indian Nation* that "a general statute in terms applying to all persons includes Indians and their property interests."[17]

Contrary to these decisions, the Tenth and Eighth Circuits have held that other federal employment statutes of general applicability do not apply to tribes.[18] The Tenth and Eighth Circuits have examined the Occupational Safety and Health Act[19] (OSHA) and the Age Discrimination in Employment Act[20] (ADEA), both of which are federal statutes of general applicability that are silent with respect to tribes. Relying on Supreme Court precedent, established canons of construction, and the current federal policy supporting tribal sovereignty and self-government, the Tenth and Eighth Circuits found the federal statutes inapplicable to tribes absent clear evidence of congressional intent to apply the statutes to tribes.[21]

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12. Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989); Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991). *See* discussion *infra* Section III.B.

13. 868 F.2d at 938.

14. *Id.* at 932.

15. *Id.* at 932-33.

16. *Lumber Indus.*, 939 F.2d at 685-86.

17. 362 U.S. 99, 116 (1960).

18. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989); EEOC v. Fond du Lac Heavy Equip. & Constr. Co. Inc., 986 F.2d 246 (8th Cir. 1993). *See* discussion *infra* Section III.A.

19. 29 U.S.C. §§ 651-668 (1994).

20. *Id.* §§ 621-634.

21. *See* discussion *infra* Section III.A.

Although not adopting the approach taken by the Tenth and Eighth Circuits, the Seventh Circuit suggested in a later case, *Reich v. Great Lakes Fish & Wildlife Commission*, that the application of ERISA to tribal employers would be different if the employees were performing a governmental function as opposed to activities of a commercial service character.[22] *Reich* addressed whether the Fair Labor Standards Act (FLSA), also a federal statute of general application, applied to the employees of the Great Lakes Indian Fish and Wildlife Commission. The Seventh Circuit held that the employees were exempt from the FLSA and furthermore, that "any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act, are exempt."[23] The court distinguished *Smart* and *Lumber Industry*, stating that "the employees in those cases were engaged in routine activities of a commercial or service character."[24]

This Comment argues that the Seventh and Ninth Circuits' approach in *Smart* and *Lumber Industry*, particularly in their analysis of federal statutes of general application, is flawed. The approach of the Tenth and Eighth Circuits is preferable in light of well-established principles of federal Indian law, Supreme Court precedent, and the current federal policy supporting tribal sovereignty and self-determination. Alternatively, the Seventh Circuit's recent decision in *Reich*, while problematic, provides a significant inroad for treating tribal government employers similar to state government employers, who are exempt from ERISA based on the "governmental plan" exception.

Part II provides a brief overview of tribal sovereignty and the relationship between the federal government and Indian tribes, providing the requisite context for analyzing whether federal statutes of general applicability should apply to tribes. Part III evaluates the different approaches taken by the Tenth and Eighth Circuits, as opposed to the Seventh and Ninth Circuits, regarding federal statutes of general applicability, including ERISA. Part IV analyzes the Seventh Circuit's decision in *Reich*, critiques the distinction made between commercial activities and governmental functions, and examines the similarities between Indian tribal employers and state governmental employers. The analysis tracks the increasing trend to treat Indian tribes as states under the Internal Revenue Code,[25] and briefly compares the employee benefits currently offered by the Ho-Chunk Nation to those offered under the State of Wisconsin's Employe Trust Fund. This Comment concludes that while the approach of the Tenth and Eighth Circuits is preferable to that of the Ninth and Seventh Circuits in interpreting federal statutes of general

22. 4 F.3d 490 (7th Cir. 1993).
23. *Id.* at 495.
24. *Id.*
25. I.R.C. § 7871 (1994).

applicability such as ERISA, the recent Seventh Circuit decision in *Reich* may actually be the most promising for respecting tribal sovereignty.

II. TRIBAL SOVEREIGNTY AND THE FEDERAL-TRIBAL RELATIONSHIP

Indian tribes in the United States have a unique status as quasi-sovereign governments, in that they are neither completely independent nations, nor one of the states of the United States of America.[26] Indian tribes in the United States are some of the few nations to have such sovereignty while being physically surrounded by another country.[27] According to the United States Supreme Court, although tribes are "physically within the territory of the United States . . . they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.'"[28]

Before analyzing whether federal statutes of general applicability, like ERISA, should apply to tribal employers, it is necessary to briefly examine the concept of tribal sovereignty, the historical relationship between tribes and the federal government, and the canons of construction specifically established by the Supreme Court for federal Indian law. When viewed in this context, it seems clear that ERISA, as a federal statute of general applicability, should not apply to tribal employers.

A. Tribal Sovereignty

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory,"[29] and at one time, Indian tribes were considered international nations in their dealings with the United States.[30] Despite the changed view of the relationship between the United States and tribes, which has come to be characterized as a "trust relationship,"[31] the Supreme Court has acknowledged that

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26. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

27. VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 2 (1984).

28. United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)).

29. United States v. Mazurie, 419 U.S. 544, 557 (1975).

30. Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 628-30 (1994). For example, the Supreme Court once stated that "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979). However, reflecting the changed relationship between tribes and the United States, the Supreme Court declared that "tribes can no longer be described as sovereigns in this sense." Duro v. Reina, 495 U.S. 676, 685 (1990).

31. Monette, *supra* note 30, at 632 (arguing that tribes and the United States entered into a federalism relationship in signing treaties). Monette reasons that treaty

Indian tribes have "always been considered . . . distinct, independent political communities, *retaining their original natural rights*."[32] The United States government acts as a "guardian" for the tribes; however, the "weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[33]

Similar to the Tenth Amendment, which reserves powers to the states that are not delegated to the United States nor prohibited by the Constitution, tribes retain those sovereign powers that have not been explicitly divested.[34] The Supreme Court expressly affirmed this proposition in an early case, *United States v. Winans*,[35] which involved off-reservation fishing rights of tribal members.[36] The Court stated that "the treaty was *not* a grant of rights to the Indians, but a grant of rights *from* them—a reservation of those not granted."[37] In other words, the treaty did not give rights to the Tribe, but rather, it reserved hunting and fishing rights that the Tribe already possessed.[38]

As sovereigns who pre-existed the United States Constitution, tribes derive their sovereignty from their tribal members-citizens, not from the United States government.[39] According to the Supreme Court, although "Congress has in certain ways regulated the manner and extent of the tribal power of self-government, [that] does not mean that Congress is the source of that power . . . . [W]hen [a tribe] exercises [the] power [to punish tribal offenders], it does so as part of its *retained sovereignty* and not as an arm of the Federal Government."[40]

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negotiations for tribes served the same function as the constitutional convention did for states, and therefore the union-tribe treaty relationship should be treated similarly to the union-state constitutional relationship. *Id.* at 632-33.

32. Worcester v. Georgia, 31 U.S. 515, 559 (1832) (emphasis added).

33. *Id.* at 561.

34. United States v. Winans, 198 U.S. 371 (1905).

35. *Id.*

36. *Id.*

37. *Id.* at 381 (emphasis added).

38. The Supreme Court has most recently reaffirmed the Winans' doctrine of "reserved rights" in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207-08 (1999) (holding that the Tribe's usufructary rights guaranteed by treaty were not extinguished by Minnesota's admission to the Union under the equal footing doctrine).

39. According to Monette, "Democracy's enduring lesson is that the only defensible sovereignty finds its source in those over whom it is exercised—government by the governed. Under democratic principles, tribal sovereignty can have only one source: the tribes themselves." Richard A. Monette, *Sovereignty and Survival*, A.B.A. J., Mar. 2000, at 64, 65. In addition, federal case law illustrates that "both state[s] and tribe[s] pre-existed the Union as international, independent entities, (2) that they are the sources of their own sovereignty, (3) that they relinquished some measure of that sovereignty to the Union, (4) that the movement of that relinquishment was from the local entities to the central, not vice-versa and (5) that what was not relinquished was reserved." Monette, *supra* note 30, at 654.

40. *Wheeler*, 435 U.S. at 328 (emphasis added). The Second Circuit has described the "original natural rights" of tribes as "'retained' in the sense that they are not granted by the federal government, but are a function of the tribe's unique status as an

Pursuant to its status as a sovereign government, a tribe has certain inherent powers, which include the power to determine its form of government and citizenship, to exclude individuals from its jurisdiction, to enact laws, to establish a judiciary, to tax, to enforce laws within its jurisdiction, to regulate commerce, to manage its domestic affairs, and to claim immunity from suit.[41] Included in a tribe's inherent powers of self-government is the power to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[42] Federal statutes such as ERISA, which apply to employer-employee relationships, erode tribal sovereignty by superimposing federal law in the tribal employment context. Based on the inherent power of a tribe to regulate its domestic affairs, it seems that tribal employer-employee issues, such as employee benefits, should fall under tribal jurisdiction. However, the characterization of tribes as "domestic dependent nation[s]"[43] often results in erroneous challenges to various aspects of tribal sovereignty, including issues regarding employment.

B. The Plenary Power Doctrine

The plenary power doctrine has its roots in Article I of the United States Constitution, where Congress assumed the right to deal with Indian tribes to the exclusion of the states.[44] However, through judicial opinions, the idea that Congress has plenary authority to deal with tribes has been transformed into the notion that Congress has plenary power over tribes.[45] Consequently, the Supreme Court has held that tribes do not possess the full attributes of sovereignty, but rather possess a unique sovereignty of a limited character that "exists only at the sufferance of Congress."[46] According to the Court, Congress has "plenary power"[47] to divest Indian

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aboriginal entity." Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 178 (2d Cir. 1996).

41. Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 685-86 (1994).

42. Montana v. United States, 450 U.S. 544, 565 (1981).

43. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

44. U.S. CONST. art. I, § 8, cl. 3.

45. *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886).

46. *Wheeler*, 435 U.S. at 323. However, there are persuasive arguments that Congress only has plenary authority to deal with tribes to the exclusion of states, not plenary power over them. *See* text accompanying note 47.

47. The first majority opinion citing the plenary relationship referred to "plenary *authority*" not "plenary power." Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (emphasis added). Furthermore, the Court has stated that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946). Nevertheless, the plenary relationship with respect to tribes is more often characterized as "plenary power" instead of "plenary authority." Monette, *supra* note 30, at 663.

tribes of aspects of their sovereignty,[48] despite the fact that the plenary power doctrine has been widely criticized as lacking any constitutional basis.[49]

Notwithstanding the legitimacy of the plenary power doctrine, the Supreme Court has held that "until Congress acts, the tribes retain their existing sovereign powers . . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[50] Aspects of sovereignty lost by virtue of Indian tribes' dependent status is based on the notion that it would be inconsistent for tribes to independently determine their external relations in light of their quasi-sovereign status.[51]

Despite the limitations on tribal sovereignty under the plenary power doctrine, tribes are nevertheless "distinct, independent political communities."[52] For example, in the Indian Tribal Justice Act of 1993,[53] Congress affirmed a "government-to-government relationship between the United States and each Indian tribe."[54] The Act recognized principles of "self-determination, self-reliance, and inherent sovereignty of Indian tribes" and stated that "tribes possess the inherent authority to establish their own form of government."[55]

C. Canons of Construction in Federal Indian Law

As established by the Supreme Court, lower courts should apply certain canons of construction when interpreting federal statutes that affect tribal rights. For example, if Congress wishes to limit tribal rights, its intent must be clearly indicated.[56] The requirement of express

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48. *Wheeler*, 435 U.S. at 323.

49. Monette, *supra* note 30, at 663-66; Newton, *supra* note 26, at 199; *see also* Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 442. Alternatively, the application of the plenary power doctrine to tribes has been criticized in the international context. It has been noted that since the United States only has plenary "power" over *foreign* nations under Article 76 of the United Nations Charter, the United States' assertion of plenary power over tribes means that tribes should be treated as foreign nations, with the corresponding rights and privileges of foreign nations. William Rice, Address at Coming Together of the Peoples' Conference (Feb. 19, 2000) (on file with author).

50. *Wheeler*, 435 U.S. at 323.

51. *Id.* at 326. For example, tribes are proscribed from entering into direct commercial or governmental relations with foreign nations. *Id.*

52. Worcester v. Georgia, 31 U.S. 515, 559 (1832); *see also Wheeler*, 435 U.S. at 322; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

53. 25 U.S.C. §§ 3601-3631 (1994).

54. *Id.* § 3601.

55. *Id.*

56. *Santa Clara Pueblo*, 436 U.S. at 49. However, Congress is often reluctant to interfere with tribal rights, including both sovereignty rights and treaty rights, due to the current federal policy favoring tribal sovereignty, self-determination, and economic self-sufficiency. Limas, *supra* note 41, at 690.

congressional intent in order to diminish tribal sovereignty was recently reaffirmed by the Supreme Court in the context of tribal treaty rights.[57]

Thus, if a statute affects tribal sovereignty rights or treaty rights, there must be "clear and reliable evidence" from the statute or from the legislative history that Congress intended to infringe upon tribal rights.[58] In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Court held that there must be clear evidence that Congress actually considered how its intended action would affect tribal treaty rights and, in that case, it found that there was no such "clear evidence" of congressional intent to abrogate the tribal treaty rights in question.[59]

The Supreme Court has also held that because of the trust relationship and the unequal bargaining power of tribes, any ambiguity in federal statutes must be liberally interpreted in favor of tribes.[60] Finally, statutes should be interpreted in light of the current federal policy to promote tribal self-determination and economic self-sufficiency.[61] Taken together, these requirements comprise the canons of construction that should be applied in federal Indian law cases.

D. ERISA in the Tribal Context

It is well established that Indian tribes are distinct political communities with inherent sovereignty rights, based on precedent and the federal-tribal relationship. Even under the plenary power doctrine, the sovereign status of tribes remains unchanged, in that tribes retain their sovereignty rights unless expressly limited by congressional action. Furthermore, the current federal policy and recent Supreme Court decisions advocate tribal self-sufficiency and self-government.[62]

Thus, federal statutes of general applicability, such as ERISA, which are silent as to their application to tribes, should *not* be construed by courts to apply to tribes. Since Indian tribes retain those aspects of

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57. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

58. United States v. Dion, 476 U.S. 734, 739 (1986).

59. *Mille Lacs* at 202-03. The Supreme Court has stated that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).

60. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 269 (1992); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

61. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 242 (1982) (quoting Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), cited with approval in Bryan v. Itasca County, Minn., 426 U.S. 373, 388 n.14 (1976)). Legislation indicative of the current federal policy recognizing and promoting tribal self-determination, self-government, and economic self-sufficiency include the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 U.S.C., 42 U.S.C., & 50 U.S.C. (1994)); the Indian Financing Act, 25 U.S.C. §§ 1451-1543 (1994); and the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1994).

62. *See Mille Lacs*, 526 U.S. at 172.

sovereignty not explicitly withdrawn by Congress and federal statutes that are silent with respect to tribes are ambiguous by definition, these statutes should be interpreted in favor of tribes. This approach is consistent with the canons of construction established by the Supreme Court and with the current federal policy promoting tribal self-government and economic self-sufficiency.

ERISA is a particularly voluminous piece of legislation with expansive provisions that include vesting, fiduciary, and contribution requirements.[63] Consequently, compliance with ERISA is particularly onerous for new employers such as tribes, and is intrusive on tribal self-governance. As governmental entities, tribes should be treated the same as federal, state, and local governments with respect to employment laws such as ERISA. Application of ERISA to tribal employers infringes on tribal sovereignty and paternalistically impedes progress toward tribal self-sufficiency, which is an explicit goal of all three branches of the federal government.[64]

The applicability of ERISA to tribes is of particular importance because tribal self-sufficiency is intimately tied to the economic viability of tribal businesses, which in turn requires the successful recruitment and retention of tribal employees. If ERISA were to apply to tribal employers, those employers may decide not to offer employee benefit plans because they are either unable or unwilling to comply with ERISA's extensive requirements. As a result, tribal employers may be unable to attract and retain the workforce necessary to maintain and continue their recent economic growth—growth that has helped provide needed revenue for performing essential tribal governmental functions and services. Thus, in addition to Supreme Court precedent, the federal-tribal relationship, and current federal policy, the practical effects of applying ERISA to tribal employers strongly countenances against doing so in the tribal context.

III. TRIBAL EMPLOYERS AND FEDERAL STATUTES OF GENERAL APPLICABILITY

ERISA is a federal statute of general applicability that is silent on whether it applies to Indian tribal employers. The "generality" of a statute refers to the scope of the class to which the statute applies and has been defined as "[t]he capacity of a word or term denoting a class (e.g., 'American citizen') to refer simultaneously to all members of the class."[65] Not surprisingly, application of such statutes to Indian tribes has been

63. 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1998).

64. *See* discussion *infra* Section III.C.

65. F. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 284 (1975).

controversial, resulting in a split among the federal courts as to whether Congress intended such statutes to apply to Indian tribal employers.

The Tenth and Eighth Circuits have respected principles of tribal sovereignty by requiring express congressional intent before applying federal statutes of general applicability to tribal employers.[66] In contrast, the Ninth and Seventh Circuits have, in effect, disregarded tribal sovereignty by presuming the applicability of such statutes to tribal employers.[67] This presumption of applicability of general statutes like ERISA is based on dicta from a Supreme Court opinion, termed the "*Tuscarora* rule."[68] The *Tuscarora* rule has been criticized on numerous grounds; however, if the exceptions to the rule are not narrowly interpreted, it is still possible to respect tribal sovereignty by considering congressional intent in determining the applicability of general statutes, such as ERISA.[69]

A. Adhering to Principles of Tribal Sovereignty: The Approach of the Tenth and Eighth Circuits

Following established principles of federal Indian law, the Tenth Circuit has complied with current federal policy and case law by acknowledging that tribes possess inherent tribal sovereignty. In *Donovan v. Navajo Forest Products Industries*, the Tenth Circuit examined whether Congress intended a federal statute of general application, the Occupational Safety and Health Act (OSHA), to apply to a tribal business, Navajo Forest Products Industries, which was owned and operated by the Navajo Tribe on the reservation.[70] Article II of the relevant treaty included a provision that excluded non-Indians, who were not authorized to enter the reservation, from entering tribal lands.[71] The court held that OSHA did not apply to the tribal business because it would "dilute the principles of tribal sovereignty and self-government recognized in the treaty" and therefore abrogate provisions of the treaty.[72]

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66. *E.g.*, EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989); Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982).

67. *E.g.*, Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989); Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

68. *See* discussion *infra* Section III.B.

69. *See* discussion *infra* Section III.C.

70. 692 F.2d 709-10 (10th Cir. 1982).

71. *Id.* at 712. Article II of the treaty between the United States and the Navajo Nation dated June 1, 1868 states that "[T]he United States agrees that no persons except those herein so authorized to do . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." *Id.* at 711. Navajo Forest Products argued that based on the language of the treaty, the only federal personnel authorized to enter the reservation are those specifically authorized to deal with Indian affairs. *Id.*

72. *Id.* at 712.

The court reasoned that "[l]imitations on tribal self-government cannot be implied from a treaty or statute; [but] must be expressly stated."[73] Although the court found that applying OSHA to the Tribe would violate this treaty provision, it recognized that the power of the Tribe to exclude non-Indians was not dependent upon the treaty, but rather is an inherent attribute of tribal sovereignty.[74]

The Tenth Circuit used similar reasoning to determine the applicability of the Age Discrimination in Employment Act (ADEA) to Indian tribes.[75] In *EEOC v. Cherokee Nation*, the Tenth Circuit dismissed an age discrimination suit against the Cherokee Nation's Director of Health and Human Services.[76] The court held that the ADEA did not apply to the Tribe.[77] Relying on its analysis in *Navajo Forest Products*, the court stated that application of the ADEA would dilute principles of tribal sovereignty and self-government and violate treaty provisions.[78] The court found that the reasoning in *Navajo Forest Products* was equally applicable to the case at bar, and held that the ADEA was not applicable to the Tribe since its enforcement would directly interfere with the Tribe's protected treaty right of self-government.[79]

The Tenth Circuit adhered to principles of tribal sovereignty, stating that it was "'extremely reluctant to find congressional abrogation of treaty rights' absent explicit statutory language."[80] It also recognized established canons of construction in federal Indian law regarding both treaty and non-treaty matters. It cited the Supreme Court's statement that "ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[81] The Tenth Circuit concluded that the ADEA's silence with respect to its applicability to tribes constituted ambiguity, and since there was no clear indication by Congress to abrogate the Tribe's sovereignty rights, the court was bound to apply longstanding canons of construction to benefit Indian interests.[82]

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73. *Id.*

74. *Id.* (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)). The court also rejected dicta in the Supreme Court's *Tuscarora* opinion that "'a general statute in terms applying to all persons includes Indians and their property interests.'" *Id.* at 711 (quoting *Tuscarora*, 362 U.S. at 116). The court found that the Supreme Court's decision in *Merrion* implicitly overruled or at least limited the statement in *Tuscarora* referring to the application of general statutes to Indians. *Navajo Forest Prods. Indus.*, 692 F.2d at 713. *See* discussion *infra* note 111.

75. EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).

76. *Id.* at 938.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (citing United States v. Dion, 476 U.S. 734, 739 (1986)).

81. *Id.* at 939 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

82. *Id.*

Thus, it found that the EEOC failed to carry its burden of proving the requisite congressional intent.[83]

In *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*,[84] the Eighth Circuit followed the Tenth Circuit's approach regarding the applicability of the ADEA to Indian tribes.[85] The court dismissed an age discrimination claim against a company owned and chartered by the Fond du Lac Tribe that was located on the reservation.[86] Similar to the Tenth Circuit's reasoning, the court held that the ADEA did not apply to the Tribe absent clear and plain congressional intent to the contrary because it would interfere with the Tribe's right of self-governance.[87]

In examining whether the requisite congressional intent was present in the case, the Eighth Circuit relied on the Supreme Court's opinion in *United States v. Dion*.[88] In *Dion*, the Court addressed whether the Bald Eagle Protection Act abrogated treaty rights of the Yankton Sioux Tribe to hunt bald eagles on the reservation.[89] In order for the Act to abrogate the treaty right, the Court stated that Congress's intention to abrogate must be "clear and plain."[90] Specifically, the Court stated, "[w]hat is essential is clear evidence that Congress *actually considered* the conflict between its intended action . . . and [the] Indian treaty rights . . . and chose to resolve that conflict by abrogating the treaty."[91]

Since the ADEA is silent on its applicability to tribes and its legislative history contained no reference to tribes, the Eighth Circuit held that under *Dion*, there was no clear and plain congressional intent to apply the ADEA to Indian tribes.[92] The court stated that in accordance with *Dion*, some "*affirmative evidence* of congressional intent, either in the language of the statute or its legislative history, is *required* to find the requisite 'clear and plain' intent to apply the statute to Indian tribes."[93]

B. Tuscarora *and the Presumption of Applicability: The Approach of the Ninth and Seventh Circuits*

In contrast to the Tenth and Eighth Circuits, the Ninth and Seventh Circuits have adopted what has been termed the *Tuscarora* rule based on dicta in the Supreme Court opinion, *Federal Power Commission v.*

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83. *Id.*
84. 986 F.2d 246 (8th Cir. 1993).
85. *Id.*
86. *Id.* at 248.
87. *Id.* at 249.
88. 476 U.S. 734 (1986).
89. *Id.*
90. *Id.* at 738.
91. *Id.* at 739-40 (emphasis added).
92. EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250 (8th Cir. 1993).
93. *Id.* (emphasis added).

Tuscarora Indian Nation.[94] The language relied upon by the Ninth and Seventh Circuits was the Court's statement that "a general statute in terms applying to all persons includes Indians and their property interests."[95]

In *Tuscarora*, the Court held that certain lands owned in fee simple by the Tuscarora Indian Nation could be appropriated by eminent domain for a storage reservoir of a hydraulic power project upon payment of just compensation.[96] The Court reasoned that since the lands in question were owned in fee simple by the Tuscarora Indian Nation, they were not included in the definition of "reservation" under the Federal Power Act and hence not protected.[97] The Federal Power Act explicitly protects lands deemed "reservations" by providing that a "license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."[98] "Reservations" are defined in the Federal Power Act as "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States."[99] The *Tuscarora* Court interpreted the definition of "reservations" narrowly, holding that because the tribe owned the land in fee simple, the land was not owned by the United States and thus did not fall within the definition of "reservations" under the Federal Power Act.[100]

The *Tuscarora* decision and the adoption of the *Tuscarora* rule by the Ninth and Seventh Circuits has been widely criticized.[101] A prominent criticism of the *Tuscarora* rule is that the statement is merely dicta in the opinion; the case turned on whether the lands in question fell under the definition of "reservations" in the Federal Power Act.[102] The Federal Power Act explicitly considered tribal lands and therefore was not silent as to its application. Consequently, the statement relied on in *Tuscarora* is inapposite to analyzing federal statutes that are silent regarding their applicability to tribes.[103] In fact, when it adopted the *Tuscarora* rule, the Ninth Circuit acknowledged that the statement was

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94. 362 U.S. 99 (1960).
95. *Id.* at 116.
96. *Id.* at 123-24.
97. *Id.* at 115.
98. 16 U.S.C. § 797(e) (1994).
99. *Id.* § 796(2).
100. *Tuscarora*, 362 U.S. at 115.
101. *See, e.g.*, Limas, *supra* note 41; William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).
102. "The *ultimate question* presented by these cases is whether certain lands, purchased and owned in fee simple by the Tuscarora Indian nation . . . may be taken . . . upon the payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress." *Tuscarora*, 362 U.S. at 100 (emphasis added).
103. *See* Limas, *supra* note 41, at 698.

dictum.[104] Moreovcr, the *Tuscarora* Court did not address tribal sovereignty or self-governance. Such issucs are critical in determining whether a federal statute of general applicability should apply to Indian tribes.[105]

Another persuasive critique of the *Tuscarora* rule pertains to the Court's language. The Court referred to "persons" and "Indians," not "Indian tribes."[106] The analysis of whether a federal statute of general application applies to Indians as opposed to Indian tribes is fundamentally different since only the latter necessarily involves taking into account issues of tribal sovereignty and self-governance.[107] It has also been noted that the *Tuscarora* opinion was issued during the era when the federal policy was termination of tribes and tribal governments,[108] which is contrary to the current fedcral policy of promoting tribal self-government and self-determination.[109] Moreover, the Tenth Circuit has interpreted the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe*[110] as limiting or implicitly overruling the *Tuscarora* rule.[111]

Despite the numerous problems with adopting the statement in *Tuscarora* as a general rule for determining whether federal statutes of general applicability apply to tribes, the Ninth Circuit nevertheless

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104. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).

105. Buffalo & Wadzinski, *supra* note 101, at 1393.

106. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). This distinction can be significant, as in *Santa Clara Pueblo*, where the Court reasoned that suits against the tribe brought in federal court under the Indian Civil Rights Act (ICRA) are barred by sovereign immunity because the only relief allowed under ICRA in federal court is habeas corpus. Consequently, tribal sovereign immunity is not waived since the respondent in a habeas corpus suit is an *individual, not a tribe.* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

107. Buffalo & Wadzinski, *supra* note 101, at 1393-94.

108. From 1940 to 1962, the federal policy with respect to Indian affairs was that of termination of tribal governments, which included terminating federal recognition of some tribes. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 155-58 (3d ed. 1991).

109. Skibine, *supra* note 101, at 107-08.

110. 455 U.S. 130 (1982).

111. *Navajo Forest Prods. Indus.*, 692 F.2d at 713. In *Merrion*, the Supreme Court held that the Jicarilla Apache Tribe had the inherent power to impose a severance tax on mining activities of non-Indians on the reservation as part of its sovereign power to govern and pay for the costs of self-government. *Merrion*, 455 U.S. at 141. The Court stated that an Indian tribe's power to exclude non-Indians from tribal land is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management. *Id.* In its analysis, the Court stated that "[w]e could find a waiver of the tribe's taxing power only if we inferred it from silence in the leases. To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head, and we do not adopt this analysis." *Id.* at 148. Furthermore, "[b]ecause the tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence on this point is that the sovereign power to tax remains intact." *Id.* at 149 n.14.

adopted the *Tuscarora* rule in *Donovan v. Coeur d'Alene Tribal Farm.*[112] In *Coeur d'Alene*, the Tribe owned and operated the Coeur d'Alene Tribal Farm, which was inspected by OSHA compliance officials and was subsequently issued citations for OSHA violations.[113] The Tribe argued that OSHA did not apply to its activities because it retained its inherent sovereign powers unless there was express congressional intent to abrogate those powers.[114] The Ninth Circuit rejected the Tribe's argument and instead applied the *Tuscarora* rule, presuming that OSHA applied despite the statute's silence regarding Indian tribes.[115] Applying the *Tuscarora* rule, the court reversed the district court's decision and held that OSHA did apply to the activities of the Coeur d'Alene Tribal Farm.[116] In addition, the court announced three exceptions to the rule.[117] A federal statute of general applicability that is silent regarding whether or not it applies to Indian tribes will *not* apply to them if:

> (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.'[118]

By applying federal statutes of general applicability to Indian tribes, the Ninth Circuit essentially presumes applicability of such laws and shifts the burden to the tribes to demonstrate congressional intent to exempt Indian tribes. In effect, the *Tuscarora* rule adopted by the Ninth Circuit turned an established principle of Indian law on its head. Instead of requiring a clear and explicit statement by Congress before a general federal statute is applied to Indian tribes, the Ninth Circuit now requires tribes to prove that Congress intended to exclude them in order for a federal statute of general application not to apply.

The Ninth and Seventh Circuits are the only federal appellate courts that have addressed the applicability of ERISA to Indian tribal employers. In its first case dealing with ERISA in the tribal context, the Ninth Circuit found ERISA applicable to tribes, reversing the lower court decision.[119] In *Lumber Industry Pension Fund v. Warm Springs Forest Products*

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112. 751 F.2d 1113, 1115-16 (9th Cir. 1985).
113. *Id.* at 1114.
114. *Id.* at 1115.
115. *Id.*
116. *Id.* at 1118.
117. *Id.* at 1116 (citing United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980)).
118. *Id.* (quoting *Farris*, 624 F.2d at 893-94).
119. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683, 686 (9th Cir. 1991).

Industries,[120] the district court held that ERISA was not applicable to a tribal pension plan for employees of a lumber mill located on the reservation that was owned and operated by the Tribe.[121] The district court followed the approach set forth by the Ninth Circuit in *Coeur d'Alene* and held that ERISA was inapplicable based on that approach. The district court acknowledged the Ninth Circuit's presumption of applicability of federal statutes of general application to Indian tribes, as well as the three exceptions to the *Tuscarora* rule espoused in *Coeur d'Alene*.[122] Within this framework, the district court formulated the issue as "determining whether ERISA touches exclusive rights of self-governance" under the first exception to the *Tuscarora* rule.[123] The court reasoned that the tribal pension plan involved the "financial security of individuals beyond their working years [which] is a central concern of any responsible sovereignty."[124] Thus, the court recognized "'proper respect . . . for tribal sovereignty'" and concluded that it must "'tread lightly in the absence of clear indications of legislative intent.'"[125]

Despite the district court's application of the *Tuscarora* rule and its exceptions, the Ninth Circuit overruled the district court's decision by narrowing the exception of tribal self-governance to situations where a tribe's "decision-making power is usurped."[126] In a cursory opinion, the Ninth Circuit stated that the district court's holding was erroneous and that the Tribe's decision-making power would not be usurped by the application of ERISA.[127] The court cited a few cases from the late 1800s and early 1900s for narrowing the exception, but it did not explain how or why these cases narrowed the tribal self-governance exception to encompass only situations where a tribe's decision-making power is usurped.[128]

In *Smart v. State Farm Insurance Co.*,[129] the Seventh Circuit decided its first case dealing with the applicability of ERISA to tribal employers. Following the Ninth Circuit's analysis in *Coeur d'Alene*, the Seventh Circuit held that ERISA governed a group health policy issued by a non-tribal insurer, State Farm, to a tribal employer for tribal employees at a health center located on the reservation that was owned and operated by the Tribe.[130] The plaintiff, a member of the Bad River Band of the Chippewa Tribe, was an employee of the Chippewa Health Center who

120. 730 F. Supp. 324 (E.D. Cal. 1990).
121. *Id.*
122. *Id.* at 326-27.
123. *Id.* at 327.
124. *Id.* at 328.
125. *Id.* at 329 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).
126. *Lumber Indus.*, 939 F.2d at 685.
127. *Id.*
128. *Id.*
129. 868 F.2d 929 (7th Cir. 1989).
130. *Id.*

sued State Farm contesting the denial of a claim.[131] The Seventh Circuit framed the issue as "whether Congress intended ERISA to include an employment benefit plan which is established and maintained by an Indian tribe employer for the benefit of Indian employees working at an establishment located entirely on an Indian reservation."[132]

The Seventh Circuit began its analysis by classifying ERISA as a federal statute of general applicability that is silent regarding Indian tribes or Indian tribal employers.[133] Noting the narrow exemptions for government and church plans from the Act, the court stated that "ERISA is clearly a statute of general application" and that "there is no doubt that the Chippewa Health Center is an 'employer' within the broad meaning of ERISA."[134] Without much discussion, the court proceeded to apply the *Tuscarora* rule and its three exceptions promulgated by the Ninth Circuit to determine whether ERISA was applicable to the tribal employer.[135] As a federal statute of general application, the court presumed ERISA was applicable to the Tribe, even though the Act is silent regarding its application to Indian tribes or tribal employers. The court then examined the exceptions to the *Tuscarora* rule. Unlike the district court in *Lumber Industry*, the Seventh Circuit rejected the argument that ERISA would interfere with the Tribe's right of self-government, considering the argument to be too broad.[136] The court reasoned that Indian tribes do not possess absolute sovereignty; rather, tribal rights to self-governance are "ultimately dependent on and subject to the broad power of Congress."[137]

It is undisputed that Indian tribes no longer possess absolute sovereignty, and federal Indian law precedent supports the notion that tribal sovereignty rights are subject to the defeasance of Congress. However, the Seventh Circuit seems to have misconstrued these points as the contentious issues. Rather, it is the determination of congressional intent that is of utmost significance, and which was noticeably sidestepped by the court in assuming the applicability of general laws, such as ERISA, to tribes. Although the Seventh Circuit characterized the issue as whether or not Congress intended ERISA to apply to Indian tribal

131. *Id.* at 930-31.

132. *Id.* at 932.

133. *Id.* at 933.

134. *Id.* The court noted that "[g]overnmental plans include those of the federal and state governments, as well as agency and political subdivisions thereof, and international organizations which are similarly exempt from taxation under the International Organizations Immunities Act, 22 U.S.C. § 288 et seq." *Id.* at 933 n.3.

135. *Id.* at 932.

136. *Id.* at 935. The court found that the "application of ERISA . . . would not impermissibly upset the Tribe's self-governance in intramural matters," and that ERISA only applies if a tribal employer decides to offer an employee benefit plan, which "merely requires reporting and accounting standards." *Id.* at 935-36. In support of its conclusion, the court noted that the insurer was not the Tribe itself, but rather a non-tribal entity, State Farm Insurance. *Id.* at 936.

137. *Id.* at 935.

employers, it failed to analyze this issue by *presuming* congressional intent. The *Tuscarora* rule does not, in effect, allow for an analysis of congressional intent because it presumes applicability of federal statutes of general application that are silent with respect to Indian tribes unless tribes can prove that one of the three exceptions applies. In *Smart*, the Seventh Circuit would have considered congressional intent only if the Tribe could have proven that its situation fell under one of the exceptions. Ironically, at the beginning of its opinion, the court itself proclaimed that "[c]ongressional intent is *paramount* in determining the applicability of a [federal] statute to Indian Tribes," but nevertheless, it assumed ERISA applied to the Tribe without examining congressional intent.[138]

C. Congressional Intent Under the Tuscarora *Rule*

Despite the contrary conclusions reached by the Tenth and Eighth Circuits as compared to the Seventh and Ninth Circuits, each court acknowledged the primacy of congressional intent in ascertaining whether a federal statute of general application should apply to Indian tribes. A principal distinction between the circuit courts' decisions lies in their fundamentally different approaches for determining congressional intent. The Tenth and Eighth Circuits followed well-established principles of tribal sovereignty and federal canons of construction, which require an express indication by Congress that the statute in question was intended to apply to Indian tribes. On the other hand, the Ninth and Seventh Circuits adopted a general rule of applicability based on dicta in the *Tuscarora* opinion, which presumes that federal statutes of general application apply to Indian tribes unless Congress explicitly excludes them.

Even under the *Tuscarora* rule adopted by the Ninth and Seventh Circuits, the three exceptions allow for an examination of congressional intent. However, it is important to note that if a court does not find any of the exceptions applicable, then there is essentially no inquiry into congressional intent and the statute is presumed to apply to Indian tribes. If a court finds that one of the exceptions to the rule is applicable, then it will look to see if Congress expressly intended the statute to affect the tribal right in question.[139] The first exception, if the statute in question touches tribal rights of self-governance in intramural matters, has been criticized as a poor proxy for determining congressional intent.[140] It has been argued that congressional intent should be ascertained using the "actual consideration test" established in *Dion* instead of examining whether a law interferes with the essential powers of tribal self-government.[141] In addition, the "clear statement rule" pronounced in

138. *Id.* at 932 (emphasis added).
139. Limas, *supra* note 41, at 702.
140. Skibine, *supra* note 101, at 139.
141. *Id.*

Dion invokes notions of federalism by requiring "clear and reliable" evidence of congressional intent to affect tribal rights, which provides a "judicial check on legislation that may 'go too far' in taking away sovereign rights."[142]

Under the analysis used by the Seventh and Ninth Circuits, it is necessary to determine that one of the exceptions to the rule is applicable in order to reach the critical issue of whether Congress intended a general statute to apply to tribes. Unfortunately, the courts that have applied the *Tuscarora* rule have narrowly construed the exceptions, thereby foreclosing any substantive inquiry into congressional intent.[143] With respect to ERISA, the first exception regarding rights of tribal self-governance is most likely to apply. As the district court in *Lumber Industry* reasoned, pension plans and welfare plans maintained for tribal employees impact tribal self-governance and therefore the self-governance exception is applicable.[144] In addition, although many tribal employees are often tribal members or non-member Indians, the scope of tribal authority is not restricted to only tribal members.[145] The Court has stated that a "tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians . . . within its reservation when that conduct . . . has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[146] Similarly, the Tenth Circuit has recently announced that a "tribe's sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation."[147] Thus, with respect to ERISA, the fact that tribal employees may consist of tribal members, as well as non-member Indians and non-Indians, should not pose a problem

142. Limas, *supra* note 41, at 706-07.

143. Similar to "strict scrutiny" in United States constitutional law, which is often described as "strict in theory, fatal in fact," if a court defines the exceptions to the *Tuscarora* rule so narrowly such that they rarely, if ever, apply, then a statute's applicability will be automatically presumed.

144. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 730 F. Supp. 324, 329 (E.D. Cal. 1990).

145. Montana v. United States, 450 U.S. 544, 565 (1981) (reaffirmed in South Dakota v. Bourland, 508 U.S. 679, 695 (1993)). "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . . . A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.*

146. *Id.* at 566 (reaffirmed in *Bourland*, 508 U.S. at 695).

147. NLRB v. Pueblo of San Juan, No. 99-2011, No. 99-2030, 2000 U.S. App. LEXIS 23754, at *20 (10th Cir. Sept. 26, 2000). The Tenth Circuit specifically pointed to the exclusion of Indian tribes from employment discrimination statutes, such as Title VII, as illustrating congressional intent not to interfere with the employee-management relationship. *Id.* at *18 n.5. The Supreme Court has also stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

in finding that the statute interferes with matters of tribal self-governance and authority.

In determining congressional intent regarding the applicability of statutes like ERISA, an essential factor that must be taken into account is the current federal policy regarding Indian tribes. Since Congress promulgates federal policy, courts should look to current federal policy to ascertain congressional intent in the absence of an explicit statement by Congress in a statute or its legislative history. All three branches of the federal government have advocated a federal policy of tribal self-determination and economic self-sufficiency, which is exemplified in various congressional acts,[148] executive orders,[149] and Supreme Court opinions.[150] In 1975, Congress enacted Public Law 93-638, commonly referred to as "638 Contracting," which codified the federal policy supporting tribal sovereignty and self-determination.[151] The executive branch recently reaffirmed its commitment to tribal sovereignty and self-sufficiency in the president's State of the Union address on January 27, 2000.[152] In addition, an Executive Order issued in November 2000 explicitly instructs federal agencies to abide by certain fundamental principles in their interactions with tribes, including the principle that the "United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self determination."[153]

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148. *E.g.*, The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 U.S.C., 42 U.S.C., & 50 U.S.C. (1999)).

149. *E.g.*, Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 363, 91st Cong., 2d Sess. 1 (1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."). *See also* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Memorandum of the President, 59 Fed. Reg. 22,951 (Apr. 29, 1994).

150. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

151. 88 Stat. 2203. Congress declared its:

> commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a *meaningful Indian self-determination policy* which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

Id. § 3(b) (emphasis added).

152. "We should begin this new century by honoring our historic responsibility to *empower* the first Americans. And I want to thank tonight the leaders and the members from both parties who've expressed to me an interest in working with us on these [budget] efforts [to improve Native American reservations]. They are profoundly important." President Bill Clinton, Address Before a Joint Session of the Congress on the State of the Union, 36 WEEKLY COMP. PRES. DOC. 160, 166 (Jan. 27, 2000) (emphasis added).

153. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). The president has stated that as "exeeutive departments and agencies undertake activities affecting Native American tribal rights . . . such activities should be . . . *respectful of tribal*

Thus, even under the *Tuscarora* rule, it is still possible to respect tribal sovereignty and self-governance if courts do not narrowly interpret the exceptions and recognize the explicit federal policy in all three branches of the federal government that supports tribal sovereignty and self-sufficiency.

IV. AN ALTERNATIVE APPROACH: THE SEVENTH CIRCUIT'S DECISION IN *REICH*

While the deferential approach to tribal sovereignty taken by the Tenth and Eighth Circuits is preferable to the *Tuscarora* analysis adopted by the Ninth and Seventh Circuits, the alternative line of reasoning in the Seventh Circuit's more recent *Reich* opinion may prove to be an even better approach for preserving and promoting tribal sovereignty. Unfortunately, the Seventh Circuit made a faulty distinction between governmental functions and commercial activities. Nevertheless, the court's own analysis of likening tribes to states, as well as the comparable employee benefits offered by the Ho-Chunk Nation and the State of Wisconsin, illustrate why tribal employers, like state and local governmental employers, should be exempt from ERISA.

A. Reich v. Great Lakes Indian Fish & Wildlife Commission

The Seventh Circuit's decision in *Reich v. Great Lakes Indian Fish & Wildlife Commission*[154] dealt with enforcement of the Fair Labor Standards Act (FLSA); however, the opinion has immediate significance for analyzing the applicability of ERISA to tribal employers. Since the FLSA, like ERISA, is a federal statute of general applicability, the court explicitly referred to and distinguished the case from its prior decision in *Smart*.[155]

In *Reich*, the Seventh Circuit affirmed the district court's refusal to enforce a subpoena sought by the Department of Labor against the Great Lakes Indian Fish and Wildlife Commission ("the Commission") to

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sovereignty." Memorandum of President, Apr. 29, 1994, 59 Fed. Reg. 22,591 (1994) (emphasis added). The memorandum also stated that:

> The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions . . . . The purpose of these principles [outlined herein] is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting *respect for the rights of self-government due the sovereign tribal governments.*

Id. (emphasis added).

154. 4 F.3d 490 (7th Cir. 1993).

155. *Id.* at 495.

obtain evidence that the Commission had violated the FLSA.[156] The Commission is a consortium of thirteen bands of Chippewa Tribes that inhabit the Great Lakes region and was created to enforce the usufructuary rights that the Tribes retained under nineteenth-century treaties with the United States.[157] These usufructuary rights extend over thousands of square miles in the Great Lakes region for which the Commission regulates and enforces compliance with seasonal activities, such as hunting, fishing, and gathering for expressly covered animals and plants.[158] Thus, the Commission's employees perform the functions of governmental employees, namely, game wardens and police.[159]

The Secretary of Labor sought to enforce a subpoena to obtain the Commission's wage and hour records for its employees to examine whether it was complying with the overtime provisions of the FLSA.[160] The district court denied the Secretary's request and found that application of the FLSA would interfere with the Tribes' internal sovereignty.[161] The district court stated that the Commission "holds sovereign authority to enforce tribal laws regulating off-reservation treaty rights and to manage resources . . . . These responsibilities are carried out by [the tribes'] employees, under the tribes' authority and on terms approved by them."[162] Consequently, the district court reasoned that application of the FLSA would interfere with the Tribes' treaty rights and rights of self-governance.[163]

The Seventh Circuit upheld the district court's decision despite the factual similarities to *Smart*.[164] But instead of applying the *Tuscarora* rule and its exceptions, the court properly took into account sovereignty principles, with the "purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow."[165] The Seventh Circuit followed the reasoning of the Tenth Circuit in *EEOC v. Cherokee Nation*,[166] which held that the ADEA is not applicable to tribes. The court stated that it was "rectifying an oversight" in a manner similar to that of the Tenth Circuit.[167] The court admitted there was "no [specific] treaty right to employ law enforcement officers on whatever terms the tribal organization sets," but nevertheless, "it has been traditional to leave the administration of Indian affairs for the most

156. *Id.* at 490.
157. *Id.* at 492.
158. *Id.*
159. *Id.*
160. *Id.* at 491.
161. Martin v. Great Lakes Indian Fish & Wildlife Comm'n, No. 92-C-409-C, 1992 WL 300841 at *10 (W.D. Wis. Oct. 7, 1992).
162. *Id.* at *2.
163. *Id.* at *8.
164. *Reich*, 4 F.3d at 496.
165. *Id.*
166. 871 F.2d 937 (10th Cir. 1989).
167. *Reich*, 4 F.3d at 496.

part to the Indians themselves."[168] The court noted that the FLSA, like ERISA, is a federal statute of general application that does not mention Indians, Indian tribes, or tribal employers.[169] However, the court reasoned that there could not be "any reason other than oversight why Congress failed to extend the law enforcement exemption to Indian police."[170]

Instead of analyzing the applicability of the FLSA under the *Tuscarora* approach like the district court, the Seventh Circuit relied on the principle of comity or respect for tribal self-governance and sovereignty.[171] This approach provides an appropriate alternative to the *Tuscarora* rule and is more in line with established principles of federal Indian law, federal policy, and the approach taken by the Tenth and Eighth Circuits. The court described the idea of comity as "treating sovereigns, including such quasi-sovereigns as states and Indian tribes, with greater respect[;] . . . [it] counsels us to exercise forbearance in construing legislation as having invaded the central regulatory functions of a sovereign entity."[172] The court also found that the inherent sovereignty of Indian tribes extends to both Indians and non-Indians with respect to the regulatory functions exercised by the Commission.[173]

Furthermore, the court made a federalism argument in support of tribal sovereignty, retracting a statement it made in *Smart*:

> Our dictum in *Smart* . . . that "federalism uniquely concerns States; there simply is no Tribe counterpart," goes too far. Indian tribes, *like states*, are quasi-sovereigns entitled to comity. Comity argues for allowing the Indians to manage their own police as they like, even though no treaty confers such prerogatives, until and unless Congress gives a *stronger indication* than it has here that it wants to intrude on the sovereign functions of tribal government.[174]

The court's explicit endorsement of viewing tribes "like states" is a radical departure from its analysis in *Smart* and provides a promising alternative basis for recognizing tribal sovereignty. Thus, although the

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168. *Id.* at 494.
169. *Id.* at 493.
170. *Id.* at 494.
171. *Id.* at 494-95.
172. *Id.*
173. *Id.* at 494 (citing South Dakota v. Bourland, 508 U.S. 679 (1993); Montana v. United States, 450 U.S. 544 (1981).
174. *Id.* at 495 (emphasis added). In support of treating tribes like states, it has been argued that "[w]hen the law treats tribes like states within the federal system, tribes are more likely to survive." Monette, *supra* note 39, at 65. Generally, there are two ways in which the analogy between tribes and states is undermined: (1) "when federal courts subordinate tribes to states, treating them as mere citizens or racial groups" and (2) "when the federal government unilaterally extends its power over tribes." *Id.*

court did not repudiate the *Tuscarora* approach it used in *Smart*, it drastically departed from the *Tuscarora* rule. Rather than presuming applicability using the *Tuscarora* rule, the court appeared to require an express statement of congressional intent before applying a statute that infringes upon rights of tribal sovereignty and self-governance.

The Seventh Circuit distinguished its holding in *Smart* by reasoning that the employees in that case were "engaged in routine activities of a commercial or service character . . . rather than of a governmental character."[175] The court stated that unlike the employees in *Reich*, the employees in *Smart* "were not law enforcement officers, who if they had been employed by a state or local government would have been exempt from the law."[176] Thus, the court held that only "those agencies' law-enforcement employees, and any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act, are exempt."[177]

B. The Commercial-Governmental Distinction

While the Seventh Circuit took a step in the right direction by recognizing the inherent sovereignty of Indian tribes and their rights to self-governance, its method of distinguishing *Smart* from *Reich* is flawed. In its analysis regarding respect of tribal sovereignty, the court analogized tribal governments to state and local governments, but attempted to limit its holding by making a distinction between tribal activities that are of a "commercial or service character" and those of a "governmental character."[178] This distinction is problematic due to the unique circumstances of tribal governments as well as the court's reliance on likening tribal governments to state governments.

Tribes establish tribal businesses in order to generate revenue that is needed for performing essential governmental functions. This is consistent with the federal policy of promoting tribal self-determination and economic self-sufficiency.[179] Although tribal businesses such as casinos are often characterized as "for profit" and therefore presumed to

175. *Reich*, 4 F.3d at 495.
176. *Id.*
177. *Id.*
178. *Id.*
179. Limas, *supra* note 41, at 690-91. According to the Wisconsin Indian Gaming Association, in 1996, tribal gaming in Wisconsin provided over 10,000 jobs, and the gaming proceeds were used by the tribes to fund social welfare programs, tribal government, schools, higher education scholarships, medical facilities, day-care centers, housing, business development, roads, and other infrastructure improvements. WIS. LEGIS. REFERENCE BUREAU, THE EVOLUTION OF LEGALIZED GAMING IN WISCONSIN, LRB-97-RB-1 (Sept. 1997).

be commercial enterprises, a majority of the profits are used to financially support tribal governments and fund governmental activities.[180]

Under the Indian Gaming Regulatory Act (IGRA),[181] tribes can only use the proceeds from tribal gaming for five purposes: (1) "to fund tribal government operations or programs; (2) to provide for the general welfare of the Indian tribe and its members; (3) to promote tribal economic development; (4) to donate to charitable organizations; or (5) to help fund operations of local government agencies."[182] Regardless of whether gaming is considered a "commercial activity," the revenue must be used for government purposes as mandated by the statute. This requirement on how tribes must use the revenue from gaming clearly illustrates that the functions of tribal governments are often funded by so-called "commercial" activities. For example, in a recent Technical Advice Memorandum, the IRS concluded that income from a tribal casino that was used to fund tribal education programs was not subject to income tax withholding under section 3402(r) of the Internal Revenue Code.[183] The IRS stated that the Tribe's "educational services [funded by casino revenues] are basic *governmental services* and provide *substantially similar* benefits to those provided by federal, state and local government educational programs."[184]

The Supreme Court has recognized the relationship between tribal businesses and self-determination with respect to tribal sovereign immunity.[185] In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[186] the State of Oklahoma sued the Tribe in state court to collect taxes from the Tribe's sale of cigarettes to non-Indians.[187] The Court refused to limit tribal sovereign immunity to

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180. Limas, *supra* note 41, at 691. It is important to note a difference between businesses owned by a tribe as compared to businesses owned by individual tribal members. While the revenue of the former is used for governmental purposes, the revenue of the latter is not necessarily for tribal government and may be entirely "for profit." In addition, tribal gaming is different from businesses on the reservation that are owned and operated by individual tribal members because only tribes as governments can operate gaming facilities. Interview with Macy Swimmer, Research Attorney, Menominee Legal Department, in Madison, Wis. (Feb. 18, 2000).

181. 25 U.S.C. §§ 2701-2721 (1994).

182. *Id.* § 2710.

183. Tech. Adv. Mem. 2000-35-007 (Sept. 1, 2000).

184. *Id.* The IRS noted that the income from the Tribe's casino was the "primary source" of funding for the Tribe's government and that the basic services provided by the Tribe were consistent with those provided by state and local governments. *Id.*

185. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991); *see also* Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751 (1998) (holding that the Tribe was entitled to sovereign immunity from suit on a promissory note it had signed, regardless of whether the note was signed on or off the reservation, and notwithstanding the fact that the note was allegedly related to its commercial activities).

186. 498 U.S. 505 (1991).

187. *Id.* at 507.

governmental activities by excluding business activities.[188] The Court reasoned that eliminating tribal sovereign immunity for tribal businesses would thwart the goals stated by Congress of promoting "Indian self-government" including the "'overriding goal' of encouraging tribal self-sufficiency and economic development."[189] Similarly, the Internal Revenue Service has held that tribes are presumed to act in a governmental capacity even when conducting commercial business on or off the reservation.[190]

Furthermore, although tribes have the power to tax and to raise revenue to fund government programs and services, their tax base is small because reservations are sparsely populated and the residents often have a low per capita income.[191] As a result, the income generated from taxation is insufficient to perform necessary governmental functions.[192] Also, tribes either choose not to tax their residents or to impose only a minimal tax in order to entice new businesses to the reservation and discourage existing businesses from leaving.[193] Thus, the revenue from tribal business activities is essential for running tribal government and carrying out basic governmental functions.

The power of tribes to tax and raise revenue for governmental functions has been clearly established by the Supreme Court.[194] The Court has stated that:

> [the] power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services [and it] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services.[195]

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188. *Id.* at 510.

189. *Id.* Similarly, in the tribal gaming context, a stated purpose of IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702 (1994).

190. Rev. Rul. 94-16, 1994-12 I.R.B. 4. The IRS has also held that an Indian tribal corporation organized under Section 17 of the Indian Reorganization Act of 1934 shares the *same tax status* as the tribe and is not taxable on income from activities carried on within the reservation's boundaries. Rev. Rul. 81-295, 1981-2 C.B. 15.

191. Interview with Donald Laverdure, Indian Law Associate, Von Briesen, Purtell & Roper, in Milwaukee, Wis. (May 3, 2000).

192. *Id.*

193. *Id.*

194. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

195. *Id.* Furthermore, the Court stated that a tribe's "sovereign power [to tax], even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.* at 148.

The Court has also held that Indian tribes may regulate by taxation, licensing, or other means, the activities of non-members who enter into a consensual relationship with a tribe through commercial dealings, contracts, or other arrangements.[196]

As quasi-sovereigns, Indian tribes are unique in their financing of governmental functions. Enterprises such as tribal gaming, which are often viewed as commercial activities, sometimes provide the majority of the essential revenue for operating a tribal government and performing necessary governmental functions for a tribal community.[197] While states primarily rely on taxation, tribes are presently unable to do so and must rely on other sources such as their commercial enterprises. Furthermore, states also engage in "commercial" enterprises to raise revenue for their governments.[198] For example, state lotteries, like tribal gaming, provide revenues used to fund government functions.[199] Ironically, states also use money received from gaming compacts with tribes to fund their own governmental agencies.[200] Thus, even though the primary means of raising revenue may be different for tribes than states, the salient point is that the revenues raised by both are used to perform governmental functions.

Moreover, tribes are increasingly being treated like states under the Internal Revenue Code, consistent with the Seventh Circuit's analysis in *Reich*. Section 7871 of the Internal Revenue Code ("the Code") enumerates the situations where Indian tribal governments are treated like states.[201] This section of the Code has undergone various amendments recently, adding the ways in which tribes are treated like states under the Code.[202] For example, section 403(b) of the Code, which deals with tax-exempt annuities, has been amended to include Indian tribal governments

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196. Montana v. United States, 450 U.S. 544, 565 (1981).

197. For example, the casino earnings of the Nez Perce Tribe in Idaho in 1999 were used to fund the Tribe's Executive Committee, Veterans Program, Prosecutor's Office and the Fish and Game Commission. The profits were also used to fund education programs, emergency housing, senior programs, cultural programs and to improve the economic enterprises on the reservation. Tara King, *Reinvesting in Fertile Ground*, LEWISTON MORNING TRIB. (Lewiston, Idaho), Jan. 16, 2000, at 1C.

198. For example, Wisconsin receives racing revenues from greyhound racetracks that are generated through a portion of each wager collected from racetrack patrons. WIS. LEGIS. AUDIT BUREAU, AUDIT SUMMARY, REPORT 97-14 (Wis. 1997).

199. WIS. STAT. § 20.005(1) (West 1999). Some states use the profits derived from state lotteries to provide partial funding for their departments of education and transportation.

200. In Wisconsin, the projected revenue from the state-tribal gaming compacts for 2000-01 is over $24 million, with over $22 million dispersed to various state agencies. WIS. JOINT COMM. ON FIN., OVERVIEW OF TRIBAL GAMING REVENUE ALLOCATIONS (Legis. Fiscal Bureau, Paper #157, 1999).

201. I.R.C. § 7871 (1994). Arguably, this section of the Code might be viewed as a codification of tribal sovereignty.

202. *Id.*

in addition to state governments.[203] This allows employees of educational organizations affiliated with a tribe to make salary deferrals into tax-deferred annuity contracts.[204] Also, the IRS has ruled that an Indian tribal corporation will be treated as a state for purposes of issuing tax-exempt bonds.[205]

In addition, the Pension Benefit Guaranty Corporation (PBGC)[206] has determined that in some instances a tribal pension plan may constitute a "governmental plan," similar to state pension plans.[207] In 1981, the PBGC issued an opinion letter finding that a pension plan of a tribal eouncil was not subject to Title IV of ERISA because the "authority to structure the Council's relationship with its employees is an undoubted attribute of the tribes' sovereignty . . . ." and therefore, ERISA "should not be presumed . . . to limit the tribes' exercise of their sovereign powers in the absence of specific language stating that intent."[208]

C. Employee Benefits Offered by the Ho-Chunk Nation and the State of Wisconsin

In addition to the fact that both tribes and states fund and perform governmental functions for their respective citizens, as employers, they both may offer employee benefit plans in an effort to attract and retain qualified and skilled employees. In Wisconsin, both the Ho-Chunk Nation and the State of Wisconsin provide comparable employee benefits for their employees.

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203. *Id.* § 7871(a)(6)(B).

204. *Id.*

205. Priv. Ltr. Rul. 98-47-018 (Nov. 20, 1998).

206. The PBGC is a federal agency created by ERISA that insures thc pensions of employees covered by private defined benefit pension plans.

207. 1981 WL 17636 (Mar. 4, 1981); Colville Confederated Tribes v. Somday, 96 F. Supp. 2d 1120, 1131 (E.D. Wash. 2000). The court in *Colville* held that a retirement plan created by thc tribal government qualified for the "'governmental plan' exemption" from ERISA. *Colville*, 96 F. Supp. 2d at 1134-35. In *Colville*, the court stated that interpretations by the PBGC are afforded "great deference" in determining the application of ERISA and relied on a letter issued by the PBGC regarding the tribal pension plan, which stated:

> The pension plan is a plan strictly for employees of the Tribe. The Tribe has the power to levy taxes as an aspect of its retained sovereignty which would allow the Tribe thc taxing authority to make up any funding deficit incurred by the pension plan. Based on these facts, the above plan is *excluded* from the termination insurance provisions of Title IV as a *governmental plan* under Section 4021(b)(2) [29 U.S.C. § 1321(b)(2)] of the Act.

Id. at 1131 (emphasis added).

208. 1981 WL 17636, at *1 (Mar. 4, 1981). However, it should be noted that the PBGC has also made a distinction between "governmental activities" and "commercial activities" in a later opinion letter, finding that a pension plan for tribal employees, mostly non-members, of a commercial for-profit enterprise off the reservation was subject to ERISA. 1989 WL 224527, at *1-2 (Nov. 28, 1989).

The Ho-Chunk Nation offers employee benefits to all tribal employees, both tribal members and non-members.[209] Although defined benefit pension plans are not offered, the Nation has set up a 401(k) defined contribution plan.[210] In addition, comprehensive health, dental, vision, life and disability benefits are provided to tribal employees.[211] The various life and health insurance plans offered by the Nation are considered employee benefit plans, more specifically welfare plans,[212] and they are self-funded and self-maintained by the Nation.[213] Long-term disability benefits are provided without employee contributions, while the other benefits are elective with a modest employee premium.[214]

Similarly, the employee benefits offered by the State of Wisconsin to state and local government employees include both pension and welfare plans.[215] The benefit plans are administered by the Wisconsin Department of Employe Trust Funds and include retirement benefits, group life insurance, group health insurance, income continuation insurance,[216] long-term disability insurance, long-term care insurance,[217] a deferred compensation program,[218] and an employe reimbursement account program.[219] Wisconsin's Employe Trust Fund was created to aid

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209. Ho-Chunk Nation Summary Plan Descriptions for: Employee Health Benefit Plans for tribal member employees; Non-tribal member employees; Short-Term Disability Plan; and Employee Dental Benefit Plan (on file with author).

210. Telephone Interview with Gary Brownell, Attorney General, Ho-Chunk Nation Department of Justice (Mar. 8, 2000).

211. Ho-Chunk Nation Summary Plan Descriptions for: Employee Health Benefit Plans for tribal member employees; Non-tribal member employees; Short-Term Disability Plan; and Employee Dental Benefit Plan (on file with author).

212. ERISA governs two types of plans: pension plans and welfare plans. Pension plans are devices or arrangements for retirement benefits. Welfare plans involve non-retirement benefits such as health and disability benefits. 29 U.S.C. § 1003 (1994).

213. Telephone Interview with Gary Brownell, *supra* note 210.

214. Gary F. Brownell, Tribal Laws Governing Employment and Labor Relations, Address before Wisconsin Bench & Bar Conference Indian Law Section (Jan. 26, 2000), *in* 2000 Bench & Bar Conference Vol. 1, at 280 (Jan. 2000).

215. WIS. DEP'T OF EMPLOYE TRUST FUNDS, YOUR BENEFIT HANDBOOK ET-2119 (rev. May 1999).

216. Income continuation insurance replaces a substantial portion of an employee's salary. The insurance is intended to cover both short-term and long-term disabilities, but the amount of the benefit under the insurance is reduced by the amount of other state and federal benefits available to the employee. *Id.*

217. Long-term care insurance is an optional plan that covers short-term and long-term home health eare, assisted living, community-based care, and nursing home care. *Id.*

218. The deferred compensation program is a supplemental retirement savings program regulated by section 457 of the Internal Revenue Code. Under the program, eligible employees may invest a portion of pre-tax earnings through payroll deduction in one of the investment options offered by the program. *Id.*

219. The employee reimbursement account program is an optional tax-free benefit that allows participants to earmark a portion of their pre-tax gross salary to pay for certain IRS-approved expenses. There are three kinds of expenses that qualify for this favorable tax treatment: (1) an employee's share of state group life and group health

public employees in protecting themselves and their beneficiaries from certain financial hardships and thereby "promoting economy and efficiency in public service by facilitating the *attraction and retention* of competent employes . . . ."[220] Pursuant to the governmental plan exemption under ERISA, the Employe Trust Fund states that it is "established as a *governmental plan* and as a qualified plan for federal income tax purposes . . . ."[221]

Thus, while both the Ho-Chunk Nation and the State of Wisconsin offer comparable employee benefit plans for their respective employees, only the Employe Trust Fund of Wisconsin is recognized as a "governmental plan" and therefore exempt from ERISA's requirements. Furthermore, state employees cannot bring suit against the state for violations of ERISA, although they might bring a claim cognizable under state law.[222] If tribes are treated like states, such that ERISA is not applicable and where suits cannot be brought for violations of ERISA, tribal forums may be available to tribal employees regarding employee benefit matters.[223] Thus, if treated similarly, employees of both a state and a tribe may be provided avenues of relief under state laws or tribal laws, respectively.

V. CONCLUSION

Indian tribes are distinct and independent political communities with inherent and retained sovereignty rights. As sovereign governments, tribes have certain inherent powers, including the power to regulate their domestic affairs. The relationship between a tribal employer and its employees should not be subject to federal statutes of general application since tribes have the inherent power to manage their internal relations and domestic affairs. However, the status of tribes as "quasi-sovereign"

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insurance premiums; (2) dependent care expenses that allow the employee and spouse to work; and (3) most out-of-pocket medical expenses not reimbursed by insurance coverage (e.g., co-pays, deductibles, prescriptions). *Id.*

220. WIS. STAT. § 40.01 (1999-2000) (emphasis added).

221. *Id.* § 40.015.

222. Although state employees are precluded from suing the state because of sovereign immunity, local governments do not have the same protection from suit. For example, a district court judge challenged a city's retirement system on equal protection grounds, claiming that her equal protection rights were violated by excluding her from participating in the city retirement system due to her participation in the state judges' retirement system. *In re* Pensions of 19th Dist. Judges Under Dearborn Employees Ret. Sys., 540 N.W.2d 784 (Mich. App. 1995).

223. For example, in Article X of its Constitution, the Ho-Chunk Nation incorporates rights enumerated in the Indian Civil Rights Act. 25 U.S.C. §§ 1301-1303 (1994). Therefore, rights such as equal protection, due process and just compensation are enforceable regarding conduct of the Nation through the Nation's Constitution. Brownell, *supra* note 214, at 277-78. With respect to employee benefits, the Nation's Trial Court recently held the Nation liable with respect to life insurance benefits based on an employee's failure to clearly opt out of that benefit as part of his orientation. *Id.* at 280.

nations and adherence to the plenary power doctrine cause confusion regarding federal statutes of general applicability in the tribal employment context.

Even under the plenary power doctrine, tribal sovereignty can be respected if courts follow established Supreme Court precedent, canons of construction, and the current federal policy in support of tribal self-governance. For instance, there must be clear evidence that Congress actually considered the effect of legislation on tribes and intended to abrogate tribal rights before a statute is construed to apply to tribes. Furthermore, in the case of ambiguity, a statute must be interpreted in favor of the tribes. From these tenets, it is clear that ERISA, as a federal statute of general applicability, should not apply to tribes or tribal employers. The statute's silence regarding its applicability to tribal employers does not evince Congress's intent to apply ERISA to tribes, but rather is ambiguous and should therefore be interpreted as not applying to tribes.

The Seventh and Ninth Circuits' adoption of the *Tuscarora* rule is in direct conflict with these established principles of federal Indian law; however, tribal sovereignty might be somewhat preserved even under the *Tuscarora* rule. If the courts do not excessively narrow the exceptions to the rule, then there will be an examination of congressional intent. Thus, if federal policy favoring tribal self-determination and self-government is taken into account along with an analysis of congressional intent, tribal sovereignty might still be respected in the employment context.

Alternatively, and perhaps most promising, is the Seventh Circuit's reasoning in *Reich*. Instead of using the *Tuscarora* rule, the court relied on comity or respect for tribal sovereignty. Key to the court's decision was the analogy it made between states and tribes. Even though the court made a faulty distinction between governmental functions and commercial activities, the crux of its analysis—treating tribes like states, is an affirmative step towards protecting and preserving the inherent sovereign rights of tribes. This distinctly different approach by the Seventh Circuit might actually be preferable to other pro-tribal approaches because it comes closer to respecting tribal sovereignty and self-government based on the inherent sovereignty of tribes, instead of relying on canons of construction, and the current federal policy, which has historically been subject to change.