UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 10, 2004

In re Investigation of:	)	
	)	8 U.S.C. § 1324b Proceeding
MICCOSUKEE RESORT AND	)	
CONVENTION CENTER	)	OCAHO Case No. 05S00003
_____	)	

ORDER DENYING PETITIONS TO REVOKE SUBPOENAS AND CONDITIONAL ORDER AUTHORIZING OSC TO SEEK ENFORCEMENT

I. PROCEDURAL HISTORY

At issue in this case are two administrative subpoenas I issued at the request of the Office of the Special Counsel for Immigration Related Unfair Employment Practices (OSC) in aid of its investigation of the Miccosukee Resort and Convention Center. The subpoenas are numbered 05S00003 and 05S00004 and are addressed respectively to Maria Espinal as the Human Resources Director, Miccosukee Corporation d/b/a Miccosukee Resort and Convention Center, Miccosukee Resort and Gaming; and to Billy Cypress, Chairman, Miccosukee Tribe of Indians of Florida.[1]

The subpoenas are identical in content. Each makes 14 specific requests that various documents be mailed to OSC on or before November 19, 2004. Four of the requests relate to documents that reflect the Resort and Convention Center's legal name, describe its organizational, legal and corporate structure, identify the custodian of its personnel records, and explain the relationship between four entities: the Resort, Miccosukee Resort & Gaming, the Miccosukee Corporation, and the Miccosukee Indian Tribe. The remainder of the requests are for documents related to the Resort and Convention Center's hiring practices, in particular to events surrounding an application made by Jose Manuel Acero for employment at the Resort and Convention Center, to the denial of that application, and to the manner in which the Resort and Convention Center

[1] Although it is not expressly stated in the subpoena, OSC contends that service on the Chairman of the Tribe is also based upon his concurrent status as Chairman of the corporation d/b/a the resort.

conducts its hiring and verifies the employment eligibility of its applicants.

On November 19, 2004, the Miccosukee Tribe of Indians of Florida filed timely[2] petitions to revoke both subpoenas on the ground that both the Office of the Chief Administrative Hearing Officer (OCAHO) and OSC lack jurisdiction over the Tribe. The petitions make no specific reference to the corporation or to the Resort and Convention Center as such but refer to Espinal as "an employee of the Tribal enterprise." Although the Tribe's petitions do not address issues other than jurisdiction, they nevertheless purport to retain the right to present arguments regarding improper service, scope or other defects in the subpoenas at some unidentified future time.[3] Although the Tribe makes a general allegation in each petition that the document requests are overbroad, it does not specify in what manner any particular request is overbroad nor does it seek a specific modification of any of the individual requests. The petitions basically argue that 8 U.S.C. § 1324b has no application to Indian tribes and that tribal sovereign immunity bars the subpoenas.

OSC filed a timely memorandum in response and the Tribe filed an unauthorized reply[4] reiterating inter alia the claim that it reserves the right to make more specific objections. The matter is ripe for adjudication.

II. APPLICABLE LAW

A. Standards for Administrative Subpoenas

It is well settled in the Eleventh Circuit that an administrative subpoena should generally be enforced "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States v. Florida Azalea Specialists*, 19 F.3d 620, 623 (11th Cir. 1994) (*quoting Federal Election Comm'n v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982)). *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). If it is shown that those three criteria have been met, the subpoena will

---

[2] Applicable rules, 28 C.F.R. Part 68 (2004), provide that a person served with a subpoena may petition to revoke or modify it within ten days of the date of service. 28 C.F.R. § 68.25(c) (2004). The entity that requested the subpoena has eight days in which to respond. *Id.*

[3] The rule makes no provision for any such reservation of rights nor does it appear to contemplate a piecemeal approach to subpoena review.

[4] The rule permits the filing of a petition to revoke or modify and a response thereto. No further pleading is either authorized or permitted. 28 C.F.R. § 68.25(c) (2004). The reply will accordingly not be considered.

generally be enforced unless the party being investigated proves that the inquiry is unreasonable because it is overbroad or unduly burdensome. *See Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 217 (1946). It is also well settled that the role of an administrative law judge or a district court in such a proceeding is sharply limited. *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996); *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991) (*citing cases*). The reason for limiting the scope of review is linked to the government's interest in expeditious investigations.[5] *In re Investigation of Strano Farms*, 3 OCAHO no. 521, 1217, 1218 (1993).[6]

As explained in *Kloster*, the investigating agency need not make a conclusive showing of jurisdiction to justify enforcing a subpoena. The agency must be allowed to investigate the facts, including the facts relevant to jurisdiction as an initial matter. 939 F.2d at 922-24. Thus *Kloster* reversed the district court because it had resolved the jurisdictional issue prematurely in a subpoena enforcement action instead of leaving the initial determination of the coverage question to the administrative agency. *Id.* at 922. The court noted that while there is some support for an exception where enforcement would result in an abuse of process, *Id.* at 923, the general rule is that "[a] subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular statute." *Id.* at 922. Characterizing a threshold question of statutory coverage as "jurisdictional" does not alter the general rule. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700 (7th Cir. 2002); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996).

B. The Scope of Tribal Sovereign Immunity

Commentators have observed that the law respecting Indian sovereign immunity is far from clear and its source has been the subject of much debate. Professor Frickey describes the field as

---

[5] OSC has only 120 days in which to conduct an investigation, 8 U.S.C. § 1324b(d)(1) (2004), after which it must notify the charging party of the right to file a private complaint within 90 days. 8 U.S.C. § 1324b(d)(2) (2004). OSC may continue to investigate during the 90 day period. *Id.*

[6] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation.

"rooted in conflicting principles that leave the field in a morass of doctrinal and normative incoherence." Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv. L. Rev. 1754, 1754 (1997). As was recently observed by Justice Thomas, "In my view, tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously." *United States v. Lara*, 541 U.S. 193, __, 124 S.Ct. 1628, 1642 (2004) (*concurring opinion*).

The leading case setting out the analysis for whether a particular federal statute applies to Indian tribes is *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), which has been adopted by a number of courts. *See, e.g., Reich v. Mashantucket Sand & Gravel*, 95 F.3d 177 (2d Cir. 1996). *Coeur d'Alene* began its analysis with the rule that a statute of general applicability presumptively applies to Indian tribes absent some clear indication of contrary legislative intent. 751 F.2d at 1115, *citing Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Three exceptions to this general rule are set out in *Coeur d'Alene*: 1) the "aspects of tribal self-government exception," where application would interfere with intramural affairs touching on self-government such as conditions of tribal membership, inheritance rules, and domestic relations, 2) the "treaty rights" exception, where the statute would abrogate rights guaranteed under a treaty, or 3) the "other indications" exception, where there is proof by legislative history or other means that Congress' intent was to exclude Indian tribes. 751 F.2d at 1116.

A statute of general applicability is one which is sets forth a comprehensive scheme and has broad applicability. *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1128-29 (11th Cir. 1999) (hereafter *FPA*). In *FPA* the Eleventh Circuit applied the *Coeur d'Alene* analysis to hold that Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, was a statute of general applicability and accordingly applied to Indian tribes. The court noted that as a general matter tribe-run business enterprises acting in interstate commerce do not ordinarily fall under *Coeur d'Alene*'s "self-governance" exception. 166 F.3d at 1129 (finding the Miccosukee Tribe's restaurant and gaming facility to be a commercial enterprise open to non-Indians).

More recently in *Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032 (11th Cir. 2001), the court again started with the *Tuscarora* rule, then proceeded to analyze the claim in light of the exceptions. *Taylor* held that an employment discrimination claim under 42 U.S.C. § 1981 alleging race discrimination against non-Indian employees in favor of Indian employees fell within two of the *Coeur d'Alene* exceptions and could not be maintained "when the employment concerns tribal self-governance, reservation administration and other intramural Indian matters." 261 F.3d at 1036-37. The court noted as well that in *Morton v. Mancari*, 417 U.S. 535, 548 (1974), the Supreme Court had expressly recognized that the purpose of excluding Indian tribes from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*,

was to enable tribes to give a preference to Indians in tribal governmental employment,[7] and that the same result should therefore obtain under § 1981. *See also* 110 Cong. Rec. 13, 701-03 (1964) (comments of Sen. Mundt). *Taylor* cautioned, however, that Indian sovereign immunity is a "unique legal concept and, unlike state Eleventh Amendment immunity, it can more freely be limited by Congressional enactment." 261 F.3d at 1035.

As observed in *FPA*, whether a tribe is subject to a statute and whether the tribe may be *sued* by a private party for violating the statute are two entirely different questions. 166 F.3d at 1130. Thus while the Miccosukee Tribe was found not to be amenable to the private suit in *FPA*, the court observed that this does not necessarily mean that the Tribe would have been immune to an action by the United States, because Indian tribes have no sovereign immunity against the United States. *Id.* at 1135. *See also Mashantucket Sand*, 95 F.3d at 182 (tribal sovereign immunity does not bar suits by the United States); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1701, 1075 (9th Cir. 2001) (Indian tribes do not enjoy sovereign immunity from suits brought by the federal government); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994) (tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers). As Justice Stevens observed, moreover, in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514-15 (1991) (*concurring opinion*), tribal sovereign immunity does not extend to actions seeking equitable relief. Under the rule of *Ex Parte Young*, 209 U.S. 123 (1908), even state sovereign immunity does not bar a suit for prospective injunctive relief. *Frew v. Hawkins*, 540 U.S. 431, __, 124 S.Ct. 899, 903 (2004).

III. THE PETITION AND RESPONSE

The Tribe alleges first that the Immigration Reform and Control Act of 1986 (IRCA) has no application to Indian tribes because it conflicts with the Tribe's inherent power to exclude non-Indians from tribal lands, because it is not a statute of general application, and because any ambiguity must be resolved in favor of the tribe. In the Tribe's view, § 1324b is not a statute of general application because it does no more than fill a gap in Title VII and because it contains exceptions. The Tribe asserts in the alternative that even if § 1324b were a statute of general application it does not apply here because the employment decision in question comes within two of the three *Coeur d'Alene* exceptions: both the "self government" exception and the "proof by other means" exception.

---

[7] The court noted that the preference was not a "racial" one but rather a "political" preference, based upon status as a member of a federally recognized tribe. 417 U.S. at 553-54 and n.24. Accordingly the preference did not raise any constitutional concerns. *Id. But see* Frickey, 110 Harv. L. Rev. at 1762 (characterizing this rationale as "fictional").

OSC's response contends that IRCA is a statute of general applicability and that an enforcement action by the United States is permitted. It says as well that the Eleventh Circuit has already held that the Resort at issue in this case does not fall under a governmental function of the Tribe, quoting *FPA*, 166 F.3d 1129, which stated that,

> [t]he Miccosukee Tribe's restaurant and gaming facility is a commercial enterprise open to non-Indians from which the Tribe intends to profit. The business does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members.

OSC argues as well that the third *Coeur d'Alene* exception does not apply because OSC's jurisdiction is not simply an extension of Equal Employment Opportunity Commission (EEOC). It notes that it has broad investigative authority which is expressly conferred by statute, and says the Tribe made no showing that compliance with the subpoena would be burdensome under the standard of *In Re Tropicana Casino and Resort*, 9 OCAHO no. 1060 at 2 (2000). Finally, OSC seeks expeditious enforcement and equitable tolling of applicable deadlines in view of the time-sensitive nature of investigative subpoenas.

IV. DISCUSSION

The Tribe argues as an initial matter that IRCA does not apply to it at all because it has an inherent power to exclude non-Indians from tribal lands and because § 1324b is not a statute of general applicability. In its view, § 1324b "is not broad, and does not apply to everyone, not even to all employers." Because the statute excludes employers of three or fewer employees and also excludes charges which are already covered by Title VII, the Tribe regards the employment provisions as "only intended to augment Title VII" and not as a comprehensive, generally applicable statute. It suggests that when read in conjunction with Title VII, it is clear that Congress intended to exempt Indian tribes.

IRCA, however, enacted a comprehensive scheme which the Supreme Court has recognized as central to the nation's immigration policy and law. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-148 (2002). It established for the first time in our national history a system to control the employment of unauthorized aliens, 8 U.S.C. § 1324a, and enacted at the same time the companion provision, 8 U.S.C. § 1324b, to protect authorized workers from unfair immigration-related employment practices. Section 1324b is part and parcel of a comprehensive statutory scheme and the Tribe trivializes its reach by suggesting that it does no more than fill a gap in Title VII. The section did, as the Tribe points out, fill a gap by creating a remedy for certain claims of national origin discrimination against some smaller employers. It also established for the first time in our national history a broad prohibition against citizenship status discrimination and also, by subsequent amendment, created a new cause of action under 8 U.S.C.

§ 1324b(a)(6) for abusive documentary practices during the employment eligibility verification process. These are not simply "augmentations" of Title VII, they are new and independent provisions of law. Unlike Title VII, moreover, § 1324b does not apply just to an "employer," it applies as well to "a person or entity," § 1324b(a)(1), which regulations define as "any legal entity, including but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship or association." 8 C.F.R. § 274a.1(b) (2004). Its coverage in this respect is broader than that of Title VII. That a statute contains limited exemptions does not mean that it is not a generally applicable statute because the term generally applicable does not mean universally applicable. *See NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998 (9th Cir. 2003) (holding that the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA), is a generally applicable statute though it contains exemptions, and listing a variety of other federal statutes containing exemptions which have nevertheless been found to be statutes of general applicability).

The Tribe argues in addition that *FPA* should not be relied upon because *Tuscarora* has been limited or overruled *sub silentio* by *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), a case which did not involve the applicability of federal statutes to Indian tribes, but rather held that an Indian tribe has the authority to impose a severance tax on non-Indian companies extracting minerals from leased lands on a reservation. The National Labor Relations Board (NLRB) recently addressed a similar attack on the *Tuscarora-Coeur d'Alene* analysis in two companion cases, *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138, 2004 WL 1283584 (2004) and *Yukon Kuskokwim Health Care, Corp.*, 341 NLRB No. 139, 2004 WL 1283584 (2004). The Board pointed out in *San Manuel* that the rule in *Tuscarora* has been widely applied and that the Supreme Court has never purported to overturn it. 2004 WL 1283584 at *8-10. While the Board recognized that critical internal matters of self-governance, such as the authority to tax (at issue in *Merrion)*, are exceptions to the general rule, there is no exception to the rule for commercial activities such as the operation of a casino catering to a non-Indian clientele. *Id.* The Board simply found no merit to the argument that Congress lacked power to regulate labor relations on Indian reservations as part of its power to regulate interstate commerce. *Id.* at *12. Accordingly it held the *Tuscarora-Coeur d'Alene* standard applicable to both on-reservation and off-reservation employment cases involving non-governmental enterprises, *Id*. at *13, stating that,

> [t]ribal businesses are playing an increasingly important role in the Nation's economy. As tribal businesses prosper, they become significant employers of non-Indians and serious competitors with non-Indian owned businesses. When Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way.

The Tribe says that *FPA*'s holding that the self governance exception did not apply to its gaming facility was incorrect, but that in any event *FPA* did not implicate employment, and employment decisions for the casino touch on the right of self governance in intramural matters. It is not clear from the limited pleadings in this matter whether the restaurant and gaming enterprise at issue in *FPA* is the same entity as the resort and casino at issue here and that question is not susceptible to resolution in this proceeding. Indeed, the legal status of the enterprise being investigated is part of the very inquiry being made by the subpoenas. The short answer to the Tribe's assertion, however, is that it is not self-evident that the operation of a casino or resort and convention center involves the exercise of self governance in intramural matters and the Eleventh Circuit appears to have held to the contrary. Neither is it self-evident that the operation of a commercial enterprise open to the public has any nexus to the power of the Tribe to exclude non-Indians from tribal lands and the Tribe has articulated no basis upon which to find such a nexus.

The Tribe's final contention is that the third *Coeur d'Alene* exception applies to it because the close relationship between § 1324b and Title VII "indicates that Congress did not intend to apply Section 1324b to tribes." Because Title VII excludes Indian tribes from its definition of "employer," the Tribe argues that the same exception should apply to § 1324b.[8] But just because Congress expressly excluded Indian tribes from the definition of an "employer" under Title VII, this does not mean that such an exception should reflexively be read into § 1324b. The omission of this exception from § 1324b and it presence in Title VII may just as readily indicate that when it wants to exclude Indian tribes Congress is well aware of how to do that.

The Tribe urges that the analysis to follow is that in *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000), but that analysis is predicated upon the assumption that *Tuscarora* has been overruled, an assumption expressly rejected in *FPA*. *San Juan* held that the NLRA was not a statute of general applicability because it excludes states and territories, a novel approach which appears to represent a minority view and is expressly contradicted by *Chapa De*, which pointed out that Congress made the NLRA as broad as was permissible under the Commerce Clause. 316 F.3d at 998. The Tribe's reliance on the language of the panel in *San Juan* is also undermined by the subsequent *en banc* rehearing of that case, 276 F.3d 1186 (10th Cir. 2002), which reached the same result but with a different and much narrower analysis.

V. CONCLUSION

The Tribe says that sovereignty should not be summarily determined in this proceeding and it is

[8] It is not clear whether Congress intended the exclusion to apply to commercial enterprises owned or operated by Indian tribes or only to tribes as a governmental employer. *See generally* Mitchell Peterson, *The Applicability of Federal Employment Law to Indian Tribes*, 47 S. D. L. Rev. 631, 633 (2002).

not. What is determined here is that OSC's arguments respecting jurisdiction are at minimum plausible under the *Kloster* standard. Its authority to investigate alleged violations of § 1324b necessarily includes the authority to investigate coverage under the statute. *In re Investigation of Univ. of S. Florida,* 8 OCAHO no. 1055, 843, 847 (2000). I conclude that the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant under the standard set out in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). Accordingly the *Florida Azalea* standard has been satisfied. The Tribe has made no showing of overbreadth or undue burden and the time within which to have made that showing has elapsed. Generalized and unsupported claims of burden do not meet the *Florida Azalea* standard. *Univ. of S. Florida,* 8 OCAHO no. 1055 at 848.

VI. EQUITABLE TOLLING/EQUITABLE ESTOPPEL

OSC says that its investigation has been truncated by the efforts of the respondent to frustrate it and accordingly requests that both the investigatory period and the complaint filing deadline be tolled for a period equal to the period during which the respondents resisted producing the documents. The Tribe's reply, which I do not consider, argues to the contrary.

There is ample support in the case law supporting the imposition of equitable relief from deadlines in appropriate circumstances where the specific facts warrant it. *In re Investigation of Conoco*, 8 OCAHO no. 1048, 729, 736-37 (2000); *EEOC v. Am. Express Centurion Bank*, 758 F. Supp. 217, 226 (D. Del. 1991); *EEOC v. Gladieux Refinery, Inc.*, 631 F. Supp. 927, 936 (N.D. Ind. 1986). However the appropriateness of equitable relief as well as the length of any period of extension depends upon a fact-specific inquiry based upon competent evidence rather than on arguments or mutual accusations in legal memoranda. Resolution of this issue is accordingly premature at this stage. The outcome of the investigation is uncertain. For all we know the charging party and the OSC may conclude at the close of the investigation that no further action is necessary. Resolution of factual questions about the nature of the work and whether or not the enterprise employs non-Indians may even alter their view of the statute's applicability to the events alleged. The Tribe is entitled in any event to an opportunity to argue the availability of equitable relief on a more complete factual record if and when the question is actually presented for resolution.

ORDER

The petitions to revoke Investigative Subpoenas No. 05S00003 and No. 05S00004 are denied. The Tribe is directed to comply with the subpoenas within 10 days of the date of this order. In the event of noncompliance within that time, OSC is hereby authorized without further application to this office to seek enforcement in the United States District Court for the Southern District of Florida pursuant to 8 U.S.C. § 1324b(f)(2) (2004) and 28 C.F.R. § 62.25(e) (2004).

SO ORDERED.

Dated and entered this 10th day of December, 2004.

_____
Ellen K. Thomas
Administrative Law Judge