S. HRG. 114–105

S. 248, THE TRIBAL LABOR SOVEREIGNTY ACT OF 2015

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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CONTENTS

S. 248, THE TRIBAL LABOR SOVEREIGNTY ACT OF 2015

WEDNESDAY, APRIL 29, 2015

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:48 p.m. in room 628, Dirksen Senate Office Building, Hon. John Barrasso, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

The CHAIRMAN. Good afternoon, I call this hearing to order and invite those who are testifying to please join us.

Today the Committee will examine S. 248, the Tribal Labor Sovereignty Act of 2015. This bill was introduced by Senator Moran, along with Senators Crapo, Daines, Fischer, Hoeven, Inhofe, Lankford, Risch, Thune, and Rounds.

Tribal sovereignty is an essential key to enhancing tribal self-determination and self-governance. Tribal sovereignty allows Indian Tribes to govern themselves, regulate tribal businesses, and provide essential services to tribal members. Tribal sovereignty brings hope for a brighter future.

We are in the era of empowering tribes. This policy is evident in Federal statutes such as the Indian Self-Determination and Education Act of 1975 and Title V of the Energy Policy Act of 2005, to name a few.

Congress has worked to reverse government policies that have been detrimental to tribes. That is why I and the sponsors of S. 248 have strong concerns about the how the National Labor Relations Board is treating Indian Tribes across the Country. The National Labor Relations Board decision to apply the National Labor Relations Act to Indian Tribes has increased costs and uncertainty, which can hinder tribal business growth.

The bill before us would amend the National Labor Relations Act so that a tribally owned and operated enterprise or institution would be treated like any other Federal- or State-owned corporation.

Before we hear the witnesses' testimony on this bill, I want to turn to Senator Tester for his opening statement.

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Once again, thank you, Mr. Chairman, for holding this hearing.

Over the past 15 years, the issues that this bill would address have become more prevalent and have really created uncertainty for tribes. The bill has wide support in Indian Country, so I think it is important to have this hearing and hear how tribes are addressing labor issues in their communities.

Tribes have recently been tasked with understanding how the National Labor Relations Act applies to them as recent decisions by the National Labor Relations Board have exerted jurisdiction over tribal enterprises on tribal lands. These recent decisions were a departure after decades of hands-off approach taken by the NLRB. This has added some confusion and uncertainty for tribes. It is not conducive for proper human resource management and running effective enterprises.

The uncertainty exists for no other governments in the Country other than Tribal Governments. Tribes have framed this is an issue of sovereignty and parity among governments, and I tend to agree with that assessment. And while I am a strong supporter of tribal sovereignty, we should acknowledge that some folks in Washington have spent the last few years trying to weaken the NLRB; gutting its funding, going after its ability to update the rules of the road for labor elections and otherwise trying to roll back two generations of protections that will help ensure workers' decisions of whether and how to organize fair and free from influence of employers.

I do not want anyone to confuse my support of this bill with my support for the work of the NLRB. Throughout the 80 years of implementing the NLRA, the NLRB has made changes to how it treats tribal enterprises and the role they play within tribal communities and government structures. While tribal economic development opportunities have indeed changed over the years, tribes, as governing bodies, like State and local governments, deserve the ability to determine their own governmental labor policies.

Tribes, like other governments, have the responsibility of providing essential services to their members, such as education, healthcare, and housing. Businesses owned by the tribes serve a critical role in this effort by raising revenue to provide these crucial services. The uncertainty created by a 2004 San Manuel decision and subsequent decisions make it tougher for tribes to run their enterprises and carry out this important function.

The NLRA guarantees key rights to workers and guides labor relations between employees and private employers. It is critically important to both employees and employers to have good working environments with an effective way to address grievances, but tribes deserve the same treatment afforded to all other governments under the NLRA. Acknowledging tribal sovereignty and affording the same opportunity to strengthen labor relations by developing their own labor policies that are consistent both in their own government, economic, and cultural realities and the larger framework of labor force protections.

I appreciate this Committee's work. I look forward to working with my colleagues on this Committee to address any concerns that we hear about this bill today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Tester.

Senator Moran, would you like to make an opening statement?

STATEMENT OF HON. JERRY MORAN,
U.S. SENATOR FROM KANSAS

Senator MORAN. Mr. Chairman, thank you very much for the opportunity. I appreciate what Senator Tester just said, and I would thank you and he for having this hearing, and I express my appreciation to the witnesses who have traveled a distance and have made significant effort to join us today.

I would like to reiterate something that I think needs to be said, and that would be that despite the word labor being in the title of this bill, in my view, the real focus of this legislation is another word in this bill, sovereignty. Do tribal governments have the right to make decisions that pertain to their business on their own lands? In my view they do, and I hope today's hearing will affirm that to be the case.

We know that there is a legislative problem. We are trying to deal with an issue that was not addressed in 1935. That question that arises is whether tribal governments should be included alongside Federal, State, and local governments as exempt from NLRA. Despite the omission of our predecessors, for almost 70 years the National Labor Relations Board rightfully honored tribal parity with other governments. Unfortunately, in the last decade there was a reversal of that policy, and this legislation, in my view, would correct that mistake.

That sovereignty is the key issue of this bill is indicated by the broad support that this legislation has within Indian Country. As of today, approximately 50 tribal organizations have expressed their support for the Tribal Labor Sovereignty Act. Whatever the differences are between tribes, it is apparent that they are united in viewing this measure as a defense of their integrity. Tribes are not businesses; they are sovereign nations recognized as such under our Constitution.

As I wrote to my colleagues upon introducing this bill, it is not the place of the Federal Government to impinge upon the authority of sovereign tribes. Tribal governments alone, accountable to their people, should decide labor practices for their entities that they own on their lands.

I look forward, Mr. Chairman, to our discussion today, and I yield back my time.

The CHAIRMAN. Thank you very much, Senator Moran.

Would any other members like to make an opening statement?

If not, we will now hear from our witnesses. There are five: Mr. Richard Griffin, the Honorable Robert Welch, the Honorable Paul Torres, the Honorable Keith Anderson, and Mr. Richard Guest. I want to remind the witnesses that your full testimony will be part of our official hearing record. Please keep your statements to five minutes so that we may have time for questions.

I look forward to hearing your testimony, beginning with you, Mr. Griffin.

STATEMENT OF RICHARD F. GRIFFIN, JR., GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

Mr. GRIFFIN. Chairman Barrasso, Vice Chairman Tester, and members of the Committee, thank you for the invitation to discuss the application of the National Labor Relations Act to tribal enterprises. I understand the Committee is considering legislation addressing this issue.

As an independent agency, the National Labor Relations Board has a well-established policy of not taking a position on pending legislation. In addition, my office currently has several open cases involving application of the Act to tribal enterprises, so I will not comment on pending cases and will instead focus my remarks today on the current state of the law.

The National Labor Relations Board is responsible for administering the National Labor Relations Act, which ensures the right of private sector workers to organize and bargain collectively with their employers and to participate in concerted activities to improve their pay and working conditions, with or without union representation.

The Act confers on the Agency broad jurisdiction to resolve representation questions and remedy unfair labor practices affecting interstate commerce. It includes only a few specific exemptions from its definition of a covered employer. Those exclusions are the Federal Government and its corporations, States and their political subdivisions, unions not acting as employers, and employers covered by the Railway Labor Act.

The definition of employer does not contain an express exemption for federally-recognized tribes or the employing enterprises that they own or control.

In 2004, in the *San Manuel Indian Bingo and Casino* case, a bipartisan board reviewed its existing jurisdictional standards, which focused on whether tribal enterprises were located on or off tribal lands, and decided to announce a new standard intended to accommodate both Federal Indian policy and Federal labor policy.

First, the Board determined that tribal enterprises meet the statutory definition of employer and do not fit any of the definitions exclusions. Next, the Board examined whether Federal Indian policy nonetheless required it to decline jurisdiction, and held that the jurisdictional question should be determined case-by-case. It adopted a presumption from the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation* that generally applicable Federal statutes like the National Labor Relations Act applied to Indian Tribes.

The Board then adopted three exceptions previously developed by the Ninth Circuit in the *Coeur d'Alene Tribal Farm* case to protect core tribal sovereignty, the Federal Government's treaty obligations, and Congress's authority over Indian affairs. The Board followed the consensus of several Federal courts of appeals which had applied the Tuscarora-Coeur d'Alene framework to other general workplace statutes. The Board distinguished cases involving conflicts with States which, unlike the Federal Government, are not

superior sovereigns to tribes or involving tribal sovereign immunity, a doctrine which applies against private or State actors, but not against the Federal Government and its agencies.

Finally, the Board augmented the framework with a Board-specific discretionary inquiry. The Board stated that even where application of the framework does not preclude jurisdiction over a particular tribal employer, the Board will balance the affect on labor and Indian policies before asserting jurisdiction, focusing on whether, in operating an enterprise, a tribe is primarily fulfilling traditionally tribal or governmental functions that are unique to the status as an Indian Tribe.

In such cases, the policies underlying the Nation Labor Relations Act are less strongly implicated. However, if a tribe is participating in the national economy through a commercial enterprise, employing many non-Indian employees, catering largely to non-Indians, and competing with non-Indian businesses, the balance of conflicting considerations favors the Board's jurisdiction because the tribe's activity affects interstate commerce in a significant way.

Applying its new standard, the Board in San Manuel asserted jurisdiction over an on-reservation tribal casino. It emphasized that the casino was a typical commercial enterprise with mostly non-Indian employees and customers. The Board noted that the tribe had no treaty with the Federal Government and it found that the casino's on-reservation location was insufficient to outweigh the factors favoring jurisdiction.

At the same time, the Board declined jurisdiction in a companion case, Yukon Kuskokwim Health Corporation, involving jurisdiction over an off-reservation tribal hospital. The Board, in that case, noted that 95 percent of the patients were Native Alaskans from the immediate surrounding area and that the clinic, as the area's primary healthcare provider, did not compete with other hospitals covered by the National Labor Relations Act.

The D.C. Circuit upheld the Board's assertion of jurisdiction in San Manuel and the Board has continued to apply the framework adopted in that case.

On a number of occasions since the Board issued San Manuel, its general counsel has, upon request, consulted with Indian Tribes potentially subject to the Board's jurisdiction, consistent with the President's memorandum on tribal consultation. As an example, in 2014, I consulted with the Little River Band of Ottawa Indian's tribal government respecting an unfair labor charge against that tribe.

In conclusion, as I hope this summary makes clear, the Board's regulation in this area, as in so many others, is the result of applying the general language in the statute to the changing circumstances of industrial life. At all times the Board seeks to give effect to the purposes and policies that Congress has embedded in the National Labor Relations Act and to take account of the decisions of the courts.

In the area of jurisdiction over tribal enterprises, as in all other areas of its administration of the Act, the Board recognizes its responsibility to enforce the statute in accordance with the provisions and amendments that Congress chooses to enact. For that reason, the Agency takes no position on any pending legislation that may

alter the Act or affect the Board's future jurisdiction over tribal enterprises.

Thank you for this opportunity to testify, and I welcome any questions.

[The prepared statement of Mr. Griffin follows:]

PREPARED STATEMENT OF RICHARD F. GRIFFIN, JR., GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

Chairman Barrasso, Vice-Chairman Tester, and Members of the Committee, thank you for the invitation to testify today. I appreciate the opportunity to appear before you to discuss the application of the National Labor Relations Act (NLRA) to tribal enterprises. I understand the Committee is considering legislation addressing this issue. As an independent agency, the National Labor Relations Board has a well-established policy of not taking a position on pending legislation. In addition, my Office currently has open cases involving the application of the NLRA to tribal enterprises. Therefore, my remarks today will address the current state of the law in this area; however, I will not be able to comment on pending cases.

The National Labor Relations Board is responsible for administering the NLRA, which ensures the right of private-sector workers to organize and bargain collectively with their employers and to participate in concerted activities to improve their pay and working conditions, with or without union representation. As General Counsel, my Office serves as the investigative and prosecutorial branch of the Agency. In that capacity, we investigate alleged violations of the NLRA, issue complaint where merit has been determined, and litigate matters before Administrative Law Judges, the Board, and in the federal courts.

Consistent with its congressionally mandated mission to ensure that workplace disputes are resolved efficiently and effectively, the NLRA confers on the Agency broad jurisdiction to resolve representation questions and remedy unfair labor practices affecting interstate commerce. The NLRA includes only a few specified exemptions from its definition of a covered "employer"—the Federal Government and its corporations, states and their political subdivisions, unions not acting as employers, and employers covered by the Railway Labor Act. [1]

The NLRA's definition of "employer" contains no express exemption for federally recognized tribes or the employing enterprises that they own or control. The Board's determination of whether and in what circumstances it should assert jurisdiction over tribal enterprises has evolved over a number of years.

I. The National Labor Relations Board's Early Approach to Jurisdiction Over Tribal Enterprises and Tribal Lands

The question of whether the Board should assert jurisdiction over labor disputes on tribal lands first arose more than 60 years ago in two cases involving non-Indian companies that were operating on tribal reservations under leases with Indian tribes. In both *Simplot Fertilizer Co.* and *Texas-Zinc,* [2] the Board found that there was no valid basis for reading the NLRA to exclude from its coverage Indians or Indian reservations as a class. The Board noted that Congress vested the Board with very broad jurisdiction and that courts had applied other general federal statutes to Indians, and on Indian lands. [3]

The Board first considered whether to assert jurisdiction over tribal enterprises located on tribal lands in a 1976 case called *Fort Apache Timber Co.* The Board declined to assert jurisdiction. It held that sovereign tribal governments, including a tribe's "self-directed enterprise on the reservation," were "implicitly exempt" from the NLRA's definition of "employer." [4]

In a 1992 case, *Sac & Fox Industries,* [5] the Board was confronted with the question of whether to assert jurisdiction over a tribally owned and controlled factory

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[1] Section 2(2) of the NLRA, 29 U.S.C. § 152(2) defines "employer" and sets forth the exemptions. The Railway Labor Act is codified at 45 U.S.C. § 151, et seq.

[2] *Simplot Fertilizer Co.,* 100 NLRB 771, 772–73 (1952); *Texas-Zinc,* 126 NLRB 603, 603–04, 607 (1960), *enforced sub nom. Navajo Tribe v. NLRB,* 288 F.2d 162 (D.C. Cir. 1961). *See also Devils Lake Sioux Mfg. Corp.,* 243 NLRB 163, 163–64 (1979) (asserting jurisdiction over on-reservation corporation partially owned by tribe but partially owned and "completely managed and operated" by non-Indian company).

[3] *Texas-Zinc,* 604, 606–07; *Simplot,* 100 NLRB at 773–74 & n.7.

[4] 226 NLRB 503, 504–06 (1976). *Accord S. Indian Health Council,* 290 NLRB 436, 436–37 (1988).

[5] 307 NLRB 241, 243–45 (1992).

that, unlike the enterprise at issue in *Fort Apache Timber Co.,* was located off the reservation. The Board asserted jurisdiction.

The Board reaffirmed its holding that off-reservation tribal enterprises were not exempt from the statutory definition of employer in a 1999 case, *Yukon Kuskokwim Health Corp.* There, the Board asserted jurisdiction over an off-reservation hospital run by a tribal consortium and serving tribal patients.[6]

II. Current law: the Board's *San Manuel* Jurisdictional Standard

In 2004, the Board decided *San Manuel Indian Bingo & Casino.* A bipartisan Board decision, noted the "increasingly important role" that tribal commercial enterprises were, by then, playing in the national economy. The Board found that tribally owned enterprises were "significant employers of non-Indians and serious competitors to non-Indian owned businesses." The Board reviewed its existing jurisdictional standards, which focused on whether tribal enterprises were located on or off tribal lands. The Board found that its previous approach was "both underinclusive and overinclusive" and based on "faulty" premises.[7] Reviewing governing Indian law precedent and exercising its congressionally designated responsibility to interpret the NLRA, the Board announced a new, comprehensive standard intended to accommodate both federal Indian policy and federal labor policy.

First, the Board determined that tribal enterprises meet the statutory definition of "employer"—a term which Congress intentionally wrote to "vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."[8] The Board then held that tribal enterprises do not fit any of the enumerated exclusions to the statutory definition of "employer," noting that those exclusions are to be interpreted narrowly.[9] The Board noted, in particular, that nothing in the text of the NLRA supports a distinction in the definition of employer based on geographic location (such as whether a facility is on or off tribal lands).[10]

Having determined that tribal enterprises are statutory employers, the Board considered whether federal Indian policy nonetheless required it to decline jurisdiction over such employers. The Board held that the jurisdictional question should be determined on a case-by-case basis, and it announced the standard it would apply going forward. The Board stated that it was adopting a presumption, from the Supreme Court's decision in *FPC v. Tuscarora Indian Nation,* that generally applicable federal statutes like the NLRA apply to Indian tribes.[11]

The Board then adopted three exemptions to that presumption. Those exemptions had previously been developed by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm,*[12] to protect three distinct interests: core tribal sovereignty, the Federal Government's treaty obligations, and Congress' authority over Indian affairs.[13]

The Board acknowledged arguments that the *Tuscarora* presumption is inconsistent with other Indian law cases, or otherwise inapplicable. But the Board followed the consensus of several federal courts of appeals which had accepted the *Tuscarora/Coeur d'Alene* framework in some measure.[14] Those courts had applied the *Tuscarora/Coeur d'Alene* framework to other general workplace statutes including the ADA, OSHA, and ERISA.[15]

The Board discussed the cases typically cited in opposition to the *Tuscarora/Coeur d'Alene* framework. The Board found that those cases either fit within that framework or did not involve application of generally applicable federal statutes like the NLRA. Many of the cases resolved conflicts with states which, unlike the Federal Government, are not superior sovereigns to tribes. Others involved tribal sov-

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[6] 328 NLRB No.86 (1999), *remanded,* 234 F.3d 714 (D.C. Cir. 2000).

[7] 341 NLRB 1055, 1056–57 (Chairman Battista and Members Liebman and Walsh; Member Schaumber, dissenting), *enforced,* 475 F.3d 1306 (D.C. Cir. 2007).

[8] *Id.* at 1057 (quoting *NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226 (1963)).

[9] *Id.* at 1057–58; *accord Holly Farms Corp. v. NLRB,* 51 U.S. 392, 399 (1996).

[10] *Id.* at 1059.

[11] 341 NLRB at 1059–60 (discussing *Tuscarora,* 362 U.S. 99 (1960)).

[12] 751 F.2d 1113 (9th Cir. 1985).

[13] The same Tuscarora/Coeur d'Alene framework had informed the Board's earlier Sac & Fox decision. 307 NLRB at 243–45 (citing Tuscarora and Coeur d'Alene).

[14] *See San Manuel,* 341 NLRB at 1059–60 & nn.16 & 17.

[15] *See, e.g., Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.,* 166 F.3d 1126 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174 (2d Cir. 1996) (OSHA); *Smart v. State Farm Ins.,* 868 F.2d 929 (7th Cir. 1989) (ERISA). *See also NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1199 & n.11 (10th Cir. 2002) (en banc) (acknowledging *Tuscarora* may apply to tribes acting in proprietary capacity; collecting cases); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.,* 986 F.2d 246, 248 (8th Cir. 1993) (acknowledging *Tuscarora* presumption in ADEA case, but finding exception for intramural tribal dispute).

ereign immunity, a doctrine which applies against private or state actors, but not against the Federal Government and its agencies.[16]

Under the *Tuscarora/Coeur d'Alene* framework, the Board, has expressly recognized that federal Indian law precludes jurisdiction that would "touch[] exclusive rights of self-government in purely intramural matters."[17] But the Board has also recognized that the courts of appeals have limited that "self-government" exception to purely intramural tribal matters.[18] The Board found that the operation of a casino is neither an exercise of self-governance nor a traditional governmental function.[19]

In addition, the Board considered the argument that the Indian Gaming Regulatory Act (or IGRA) precluded Board jurisdiction. The Board rejected that argument, noting that IGRA regulates gaming while the NLRA regulates labor relations, a subject IGRA does not address.[20]

The Board acknowledged that it could not assert jurisdiction if doing so abrogated Indian treaty rights. The Board also accepted the *Coeur d'Alene* exception to jurisdiction where there is "'proof' in the statutory language or history that Congress did not intend the law to apply to Indian tribes." In *San Manuel,* the Board found no such proof in the NLRA.[21]

Finally, the Board in *San Manuel* augmented the *Tuscarora/Coeur d'Alene* framework with a Board-specific discretionary inquiry. The Board stated that, even where application of the *Tuscarora/Coeur d'Alene* framework does not preclude jurisdiction over a particular tribal employer, the Board will balance the effects on labor and Indian policies before asserting jurisdiction. That final inquiry balances "the Board's interest in effectuating the policies of the NLRA with its desire to accommodate the unique status of Indians in our society and legal culture."[22] The Board's focus is on whether, in operating an enterprise, a tribe is "primarily . . . fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes." In such cases, the policies underlying the NLRA are less strongly implicated.

The matter is different if a tribe is reaching out to participate in the national economy through a commercial enterprise employing many non-Indian employees, catering largely to non-Indians, and competing with non-Indian businesses. In that different circumstance, the balance of conflicting considerations favors Board jurisdiction, because the tribe's activity "affect[s] interstate commerce in a significant way."[23]

Applying its new standard, the Board in *San Manuel* asserted jurisdiction over an on-reservation tribal casino. It emphasized that the casino was a typical commercial enterprise with mostly non-Indian employees and customers. The Board noted that the tribe had no treaty with the Federal Government, and it found that the casino's on-reservation location was insufficient to outweigh the factors favoring jurisdiction.

At the same time, the Board declined jurisdiction in a companion case, *Yukon Kuskokwim Health Corp.*, on remand from the D.C. circuit. In that case, the Board found that the *Coeur d'Alene* factors did not preclude jurisdiction, but it declined jurisdiction over an off-reservation tribal hospital for prudential reasons. The Board also noted that 95 percent of the clinic's patients were Native Alaskans from the immediate surrounding area and that the clinic, as the primary health care provider in the area, did not compete with other hospitals covered by the NLRA. The Board also cited the hospital's function, "fulfilling the Federal Government's trust responsibility to provide free health care to Indians."[24]

The D.C. Circuit upheld the Board's assertion of jurisdiction in *San Manuel.* In doing so, it declined to adopt the Board's standard or the *Tuscarora/Coeur d'Alene* framework, but it also rejected an interpretation of tribal sovereignty as "absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint."[25]

Since *San Manuel,* the Board has asserted jurisdiction over three materially similar tribal casinos. In *Little River Band of Ottawa Indians Tribal Government,* a case arising in Michigan, the Board further explained its decision to adopt the *Tusca-*

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[16] *See id.* at 1061–62 & n.20, 1063 n.22; *see also San Manuel,* 475 F.3d at 1312.
[17] 341 NLRB at 1059 (quoting *Coeur d'Alene*).
[18] *Id.* at 1061 & n.19, 1063 (citing *Fla. Paraplegic and Mashantucket, supra;* quoting *Coeur d'Alene, supra*).
[19] *Id.* at 1063–64 & n.24.
[20] *Id.* at 1064 (discussing IGRA, 25 U.S.C. § 2701, et seq.).
[21] *Id.* at 1059, 1063.
[22] *San Manuel,* 341 NLRB at 1062.
[23] *Id.* at 1062–63.
[24] *Yukon Kuskokwim,* 341 NLRB 1075, 1075–77 (2004).
[25] *San Manuel,* 475 F.3d at 1314–15.

rora/Coeur d'Alene framework and responded to certain Tenth Circuit decisions questioning the applicability of that framework in some, but not all, circumstances.[26] In *Soaring Eagle Casino & Resort,* also a Michigan case, the Board reiterated that a tribe's operation of a casino does not fit within the *Coeur d'Alene* self-government exception. The Board also addressed for the first time the treaty exception and clarified that to preclude jurisdiction a treaty must provide some right beyond reservation of the sovereign powers retained by all tribes.[27] Finally, in *Casino Pauma,* a California case issued last month, the Board addressed a Supreme Court decision issued last term—*Michigan v. Bay Mills Indian Community*—where the Court held that sovereign immunity protected an Indian tribe from Michigan's lawsuit alleging that the tribe's off-reservation casino was unlawful. The Board explained that *Bay Mills* reaffirmed cases that the Board had discussed in *San Manuel* and did not involve application of a generally applicable federal law.[28]

III. Pending Litigation in the Courts of Appeals and Before the Board

To date, the D.C. Circuit is the only court of appeals to have addressed the *San Manuel* standard in a published decision. Two Board decisions applying *San Manuel* are currently the subject of enforcement litigation before the Sixth Circuit. *Little River Band* has been submitted to a panel for decision (6th Cir. Case No. 14–2239), and *Soaring Eagle* will be argued on April 29 (6th Cir. Case Nos. 14–2405, 14–2558).

IV. Consultation with Indian Tribes

On a number of occasions since the Board issued its governing San Manuel jurisdictional standard, its General Counsel has, upon request, consulted with Indian tribes potentially subject to the Board's jurisdiction, consistent with the President's Memorandum on Tribal Consultation.[29] Most recently, in 2014, I consulted with the Little River Band of Ottawa Indians Tribal Government, and the Tribe's counsel, respecting an unfair-labor-practice charge against the Tribe filed before the Agency. Prior General Counsels have consulted with other tribes, including the Saginaw Chippewa Indian Tribe of Michigan in 2007, and the Mashantucket Pequot Tribal Nation in 2008.

V. Conclusion

As I hope I have made clear in this brief summary of the history of the Board's regulation of tribal enterprises over the years, the Board's regulation in this area, as in so many others, is the result of its efforts to apply the general language in the statute to the changing circumstances of industrial life. At all times, the Board has endeavored to give effect to the purposes and policies that Congress has embedded in the National Labor Relations Act and to take account of the decisions of the courts. In the area of jurisdiction over tribal enterprises, as in all other areas of its administration of the NLRA, the Board recognizes its responsibility to enforce the statute in accordance with the provisions and the amendments that Congress chooses to enact. For that reason, as I stated at the outset, the Agency takes no position on any proposed legislation that may alter the NLRA or affect the Board's future jurisdiction over tribal enterprises.

The CHAIRMAN. Thank you, Mr. Griffin. I am sure there will be questions after others get a chance.

Mr. Welch, could I call on you, please?

STATEMENT OF HON. ROBERT J. WELCH, JR., CHAIRMAN, VIEJAS BAND OF KUMEYAAY INDIANS

Mr. WELCH. Good afternoon. I am Robert Welch, Jr., Chairman for the Viejas Band of Kumeyaay Indians. Thank you for allowing me to testify today regarding S. 248 and its critical importance to tribal sovereignty.

Viejas proudly owns and operates the Viejas Casino and Resort located in Southern California, which is the primary source of rev-

[26] 361 NLRB No.45 (2014), *adopting and incorporating* 359 NLRB No. 84, slip op. 4 & n.9 (2013).
[27] 361 NLRB No.73 (2014), *adopting and incorporating* 359 NLRB No.92, slip op. 7–8 (2013).
[28] 362 NLRB No.52, slip op. 1 n.3, 4 & n.12 (2015) (discussing *Bay Mills,* 134 S. Ct. 2024 (2014)).
[29] 74 Fed. Reg. 57881 (Nov. 5, 2009).

enue to fund essential tribal government services and programs such as education, health, housing, public safety. Viejas Casino and Resort provides over 1,700 jobs and annually contributes millions of dollars to the local economy.

Tribal government gaming has made self-determination and economic self-sufficiency a reality. S. 248 is about respecting the sovereignty of tribal governments and affirming that they possess the same status as Federal and State governments with respect to labor relations on sovereign lands. S. 248 would reverse the NLRB's drastic shift in policy under the 2004 San Manuel decision when it ignored 30 years of precedent to rule for the first time that the NLRA applied to tribal governments.

Finally, S. 248 would set the record straight once and for all regarding Congress's intent as to the exemption of tribal governments from the NLRA. If exemption from the NLRA is appropriate for State lotteries, it should be for tribal gaming too.

Opponents of S. 248 likely will characterize the measure as anti-union. They will argue that the NLRA is essential to protect the rights of employees. Viejas serves as a striking example why neither of these propositions is true. In August 1998, long before anyone, including the NLRB, believed the NLRA should be applied to tribal governments, Viejas entered into voluntary election agreement with the Communication Workers of America for the purpose of labor organizing.

In January 1999, following a secret ballot election, CWA was certified as a bargaining representative for approximately 30 percent of the Viejas Casino and Resort workforce. Shortly thereafter, Viejas and CWA commenced collective bargaining, and in October 1999 ratified the first-ever collective bargaining agreement between a tribal government and a labor organization in California.

Every stage of the process, from organizing to contract ratification, reflected a decision made by Viejas in the exercise of its sovereignty. None of the procedures were compelled or forced upon Viejas, nor did they involve the NLRA or the NLRB.

In 1999, as further exercise of sovereignty, Viejas adopted a tribal labor relations ordinance in conjunction with its compact negotiations with California. A copy of the TLRO is included as an exhibit in my written submission.

The TLRO, like similar voluntary adopted State laws governing labor relations, is similar to the NLRA in that it includes access, election, unfair labor practices, and dispute resolution provisions. It differs, however, in matters that are unique to tribal government gaming, including recognition of an Indian hiring preference, the exclusion of certain employee classifications from organization, the ability to require a labor organization to secure a gaming license, and the resolution of labor disputes through a binding arbitration before an independent tribal labor panel rather than through NLRB proceedings.

The TLRO has been adopted by over 70 tribal governments in California as an exercise in tribal sovereignty not because they are required to do so by some Federal or State law; it has worked for over 15 years.

Viejas has recently faced a series of conflicts between the TLRO and the NLRA. Last year, an employee within the bargaining unit

filed a petition before the NLRB to decertify the CWA as the bargaining representative. Relying on the San Manuel decision, the NLRB asserted jurisdiction over the decertification election. Viejas had to either accept NLRB jurisdiction or endure expensive and protracted litigation fighting over whether the TLRO or the NLRA election procedure controlled.

The Viejas Band reluctantly stipulated to the NLRB election process and a new union, United Food and Commercial Workers, was elected as a new bargaining representative. Shortly thereafter, UFCW and Viejas commenced collective bargaining, which immediately triggered conflict over whether the TLRO or the NLRA controlled negotiations.

One example of the conflict involved requirement under Viejas gaming commission regulations and the TLRO for UFCW to obtain a gaming license as CWA had done for the past 14 years. UFC objected to the requirement and filed an unfair labor practice charge with the NLRB, claiming that it was being denied access. Fortunately, UFCW ultimately agreed to licensure in order to conclude a collective bargaining agreement.

But the recently ratified agreement remains silent as to whether the TLRO or the NLRA governs. This has created an environment ripe for ongoing dispute, which the passage of S. 248 could avoid.

In conclusion, S. 248 is about protecting tribal sovereignty. Viejas and other tribes have proven that they can develop laws that protect the rights of employees while also protecting essential tribal government gaming operations. Viejas' adoption of the TLRO should be respected. The NLRA, the NLRB should have no application or role in labor relations at Viejas Casino & Resort. Viejas respectfully requests that Congress enact S. 248 and reaffirm that tribal governments possess the same status as Federal and State governments. The NLRB and the courts should not decide what Congress intended.

Thank you for listening to my testimony today, and I stand ready to answer any questions you may have.

[The prepared statement of Mr. Welch follows:]

PREPARED STATEMENT OF HON. ROBERT J. WELCH, JR., CHAIRMAN, VIEJAS BAND OF KUMEYAAY INDIANS

Good afternoon. My name is Robert Welch, Jr. I serve as Chairman for the Viejas Band of Kumeyaay Indians (the "Viejas Band"), one of seven elected members of the Viejas Tribal Council. On behalf of the Viejas Band, I would like to thank you for allowing me to testify today regarding S. 248, the "Tribal Labor Sovereignty Act of 2015", and its critical importance for the preservation of the sovereignty of the Viejas Band and other Tribal governments across the nation.

ABOUT THE VIEJAS BAND AND VIEJAS CASINO & RESORT

The Viejas Band, one of the 12 remaining bands of the Kumeyaay Indian Nation, resides on a 1,600-acre reservation in the Viejas Valley, east of the community of Alpine in San Diego County, California. The Kumeyaay people have lived in the San Diego County region for over 10,000 years. Prior to the passage of the Indian Self-Determination and Education Assistance Act of 1975, the story of the Viejas Band, like that of many other tribes in California and throughout the nation, was one of struggle, resilience and survival against genocide, enslavement, forced removal from ancestral lands, termination, assimilation and extreme poverty. Following this critical shift towards Tribal self-determination, in 1976, the Viejas Band was able to secure funds in order to create its first Tribal enterprise: Ma Tar Awa RV Park. While the Indian Self-Determination and Education Assistance Act of 1975 helped start Tribes on a path towards rebuilding their governments, the revenue producing opportunities it created were not substantial enough to promote economic self-sufficiency, and most Tribes still relied heavily on federal funding to support their governments. And without a sizeable population base to generate tax revenue, Tribes desperately needed a mechanism, under their control, to generate meaningful government revenue and control their own destinies. That is where Tribal government gaming stepped in.

The U.S. Supreme Court's ruling in the *Cabazon*[1] decision, the passage of the Indian Gaming Regulatory Act of 1988[2] ("IGRA"), and the execution of Tribal-State gaming compacts, recognized and preserved the rights of Tribes to utilize government gaming to generate critical revenue, in the same way that many States earn substantial revenues through government-operated lotteries.

Today the Viejas Band proudly owns and operates the Viejas Casino & Resort, which is the primary source of revenue for the Viejas Tribal Government. The revenues generated by Viejas Casino & Resort fund the types of essential governmental departments, services, and programs that many non-Indians take for granted, such as education, health, housing, water, roads, fire, and public safety. In addition, Viejas Casino & Resort provides over 1,700 jobs to the local community, including employment opportunities for citizens of the Viejas Band, annually contributes millions of dollars to the local economy through the purchase of goods and services, and is a proud supporter of many charitable organizations throughout San Diego County. Indeed, Tribal government gaming has been a success story for the Viejas Band and our local community. It has made self-determination and economic self-sufficiency a reality, and is essential to the continued prosperity of the Viejas Band and its people.

THE NATIONAL LABOR RELATIONS ACT AND INDIAN TRIBES

The National Labor Relations Act ("NLRA") was first enacted in 1935. At that time Indian tribes around the country were trying to recover from the devastating impacts of allotment. The NLRA was intended to provide collective bargaining rights to employees of large corporations. For that reason, most governments were exempted from the NLRA, including the United States, states and local governments. Unfortunately, Indian tribes had almost no employees as all government and enterprise operations were handled by the Bureau of Indian affairs, thus the thought of including Tribal governments in the list of exempted governments did not occur to the drafters of the NLRA. This oversight, however, was handled administratively by the National Labor Relations Board ("NLRB").

Underpinning the exemption for governments in the NLRA was an acknowledgment that governments have significantly different considerations in how they handle their business when compared to private enterprises. Governments are not driven by pure profit motive; rather they are driven by the responsibilities and authorities given them by their citizens. To best meet those responsibilities and exercise those authorities, governments need flexibility. Thus the NLRA left it to governments to best determine what laws would govern their employee relations. Tribal governments are no different. The operations and enterprises of a Tribal government, even those that raise revenues, are not driven by purely profit motives, but by the responsibility to deliver services and meet the present and future needs of its citizens. Ultimately, it is the sovereign responsibility of a Tribal government to determine how it can best deliver services and meet the needs of its people.

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[1] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
[2] 25 U.S.C. 2701 *et seq.*

Gaming, whether through private commercial operations like Las Vegas casinos, or through governmental operations like Tribal gaming under IGRA or state lotteries, is a unique business that requires significant regulation and oversight. The unique regulatory and oversight needs of the business led to enactment of IGRA by the U.S. Congress, promulgation of significant regulations by the National Indian Gaming Commission, and enactment of a substantial body of Tribal law and regulation. Subsequent interactions with state governments has further led to the numerous Tribal-State compacts adopted around the country. To adequately address all of these laws, regulations, and agreements, while at the same time developing a well-trained, educated, and happy workforce, Tribal governments need great flexibility.

The Viejas Band's history in Tribal government gaming is a great example in how these sometime conflicting responsibilities can be reconciled by careful consideration and balancing of interests, and great flexibility.

S. 248 AND THE NLRB DECISION IN *SAN MANUEL*

S. 248, as its title suggests, is about respecting and protecting the sovereignty of Tribal governments. It is about affirming that Tribal governments possess the same status as the federal government, states and their political subdivisions, as it pertains to labor relations on sovereign lands. S. 248 would reverse the NLRB's improper and about-face change in policy found in the 2004 *San Manuel* decision[3], when it ignored thirty years of precedent to rule, for the first time, that the NLRA applies to Tribal governments. Finally, S. 248 would set the record straight, once and for all, regarding Congress' intent as to the exemption of Tribal governments from the NLRA. As sovereign governments engaged in economic activities essential to fund government services, Tribes, such as the Viejas Band, should enjoy the same exempt status as the United States, State governments, and their government business. If exemption is appropriate for state lotteries, it should be for Tribal governments too.

THE VIEJAS BAND AS AN EMPLOYER

Opponents of S. 248 will likely characterize this measure as "anti-union". They will also likely suggest that imposition of the NLRA upon Tribal governments is essential to protect the rights of non-tribal member employees. But the voluntary actions of the Viejas Band, and many other Tribal governments across the U.S., fundamentally expose the fallacy of those myths.
As one of the largest employers in East San Diego County, the Viejas Band takes its role as an employer very seriously. The Viejas Band recognizes the key role that its employees – we call them Team Members – play in the growth, success and well-being of Viejas Casino & Resort, and by extension the Viejas Band. That is why the Viejas Band continually strives to treat all of its Team Members fairly and with respect. The Viejas Band provides its Team Members with competitive salaries and great benefits including health, dental and vision insurance, basic life insurance, a 401(k) program with employer matching, a college tuition reimbursement program, a robust wellness program with fitness club dues reimbursement, and paid leave and vacation, to name a few. The Viejas Band treats its employees well because it is the right thing to do, not because it has been compelled to do so by some Federal or State law.

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[3] *San Manuel Indian Bingo & Casino*, 341 N.L.R.B 1055 (2004).

THE HISTORY OF UNION ORGANIZING AT VIEJAS CASINO & RESORT

The history of the Viejas Band and the organization of a portion of its workforce at the Viejas Casino & Resort is a striking example of why the application of the NLRA is unnecessary for Tribal governments, in the same way it is unnecessary for Federal and State governments.

In August 1998—long before anyone, including the NLRB, believed the NLRA should be applied to Tribal governments—the Viejas Band entered into a voluntary election agreement with Communications Workers of America ("CWA"), to provide access to service employees working at Viejas Casino & Resort for purposes of organizing. The voluntary election agreement provided for an election trigger (union authorization cards signed by 30% of the service employees) and a secret ballot election process supervised by an independent arbitrator.

In January 1999, a secret ballot election occurred and CWA was certified as the bargaining representative for approximately 30% of the Viejas Casino & Resort workforce. Shortly thereafter, the Viejas Band and CWA commenced negotiating the first collective bargaining agreement. The negotiation process concluded in October 1999, with the Viejas Band and members of the CWA ratifying the first-ever collective bargaining agreement between a Tribal government and a labor organization in the State of California.

Every stage of the process, from organizing activity to ratification of a collective bargaining agreement, reflected a choice made by the Viejas Band in the exercise of its sovereignty as a Tribal government. None of those procedures were compelled or forced upon the Viejas Band. And each stage started and concluded without the involvement of the NLRB or the application of the NLRA.

The Viejas Band's exercise of its sovereignty demonstrates why Tribal governments should be empowered to exercise sovereignty, rather than have it stripped away by Federal or State laws. The Viejas Band's actions were received positively by its Team Members, other Tribes, and other labor organizations. In fact, a few months after the ratification of the historic collective bargaining agreement, the Viejas Band was honored by the San Diego-Imperial Counties Labor Council, AFL-CIO, at its 12th annual Worker's Memorial Dinner with its Spirit of Cooperation Award.

THE TRIBAL LABOR RELATIONS ORDINANCE

In the late 90's, during gaming compact negotiations, the issue of labor relations was critical to both the State of California and Tribal governments. Discussions on that issue ultimately resulted in several Tribal governments, such as the Viejas Band, exercising their sovereignty and adopting, as their own Tribal law, a September 14, 1999 Tribal Labor Relations Ordinance ("TLRO").[4]

The TLRO, like similar voluntarily adopted State laws addressing labor relations for government agencies, contains numerous provisions that are similar to the NLRA, including detailed

[4] *See* attached Appendix A—Tribal Labor Relations Ordinance adopted by the Viejas Band of Kumeyaay Indians.

procedures for representation proceedings, a guarantee of rights to engage in concerted activity, enumeration of unfair labor practices by Tribes and unions, and procedures for secret ballot elections and union decertification. The TLRO, however, also diverges from the NLRA in matters that are unique to Tribal government gaming, including the recognition of an Indian hiring preference, the exclusion of certain employee classifications from organization (such as Tribal Gaming Commission employees), the ability for a Tribal Gaming Commission to require a labor organization to secure a gaming license, and the resolution of any labor disputes through binding arbitration before an independent Tribal Labor Panel comprised of labor arbitrators affiliated with the American Arbitration Association, rather than conferring jurisdiction to the NLRB.

The TLRO, in substantially the same form as it originally appeared in 1999, has now been adopted by over 70 Tribal governments in California. It has worked for over 15 years. And it is worth noting, again, that the TLRO was adopted by Tribal governments as an exercise of Tribal sovereignty, not because it was required by some Federal or State law.

THE UNRESOLVED IMPACT OF *SAN MANUEL* ON THE TLRO

The 14 year relationship between the Viejas Band and CWA was one of mutual respect. While the CWA and the Viejas Band often disagreed on economic provisions during contract negotiations, CWA always respected the Viejas Band as a government and abided by the TLRO. CWA never once challenged the TLRO, or attempted to invoke action by the NLRB even after the *San Manuel* decision. Consequently, the Viejas Band was generally unaware, at that time, of the threat that the *San Manuel* decision presented to the TLRO.

All of that changed in August 2014, when an employee within the bargaining unit filed a petition before the NLRB to decertify the CWA as the bargaining representative pursuant to the NLRA. The NLRB asserted that it had jurisdiction over the decertification election in light of the *San Manuel* decision and did not agree that the TLRO decertification procedures controlled. In addition, Viejas was informed that a majority of the bargaining unit Team Members had signed on to the decertification petition, such that the Viejas Band would alienate hundreds of Team Members if it objected to the NLRB process that they chose. It was a no win situation, under which the Viejas Band was essentially compelled to agree to NLRB jurisdiction to avoid expensive litigation concerning NLRB jurisdiction and angering its Team Members. Thus, the Viejas Band reluctantly stipulated to the NLRB election.

Through the NLRB election process, a new and previously unknown union, the United Food and Commercial Workers ("UFCW"), was allowed to intervene at the eleventh hour and was added to the election ballot, which would not have been permitted under the TLRO. During the "campaign" process immediately preceding the election, the NLRB notified the Viejas Band that it was required to comply with the NLRA election procedures. Through the election, the UFCW was selected as the new representative for bargaining unit employees at Viejas Casino & Resort. The UFCW was certified by the NLRB as the bargaining unit representative on September 30, 2014. Shortly thereafter, the UFCW and the Viejas Band commenced collective bargaining negotiations. The UFCW commenced negotiations under the NLRA, whereas the Viejas Band commenced negotiations in accordance with the TLRO.

Given the differences mentioned earlier between the NLRA and the TLRO, there was substantial disagreement on certain issues authorized by the TLRO, including the ability for the Viejas Tribal Gaming Commission to require the UFCW to secure a gaming license. In contrast to CWA, the UFCW refused to be licensed and filed an unfair labor practice charge with the NLRA. The Viejas Band, of course, objected to the jurisdiction of the NLRB, while also disputing the unfair labor practice charge on the merits.

Fortunately, in the months that followed, and prior to the NLRB issuing any decision, Viejas and the UFCW were able to complete negotiations on a collective bargaining agreement and temporarily resolve their differences, including UFCW's voluntary agreement to licensure by the Viejas Tribal Gaming Commission. But the collective bargaining agreement remains silent as to whether the TLRO or the NLRA governs labor relations for Viejas Casino & Resort, based on the ongoing disagreement of the parties. This has created an environment ripe for ongoing jurisdictional disputes in the future, which S. 248 could prevent.

CONCLUSION

In conclusion, S. 248 is about protecting Tribal sovereignty. The Viejas Band and other Tribes across the nation serve as key examples of how Tribal governments are capable of developing laws that protect the rights of workers within a fair framework, while continuing to meet the strict regulatory needs of their gaming enterprises. The Viejas Band believes that its agreement with the State of California, and its adoption of the TLRO, should be respected. The NLRA and NLRB should have no application or role in labor relations at Viejas Casino & Resort.

The Viejas Band respectfully requests that Congress enact S. 248 and reaffirm that Tribal governments possess the same status as the federal government, states and their political subdivisions. This is not an issue to be left for the courts decide what Congress "intended". S. 248 should set the record straight, once and for all, regarding Congress' intent to exempt Tribal governments and their government enterprises from the NLRA. Thank you.

Attachment

APPENDIX A – TRIBAL LABOR RELATIONS ORDINANCE

TRIBAL LABOR RELATIONS ORDINANCE
September 14, 1999

Section 1: Threshold of applicability

(a) Any tribe with 250 or more persons employed in a tribal casino and related facility shall adopt this Tribal Labor Relations Ordinance (TLRO or Ordinance). For purposes of this ordinance, a "tribal casino" is one in which class III gaming is conducted pursuant to a tribal-state compact. A "related facility" is one for which the only significant purpose is to facilitate patronage of the class III gaming operations.

(b) Any tribe which does not operate such a tribal casino as of September 10, 1999, but which subsequently opens a tribal casino, may delay adoption of this ordinance until one year from the date the number of employees in the tribal casino or related facility as defined in 1(a) above exceeds 250.

(c) Upon the request of a labor union, the Tribal Gaming Commission shall certify the number of employees in a tribal casino or other related facility as defined in 1(a) above. Either party may dispute the certification of the Tribal Gaming Commission to the Tribal Labor Panel.

Section 2: Definition of Eligible Employees

(a) The provisions of this ordinance shall apply to any person (hereinafter "Eligible Employee") who is employed within a tribal casino in which Class III gaming is conducted pursuant to a tribal-state compact or other related facility, the only significant purpose of which is to facilitate patronage of the Class III gaming operations, except for any of the following:

(1) any employee who is a supervisor, defined as any individual having authority, in the interest of the tribe and/or employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(2) any employee of the Tribal Gaming Commission;

(3) any employee of the security or surveillance department, other than those who are responsible for the technical repair and maintenance of equipment;

(4) any cash operations employee who is a "cage" employee or money counter; or

(5) any dealer.

Section 3: Non-interference with regulatory or security activities

Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance. Furthermore, the exercise of rights hereunder shall in no way interfere with the tribal casino's surveillance/security systems, or any other internal controls system designed to protect the integrity of the tribe's gaming operations. The Tribal Gaming Commission is specifically excluded from the definition of tribe and its agents.

Section 4: Eligible Employees free to engage in or refrain from concerted activity

Eligible Employees shall have the right to self-organization, to form, to join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 5: Unfair Labor Practices for the tribe

It shall be an unfair labor practice for the tribe and/or employer or their agents:

(1) to interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, but this does not restrict the tribe and/or employer and a certified union from agreeing to union security or dues checkoff;

(3) to discharge or otherwise discriminate against an Eligible Employee because s/he has filed charges or given testimony under this Ordinance;

(4) to refuse to bargain collectively with the representatives of Eligible Employees.

Section 6: Unfair Labor Practices for the union

It shall be an unfair labor practice for a labor organization or its agents:

(1) to interfere, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a primary or secondary boycott or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce or other terms and conditions of employment. This section does not apply to section 11;

(3) to force or require the tribe and/or employer to recognize or bargain with a particular labor organization as the representative of Eligible Employees if another labor organization has been certified as the representative of such Eligible Employees under the provisions of this TLRO;

(4) to refuse to bargain collectively with the tribe and/or employer, provided it is the representative of Eligible Employees subject to the provisions herein;

(5) to attempt to influence the outcome of a tribal governmental election, provided, however, that this section does not apply to tribal members.

Section 7: Tribe and union right to free speech

The tribe's and union's expression of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of interference with, restraint or coercion if such expression contains no threat of reprisal or force or promise of benefit.

Section 8: Access to Eligible Employees

(a) Access shall be granted to the union for the purposes of organizing Eligible Employees, provided that such organizing activity shall not interfere with patronage of the casino or related facility or with the normal work routine of the Eligible Employees and shall be done on non-work time in non-work areas that are designated as employee break rooms or locker rooms that are not open to the public. The tribe may require the union and or union organizers to be subject to the same licensing rules applied to individuals or entities with similar levels of access to the casino or related facility, provided that such licensing shall not be unreasonable, discriminatory, or designed to impede access.

(b) The Tribe, in its discretion, may also designate additional voluntary access to the Union in such areas as employee parking lots and non-Casino facilities located on tribal lands.

(c) In determining whether organizing activities potentially interfere with normal tribal work routines, the union's activities shall not be permitted if the Tribal Labor Panel determines that they compromise the operation of the casino:

(1) security and surveillance systems throughout the casino, and reservation;

(2) access limitations designed to ensure security;

(3) internal controls designed to ensure security;

(4) other systems designed to protect the integrity of the tribe's gaming operations, tribal property and/or safety of casino personnel, patrons, employees or tribal members, residents, guests or invitees.

(d) The tribe shall provide to the union, upon a thirty percent (30%) showing of interest to the Tribal Labor Panel, an election eligibility list containing the full first and last name of the Eligible Employees within the sought after bargaining unit and the Eligible Employees' last known address within ten (10) working days. Nothing herein shall preclude a tribe from voluntarily providing an election eligibility list at an earlier point of a union organizing campaign.

(e) The tribe agrees to facilitate the dissemination of information from the union to Eligible Employees at the tribal casino by allowing posters, leaflets and other written materials to be posted in non-public employee break areas where the tribe already posts announcements

pertaining to Eligible Employees. Actual posting of such posters, notices, and other materials, shall be by employees desiring to post such materials.

Section 9: Indian preference explicitly permitted

Nothing herein shall preclude the tribe from giving Indian preference in employment, promotion, seniority, lay-offs or retention to members of any federally recognized Indian tribe or shall in any way affect the tribe's right to follow tribal law, ordinances, personnel policies or the tribe's customs or traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention. Moreover, in the event of a conflict between tribal law, tribal ordinance or the tribe's customs and traditions regarding Indian preference and this Ordinance, the tribal law, tribal ordinance or the tribe's customs and traditions shall govern.

Section 10: Secret ballot elections required

(a) Dated and signed authorized cards from thirty percent (30%) or more of the Eligible Employees within the bargaining unit verified by the elections officer will result in a secret ballot election to be held within 30 days from presentation to the elections officer.

(b) The election shall be conducted by the election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning representation of the tribe and/or Employer's Eligible Employees by a labor organization shall be resolved by the election officer. The election officer shall be chosen upon notification by the labor organization to the tribe of its intention to present authorization cards, and the same election officer shall preside thereafter for all proceedings under the request for recognition; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall certify the labor organization as the exclusive collective bargaining representative of a unit of employees if the labor organization has received the majority of votes by employees voting in a secret ballot election that the election officer determines to have been conducted fairly. If the election officer determines that the election was

conducted unfairly due to misconduct by the tribe and/or employer or union, the election officer may order a re-run election. If the election officer determines that there was the commission of serious Unfair Labor Practices by the tribe that interfere with the election process and preclude the holding of a fair election, and the labor organization is able to demonstrate that it had the support of a majority of the employees in the unit at any point before or during the course of the tribe's misconduct, the election officer shall certify the labor organization.

(d) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

(e) A union which loses an election and has exhausted all dispute remedies related to the election may not invoke any provisions of this labor ordinance at that particular casino or related facility until one year after the election was lost.

Section 11: Collective bargaining impasse

Upon recognition, the tribe and the union will negotiate in good faith for a collective bargaining agreement covering bargaining unit employees represented by the union. If collective bargaining negotiations result in impasse, and the matter has not been resolved by the tribal forum procedures sets forth in Section 13 (b) governing resolution of impasse within sixty (60) working days or such other time as mutually agreed to by the parties, the union shall have the right to strike. Strike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. Sec. 2703 (4).

Section 12: Decertification of bargaining agent

(a) The filing of a petition signed by thirty percent (30%) or more of the Eligible Employees in a bargaining unit seeking the decertification of a certified union, will result in a secret ballot election to be held 30 days from the presentation of the petition.

(b) The election shall be conducted by an election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning the decertification of the labor organization shall be resolved by an election

officer. The election officer shall be chosen upon notification to the tribe and the union of the intent of the employees to present a decertification petition, and the same election officer shall preside thereafter for all proceedings under the request for decertification; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall order the labor organization decertified as the exclusive collective bargaining representative if a majority of the employees voting in a secret ballot election that the election officer determines to have been conducted fairly vote to decertify the labor organization. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or the union the election officer may order a re-run election or dismiss the decertification petition.

(d) A decertification proceeding may not begin until one (1) year after the certification of a labor union if there is no collective bargaining agreement. Where there is a collective bargaining agreement, a decertification petition may only be filed no more than 90 days and no less than 60 days prior to the expiration of a collective bargaining agreement. A decertification petition may be filed anytime after the expiration of a collective bargaining agreement.

(e) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

Section 13: Binding dispute resolution mechanism

(a) All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein, with the exception of a collective bargaining negotiation impasse, which shall only go through the first level of binding dispute resolution.

(b) The first level of binding dispute resolution for all matters related to organizing, election procedures, alleged unfair labor practices, and discharge of Eligible Employees shall be an appeal to a designated tribal forum such as a Tribal Council, Business Committee, or Grievance Board.

The parties agree to pursue in good faith the expeditious resolution of these matters within strict time limits. The time limits may not be extended without the agreement of both parties. In the absence of a mutually satisfactory resolution, either party may proceed to the independent binding dispute resolution set forth below. The agreed upon time limits are set forth as follows:

(1) All matters related to organizing, election procedures and alleged unfair labor practices prior to the union becoming certified as the collective bargaining representative of bargaining unit employees, shall be resolved by the designated tribal forum within thirty (30) working days.

(2) All matters after the union has become certified as the collective bargaining representative and relate specifically to impasse during negotiations, shall be resolved by the designated tribal forum within sixty (60) working days;

(c) The second level of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this ordinance. The Tribal Labor Panel shall have authority to hire staff and take other actions necessary to conduct elections, determine units, determine scope of negotiations, hold hearings, subpoena witnesses, take testimony, and conduct all other activities needed to fulfill its obligations under this Tribal Labor Relations Ordinance.

(1) Each member of the Tribal Labor Panel shall have relevant experience in federal labor law and/or federal Indian law with preference given to those with experience in both. Names of individuals may be provided by such sources as, but not limited to, Indian Dispute Services, Federal Mediation and Conciliation Service, and the American Academy of Arbitrators.

(2) Unless either party objects, one arbitrator from the Tribal Labor Panel will render a binding decision on the dispute under the Ordinance. If either party objects, the dispute will be decided by a three-member panel of the Tribal Labor Panel, which will render a binding decision. In the event there is one arbitrator, five (5) Tribal Labor Panel names shall be submitted to the parties and each party may strike no more that two (2) names. In the event there is a three (3) member panel, seven (7) TLP names shall be submitted to the parties and each party may strike no more than two (2) names. A coin toss shall determine which party may

strike the first name. The arbitrator will generally follow the American Arbitration Association's procedural rules relating to labor dispute resolution. The arbitrator or panel must render a written, binding decision that complies in all respects with the provisions of this Ordinance.

(d) Under the third level of binding dispute resolution, either party may seek a motion to compel arbitration or a motion to confirm an arbitration award in Tribal Court, which may be appealed to federal court. If the Tribal Court does not render its decision within 90 days, or in the event there is no Tribal Court, the matter may proceed directly to federal court. In the event the federal court declines jurisdiction, the tribe agrees to a limited waiver of its sovereign immunity for the sole purpose of compelling arbitration or confirming an arbitration award issued pursuant to the Ordinance in the appropriate state superior court. The parties are free to put at issue whether or not the arbitration award exceeds the authority of the Tribal Labor Panel.

The CHAIRMAN. Thank you very much, Mr. Welch.
Mr. Torres.

STATEMENT OF HON. E. PAUL TORRES, GOVERNOR, PUEBLO OF ISLETA, NEW MEXICO; CHAIRMAN, ALL PUEBLO COUNCIL OF GOVERNORS

Mr. TORRES. Good afternoon. My name is Paul Torres. I am the Governor of the Pueblo of Isleta, New Mexico. I am also the Chairman of the All Pueblo Council of Governors, which represents 19 Pueblos in New Mexico and one in Texas. Thank you for the opportunity to testify today.

All the pueblos strongly support this bill. This bill is very important to tribes. It is essential to protect our responsibilities as sovereign governments. I would like to start by telling you about my Pueblo. Then I would like to tell you about our experience with the NLRB.

The Pueblo of Isleta is governed by an elected tribal council and governor. We do all the things that all governments must do: we hire police to protect public safety, we operate courts, we run a health center, we have many programs to care for and educate our children. We work so that our community has safe roads, clean water, and affordable housing.

Like other governments, we have laws that define the rights and responsibilities of our employees. Our laws include procedures so that if an employee feels he has not been treated fairly, he can challenge the action through an appeal process. Our laws also recognize the rights of employees to organize unions. But to protect our ability to provide important government services, the law does not allow employees to strike. Instead, it has procedures so that any labor dispute can be resolved by an independent board with a right to appeal to the tribal court.

We are making progress in addressing the needs of our community. We owe much of our success to the commitment that Congress

has made to tribal self-determination and we rely heavily on Indian gaming to do this. Our casino is owned and operated by the Pueblo government. We regulate and manage our own casino consistent with the Indian Gaming Regulatory Act. When Congress enacted the IGRA, it recognized that tribal economic development was a key to strengthening tribal governments. Congress made that connection clear by requiring that tribes use gaming revenues to fund tribal government programs and services, and that is exactly what we do.

All of the net revenues from our casino are used to provide government services. In fact, 60 percent of the money that we spend to run the Pueblo government is paid for with casino revenues. This year, the Pueblo will take over management of our elementary school from the BIE and we will use casino revenues to help run the school. In addition, on May the 30th, we will open a new assisted living facility and new elder center. None of this would be possible without our gaming revenues.

The Pueblo is moving forward as Congress intended under the self-determination policy, but the NLRB is ignoring that policy. Instead, the Board treats Indian Tribes like private businesses.

Now that is happening to us. A few months ago, a former employee of our casino submitted a grievance to our gaming agency and also to the Board. The Board then asserted jurisdiction over the Pueblo. Just last week, the Board served us with a subpoena that shows how it views tribes. For example, the Board demands that we produce documents that prove that the Pueblo is a sovereign, even though the United States has always recognized us as sovereign. The Board demands that we produce all records that prove how we spend every dollar of our gaming revenues, even though our funds are audited every year and those audits are submitted to the NIGC. None of that matters to the Board. The Board still demands that we prove to the Board's satisfaction that we are using gaming revenues for purposes that the Board believes are governmental.

The Board's attack on tribes is wrong. When Congress enacted the NLRA, Congress said that this law does not apply to governments. Tribes are governments. And Congress never said the Board could treat tribes differently from every other government, but that is what the Board is doing. The Board's attack on tribes is also wrong because it does not respect Congress's self-determination policy. Even though we have laws to address employee grievances, the Board says that our laws have no role in resolving the employee's claim.

Finally, the Board is wrong because it does not respect the careful balance that our laws observe. We recognize the right of employees to organize, but not to strike. A strike would cut off the funds that we need to run our government. We cannot be put in a position where, as a result of a strike, we must reduce police patrols or close schools or suspend care to our elders.

This bill would solve the problem. Litigation is not the answer. Litigation is expensive; it drains resources needed to pay for government services. And the Board is doing the same thing to tribes across the Country. The Board won't stop attacking tribes unless Congress acts. On behalf of the Pueblo of Isleta and the 19 other

Pueblos, I respectfully urge the members of the Committee to protect tribal self-government by supporting this bill.

Thank you again for this opportunity, and I will be happy to answer any questions.

[The prepared statement of Mr. Torres follows:]

PREPARED STATEMENT OF HON. E. PAUL TORRES, GOVERNOR, PUEBLO OF ISLETA, NEW MEXICO; CHAIRMAN, ALL PUEBLO COUNCIL OF GOVERNORS

Chairman Barrasso, Vice Chairman Tester, Senator Udall and honorable members of the Committee, my name is Paul Torres, and I am the Governor of the Pueblo of Isleta. I am also here today in my capacity as Chairman of the All Pueblo Council of Governors, which is comprised of the nineteen Pueblos of New Mexico—the Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, San Felipe, San Ildefonso, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia and Zuni—and Ysleta del Sur Pueblo of Texas. On behalf of the Pueblo of Isleta and the All Pueblo Council of Governors, I want to thank this Committee for holding this hearing on S. 248 and for the invitation to testify.

All of the Pueblos are federally recognized Indian tribes who have lived in our present day location since time immemorial. In our long history, the United States is the third sovereign to recognize us—Spain and then Mexico were the first two—and we governed this area long before even those sovereigns arrived. One aspect of sovereignty is working with other governments, and that is what I want to talk about today.

All the Pueblos support S. 248. This bill is essential to restore the dignity and equality of Indian tribes as sovereigns, which the National Labor Relations Board (Board or NLRB) is seeking to deny us. The Board treats every sovereign, all the way down to local governments and political subdivisions of the state, as exempt from the National Labor Relations Act (NLRA) except for one—Indian tribes. It does so even though Congress made clear, when the NLRA was enacted, that the Act does not apply to sovereign entities. The NLRA does not mention Indian tribes and for a long time the Board recognized that the Act does not apply to Tribes. Now it wants that power—but it did not ask Congress for it. Nor did it ask the Tribes for their views. Instead, the Board made up its own rules about how to treat Indian tribes—to the Board we are private businesses, unless we prove to their satisfaction that we are sovereign. And they are currently seeking to impose the NLRA against Indian tribes throughout the Nation, in California, Michigan, Minnesota, Oklahoma and New Mexico. We need your help to stop the Board from violating our sovereignty and ignoring the will of Congress. S. 248 would fix this problem by clarifying that Congress never intended the NLRA to apply to sovereigns, that Indian tribes are sovereigns, and therefore the Act does not apply to them.

Let me start by telling what the Pueblo is doing as a sovereign, and how we are doing it. And then let me describe what the Board is doing to us, and why we support the enactment of S.248.

The Pueblo of Isleta's Governmental Programs and Services

The Pueblo of Isleta is governed by an elected Tribal Council and Governor, pursuant to a tribal constitution adopted under the Indian Reorganization Act and approved by the Secretary of the Interior. We live on a reservation that is a very small piece of our aboriginal territory, and we are responsible for governing that reservation. This includes providing essential services to 3,400 tribal members as well as other residents and visitors to the Pueblo. We meet the needs of our community by protecting public safety, enforcing the law, operating a court system, offering medical, dental and other wellness services, and providing social services in areas that include counseling, substance abuse treatment, child protection, and foster care. In addition, we have: an Education Department, which operates a Head Start program for our youth and a scholarship program; Public Works, Natural Resources and Realty Departments that maintain safe roads and buildings, keep our irrigation systems running, provide clean water and proper waste disposal, manage our grazing and farming lands, and protect our natural resources; and a Housing Authority which provides safe and affordable housing for our members.

As with all governments, we carry out all of these duties through our employees. And we have enacted laws and policies to define their rights and responsibilities. We also have adopted grievance procedures under which an employee who is disciplined or terminated may challenge such action, appeal any adverse decision, and have it reviewed. We also work to prevent problems of drugs in the workplace by requiring drug testing of employees under a program that follows the requirements

of the federal Drug Free Workplace Act, which we adhere to as a condition of our receipt of federal funds, and which also covers Pueblo employees who work in non-federally funded programs where the nature of the employee's work warrants drug testing.

We also regulate labor relations on the Reservation. The Pueblo's Labor and Employment Relations Ordinance was adopted by the Pueblo in July 2010 and approved by the Secretary of the Interior in December 2010. The Ordinance provides a minimum wage, overtime compensation, and addresses other matters such as family and medical leave. It also contains provisions that recognize the rights of employees to organize unions and pursue collective bargaining agreements. The Ordinance applies to all employers on the Reservation, including the Pueblo itself. The Ordinance also balances the interest of employees in organizing, with the Pueblo's duty to provide essential governmental services to protect and serve our community, by not allowing employees or labor organizations to strike. In this important area, the Ordinance establishes alternative means by which labor disputes and alleged unfair labor practices can be heard and resolved—which is done through the Pueblo Labor and Employment Relations Board with a right to appeal to the Pueblo of Isleta Tribal Appellate Court.

How are we able to do all this? We owe much of our success to Congress' commitment to the policy of self-determination, which has strengthened tribal self-government and diminished federal paternalism. We also rely heavily on Indian gaming, which we conduct under the Indian Gaming Regulatory Act (IGRA). In enacting IGRA, Congress recognized the fundamental connection between strengthening tribal governments and promoting tribal economic development. IGRA makes that connection clear by requiring that we use our net gaming revenues to fund tribal government programs and services and other tribal economic development. And we do just that: the Pueblo of Isleta operates its casino and uses gaming revenues to strengthen the tribal government and provide programs and services essential to the welfare of our community.

Our gaming facility, the Isleta Resort & Casino, along with a small satellite facility known as Palace West, is wholly owned and operated by the Pueblo. Our tribal government oversees, regulates, operates, and manages all aspects of our gaming enterprise. We do this in the exercise of our inherent sovereign authority and in accord with IGRA, the regulations promulgated by the National Indian Gaming Commission (NIGC), and our Gaming Compact with New Mexico. Further, as required by IGRA and the Compact, we comprehensively regulate our gaming operations, in accordance with comprehensive regulations adopted by our Tribal Council and approved by the NIGC. The Pueblo of Isleta Gaming Regulatory Agency is an independent regulatory agency responsible for overseeing and regulating the Pueblo's gaming enterprise. Its many responsibilities include licensing gaming employees and ensuring that our employees comply with the Pueblo's gaming laws, IGRA and the Gaming Compact. The Pueblo's laws also implement requirements of the NIGC's regulations and impose internal controls that effectively set a number of work rules for employees.

The net revenues earned by the Isleta Resort & Casino fund the Pueblo's governmental operations and programs. As IGRA requires, all net revenues from the gaming facility are used to provide essential governmental services. In fact, more than half of the Pueblo's total governmental expenditures for law enforcement, public safety, tribal courts, education, social services, natural resource management, roads and other infrastructure are directly funded by net revenues earned by our Isleta Resort & Casino enterprise.

We also continue to work on the backlog of unmet needs that we inherited from the BIA. This year, the Pueblo will take over the operation and management of the Pueblo of Isleta elementary school. And because federal funds are not sufficient, the Pueblo will subsidize the school's operations with gaming revenues. Our gaming revenues also allow us to care for our elders needs in areas not supported by federal programs. On May 30 we will open an assisted living facility that will serve 20 elderly residents and a new elder center that will provide meals, recreation, counseling and related community services to many other elders, including those who are home-bound and require help with daily living needs. None of this would be possible without our gaming revenues. And this is precisely how the self-determination policy, as developed by Congress, is designed to work.

How the NLRB Deals With Tribes

The Board ignores the Self-Determination policy, makes up on an ad hoc basis when it will treat tribes as sovereigns, requires that tribes prove they are sovereigns under those rules, and imposes the NLRA on any activity that it does not deem to be sufficiently sovereign.

This is how the Board has dealt with the Pueblo of Isleta. A few months ago, a former employee of the Isleta casino, after having filed complaints with the Pueblo of Isleta Gaming Regulatory Agency, also submitted a grievance to the NLRB. Her grievance does not allege that she sought to engage in any activity that is subject to the protection of the National Labor Relations Act (even if it did apply)—but that has not stopped the Board from using that grievance to try to force the Pueblo to operate under the NLRA. We have our own employee relations laws, which allow employees to organize collectively and which establish procedures for hearing and resolving employee grievances. But the Board will not allow those laws to govern our activities. And although the federal law in our Circuit is clear that the National Labor Relations Act does not apply to tribes [1]—the NLRB plows forward, undeterred. [2]

The NLRB responded to this individual complaint by initiating a broad-ranging investigation under which it is asserting primary jurisdiction over all of the Pueblo's activities—without any government-to-government consultation with the Pueblo. Instead, the Board served a subpoena on the Pueblo which demands a massive quantity of our records, questions our status as a sovereign, and completely ignores the federal laws that do govern the Pueblo's activities.

For example: the Board demands that the Pueblo produce documents that prove that the Pueblo is a sovereign—despite the fact that we are recognized as a sovereign by the United States and have always been listed on the Federal Government's official list of federally recognized tribes. Indeed, we have been recognized as a sovereign for 500 years, since the arrival of the Spanish. Our basic status as a government should not be subject to attack by the Board.

The Board also demands that the Pueblo produce all records that demonstrate how the Pueblo spends every dollar of net gaming revenues for government facilities and programs—including receipts to show when, where and how the funds were used. In IGRA, Congress expressly defined how we are to use our net gaming revenues—to fund tribal government programs and services and economic development—and under IGRA our use of funds is subject to audit and review by other federal agencies that have express authorization from Congress to do so. That makes no difference to the Board. Instead, the Pueblo has to prove to the Board that it is using gaming revenues for purposes that the Board approves of as sovereign expenditures. The Board has no right to do this.

The Board has also demanded that we produce personnel records of many other employees, and establish for it the "regularity of drug tests administered by [the Pueblo], including all supporting documentation showing the circumstances under which these drug tests were administered," as well as "the process for selecting employees for drug screenings, including all supporting documentation explaining the process of selecting employees for drug screenings." The Board makes this demand notwithstanding that drug testing is a critical element of modern day employment, governed by the standards of the Drug Free Workplace Act, not the NLRA, and that it is essential to protect the integrity of gaming operations under IGRA. The Board also ignores the fact that much of this information is confidential, the production of which would infringe on the privacy rights of persons not involved in the NLRB proceeding.

Why S. 248 Is Needed

The NLRB's attack on tribes is wrong. Congress made clear in the National Labor Relations Act that it does not apply to sovereigns, and Indian tribes are sovereigns. Congress never authorized the Board to single out Indian tribes and treat them differently from every other sovereign in the United States. But this is what the Board is doing. And in so doing, it is severely undercutting the goals of the Indian Gaming Regulatory Act, in which Congress made clear that economic development, through gaming, is key to enhancing tribal governments and tribal self-determination.

For decades, the NLRB interpreted the Act's exception for government employers to include Indian tribes and tribal enterprises owned by Indian tribes that were lo-

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[1] *See Dobbs v. Anthem Blue Cross & Blue Shield,* 600 F.3d 1275, 1283–84 (10th Cir. 2010) ("federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization"); *NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) (rejecting argument that NLRA preempted tribal sovereign authority to enact a right to work ordinance because legislative "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory."); *Chickasaw Nation v. NLRB,* No. CIV–11–506–W (W.D. Okla. Jul. 11, 2011) (order granting preliminary injunction against the NLRB from proceeding with a hearing on its complaint against the Chickasaw Nation and its gaming enterprise).

[2] The Pueblo raised all of these issues in correspondence, and later in a motion to dismiss the NLRB proceeding, without effect.

cated on Indian reservations. *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). It was not until 2004 that the NLRB changed its long-standing interpretation. In *San Manuel Indian Bingo & Casino,* 341 N.L.R.B. 1055 (2004), the Board announced its view that the NLRA does apply to tribally-owned, on-reservation enterprises.

The NLRB's attack on tribes is wrong because it undermines self-determination at its core. Although the Pueblo has enacted comprehensive laws and established governmental agencies to address employee grievances, the Board says that the Pueblo's laws, agencies and courts will have no role to resolving the employee's grievance. Instead, it will decide the grievance. And under the NLRB's view, it can ignore any treaty or Act of Congress that is inconsistent with its view of the authority it holds under the NLRA.

The NLRB is wrong because it fails to recognize the central importance of revenues from the Pueblo's enterprises to the day-to-day operations of the tribal government, and does not respect the careful balance that the Pueblo's laws observe—which recognize the right of employees to organize, but not to strike. For a tribal government, that limitation is essential. A strike would disrupt the generation of the revenues on which our tribal programs and services—and our elders, children and poor—depend. A strike would force the government to either shut down or substantially cut back government operations, and just the threat might be enough for the Pueblo to agree to any demands that would avoid that result. As governments with responsibilities for the safety and welfare of our people, we cannot be put in a position where we must curtail police patrols, close schools, or provide diminished care to our elders.

S. 248 is the solution to this problem. Letting the Board litigate the issue across the country will only worsen and prolong the current problem. That litigation is also extremely expensive and drains resources needed to fund government programs and services. Litigation is a waste of federal resources as well. The NLRB is pursuing its recent change in policy piecemeal, through individual enforcement actions against tribes throughout the country—creating extensive uncertainty along the way. The NLRB's authority to attack tribes is fabricated out of thin air, without express authorization from Congress and is imposed without the kind of government-to-government consultation and evaluation by which appropriate policy determinations should be made. But the NLRB won't stop unless Congress says it never had the power over tribes that it now claims. As we see it, the choice is clear—tribal self-government is protected and furthered by supporting and passing S. 248.

Thank you again for this opportunity to testify.

The CHAIRMAN. Thank you very much, Mr. Torres.

Senator Franken, could I ask you to please introduce our next guest and witness?

STATEMENT OF HON. AL FRANKEN, U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. Mr. Chairman, I am pleased to welcome Keith Anderson to the Indian Affairs Committee. Keith is Vice Chairman of the Shakopee Mdewakanton Sioux community, one of four Dakota communities in Minnesota. Under his leadership, Shakopee provides an impressive range of services not only to its members, but also its employees. The tribe is also an important source of economic development in the region. Shakopee is the largest employer in Scott County and one of the 50 largest employers in the State of Minnesota.

Vice Chairman Anderson knows the importance of economic development on Indian lands. I appreciate that he is here on behalf of Shakopee to provide his perspective on this legislation.

The CHAIRMAN. Thank you very much, Senator Franken.

Mr. Anderson.

STATEMENT OF HON. KEITH B. ANDERSON, VICE CHAIRMAN, SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

Mr. ANDERSON. Good afternoon, Mr. Chairman. Thank you very much, Senator Franken. Good afternoon, Senator Moran, Ms. Heitkamp.

On behalf of my Shakopee tribal government, I want to convey our strong support for prompt enactment of S. 248. We are indebted to you, Mr. Chairman, and especially to you, Senator Moran, for joining us in our effort to enact S. 248. We urge you to keep this bill clean, without any change, and to enact it quickly.

S. 248 is a simple, narrow response to a 2004 decision by the NLRB to override decades of Federal law respect for tribal labor sovereignty. Since then, Shakopee, along with other tribal governments, has asked Congress to clarify the expressed wording in a statute that, once again, tribal governmental employers are treated the same as all other governmental employers for the purposes of the NLRA.

Each of us, Federal, Tribal, State, and local is a government. Each possess governmental sovereignty. Each should respect the other's governmental sovereignty. When tribal governmental sovereignty is respected, economic success follows.

The NLRA statute did not change in 2004. The only thing that changed was the NLRB's interpretation of the NLRA. The NLRB suddenly claimed in 2004 that it had the right to look over the shoulders of tribal governments and decide whether or not our activities are commercial rather than governmental. If commercial, then the NLRB said it will treat tribal governments like we are private sector corporations and not governments.

As tribal governments, we must ask ourselves why does the NLRB not apply the same commercial versus governmental status and analysis to State and local government employers. State-run golf courses, liquor stores, spa resorts, conventions, event arenas, RV parks, port authorities, lotteries, hosts of other enterprises, like tribal governments, they do so for the same reason, to raise governmental revenue.

When opponents of S. 248 say they are concerned for the welfare of tribal government workers if S. 248 is enacted, they should be asked how are tribal employees any less protected than the millions of Federal, State, and local government workers whose employers are excluded from the NLRA provisions today.

Mr. Chairman, to help understand our passion for this issue, let me provide you with a brief background of my tribe. In recent decades, economic development has surrounded our reservation. The Shakopee Tribe has played a significant role in the economic revitalization of our region. For years our tribal government has been the largest employer in Scott county. Our tribally owned and controlled enterprises are a vital source of governmental revenue for ourselves and for our neighbors. Our tribal government workforce of over 4,000 people earn some of the most competitive salaries in our regional market and receives well regarded benefits, amenities, and I have listed that in my written testimony.

In 2014, as in previous years, the Shakopee Tribe was the largest of the 155 employers named as the top workplaces in Minnesota. The Shakopee Tribe's economic enterprises cannot be distinguished

from those owned and controlled by State and local governments throughout America. Those governments, just like tribal governments, are engaged in a wide variety of commercial-like activities. What makes all of our enterprises governmental is that they are under the exclusive ownership and control of government and the revenues that they raise are dedicated exclusively to governmental purposes.

The NLRA has always protected the sovereign right of governmental employees to define their own collective bargaining rights and to avoid work stoppages and strikes in their governmental workforces. Tribal governments share the same need for workforce stability. The NLRB should respect tribal government sovereignty. They did so until 2004.

None of the facts changed in 2004. There were no changed circumstances that would compel the NLRB their drastic curtailment of tribal sovereignty in the San Manuel decision. Long before 2004, Indian gaming began on our reservation, in the early 1980s, and we enjoyed steady growth throughout the next two decades. Just as State governments employ many workers who are citizens in other border States, tribes like Shakopee have always employed many workers who are not members of our tribe.

How can opponents of S. 248 justify treating tribal government employers differently than State or local government employers? Surely they don't mean to imply that tribal governments can't be trusted as much as State governments. They deal with their governmental employees in a fair way. It would be paternalistic and discriminatory for Congress to add any special tribal requirements or preconditions to S. 248.

Proponents of adding preconditions should be asked if S. 248 is enacted as introduced, would tribal government employees have any less protection than do State and local government employees under the NLRA today, and the answer, of course, is no.

So, in conclusion, I want to be very, very clear. S. 248 is not about a labor policy; it is all about tribal sovereignty. We insist that our friends, both Republicans and Democrats, not turn S. 248 into a partisan political football. Winning its enactment is far more important to us than scoring points. The Committee often straddles partisan divides when it defends tribal government sovereignty in our unique Federal trust and treaty relationships. We ask that you once again stretch this time to embrace S. 248, give the bill your undivided and unequivocal bipartisan support because it would treat tribal governments like all other governments and restore the tribal labor sovereignty that existed before 2004, and that existed for seven decades prior to that.

Mr. Chairman, thank you for the opportunity to present this testimony in support of the prompt enactment of S. 248 and the Tribal Labor Sovereignty Act of 2015. Thank you all for your help.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF HON. KEITH B. ANDERSON, VICE CHAIRMAN, SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

Introduction

Good afternoon, Mr. Chairman and Members of the Committee. My name is Keith Anderson. I am the duly-elected Vice-Chairman of the Shakopee Mdewakanton

Sioux Community ("SMSC" or "Tribe"), a federally-recognized tribal government, located in Prior Lake, Minnesota.

My Tribe wholeheartedly supports S. 248 and asks that you secure its prompt enactment. S. 248 rests on a principle that has been amply demonstrated by Indian tribes across the country: when tribal sovereignty is respected and acknowledged, economic success follows.

The language of S. 248 would simply, and narrowly, clarify that tribal government employers should be treated exactly as state and local government employers are treated in the National Labor Relations Act of 1934 ("NLRA"). No more. No less.

S. 248 would return understandings of the federal law on tribal labor sovereignty to the position held by everyone until 2004. All S. 248 would do is restore the status quo of 2004, a status quo that held steady for the preceding seven decades.

The NLRA, 29 U.S.C. § 151 *et seq.,* is the primary law governing relations between unions and employers. It guarantees the right of employees to organize, or not to organize, a union and to bargain collectively with their employers. Its provisions apply to all "employers," except that Section 2(2) of the Act (29 U.S.C. § 152) explicitly says that the term "employer" does not include the United States government or any state government or political subdivision thereof.[1] And therein is the issue—for the first 70 years of its existence, everyone interpreted the NLRA definition of employer to exclude tribal government employers operating on tribal lands—along with the exclusion of all other governmental employers.

The NLRA statute did not change in 2004. The only thing that changed in 2004 was the interpretation of that statute by the National Labor Relations Board (NLRB). The NLRB decided to change its position and declare that because tribal governments were not expressly listed among the excluded governmental employers in the statute, the NLRB in some situations would treat tribal governments as private employers subject to all the requirements of the NLRA.

Shakopee and other tribal governments were offended by the NLRB's analytical framework in its 2004 *San Manuel* decision—that the NLRA should be applied to tribal government employers when those tribes are engaged in "commercial" activities which the NLRB decides are "commercial." The NLRB has never applied this same analysis to the many similar "commercial" activities engaged in by federal, state and local government employers. If political considerations would never permit the NLRB to impose this interpretation on other governmental employers—how can this analysis be fairly imposed upon tribal government employers?

My Tribe, and many tribal governments, was alarmed that the NLRB thought it could roll back tribal sovereignty in this way, on its own, without any change in the statute by Congress. Ever since the NLRB decision in 2004, we have been asking for the technical relief embodied in S. 248, and are indebted to you, Mr. Chairman, and especially, to Senator Jerry Moran, for joining us in our efforts to fix this grievous error by the NLRB.

Background on the Shakopee Mdewakanton Sioux Community

Our Tribe has remained on our Reservation lands that were once part of the millions of acres upon which our ancestors lived before they were forced to relinquish them under a series of disastrous land treaties. What remains of our lands are approximately 1,844 acres held in trust and 2,279 acres in non-trust status for our Tribe, about half an hour from the outskirts of Minneapolis.

In recent decades, economic development has surrounded our Reservation. At the same time, our Tribe has played a significant role in the economic revitalization of our region. For years, our tribal government has been the largest employer in Scott County.

Our tribal government provides a full range of governmental services to our Community residents. We administer social services for children and families, mental health and chemical dependency counseling, employee assistance, emergency assistance, public works, roads, water and sewer systems, health programs and a dental clinic, vehicle fleet and physical plant maintenance, membership enrollment, education assistance, regulatory commissions, economic planning and development, enterprise management and operations, cultural programs, an active judicial system, and many other governmental services. Our tribal government builds all Reservation infrastructure, including roads, water, and sewer systems, subdivision utilities,

[1] "The term 'employer'. . . shall not include the United States or any wholly owned Government corporation . or any State or political subdivision thereof. . . ." *Id.* Most employees work for employers in the private sector who are covered under the NLRA. The law does not cover government employees, agricultural laborers, independent contractors, and supervisers (with limited exceptions). See FAQs on NLRB website—*http://www.nlrb.gov/resources/faq/nlrb#t38n3182* (accessed April 27, 2015).

and tribal government facilities. About a dozen Reservation businesses are now owned by individual tribal members, including a smoke shop, gift shop, landscaping and excavating, construction services, and photography services.

Tribally-owned and controlled enterprises are an important source of governmental revenue for the Shakopee Tribe. Unlike state and local governments, we are unable to derive any governmental revenue from real estate taxes or sales taxes or income taxes. But like state and local governments, we are able to derive governmental revenue from the operation of governmental enterprises. For us, these include two casinos, a recreational vehicle campground, a hotel, events centers, a fitness and recreation facility, a children's entertainment and daycare facility, a waste treatment plant, a golf course, an organic and natural foods store, an organic farm, and convenience stores and car washes.

As the owner and operator of the largest casino hotel resort in Minnesota, Shakopee Mdewakanton Sioux Community provides an attractive workplace for our workforce. Our tribal government employees earn some of the most competitive salaries in our regional market. And our full-time and part-time employees receive well-regarded benefits and amenities, including—

- no-charge assessment and treatment of non-complicated illness and injury at a workplace health clinic for employees and their dependents on the medical plan;
- reduced co-pay for pharmaceuticals at a workplace pharmacy for employees and their dependents on the medical plan;
- no-charge diagnostic and preventive dental services, and reduced rates on basic and some major restorative services at a workplace dental clinic for employees on the dental plan;
- routine eye exams and discounted eyewear available at a workplace vision clinic for employees and their dependents on the medical plan;
- no-charge physical therapy and chiropractor evaluations and treatments available at a workplace "Wellness Center" for employees and their dependents on the medical plan;
- full-time employees may be reimbursed up to $2,000 for tuition after one year of service;
- cost-share (50 percent) of child care services at a workplace "Playworks" up to maximum annual benefit of $5,000 for employees;
- retirement contribution (50 percent match up to 5 percent of annual pay);
- sharply discounted membership fees at workplace "Dakotah! Sport and Fitness" facilities; and
- a broad array of other benefits, from financial services and employee assistance programs to employee discounts and reduced rate medical insurance plans.

The Shakopee tribal government employs more than 4,000 people, most of whom are in full-time positions. For each of the past five years, the Shakopee Tribe has been included among the "top work places" in Minnesota as part of the Minneapolis *Star Tribune* survey. We are very proud to be able to say that the Shakopee tribal government was the largest of the 155 employers on the 2014 list of "top work places" in Minnesota.

Our Tribal Government Enterprises Are Similar to State Government Enterprises

For the past four decades, federal policy makers in the White House and in the Congress have pursued a broadly bi-partisan policy of encouraging tribal government self-determination and self-sufficiency through the development, by the tribes themselves, of tribal economic enterprises.

At least three separate rationales have driven this federal-Indian policy. First, there is a desire to reverse the process that has led to considerable land loss and resource deprivation of tribal resources over the past centuries. Second, there is an effort to enable Indian tribes to help rid themselves of the plague of poverty and under-development in Indian communities that has forced Native Americans, as a group, to the bottom of every known measure of economic and social well-being in America. And third, there is support for an approach that respects the sovereign authority of governments to set their own course and resolve their own problems in their own way. For the Shakopee Mdewakanton Sioux Community that has meant we have actively pursued the development of appropriate economic development, including gaming, in order to boost the governmental revenues of our Tribe.

As do state and local governments throughout America, the Shakopee tribal government operates a hotel and convention center, event arenas, fitness center, child care center, golf course, emergency response and fire-fighting station, fuel stops, or-

ganic and natural food store and farms, recreational vehicle park, and a waste water treatment facility among many other activities.

In all fairness, my Tribe's economic enterprises cannot be distinguished from those owned and controlled by state and local governments throughout America. State and local government employees typically are engaged in a wide variety of commercial-like activities. State governments operate lotteries, liquor stores, resort spas and recreational parks, waste water treatment facilities, port authorities, transportation systems, event and entertainment venues, and convention centers, among many other enterprises that in competition with similar enterprises in the private sector. What makes all of these enterprises "governmental" is that they are under the exclusive ownership and control of state and local governments, and the revenues they raise are dedicated exclusively to governmental purposes. Our tribal government enterprises are no different. [2]

Why S. 248 and Why Now?

My Tribe urgently needs the statutory language of the NLRA to be clarified so that there can be no doubt that it is treated in the same way as all other governmental employers are treated under the NLRA.

The NRLB respects the sovereignty of all other governmental employers that the NLRA statute protects. The NLRA has always protected the sovereign right of governmental employers to define their own collective bargaining rights and to avoid work stoppages and strikes in their governmental workforces. In all fairness, the NLRB should likewise respect tribal government sovereignty. The NLRB did so until 2004. But given the NLRB's new interpretation in 2004, and the deference given the NLRB by the courts, Congress must now step in and clarify, with enactment of S. 248, that tribal government sovereignty is to be protected no less than state government sovereignty is protected in the NLRA. Nothing short of a technical amendment like S. 248 will work.

None of the facts changed in 2004. There were no changed circumstances that would compel such a dramatic curtailment of tribal sovereignty. No "problems" arose in 2004 that had to be addressed by mandating NLRA's collective bargaining.

Indian gaming began on our Reservation in the early 1980s and enjoyed steady growth through the late 1980s and throughout the 1990s. Throughout much of Indian Country, much of the fastest economic growth occurred in the 1990s, including enterprise development ancillary to gaming. There was no "tipping point" in economic growth on Indian reservations that occurred in the years immediately preceding 2004.

Likewise the composition of our tribal government workforce, while it has grown in size, has always been predominately non-Indian or non-tribal. Just as state governments employ many workers who are citizens of other states, tribes like Shakopee have always employed many workers who are not members of the tribe. Similarities to state government employers abound: one need only look at the Maryland, Virginia and D.C. government workforces, or New York, New Jersey and Connecticut government workforces.

In short, opponents of S. 248 cannot point to anything unique that happened in the years immediately preceding 2004 to justify the NLRB's change in how it interpreted the statute.

It is Irrational and Discriminatory to Impose the NLRA on Tribal Government Employers But Not State Government Employers

The basic premise of sovereignty, for both state and tribal governments, is that each government sets its own policies in its own sphere of influence. Of course, that sovereignty is limited under the U.S. Constitution. What Shakopee and other tribes are seeking is to be treated the same as state governmental employers are treated under federal labor law, no more and no less.

Shakopee will insist that those who question the propriety of S. 248 be made to answer the following question: *how do you justify treating tribal government employers differently than you treat state government employers?* Surely you do not mean to imply that tribal governments cannot be trusted as much as state governments can be trusted to deal with their governmental employees in a fair way?

Shakopee, like other tribal government employers, understands that it is in our self-interest to treat our employees fairly. After all, if our employees are not happy, our customers may not receive the high quality entertainment product we want for them. Maintaining above average or better workplace conditions than the marketplace surrounding our Reservation means tribal employers like Shakopee are better

[2] In point of fact, the federal Indian Gaming Regulatory Act of 1988 requires that our gaming revenues must be applied to statutorily-prescribed governmental purposes.

able to recruit and retain more productive workers. At Shakopee, we take great pride in the fact that many members of our tribal government workforce have worked for the Tribe for decades. Indeed, recently we noted the following worker anniversaries with a special honoring celebration that was widely appreciated to great acclaim (2 employees with 30 years, 6 employees with 25 years, 82 employees with 20 years, 126 employees with 15 years, 103 employees with 10 years).

Shakopee Asks that You Categorically Reject the Partisan Narratives on S. 248

The Shakopee Mdewakanton Sioux Community wishes to be very, very clear about this to both our allies and our opponents on S. 248—S. 248 is not about labor policy.

S. 248 is about tribal sovereignty. Period.

We insist that supporters and opponents of S. 248 not turn this into a partisan political football they use for partisan political purposes.

Tribes need S. 248 to be enacted in order to restore tribal labor sovereignty as a matter of basic fair public policy.

Allies of Indian Country and tribal sovereignty, whether Republicans or Democrats, should not turn this issue into a partisan fight. Instead, we ask that our friends, both Republicans and Democrats, come together in a *bi-partisan* effort to enact S. 248 and restore tribal labor sovereignty to the parity position tribal government employers had as recently as 2004, and for the preceding seven decades under federal law.

Indeed, partisans on both sides of S. 248 have misconstrued the scope and meaning of S. 248. S. 248 addresses only an employer who is a federally-recognized tribal government operating on the Indian lands of that tribal government. Its provisions do not extend to other employers on those Indian lands, including Indian individuals, non-Indian individuals, and businesses not owned and operated by the tribal government. As in the 70 years prior to 2004, those employers would remain subject to the NLRA under S. 248.

While Shakopee would prefer to have S. 248 written much more expansively than it is, so that it would reflect Shakopee's understanding of its own territorial sovereignty and giving preemptive effect to Shakopee's tribal labor law as to all employers within the boundaries of its Reservation, Shakopee recognizes such an expansion of the scope of S. 248 might raise much more controversial issues akin to those that accompany the national debates over "right-to-work" laws.[3] So Shakopee has decided to give its full-throated support to the much more narrow scope embodied in S. 248—to restore tribal government employers to the position we had in 2004, treating us the same as the law treats state government employers.

Partisanship has no place on matters of federal-Indian issues involving tribal sovereignty. The members of this Committee have a remarkable and noteworthy history of straddling partisan divides when it comes to the defense of tribal sovereignty and the unique federal trust and treaty relationships with tribal governments. Each year budget hawks among the Committee's Republicans strike an agreement with Democrats on the Committee's federal program budget request recommendation letter. The same could be said of the budget hawks regarding the mandatory spending authority provisions on the Special Diabetes Programs for Indians measure that was re-enacted in recent weeks. In the reauthorization of the Violence Against Women Act (VAWA) last year, Republicans swallowed hard and accepted other unrelated provisions they opposed, and Democrats supported, in order to secure enactment of VAWA provisions that restored tribal territorial authority in law enforcement over violence against women. On the sovereignty principles that underlie tribal gaming authority, Republicans and Democrats on this Committee have, year after year, protected the Indian Gaming Regulatory Act against efforts mounted by powerful state government and private sector interests to amend and curtail the Act. And we should never forget that it was a bi-partisan group of members from this Committee who stopped an effort to impose a crippling, Unrelated Business Income Tax on tribal government revenue nearly two decades ago.

While tribes and tribal sovereignty sometimes stretch the political partisan philosophies of both the Democratic and Republican parties, Shakopee and other tribes are grateful that the allies of tribal sovereignty on Capitol Hill have found a way to embrace, on a bi-partisan basis, issues of importance to Indian Country like tribal labor sovereignty which may otherwise be misunderstood to be divisive. These Republican and Democratic leaders have earned our praise and support for engaging, like yoga masters, in bi-partisan stretching that results in a good and just result

[3] As this Committee knows, half the 50 states have enacted right-to-work laws, which protect workers in so-called "open shops" who decline to join a union and pay union fees.

for Indian Country and tribal sovereignty. This is what we ask of each member of this Committee, that you give S. 248 your undivided and unequivocal *bi-partisan* support because it would treat tribes like states and restore the tribal labor sovereignty that existed up until 2004.

Tribal Sovereignty Is the Issue

By definition, sovereignty means different decisions may be made by different tribes. Just as with the 50 states, each tribe may exercise its sovereign authority over labor policies in a manner different from another tribe. Why should tribes be any given less latitude in this regard than is given Minnesota, or North Dakota, or New Mexico, or Kansas, or Wyoming?

Fundamentally, S. 248 poses the question—in what ways are tribal government employers different from state government employers so as to justify treating tribal government employers differently? And should the NLRB be permitted to precipitously break decades of precedence and changes the rules without a change in the statute? Especially when it comes to matters directly affecting tribal government sovereignty?

It is Imperative That a Clean Bill Be Enacted Free of All Conditions

Sovereignty at its core is a question of who decides? Whose governmental authority is recognized and respected? Shakopee asks, for its part, that Congress promptly enact S. 248 so that this question restores the status quo of 2004. Any special, preconditions applied to tribal governments must be rejected as unbearably paternalistic and discriminatory. What possible other rationale can be given for treating a tribal government employer different than the law treats a state governmental employer? Under S. 248 as introduced, would tribal government workers have any less protection than do state government workers under the NLRA today? The answer is no. And the next question is obvious—by what right would Congress burden tribal government employers with conditions precedent that they do not equally place upon state government employers?

Tribal sovereignty is premised on equity and parity. In 2009, the late Senator Daniel K. Inouye, a staunch defender of tribal sovereignty, supported simple and unconditional bill language like that in S. 248 because he said it would restore tribal sovereignty to federal labor law where it was for almost 70 years and treat tribal government employers like state government employers are treated.

All Shakopee asks is that S. 248 be maintained without conditions, a clean restoration of the legal position it and other tribal government employers had in 2004. We can accept nothing less. And we ask that this corrective legislation be enacted promptly this year with overwhelming bi-partisan support.

Mr. Chairman, thank you for the opportunity to present this testimony in support of prompt enactment of S. 248, the Tribal Labor Sovereignty Act of 2015.

Attachments:

NATIONAL LABOR RELATIONS ACT OF 1935 (redline incorporating language of S. 248]

29 U.S.C. §152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

...

(15) The term 'Indian tribe' means any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(16) The term 'Indian' means any individual who is a member of an Indian tribe.

(17) The term 'Indian lands' means—

(A) all lands within the limits of any Indian reservation;

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation; and

(C) any lands in the State of Oklahoma that are within the boundaries of a former reservation (as defined by the Secretary of the Interior) of a federally recognized Indian tribe.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 07 2011

Lafe Soloman, Acting General Counsel
National Labor Relations Board
1099 14th St., NW
Washington, DC 20570-0001

Dear Mr. Soloman:

Last week, I had the honor of attending the third annual White House Tribal Nations Conference, during which President Obama reiterated his deep commitment to making government work better to fulfill our trust responsibilities, support tribal self-determination, and empower Indian tribes to unlock the economic potential of their communities. Across several agencies of the federal government, we were able to highlight many initiatives underway that are strengthening our government-to-government relationship with tribes, protecting tribal sovereignty, and restoring greater control to tribes over their lands.

And so it is in this spirit that I write to encourage the NLRB to re-evaluate its position on tribal issues and to help advance the federal government's commitments to Indian country, particularly with regard to respecting tribes as sovereign governments.

In particular, I would like to address the NLRB's decision in the *San Manuel* case and the subsequent NLRB practice of bringing enforcement actions under the National Labor Relations Act (NLRA) against tribal nations exercising their sovereign authority to operate and regulate gaming facilities within tribal territorial jurisdictions. This letter is not the appropriate venue to argue the merits of the NLRB's *San Manuel* decision. Rather, I seek an opportunity to advance the Department's position on the applicability of the NLRA to Indian tribes, articulated by the Tenth Circuit Court of Appeals, that Indian nations acting within their jurisdictions are exempt from the NLRA. *See Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283-84 (10th Cir. 2010); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). As stated by the Tenth Circuit: "[R]espect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs*, 600 F.3d at 1283.

Rather than advancing this position in a litigation context, I believe that there may be an opportunity to work together to address whether Congress intended the NLRA to apply to tribal government employers. It is undoubtedly within the NLRB's power to consider whether its original interpretation of the government employer exemption, 29 U.S.C. §152(2), as implicitly exempting tribal governments acting within their territorial jurisdictions, correctly interpreted

congressional intent, as Member Schaumber argued in his dissent in *San Manuel*. Tribal governments should be given at least the same exception as provided to state governments in the NLRA. I understand that in its regulations, the NLRB interprets the term "State" to include the District of Columbia and all territories and possessions of the United States. 29 C.F.R. § 102.7. The NLRB could—and should—include tribes in a similar manner.

I strongly recommend that we meet to discuss this important legal issue and policy topic. In the meantime, I would encourage your office to use its prosecutorial discretion to refrain from bringing unfair labor practice actions against tribal nations operating within tribal jurisdictions, and to seek voluntary adjournment of those actions already initiated, in order to respect our tribal nations and engage them on a government-to-government basis.

I stand ready to assist you on this initiative in any way that I can. Please call me at if you would like to set up a meeting to discuss these ideas in greater detail.

Sincerely,

Patrice H. Kunesh

Patrice H. Kunesh
Deputy Solicitor – Indian Affairs

DANIEL K. INOUYE
HAWAII

COMMITTEE ON APPROPRIATIONS, CHAIRMAN
Subcommittee on Defense, Chairman
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DEMOCRATIC STEERING AND COORDINATION COMMITTEE
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June 1, 2009

The Honorable Edward M. Kennedy
Chairman
Committee on Health, Education, Labor, and Pensions
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As you move forward with consideration of the Employee Free Choice Act please consider the attached amendment that would treat Indian tribes as governments.

The Constitution of the United States acknowledges Indian tribes as governments under the Commerce Clause and the Supremacy Clause. President Franklin D. Roosevelt's New Deal for Native Americans, the Indian Reorganization Act of 1934, encouraged tribal governments to revitalize self-government through the adoption of tribal constitutions and federally chartered tribal government corporations. The National Labor Relations Act, President Roosevelt's New Deal for Labor, provided for collective bargaining in private industry and excluded the United States, state and local governments, and wholly owned government corporations so that governments might establish their own laws for employee relations. For almost 70 years, tribal governments were included in the Act's definition of governments, and although a recent NLRB decision departed from that rule, Congress should affirm the original construction of the Act by expressly including Indian tribes in the definition of employer.

Thank you for your thoughtful consideration. If you have any questions please contact my staff Kawe Mossman-Saafi at 4-3934.

Aloha,

DANIEL K. INOUYE
United States Senator

The CHAIRMAN. Thank you very much, Mr. Anderson.
Mr. Guest.

STATEMENT OF RICHARD A. GUEST, SENIOR STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Mr. GUEST. Thank you, Mr. Chairman, distinguished members of the Committee. The Native American Rights Fund is honored to provide this testimony, the purpose of which is to demonstrate that in furtherance of Congress's longstanding policies on Indian self-determination, tribal self-governance, tribal economic self-sufficiency, it is time for Congress to provide parity for tribal governments under the National Labor Relations Act.

In this context, parity encompasses the quality of being treated equally under the law alongside Federal and State governments. Tribal governments are entitled to the freedom to choose for them-

selves the appropriate time, place, and manner for regulating union activity on Indian lands and collective bargaining for its employees.

As you all are aware, the NLRA was enacted in 1935 to govern labor relations in the private sector, excluding Federal and State governments from the definition of employer. Therefore, workers in the public sector, employees of the Federal and State governments, were and are subject to the labor relations policies of their respective employers.

In terms of parity with the United States, it wasn't until 1978 that Congress passed the Federal Labor Relations Act to regulate labor relations with its workers. To meet the special requirements and needs of the Federal Government, Congress excludes members of the military, supervisory and management personnel, and all employees of certain Federal agencies, including the FBI, the CIA, and the U.S. Secret Service.

Although patterned after the NLRA, the FLRA limits collective bargaining only to personnel practices, with no right of employees to negotiate their wages, no right to negotiate their hours, employee benefits, or classifications of their jobs. The FLRA also limits the right of Federal workers to engage in any concerted action like workplace strikes. Under the FLRA, there is no right to strike for Federal workers, and it specifies that it is an unfair labor practice for labor unions to call or participate in a strike, a work stoppage, or picketing that interferes with the operation of a Federal agency.

Now, in terms of parity with State governments, according to a 2002 report by the GAO, about 26 States and the District of Columbia had statutorily protected collective bargaining rights for its employees. Another 12 States had collective bargaining only for specific groups of workers; example, teachers and firefighters. And in another 12 States there was no statute regulating labor relations with its employees or protecting the rights of its employees to collective bargaining.

According to this report, most State government workers who are entitled to collective bargaining rights under State law are prohibited from striking. Instead, those States provide compulsory, binding interest arbitration, a procedure unavailable under the NLRA.

In my written testimony I have included the January 2014 report, Regulation of Public Sector Collective Bargaining in the States, published by the Center for Economic and Policy Research, and I invite you to take a look. And the charts there, although they don't update the 2002 GAO report, really do provide an illustration of the differences between the various States, and in the appendix it actually goes into much detail about the various labor laws in the different states and where their priorities are, where their needs are.

So when we look to regulating labor relations on Indian lands, I hope that you, Mr. Chairman, and each member of the Committee will recognize that each of the 566 federally-recognized tribes as governments must have the opportunity to make their own policy judgments regarding labor relations on their reservations based on the values and priorities which best serve the needs of their communities. In considering S. 248, the Committee should be mindful that the 566 tribes enjoy demographic, cultural, political, and eco-

nomic diversity, and should not be subject to any one-size-fits-all approach.

In general, there are four areas of concerns for Indian Tribes: first, a guaranteed right to strike threatens tribal government revenues and the ability to deliver vital governmental services; two, the broad scope of collective bargaining for other working conditions will undermine Federal and tribal policies requiring Indian preference in employment; three, preemption is the power to exclude, which is the fundamental power of tribal government that would be diminished, the ability of tribes to place conditions on entry, condition presence, or reservation conduct of outsiders; and, four, the potential for substantial outside interference with tribal politics and elections.

In my written testimony I provide a summary of the Navajo Preference in Employment Act of 1985, and it goes into detail about how Navajo reached various policy decisions based on their community needs. I also provide much detail about the experience, what I call the experiment, in California with the tribal labor relations ordinances that Chairman Welch discussed, and the differences there and how that is now working.

The final point I want to make, Mr. Chairman, is that before its decision in San Manuel, the National Labor Relations Board respected Indian Tribes as sovereign governments, drawing a distinction regarding its jurisdiction on whether a tribal business was located on Indian lands or outside the reservation. Today, the NLRB draws a distinction between commercial activities versus what it deems traditional or governmental activities.

Under the Indian Gaming Regulatory Act, Congress recognized a principal goal of Federal Indian policy was to promote tribal economic development, tribal self-sufficiency, and a strong tribal government. Under IGRA, it declared the purpose was to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. Congress said that. And we believe Congress meant that tribal gaming is a part of tribal government, a means of generating tribal revenues to support tribal programs and services.

In IGRA, Congress said and limited net revenues from any tribal gaming are not to be used for purposes other than to fund tribal government operations and programs, to provide for the general welfare of an Indian Tribe and its members, and to promote tribal economic development and to donate to charitable organizations or help fund operations of local government agencies.

Congress determined that tribal gaming is governmental and should not be treated as a commercial activity on par with non-Indian casinos, as the NLRB has determined in the San Manuel decision.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Guest follows:]

PREPARED STATEMENT OF RICHARD A. GUEST, SENIOR STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

I. Inroduction

Chairman Barrasso and Distinguished Members of the Committee: The Native American Rights Fund (NARF) is a national, non-profit legal organization dedicated to securing justice on behalf of Native American tribes, organizations, and individuals. Since 1970, NARF has undertaken the most important and pressing issues facing Native Americans in courtrooms across the country and here within the halls of Congress.

We are honored to be invited to provide testimony to the Committee regarding S. 248, the "Tribal Labor Sovereignty Act of 2015"—a bill to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act (NLRA). The purpose of our testimony is to demonstrate that, in furtherance of its longstanding policies of Indian self-determination, tribal self-governance and tribal economic self-sufficiency, it is time for Congress to provide *parity* for tribal governments under the NLRA. In this context, *parity* encompasses the quality of being treated equally under the law alongside Federal and State governments. Tribal governments are entitled to the freedom to choose the appropriate time, place and manner for regulating union activity on Indian lands and collective bargaining for its employees.

II. Parity with the Federal and State Governments

The National Labor Relations Act was enacted by Congress in 1935 to govern labor relations in the private sector. Under section 2 of the NLRA, the term "employer" is defined to include "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . . "Therefore, workers in the public sector—employees of the federal and state governments—were not afforded the rights and protections of the NLRA. Based on sound policy determinations, Congress provided those governments an opportunity to choose how to best regulate union organizing and collective bargaining labor relations with their workers given the essential and, oftentimes, sensitive nature of their work.

A. Parity with the United States

In 1978, forty-three years after it passed the NLRA, Congress enacted the Federal Labor Relations Act (FLRA), 5 U.S.C. § 7101 *et seq.,* regulating labor relations for most federal workers. The FLRA specifically aims to "prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs ofthe Government." 5 U.S.C. § 7101(a)(2). Congress determined that the rights of federal workers to organize, bargain collectively, and participate in labor organizations: "(1) safeguards the public interest, (2) contributes to the effective conduct of public business; and (3) facilitates and encourages the amicable settlement of disputes between employers and employees involving conditions of employment." 5 U.S.C. § 710l(a)(l).

However, the FLRA does not apply to all federal employers or employees. Coverage extends to individuals employed in an "agency," 5 U.S.C. § 71 03(a)(2), but specifically excludes members of the military, noncitizens who work outside the United States, supervisory and management personnel, and various Foreign Service officers. 5 U .S.C. § 71 03(a)(2)(B). It also excludes all employees of certain federal agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, and the United States Secret Service. 5 U.S.C. § 7103(a)(3).

Although patterned after the NLRA, based on the Federal government's unique public-service needs, obligations and vulnerabilities, the FLRA mandates certain proscriptions and prescriptions not contained in the NLRA. One important example is the scope of the authorized collective bargaining process. Under the NLRA, private-sector employees are entitled to collectively bargain with respect to wages, hours, benefits, and other working conditions. Under the FLRA, federal employees can only collectively bargain with respect to personnel practices. Under the FLRA, there is no right to negotiate working conditions such as wages, hours, employee benefits, and classifications of jobs.

A second important diffemce is the right of private sector employees to engage in "concerted action," like workplace strikes. Under the FLRA, there is no right to strike for federal workers. In fact, the FLRA specifically excludes any person who participates in a workplace strike from the definition of "employee," 5 U.S.C. § 71 03(a)(2)(B)(v), and it specifies that it is an unfair labor practice for labor unions to

call or participate in a strike, a work stoppage, or picketing that interferes with the operation of a federal agency. 5 U.S.C. § 7116(b)(7)(A).

B. Parity with the States

According to a 2002 Report by the Government Accountability Office (GAO), about 26 states [1] and the District of Colombia had statutorily-protected collective bargaining rights for essentially all State and local government workers; 12 states [2] had collective bargaining only for specific groups ofworkers (e.g. teachers, firefighters); and 12 states [3] did not have laws providing rights to collective bargaining for any government worker. "Collective Bargaining Rights," GA0–02–835, p. 8–9 (September 2002). According to the Report, most State government workers who are entitled to collective bargaining rights under state law are prohibited from striking. Instead, those States provide compulsory binding interest arbitration (a procedure unavailable under the NLRA). *Id.* at p. 10.

In a January 2014 Report, *Regulation of Public Sector Collective Bargaining in the States,* the Center for Economic and Policy Research (CEPR) reviewed the rights and limitations on public-sector bargaining in the 50 states and the District of Colombia in order to answer three key questions- whether workers have the right to bargain collectively, whether unions can bargain over wages, and whether workers have the right to strike. A copy of the Report is attached to this testimony (minus the Appendix).* The CEPR did not update the numbers provided by GAO, but it did provide helpful charts to better illustrate the types of policy choices State governments are making in regulating the rights of government workers: Chart 1, "Legality of Collective Bargaining for Select Public-Sector Workers" lists the states which regulate collective bargaining for specific workers is legal, illegal, or simply no ; Chart 2, "Legality of Collective Wage Negotiation for Select Public-Sector Workers"; and Chart 3, "Legality of Striking for Select Public-Sector Workers." As you review each chart, you can see that certain states make it illegal, or do not protect the rights of certain government workers, to engage in collective bargaining or wage negotiations, with most states making it illegal for these government workers to strike.

And of final note, according to the National Right to Work Legal Defense Foundation *http://www.nrtw.org/*, 25 States have enacted right to work laws and 25 States do not have right to work laws. [4] Therefore, half of the State legislatures have determined that—as a matter of State labor relations policy—a worker in a Right to Work State not only has the right to refrain from becoming a union member, but cannot be required to pay anything to the union unless the worker chooses to join the union.

III. Regulating Labor Relations on Indian Lands

Before its 2004 decision in *San Manuel Indian Bingo and Casino,* the National Labor Relations Board did not exercise jurisdiction over tribal-owned businesses located on Indian lands. In *Fort Apache Timber Co.* (1976), and *Southern Indian Health Council* (1988), the NLRB held that tribal-owned businesses operating on tribal lands were exempt from federal labor law jurisdiction as "governmental entities." [5] However, in *Sac & Fox Indus*. (1992), the NLRB held that the provisions of the NLRA would apply to a tribal-owned business operating outside the reservation.

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[1] Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin. As with the NLRA, the state laws that provide collective bargaining rights to public employees often exclude various groups of employees (e.g., many states expressly exclude management officials) from coverage. GAO 02–835, at note 12.

[2] Georgia, Indiana, Idaho, Kansas, Kentucky, Maryland, Missouri, Nevada, North Dakota, Oklahoma, Tennessee, and Wyoming. Three of these states, Indiana, Kentucky and Missouri, extend collective bargaining rights to certain public employees through an executive order from the governor. GAO 02–835, at note 14.

[3] Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and West Virginia. Texas prohibits collective bargaining for most groups of public employees, but firefighters and police may bargain in jurisdictions with approval from a majority of voters. GAO 02–835, at note 13.

* The information referred to has been retained in the Committee files.

[4] The 25 states that have right to work laws are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana,Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma,South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

[5] The NLRB did exercise jurisdiction over non-Indian enterprises operating. For example, in *Simplot Fertilizer Co.* (1952), the NLRB exercised jurisdiction over a union's attempt to organize a non-Indian phosphate mining company leasing Shoshone-Bannock tribal land in Idaho. Also *see Texas-Zinc Minerals Corp.* (1960), and *Devils Lake Sioux Mfg. Corp.* (1979).

Thus, prior to 2004, the NLRB drew a distinction regarding its jurisdiction based on whether the tribal business was located on Indian lands (no jurisdiction) versus off-reservation (jurisdiction). Today, in considering S. 248, the Committee should be mindful that the 566 federally-recognized Indian tribes enjoy demographic, cultural, political and economic diversity, and should not be subject to any one-size fits all approach.

A. The Navajo Nation Labor Code

Enacted by resolution in 1985, the Navajo Preference in Employment Act ("NPEA") serves as the Navajo Nation's general labor code. 15 N.N.C. Sec. 601 *et seq*; Resolution No. CAU–63- 85 in 1985, and amended through Resolution No. C0–78–90 in 1990. Incorporated into the NPEA is a clause which enables unionization on the Navajo Nation. 15 N.N.C. Sec. 606 *Union and Employment Agency Activities; Rights of Navajo Workers*

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

It was the legislative intent of the council in 1985 to incorporate the most basic of those privileges of the National Labor Relations Act (NLRA) to tribal employees, whom the council acknowledged were otherwise exempt from the NLRA. The rights of Navajo Nation employees to collectively bargain were debated and CAU–63–85 ultimately passed. 14 NTC 8/1/1985.

The 1990 Navajo Nation council debated whether to include in the amendments "closed shop" language, which would permit labor organizations to collect union dues from non-members. This sparked much debate in the council, which ultimately decided 34 to 33 to ensure the Navajo Nation is a "right to work" jurisdiction, and amended the Labor Investigative Task Force's proposed amendments to strike the "closed shop" language otherwise amending 15 N.N.C. Sec. 606. 28 NNC 10/25/90.

The NPEA confers upon the Human Services Committee (HSC) of the legislative council to "promulgate rules and regulations necessary for the enforcement and implementation of the provisions ofthis Act." 15 N.N.C. Sec. 616. HSC has availed themselves with this authority in the otherwise sparsely worded enabling legislation through Resolution No. HSCJY–63–94 *Adopting the Navajo Preference in Employment Act Regulations to Provide Rules and Enforcement Procedures to Permit Collective Bargaining for Employees of the Navajo Nation, Its Agencies or Enterprises.*

These regulations provide additional guidance as to, for example, management's role of neutrality, prohibited employer practices, how to become an exclusive bargaining agent, the process for certification, an impasse resolution in the event of failed bargaining, and the process for decertification of a bargaining agent.

Collective bargaining is occurring on the Navajo Nation, with private enterprise as well as government. The United Mine Workers of America (UMWA) represents employees at the Navajo Nation Head Start Program, a tribal government program. The Nal-Nishii Federation of Labor AFL–CIO includes 12 labor organizations that represent miners, power plant workers, construction workers, school employees and city employees working on or near the Navajo Nation.

B. California Tribal Labor Relations Ordinances

In negotiating tribal-state gaming compacts in 1999, Indian tribes in California agreed to adopt a process for addressing union organizing and collective bargaining rights of tribal gaming employees, or the compact is null and void. From these negotiations, a *Model Tribal Labor Relations Ordinance* ("Ordinance") was crafted, and tribes with 250 or more casino-related employees were required to adopt the Ordinance. In its 2007 Report, *California Tribal State Gambling Compacts 1999–2006,* the California Research Bureau provided the following summary:

- Under the *Model Tribal Labor Relations Ordinance* ("Ordinance"), employees have the right to engage in employee organizations, bargain collectively, and join in concerted activities for the purpose of collective bargaining. The Ordinance defmes unfair labor practices on the part of a tribe or a union, guarantees the right to free speech, and provides for union access to employees for bargaining purposes. (Excluded employees include supervisors, employees of the

tribal gaming commission, employees of the security or surveillance departments, cash operations employees or any dealer.)

Key Issues: Certification of union representation and dispute resolution

- Upon a showing of interest by 30 percent of the applicable employees, the tribe is to provide the union an election eligibility list of employee names and addresses. A secret ballot is to follow. An elections officer chosen by the tribe is to verify the authorization cards and conduct the election. If the labor organization receives a majority of votes, the election officer is to certify it as the exclusive collective bargaining representative for the unit of employees. Decisions may be appealed to a tribal labor panel.
- The Ordinance establishes procedures to address an impasse in collective bargaining, including the union's right to strike outside oflndian lands, and to decertify a certified union. It also creates three levels of binding dispute resolution mechanisms, beginning with a tribal forum, followed by an arbitration panel, and finally tribal court and federal court. Collective bargaining impasses may only proceed to the first level of binding dispute resolution, in which a designated tribal forum makes the decision.

California Tribal State Gambling Compacts 1996–2006, at p. 33–34 (a copy of the Labor Standards section, P. 33–39, of the Report is appended to this testimony).* In a presentation to the Intemational Association of Gaming Attomeys in September 1999, the following observations were provided regarding the Ordinance as a product of compromise between powerful forces, including:

1. the public policy of providing economic support for Indians from non-tax sources through Indian gaming;

2. the drive by the State of Califomia to reclaim some of the economic benefit it had forfeited to Nevada by blocking the expansion of gaming in CalifomiaJ.;

3. the expectation of employees working at Indian casinos that they will have the same rights as employees working at non-Indian enterprises;

4. the need and desire by many tribes to maintain and expand their gaming operations; and

5. the wish by other interested parties in the gaming business (most importantly, Nevada gaming companies and unions representing their employees) to create, at a minimum, a "level playing field" by eliminating the competitive advantage enjoyed as a result of the non-union status of California's Indian casinos.

The full written presentation is available at *http://cornorate.findlaw.com/litigation-disputes/thecalifornia-tribal-labor-relations-ordinance-overview-and.html.*

The Ordinance provides labor unions at tribal gaming facilities with a number of advantages not provided for under the NLRA. Most impmtantly, under the Ordinance unions at tribal casinos: (1) have the right to enter onto casino property at any time to talk to employees and post leaflets and posters there in order to facilitate the organizing of employees; and (2) may engage in secondary boycotts after an impasse is reached in negotiations without suffering any penalty under the Ordinance.

The Ordinance also provides tribes with certain advantages not enjoyed by employers under the NLRA. Most importantly, unions representing tribal casino employees may not strike, picket or engage in boycotts before an impasse is reached in negotiations. Since 1999, a number of new tribalstate gaming compacts have been negotiated, or renegotiated, some with additional provisions regulating labor, but all requiring the adoption of the 1999 Model Tribal Labor Relations Ordinance.

The examples of the Navajo Nation and the California tribes exemplify the growing list oflndian tribes who are regulating labor relations with their employees. Mr. Chairman, we hope that you and each member of the Committee will recognize that each of the 566 tribes—as governments—must have the opportunity to make their own policy judgments regarding labor relations on their reservations based on the values and priorities which best serve the needs of their community. In general, there are four areas of concem for Indian tribes: (1) a guaranteed right to strike threatens tribal government revenues and the ability to deliver vital services; (2) the broad scope of collective bargaining for "other working conditions" will undermine federal and tribal policies requiring Indian preference in employment; (3) preemption of the power to exclude which is a fundamental power of tribal government diminishes the ability of tribes to "place conditions on entry, on conditioned pres-

*The information referred to has been retained in the Committee files.

ence, or on reservation conduct"; and (4) the potential for substantial outside interference with tribal politics and elections.

IV. Conclusion

In closing Mr. Chairman, we would simply remind you and members of the Committee that under the Indian Gaming Regulatory Act (IGRA), Congress recognized "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701 , and declared its purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

Congress said that, and we believe Congress meant that tribal gaming is a part of tribal government—a means of generating tribal revenues to support tribal programs and services. In 25 U.S.C. § 2710(b)(2)(B), Congress stated "net revenues from any tribal gaming are not to be used for purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." Congress determined that tribal gaming is a governmental activity of Indian tribes—and should not be treated as a commercial activity on par with nonIndian casinos as the NLRB has determined in *San Manuel Indian Bingo and Casino.*

The CHAIRMAN. Thank you very much, Mr. Guest.

The order for questioning will be Senator Moran, then Senator Franken, then I will conclude.

Senator Moran.

Senator MORAN. Mr. Chairman, thank you very much. Let me direct my first questions to Mr. Griffin.

Mr. Griffin, perhaps a series of questions that you can respond to or we can discuss. First of all, from 1935 to 2004, the Board held that the NLRA did not apply to tribal employers on tribal lands. The question then becomes what is the rationale for making a change in that policy in 2004 and ignoring the precedent and then holding otherwise.

In your testimony you mentioned the Board of San Manuel decision and noted the "increasingly important role" that tribal commercial enterprises were by then playing in the national economy. And you write, "the Board found that tribal-owned enterprises were 'significant employers of non-Indians in serious competition to non-Indian-owned business.'"

It strikes me, several things about that. One, if the real issue is whether the tribes are sovereign or not, then these other factors about serious competition or number of non-tribal employees, in my view, should be irrelevant. And I would welcome your response to that.

And then another thought about that, it adds additional uncertainty to tribal employers because how will we know what the serious competition definition is? How will we know how many employees it takes before the NLRA would come into force in those circumstances? It seems to me that the issue of sovereignty, either the tribes are sovereign or they are not; and there ought not be this fuzzy area in trying to determine what kind of nature of the activity, size, and scope of the activity that then determines that.

Finally, the District of Columbia is not mentioned in the NLRA, and NLRB does not exercise jurisdiction over it as an employer. U.S. territories are not mentioned in NLRA, and NLRB does not exercise jurisdiction over them as employers. And yet Indian Tribes are not mentioned in the Act, but the NLRB does exercise jurisdiction. How do you square the differences? Because your testimony

was Congress didn't speak; therefore, we believe we have the authority.

Mr. GRIFFIN. Well, thank you very much for the series of questions, and I will try and be responsive to each one in turn; and if I miss one, I am sure you will bring me back to it.

Senator MORAN. People bring me notepads of questions, so I am not trying to trick you.

Mr. GRIFFIN. No, I didn't take it in that fashion at all.

Senator MORAN. It is only that the clock will run.

Mr. GRIFFIN. I just wanted to keep it all in my head.

I think you cite to my testimony, which is in fact quotations from the Board's decision in San Manuel, so I am describing in the testimony the basis for that decision that the Board articulated itself in the decision. And I would say, really, there were two things going on. The first thing, just stepping back for a second, is that the Board has been given jurisdiction by Congress to interpret the Act, and it is considered to be the expert agency to interpret the Act in light of changing industrial circumstances.

So I do think that the rise of Indian gaming, which is noted, and the employment of more non-Indian, non-tribal members, those were changing circumstances that are the type of changing circumstances that typically the Board will look to when it reexamines a line of case law.

The other thing that the Board will typically look to, and which is clearly one of the operative factors in the San Manuel decision, is the development in the case law otherwise. So it looked to the Supreme Court's Federal Power Commission versus Tuscarora decision, it looked to the development in the Ninth Circuit; and that Board determined that the prior law was not the best interpretation of the Act in light of the decisions of the Supreme Court, the decisions of the Ninth Circuit, and then reexamining the situation in light of the increased presence of tribal enterprises such as casinos.

So that is the basis for the change, is looking to the doctrine from the Supreme Court and the Ninth Circuit with respect to the laws of general application applying to tribes, A, that is Tuscarora; and then looking to the exceptions that are articulated in the *Donovan v. Coeur d'Alene* case and seeing whether those exceptions apply to the casino and determining that they didn't.

With respect to the territories, you are correct the territories, you are correct the territories are not mentioned in the statute with respect to the definition of employer. Territories actually are mentioned in the statute with respect to another section of the law, that is the section 10(a), which allows for the Board to cede jurisdiction to either State or territories where there is a law that is substantially identical to the National Labor Relations Act. And as you have heard, although there are a number of considerations in the laws that have been referred to, they are not substantially identical to the National Labor Relations Act.

I am trying to remember the final question, which was? I am sorry.

Senator MORAN. I think a point that I was attempting to make is that not all irrelevant if you reach the conclusion that the tribes are sovereign?

Mr. GRIFFIN. Well, the test takes into account traditional governmental functions and looks at those. That is the first piece of the Donovan inquiry. And quoting the decision, it focuses on whether or not applying the Act to the casino would touch "exclusive rights of self-government and purely intramural matters," and looks to Coeur d'Alene, which describes intramural matters as topics such as tribal membership, inheritance rules, and domestic relations. And the view is that those are the aspects of sovereignty and that the operation of the casino is not, as the Board has described it in San Manuel.

Senator MORAN. My attempt to ask more than one question or talk to more than one witness failed, despite my efforts to combine all my questions into one. My time has expired, but I hope we have a second round so I can ask some other questions of the witnesses.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Moran.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

In this hearing we are trying to discuss the balance between two very important things, tribal rights and labor rights. The tribes here today disagree with the NLRB decision in San Manuel, but there is actually a fair amount of common ground here and I want to first focus on points of general agreement.

Mr. Griffin, you said in your testimony that even under the San Manuel decision, the Board still must protect interests in "core tribal sovereignty, the Federal Government's treaty obligations, and Congress's authority over Indian affairs." Has the Board ever declared jurisdiction over what the Board called intramural matters? And what functions would intramural matters which you just referred include?

Mr. GRIFFIN. The Board has not ever taken jurisdiction over something that fell within those core intramural matters. And just to repeat what I said, those are described in the *Coeur d'Alene* case and quoted in San Manuel as topics such as tribal membership, inheritance rules, and domestic relations. And, in fact, at the same time that the Board issued San Manuel, the Board declined jurisdiction, as I mentioned, in the *Yukon Kuskokwim* case, which involved a clinic that was operated by a tribe that was off the reservation.

So when the Board decided San Manuel, it said that drawing the line on enterprises that are within the reservation was over-inclusive and under-inclusive. So there was an off-the-reservation enterprise that was held the Board did not assert jurisdiction; there was an on-the-reservation enterprise that was.

Senator FRANKEN. As I understand it, whether or not this bill is enacted, the National Labor Relations Act would still apply to private businesses on Indian lands and tribal enterprises off of reservations. Is that understanding correct, Mr. Guest?

Mr. GUEST. It would apply to any commercial ventures of Indian Tribes outside of Indian reservations. Again, I would take issue with Mr. Griffin's description. Prior to 2004, and even in the Yukon case, in its first iteration before the Board, the Board was seeking to exercise jurisdiction over the health care services being provided outside the reservation. There are no reservations in Alaska, so it

was seeking to exercise that jurisdiction even though it was a consortium providing health services.

It wasn't until the San Manuel decision and afterwards that the Board said, oh, we are going to change our mind and we are not going to exercise it even over tribal health care facilities outside the reservation. So they have drawn the line differently now. Instead of on reservation versus off reservation, it is commercial versus governmental.

And in the D.C. Circuit's decision in San Manuel, the way that the courts—and this is a challenge that we have for ourselves in the Federal courts and why we need Congress to act, is because the D.C. Circuit created a continuum of tribal sovereignty, saying, well, for these purposes, the further you move out from this core of tribal sovereignty, then we can act and the Board can act.

Senator FRANKEN. Mr. Guest, I have so much time, so I just want to pick up.

Vice Chairman Anderson, I want to talk about labor relations and the context of Shakopee. Shakopee is an important employer in its area for both Indian and non-Indian workers. Would you say that the tribe's employees are generally happy?

Mr. ANDERSON. Yes, I would. We have several long-term employees that are 5-year, 10-year, 15-year, and now all the way up to 30-year employee recognition banquets every year just continue to grow, and we are struggling with the 5 and 10-year as they are so big; we still want to get to them and we still want to recognize them.

Senator FRANKEN. Has the NLRB ever been involved in a dispute between Shakopee and its employees?

Mr. ANDERSON. No.

Senator FRANKEN. Would you treat your employees better or worse if this bill were enacted?

Mr. ANDERSON. Well, we say our employees are our best customers. If it wasn't for them, we wouldn't have the success that we do. So not for better or worse, but there definitely would be a change. I don't know that it would be in either party's benefit at this point.

Senator FRANKEN. May I have just another one more question?

Mr. Griffin mentioned in his testimony that other labor laws, the Americans with Disabilities Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act, ERISA, have also been extended to cover tribes.

Mr. Torres, are any of the tribes represented today advocating to exempt tribal enterprises from these other labor laws?

Mr. TORRES. Not that I know of, Senator.

Senator FRANKEN. Okay. So what is different or special about the National Labor Relations Act? From those.

Mr. TORRES. I am not sure I can answer that. I don't totally understand what you are asking me.

Senator FRANKEN. Okay, I am sorry.

Anyone else care to answer?

Mr. ANDERSON. I can give a shot at it. You know, the difference is stability in the workforce. We have, at minimum, in codes and other areas you adopt those minimums for obvious reasons, especially the ADA or building codes and such. Our labor law includes

due process, and we hire professionals that establish the Employee Rights Commission that are modeled after some of the best commissions that are out there. That is what you want to do. That is what you want to do to cover all of these types of questions. So that is the way I look at it.

Senator FRANKEN. Thank you.

Thank you for your indulgence, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Franken.

Senator Moran, you have some additional questions?

Senator MORAN. Thank you, Mr. Chairman, for your consideration.

Mr. Vice Chairman, let me ask you. You made the pitch, the appeal in your testimony for bipartisanship in consideration on this legislation. I wanted to give you the opportunity to explain why you think that is important, what you want to accomplish here. What would be your suggestion to make certain that we accomplish that? And is there anything in this legislation that we need to alter?

I believe it was you that testified it needed to be passed in its current exact form. Is there anything, then, that you think is terribly partisan or that is detrimental to the cause of getting this legislation passed that we need to alter?

Mr. ANDERSON. Not that I have heard recently, but with the work that we have done with our help that is behind me, I am hearing that there is partisanship, and I would hope that there would be an opportunity for bipartisanship in lieu of how the year finished last year and things of that nature.

But that is more or less how I would approach some of the opponents of the bill. The bill, as written, is a clean fix. Its intent is to clarify. Such as an employee needs clear direction, it clarifies what we want to accomplish to be recognized as tribal governments.

Senator MORAN. Let me ask any of the witnesses from the tribes, in the effort to take care of your responsibilities as tribal leaders to care for tribal members, what is the consequence of the uncertainty that comes from dealing with the NLRA or the NLRB in your efforts to care for tribal members? My guess is that you were elected by your members to pursue on their behalf. How does dealing with the NLRB affect your ability to accomplish those goals?

Mr. TORRES. The thing that is happening to the Pueblo of Isleta right now, as far as dealing with the NLRB, is very wrong for us because we are required to come up with all the documents, every dollar that was spent for like two years, and we don't think that that is right. Our employees are protected by our personnel policies, our labor laws, which our labor law was approved by the Department of Interior and we have that in place.

So at Isleta we feel that we are taking care of our employees. We hardly have any grievances at all. They have really good benefit packages, they get paid really well, and it was just one employee that caused this mess that we are in right now with the NLRB.

I hope that answers your question, Senator.

Senator MORAN. It does. Thank you.

Anyone else?

Mr. ANDERSON. I would just like to add we haven't had to deal with the NLRB, but it seems to me that the means testing and the

type of—I am not a lawyer, but what I do read is that you have an ever-changing Board that has decided to ask a question that isn't being asked up until somebody decides this might be an issue. The purposes of IGRA and all of the things that we provide with the money, IGRA determines how you divide that money and how you use that gaming dollar.

This is clearly an intent of a governmental purpose; infrastructure, health, education, welfare. And you satisfy those requirements and you move from there. If a stoppage of that were to occur in the populace that we are in, the memorandums of understandings and agreements that we have with the two cities that are surrounded by us in the county, some of the services that we share with them will get interrupted, at a minimum. The upkeep of our infrastructure and so forth would show interruption.

There is no other way you can interpret this but to say we need to continue to interpret the NLRA as it had and intends us recognizing tribal sovereignty.

Senator MORAN. Let me see if I can say what I think I am hearing, and you can agree or disagree. But what I think the governor was indicating is that we don't intend to diminish the rights of our workers or the relationship we have with labor. What we hope to do is, instead of using our resources for paperwork, bureaucracy, the reports, that we can use those resources as you say, Mr. Vice Chairman, to the benefit of our citizens, as we are required to do under IGRA. Is that a message that I should hear and is that something that you are conveying to me? Or am I putting words in someone's mouth?

Mr. TORRES. No, that is exactly what I am trying to get across.

Mr. ANDERSON. Our constitution establishes that we work and strive for that infrastructure and our self-sufficiency. It is a requirement of my position, responsibility. To have that usurped by a simple process of applying, like I say, a means test of some sort, you know, the decision that I read, certainly the courts have left out some of that testing, but have decided to accept that decision of the Board.

It doesn't really say that it could be, it should be this way. All it is saying is somebody asked that question and applied a very—I don't know who needs to determine what is traditional for us, but certainly a lot of other governmental operations to be applied, you apply that to the State or the local governments, that is unheard of. That isn't even asked. You could ask that. Maybe that drives another court decision or maybe another application of the jurisdiction of the NLRA in our instrument of those local governments.

Senator MORAN. In addition to the nature, in my view, this bill is about the issue of sovereignty. I assume it is true that tribes have different relations, customs, traditions that would be different than other employers that, again, sovereignty protects you in the ability for you to honor those customs, those traditions, the way of doing business.

Am I missing something here? Is there something unique? I am asking you can you tell us if there are things that are unique about tribes that need to be honored as you deal with people who work on the reservation. Governor?

Mr. TORRES. I can tell you on behalf of the Pueblos, the Pueblos in New Mexico are similar. We have certain days when we have ceremonies where we have to give a day off for our employees, tribal and non-tribal employees, and then we have to close the Pueblos off. And, of course, all of the employees like that because they get a day off.

A lot of the employees that are tribal members participate in the ceremonies, so they have to take off anyway. There are certain days throughout the year that we do that, and the county government and even the State, they know these things because sometimes we have to close the State highway for certain periods of time that go through either our outskirts of the Pueblo or whatever. So that is how that works in Isleta and a lot of the other Pueblos in New Mexico.

Senator MORAN. Governor, thank you.

To me, Mr. Chairman, that highlights the importance of sovereignty. A reason for sovereignty is for Native Americans, Indian Tribes to make decisions based upon Indian customs, the relationship with the people, plus, it is also what the Constitution allows. Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Moran. Thank you for bringing this bill and for asking so many questions.

I just have a couple of other questions to hopefully wrap things up, things that haven't been covered by those who have asked questions.

Mr. Welch, your written testimony highlights the framework of labor relations for the State and the tribes in California. Tribes were instrumental and actively involved in developing the framework and then in balancing multiple interests for tribal employees. Can you tell me how the National Labor Relations Board engaged tribes in either learning about or developing a framework for the employee-employer relations? How should the NLRB also be involved in developing this sort of a framework? How did they do it and what should it have been?

Mr. WELCH. That is kind of easy on the first one. They did not engage us at all. They did not come to us and ask us what your customs and traditions are, are you a sovereign nation, or anything to that sort. So basically they said here is our ruling; deal with it.

So what they should do is respect us as our own government, our own sovereign nation. California is unique because I think there are 107 federally-recognized tribes in California, and in San Diego County there are 17 reservations.

We don't even tell the other tribes how to run it. If they do something that we don't think is right, we kind of like say, well, they have the right to govern themselves; and that is what the NLRB should do. We have the right to govern ourselves, and we protect our team members as much as we can.

And we do have a union. So, like I said, 3 percent of our workforce is unionized, but we take very good care of them. When the non-union employees get a bonus, they get a bonus. It would be nice if they could learn from tribes what is right and what is wrong.

The CHAIRMAN. Thank you.

Mr. Guest, as you are well aware, the 2004 decision against the San Manuel Band overturned many years of precedence that had given parity to Indian Tribes under the National Labor Relations Act as similarly given to State governments. Given this abrupt turn of events, what protections do Indian Tribes have absent this legislation? What would prevent additional tribal sovereignty from being lost?

Mr. GUEST. Well, I think that the challenge for tribes continues to be in the Federal courts, and the issue of sovereignty, as I was saying in my remarks to Senator Franken in response. The D.C. Circuit went even further with respect to describing tribal sovereignty on this continuum. Without this legislation, tribes are going to continue to be faced, although there may not be union organizing activity, and again, in response to an earlier question, the difference here between the NLRA and other Federal labor laws and employment laws is the fact that under the NLRA outside third-parties can come onto the reservation without permission from the tribe, can be there. Any attempt to remove them would be considered an unfair labor practice, actionable under the NLRA.

So the ability of tribes to exercise their authority as governments is wholly diminished. They are not able to exclude. If an employee is dismissed for certain reasons and the tribe wants to exclude them for other reasons, such as drug charges, again, it comes under the purview of the NLRA because he is a former employee bringing an unfair labor practice against his employer, the tribe.

So there are all types of areas. The licensing by tribes to have non-Indian businesses coming onto the reservation, again, under the NLRA called into question. So there are all kinds of aspects for sovereignty to be diminished. It is just a matter of time as we see more and more organizing.

The other place that I would just mention very quickly, Mr. Chairman, is the fact that in one of the pieces of litigation, Mr. Griffin mentioned the tribe, the Little River Band, the union brought the action simply because the tribe had enacted a labor ordinance. Back in 2005, it had enacted its own labor ordinance to govern union organizing. And the union brought the action, and the NLRB hid behind the fact that it was a union bringing the action and not the NLRB itself bringing it as an unfair labor practice. So the very ability of tribes to enact laws is now being called into question.

The CHAIRMAN. Thank you.

Mr. Anderson, one final question. According to the Bureau of Labor Statistics 2014, your home State of Minnesota union membership a little above 14 percent, higher than the national average. But as I understand, there are no unions at the tribally-run businesses in your community. Is there a reason there aren't any unions on the tribe's reservation? And how does the tribe handle employee concerns or complaints?

Mr. ANDERSON. Well, at Shakopee, like the 86 percent of the workforce that does not include unions, we would look at that as, you know, we want to be able to be as fair as possible in the application of the NLRA, so I think any State-run business would think the same way. And it is fair to say that we don't have any unions in our business, but with salaries and benefits that out-compete

others in the region, our workforce is pretty happy. We mean to do that.

There was an all-time low in unemployment several years ago and it made it hard to find good workers, and we went out and established a new minimum rate out there. Burger King, perhaps $8 to $10 an hour. Well, we went to $9 to $11 an hour. And our benefit package includes a full complementary of holidays and so forth that we want that employee.

So we look after them with the benefits and other salaries that out-compete our competition. We have a long-established employee rights commission that is modeled after some of the best. We have our human resources department hired for that specific purpose, for the purpose of human resource management of our employees, and they bring to the table the best of a lot of these plans, and we have a hearing examiner that provides full due process. So we have not used that probably to the full extent of how it is written.

The CHAIRMAN. Thank you.

I appreciate all the testimony from each and every one of you today. Thank you for being here.

Senator Moran, thank you so very much for bringing this very important matter to the attention of the Committee and to the Senate.

The hearing record will be open for two weeks, if you have additional comments you would like to submit.

I know Senator Heitkamp had some questions that she wasn't able to orally bring to us today because of a conflict in her schedule, but I know she would like to submit some in writing, so we would ask that you respond to those questions in writing in a timely manner.

Thank you so very much for being here today and, with that, this hearing is adjourned.

[Whereupon, at 3:59 p.m., the Committee was adjourned.]

A P P E N D I X

JOINT PREPARED STATEMENT OF HON. BILL ANOATUBBY, GOVERNOR, CHICKASAW NATION AND HON. GARY BATTON, CHIEF, CHOCTAW NATION OF OKLAHOMA

We are Bill Anoatubby, Governor of the Chickasaw Nation, and Gary Batton, Chief of the Choctaw Nation of Oklahoma. We are honored to submit this testimony on behalf of our Nations in support of S. 248, the Tribal Labor Sovereignty Act.

The Chickasaw and Choctaw Nations are federally-recognized Indian tribes with government-to-government relationships with the United States, holding rights guaranteed under treaties dating to the 19th century. Under those treaties, our Nations exercise rights of self-government and the power of exclusion over our treaty territories in southern and southeastern Oklahoma. The Nations also have the inherent right, as recognized by federal law, to engage in and regulate economic development and to raise governmental revenues from tribal economic activities. And we exercise those rights, and in so doing raise revenues that are critical to our ability to provide essential governmental services to our citizens. These rights are directly threatened by the National Labor Relations Board's current interpretation of the National Labor Relations Act. What's more, we have seen over the years an aggressive approach to enforcement by the Board, which is an affront to the Nations' rights under federal law, and to our dignity as sovereign Nations.

The Choctaw Nation of Oklahoma has nearly 200,000 members, making it the third-largest tribe in the country. Its headquarters are located in Durant, Oklahoma. The Choctaw Nation exercises governmental authority over its treaty territory, which spans all or parts of 11 counties in southeastern Oklahoma. The Chickasaw Nation has 38,000 members, making it the thirteenth-largest tribe in the country, with headquarters located in Ada, Oklahoma. The Chickasaw Nation exercises governmental authority over a treaty territory covering all or parts of 13 counties in south-central Oklahoma. Both Nations exercise authority over their territories pursuant to solemn treaty promises made by the United States. In our Treaties, the Nations agreed, in exchange for removing from our historic homelands east of the Mississippi, to receive new homelands in what is now Oklahoma, where we would reside and exercise rights of self-government. The Nations settled in these new homelands after surviving removal from our ancestral lands and the horrors of the Trail of Tears.

Our rights as sovereign Nations are critically important to us—those rights secure our future, and are held under treaties that are the law of the land. Under the 1830 Treaty of Dancing Rabbit Creek, the Choctaw secured a new homeland, set aside in Article 2, to occupy and govern so long as the Choctaw Nation "shall exist as a Nation." Article 4 guaranteed that the Choctaw Nation would not be subject to any laws other than its own laws, except those that Congress enacted to govern Indian affairs, and secured to the Choctaw Nation jurisdiction over "all the persons and property" within its territory. Article 12 secured to the Choctaw Nation the authority to exclude intruders from its territory and obligated the United States to remove intruders and keep them from entering Choctaw lands.

The Chickasaw Nation's territory was secured to it in the 1837 Treaty of Doaksville. In Article 1 of that Treaty, the Chickasaw agreed to remove to a portion of the Choctaw treaty territory, which the Chickasaw Nation would own and govern on the same terms as the Choctaw Nation held its lands—that is, with the rights of self-government and the power of exclusion. The 1837 Treaty made the Chickasaw Nation a beneficiary of the earlier 1830 Treaty with the Choctaw Nation.

These rights were reaffirmed by treaties that both Nations signed with the United States in 1855 and 1866. Because the Chickasaw and Choctaw Nations hold their rights of self-government on the "same terms," each Nation has a vested interest in how the other's rights are impacted by the actions of maverick agencies like the National Labor Relations Board.

The Nations exercise their sovereign rights to govern their territories and provide services to tribal citizens. Both Nations operate their governments under Constitutions adopted by their citizens and approved by the United States. Our Constitu-

tions provide for three branches of government: Executive, Legislative, and Judicial. Both Nations provide extensive governmental services in their respective territories through their respective Executive branches. Those services include: law enforcement; healthcare provided through various facilities, including hospitals, out-patient clinics, wellness centers, nutrition centers, and other specialized programs; education services as diverse as the needs of our people, including Headstart and childcare programs, early childhood development services, adult education programs, scholarship programs, and vocational training programs. We also maintain family service programs that provide family counseling, investigate child neglect or abuse, address domestic violence, and assist in compliance with child support orders; and cultural, language, and historical research and preservation programs.

The overwhelming majority of our funding for these services comes from revenues generated from tribally-operated public gaming facilities. The Chickasaw Nation's Division of Commerce, a division of its Executive Branch, employs Chickasaw public employees in operating gaming activities on numerous locations within its treaty territory, and the net revenues from these activities, minus revenue sharing payments to the state of Oklahoma under the Nation's gaming compact, go to the Chickasaw Nation treasury to maintain Nation programs and operations. The Choctaw Nation similarly owns and operates licensed gaming facilities throughout its territory, and all of its gaming revenues, after revenue sharing payments, are held by the tribal government and spent to support the Nation's operations and the wide array of governmental services described earlier. Both Nations also operate a number of other businesses, although the National Labor Relations Board has decided to target our publically operated gaming establishments.

The Board's new interpretation of the National Labor Relations Act is a direct attack on our treaty rights, including our ability to function as governments dependent upon revenue generating activities (which are our *de facto* tax base). That attack threatens our ability to provide essential governmental services to our people. The full scope of that threat became clear in 2011. What the Board did then, and what it has done in the years since, shows its unwillingness to treat Indian tribes fairly, and to accord them the dignity they deserve as sovereign nations. In 2011, the Board filed an unfair labor practice charge against the Chickasaw Nation, asserting jurisdiction over the Nation's gaming activities in Thackerville, Oklahoma. Because of the threat that Board jurisdiction poses to tribal sovereignty, the Chickasaw Nation quickly sought a preliminary injunction in the United States District Court for the Western District of Oklahoma, in Oklahoma City, that would block the Board from proceeding any further.

In the district court, the Chickasaw Nation argued that the Board could not exercise jurisdiction over the Nation because the Act does not apply to Indian tribes and does not authorize the Board to take actions that violate tribal sovereignty or tribal treaty rights. The federal court agreed and enjoined the Board from proceeding. After that decision was handed down, the Chickasaw Nation and the Board came to a procedural accommodation through settlement discussions. Under the settlement, the Chickasaw Nation agreed to litigate the issue of the Board's jurisdiction before the full Board on a stipulated record and on an expedited basis. The only issue before the Board would be the legal question of whether the Board had jurisdiction over the Nation. After this settlement was finalized, the Chickasaw Nation and the Board asked the federal district court to modify the injunction to allow the Board to hear the case on an expedited basis. In June 2012, the court agreed to modify its injunction accordingly.

Initially, the Board complied with the modified Order. The Chickasaw Nation, and the Choctaw Nation appearing as amicus, filed briefs with the Board in November 2012, and the Board issued its decision in July 2013. Not surprisingly, the Board found it had jurisdiction over the Chickasaw Nation, relying on its recent reinterpretation of the Act announced in its 2004 San Manuel decision. The Chickasaw Nation immediately appealed to the Tenth Circuit, briefed the case, and again the Choctaw Nation filed an amicus brief. But before the Tenth Circuit could decide the case, the Supreme Court in June 2014 handed down its *Noel Canning* decision. The *Noel Canning* decision held that the Board did not have enough validly appointed members to make any decisions in July 2013. So, in July 2014 the Tenth Circuit sent the Chickasaw Nation's case back down to the Board and told it to issue a new opinion. Since then, the Board has sat on the Chickasaw Nation's case without taking any action, despite having decided other similar cases. Recently we asked the federal court in Oklahoma City to consider whether to restore its original 2011 injunction because the Board has failed to act expeditiously, defying the court's 2012 Order.

The Board's failure to act promptly is unexplained. At about the same time the Chickasaw Nation's case was remanded to the Board in 2014 (after the *Noel Can-*

ning decision), so were two cases from the Sixth Circuit, one involving the Little River Band of Ottawa Indians and the other the Saginaw Chippewa Indian Tribe of Michigan. All three cases involve the application of similar legal principles. But the Board has treated the cases very differently. It quickly issued new opinions in the Little River Band and Saginaw Chippewa cases by October 2014, and those cases have since returned to the Sixth Circuit. Yet the Board has done nothing in the Chickasaw Nation's case since it was remanded to the Board nearly a year ago. The Chickasaw Nation asked the Executive Secretary of the Board why there has been such a delay, and the Executive Secretary said only that the case is "under active consideration."

The Board's delay has had an impact on the order in which the federal judicial system is considering challenges to the Board's actions. The Sixth Circuit is proceeding in two cases now, while the Tenth Circuit's consideration of the Chickasaw Nation's case is delayed. The legal precedent in the Tenth Circuit is powerful for Indian tribes and unfavorable for the Board. That is, of course, no reason for delay, particularly in light of the federal government's trust responsibility, which obligates the NLRB to engage in consultation with Indian tribes, and to treat Indian tribes with the respect to which they are entitled as sovereigns with a government-to-government relationship with the United States. But the Board's delay is contrary to our interests. And whether explained or not, it is plainly contrary to the federal court order that ordered the Board to decide the Chickasaw Nation's case on an expedited basis. Lengthy delay is not expedition.

In sum, our experience in dealing with the NLRB shows that the Board's interpretation of the NLRA is not the only thing it has gotten wrong. It has also made the grave mistake of disregarding Indian tribal sovereignty. Although the Federal Government has long treated Indian tribes as partners, the Board lags far behind and treats them solely as adversaries. And as our attorney's separate testimony to the Committee demonstrates, it will not hesitate to disregard the words, context and history of the NLRA, as well as decades of recognition that the Act does not apply to Indian tribes, in order to continue its campaign to establish control over the governmental institutions of Indian tribes involved in gaming. It is doing so notwithstanding that Indian gaming generates the revenues necessary to sustain the essential government functions of the tribes that conduct gaming. And those tribes rely on those revenues to serve some of the poorest and most marginalized people in America.

This is why S. 248 is necessary. S. 248 will not just make it clear that the Board's interpretation of the NLRA is patently wrong; it will also protect Indian tribes from the Board's high-handed procedures and unwillingness to honor its obligations to the tribes.

Thank you for the opportunity to offer this testimony on the proposed Tribal Labor Sovereignty Act.

PREPARED STATEMENT OF HON. LARRY ROMANELLI, CHIEF, LITTLE RIVER BAND OF OTTAWA INDIANS

I am Mr. Larry Romanelli, Ogema (Chief), of the Little River Band of Ottawa Indians (the Band). I am honored to submit this testimony on behalf of the Band in support of S. 248, the Tribal Labor Sovereignty Act.

The Little River Band of Ottawa Indians is a tribal government with a government-to-government relationship with the United States. The Band's status was reaffirmed by Congress in 1994. See 25 U.S.C. § § 1300k to1300k-7. The Band's support for this legislation arises from the need to protect the Band's ability to make the necessary decisions for the best interests of the Band as a sovereign government, for our tribal citizens, and for the people who willingly enter our territory to work and play.

Our experience with the National Labor Relations Board (NLRB) and its continuing persistence to run roughshod over our laws, without any consideration of the harm to the Band, is sufficient reason for Congress to enact this legislation. However, it is the NLRB's failure to recognize its trust responsibility as an agent of the Federal Government to protect and uphold our right to govern our lands and our people that should guide Congress's hand in moving forward with this important legislation.

The Little River Band of Ottawa has nearly 4,000 members. We are located in our ancestral homeland in Michigan's Lower Peninsula along the shore of Lake Michigan. When Congress reaffirmed the Band's relationship with the federal government, it reaffirmed that the Band has all the powers and rights enjoyed by all federally recognized Indian tribes. Pursuant to the Restoration Act, the Band en-

acted a Constitution in accordance with the Indian Reorganization Act, which was approved by the Secretary of the Interior. The Constitution confirmed the Band's three branches of government: a legislative branch, through the office of the Tribal Council; the Executive, through the office of the Tribal Ogema; and a judiciary, through the Band's Tribal court. This Constitution provides that the Tribe has jurisdiction over its members and territory and empowers the Tribal Council to enact laws to govern the conduct of its members and other persons within its jurisdiction.

As an exercise of this authority, the Council enacted the Fair Employment Practices Code, which governs labor relations, including the negotiation of the terms and conditions of continuing employment relations under collective bargaining agreements. This law is the result of considerable legislative process by the Tribal Council and reflects the important policy choices necessary to ensure that the needs of the tribal government are fairly balanced with the rights of workers to engage in collective bargaining.

In doing so, the Band considered examples of public sector labor laws from states and the federal government and enacted provisions to: define the rights and duties of employers, employees, and labor organizations within the Band's governmental operations with respect to collective bargaining, including the scope of the duty to bargain in good faith; require labor organizations engaged in activities within the Band's governmental operations to hold a tribal license; provide a process for defining appropriate bargaining units of employees; standards for union election campaigns; procedures for union elections and methods for resolving disputes that could arise; establish procedures and remedies for alleged unfair labor practices; prohibit strikes against the Band's governmental operations; and dispute/impasse resolution processes, including a waiver of tribal sovereign immunity for actions in tribal court. Multiple bargaining elections have taken place at Little River pursuant to this law. The Band's law is not anti-union, but it is critically necessary to ensure the integrity of the Band's governmental operations and to protect all governmental activities. Unfortunately, for the better part of the last decade the Band has been engaged in a struggle with the NLRB regarding the Band's sovereign authority to enact and enforce this law.

This Band's gaming operation exists by virtue of the Band's governmental authority, and is operated pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§2701–2721. Pursuant to IGRA, the Band entered into a compact with the State of Michigan to conduct Class III gaming activities on the Band's trust land in Manistee, Michigan. Further, as mandated by IGRA and the Band's gaming ordinance (which is required by IGRA and approved by the National Indian Gaming Commission) the Band has sole proprietary interest and responsibility for the gaming at its casino; the Band must license key employees; and all revenues generated from the casino are governmental revenues of the Band which must be used only for the Band's governmental services, the general welfare of the Band and its members, tribal economic development, to support local governmental organizations, or to donate to charitable organizations. See 25 U.S.C. §§2710(b)(2) (A),2710(b)(2)(B).

These revenues help support the wide array of services that the Band provides to our members, including health services; counseling and support for tribal members and children; natural resource management; public safety; a tribal judiciary; and prosecutorial services. The Band's gaming revenues account for 100 percent of the budget for our Judiciary, including our prosecutor's office; 80 percent of the budget for mental health and substance abuse services at our clinic; 77 percent of the budget for our Department of Family Services; and 62 percent of the budget for our Department of Public Safety. Without these revenues our government would essentially close down.

The Little River Casino is fulfilling the promise that Congress hoped for when it enacted IGRA: it is providing tribal financial security to fulfill the needs that Congress failed to meet for more than a century. All this is threatened by the actions of the NLRB, which has failed to recognize our sovereignty and the intent of Congress to provide Tribes a pathway to generate governmental revenues where none had existed before.

In March, 2008, the Local 406 of the International Brotherhood of Teamsters filed charges with the NLRB alleging that the very enactment of the Band's Fair Employment Practices Code violated the National Labor Relations Act (NLRA). The NLRB agreed and launched a full scale attack on the Band. This represents a direct attack on our sovereignty, something the Federal Government has a duty to protect and enhance, not to undermine and destroy.

Specifically, the NLRB found it to be unfair labor practices for the Band to enact a law that requires labor organizations doing business within the Casino to obtain a license from the Band; excludes alcohol and drug abuse policies from collective bargaining negotiations; and prohibits strikes. Yet the entire FEP Code was enacted

as a balance of competing tribal interests in running its governmental operations consistent with the Indian Gaming Regulatory Act, tribal interests, and employee interests. The three targeted provisions in particular demonstrate why the balance our tribal government struck was necessary. But by characterizing each of these tribal government judgments to be an unfair labor practice, the NLRB has directly attacked our government and jeopardized the Tribe's very future.

For instance, requiring licensure of unions and individuals seeking to organize at the Band's casino is critical to ensuring the integrity of the Tribe's gaming operation. The legislative history of the Indian Gaming Regulatory Act, (including hearings held after enactment) included a great deal of discussion regarding the potential and the need to prevent the infiltration of organized crime into tribal gaming operations. See generally, *Gaming Activities on Indian Reservations and Lands,* S. Hrg. 100–341; Hearing on S. 2230, *Indian Gaming Regulatory Act Amendments Act of 1994,* S. Hrg. 103–874. One way to address this is to require licensure and background checks of key parties conducting any activity in a Tribe's casino. Like several States, including Nevada, Michigan and Pennsylvania, the Little River Band determined that a union seeking to do its business in its Casino must be certified (another term for licensed). This is simply good policy and is consistent with Congress's interest in ensuring that organized crime does not infiltrate Indian gaming. Yet, the NLRB has held that the Band's policy in this area is an unfair labor practice. If that is the case, then Nevada's, Michigan's and Pennsylvania's certification policies are equally offensive and must be struck down.

Secondly, prohibiting collective bargaining regarding the Band's alcohol and drug testing policies represents a careful decision by the Tribal Government that in order to work for the Band you must be drug and alcohol free. This decision was based on the well-documented and devastating impacts of drugs and alcohol in tribal communities, and on the Band's decision to stem this tide in our community by enacting strict testing requirements. Moreover, federal law requires all Tribes to maintain a drug free work place. It would be difficult (if not unlawful) for the Band to have one law that is necessary to comply with federal law for one set of its public workforce, and then have a different law for a different set of its public workforce subject to a collective bargaining agreement. But by determining the prohibition on bargaining over the Band's drug and alcohol testing law is an unfair labor practice, the NLRB has put the Band's compliance with the Federal drug free work place laws in jeopardy, and thus put at risk all federal funds that we receive.

Finally, NLRB's directive to the Band to permit strikes, and to repeal the provisions of the code that prohibit strikes, represents a direct threat to the Tribal Government's continued operation. A strike against the Band's gaming operations would be a direct assault on the Band's sovereignty. It would threaten the continuation of most essential governmental functions, putting our citizenry at grave risk. The Band's decision to prohibit strikes in all its operations is no different than the decisions of many States that prohibit strikes, including New York's prohibition against strikes at its off-track betting facilities and Massachusetts's prohibition against strikes by its lottery employees.

Like these States, the Band balanced the need to fairly resolve impasses with its need to ensure its operations remain open. It did this by allowing binding arbitration. By this means, the workers' interests are fairly addressed, governmental operations remain open, and the critical flow of governmental revenues to fund essential governmental services is protected. This is all the more critical for a governmental gaming establishment in rural Michigan, because if there were a strike there would never be a sufficient number of licensed and qualified workers that could be called in as replacements. To be clear, a strike would shutter the casino. This would unfairly favor the union; as a mere threat of a strike would be the only thing needed to force the government to capitulate to the union's demands. The public at large—our tribal citizenry—would be held hostage to union demands. As a result there would never be good faith negotiations, just union demands to which the Tribal Government would have to agree. In this very real way, the Band loses its power to govern itself, for it has to do whatever the union demands or risk shutting down. Both the Band, and the United States as trustee for the Band, have a responsibility to keep this from happening.

These three examples underscore why the NLRA was never intended, and is not structured or designed, either to apply to government employers or to permit a government's law to be struck down. Nothing in the Act is tailored to respond to the unique challenges and obligations facing governments, which is why for more than 70 years the Act was found not to apply to any government, including tribal governments.

Unfortunately, the NLRB recently changed course. Even though it has an obligation under the United States' trust responsibility and President Obama's 2009

Memorandum on Tribal Consultation to consult with Tribes about the enforcement of federal policies that affect Indian Tribes, the Board has failed to consult and disregarded our views. At this point it is perfectly plain the Board will only stop if Congress tells it to.

Congress can do that by passing S. 248. S. 248 adds language to the Act to make it unmistakably say what was clear to everyone for decades: the NLRA does not apply to Indian Tribes. This is why S. 248 is necessary and why Congress must act now. I thank the Committee for the opportunity to submit this testimony for the record.

JOINT PREPARED STATEMENT OF THE CHICKASAW NATION, CHOCTAW NATION, FOREST COUNTY POTAWATOMI COMMUNITY, PUEBLO OF ISLETA, LITTLE RIVER BAND OF OTTAWA INDIANS AND PUYALLUP TRIBE OF INDIANS

I. Introduction

The enactment of S. 248, the Tribal Labor Sovereignty Act, is essential to protect tribal sovereign authority from the unlawful actions of the National Labor Relations Board ("Board"). S. 248 would do so by reaffirming that the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151–169, does not apply to Indian tribes exercising their sovereign authority in Indian country. Congress never intended to apply the NLRA to Indian tribes, as the text and legislative history of the Act (neither of which even mentions Indian tribes) confirm. Indeed, Congress did not intend to apply the Act to any sovereign. Instead, it exempted sovereign entities from the Act's definition of "employer," 29 U.S.C. § 152(2), in terms that include every domestic sovereign in the United States. Indian tribes are, of course, sovereign entities, and they too are exempt from the Act under § 152(2). And for decades the Board so held. *Fort Apache Timber Co.,* 226 N.L.R.B. 503 (1976). But in 2004, the Board did a complete turnabout, ruling that the NLRA applies to Indian tribes, and that the Board will decline to exercise jurisdiction over an Indian tribe only when it decides the tribe is acting as a sovereign. *San Manuel Indian Bingo & Casino,* 341 N.L.R.B. 1055 (2004). The Board has no authority to decide when a tribe is not a sovereign—under the NLRA or any other law. As the Supreme Court recent made clear, "the special brand of sovereignty the tribes retain—both its nature and extent—rests in the hands of Congress." *Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024, 2037 (2014).

S. 248 is also urgently needed because the Board's efforts threaten the self-determination policy's firm commitment to achieving tribal self-sufficiency through tribal economic development. Under the *San Manuel* decision, the Board claims that tribal governments are acting as sovereigns only when they "are acting with regard to . . . traditional tribal or governmental functions," not when they are engaged in what the Board calls "commercial" activity. 341 N.L.R.B. at 1063. Applying that test, the Board continues to rule that Indian gaming activity is "commercial" and therefore subject to the NLRA. *E.g., Chickasaw Nation,* 359 N.L.R.B. No. 163 (2013), *vacated & remanded sub nom. Chickasaw Nation v. NLRB,* Nos. 13–9578, 13–9588 (10th Cir. July 22, 2014); *Soaring Eagle Casino & Resort,* 361 N.L.R.B. No. 73 (2014), *on appeal sub nom. Soaring Eagle Casino & Resort v. NLRB,* Nos. 14–2405, 14–2558 (6th Cir. argued Apr. 29, 2015); *Little River Band of Ottawa Indians Tribal Gov't,* 361 N.L.R.B. No. 45 (2014), *enforcement petition docketed sub nom. NLRB v. Little River Band of Ottawa Indians Tribal Gov't,* No. 14–2239 (6th Cir. Sept. 26, 2014).

The *San Manuel* test is contrary to federal law because Indian tribes undertake economic development through their governments in the exercise of their sovereign authority, *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 335 (1983). And they retain their sovereign authority when they engage in economic activity unless Congress has abrogated that authority in clear terms. *See Bay Mills,* 134 S. Ct. at 2037. Congress did not do so in the NLRA. Furthermore, in *Bay Mills,* the Supreme Court declined to create a commercial activity exception to tribal sovereign immunity—the same distinction that the *San Manuel* test relies on—holding that "it is fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity." *Bay Mills,* 134 S. Ct. at 2037. If the Supreme Court will not make that distinction in the absence of clear congressional authorization neither can the Board.

Nevertheless, the Board asserts that Indian gaming is a "typical commercial enterprise," *San Manuel,* 341 N.L.R.B. at 1063. Here too, federal law holds otherwise. Indian gaming is a sovereign function. Congress enacted the Indian Gaming Regulatory Act to "provide a statutory basis for the operation of gaming *by Indian tribes as a means of promoting* tribal economic development, self-sufficiency, and *strong*

tribal governments," 25 U.S.C. § 2702(1) (emphasis added), and "a means of generating tribal governmental revenue," id. § 2701(1) (emphasis added). Prior to IGRA, the Supreme Court had reached the same conclusion, holding that Indian gaming furthers "the congressional goal of *Indian self-government*, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987) (citation omitted) (emphasis added), and emphasizing that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members," id. at 219. As one federal appellate court observed, in conducting gaming, "*[t]he Tribes . . . are engaged in the traditional governmental function of raising revenue. They are thereby exercising their inherent sovereign governmental authority*." *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n,* 829 F.2d 967, 982 (10th Cir. 1987) (citation omitted) (emphasis added).

S. 248 will stop the Board's unauthorized campaign to apply the NLRA to Indian tribes by reaffirming that Indian tribes, like all other sovereign entities in the United States, are exempt from the Act. S. 248 would do so simply by declaring that the definition of "employer" in the Act does not include "any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands . . . ." S. 248, § 2(1). Passage of S. 248 is critical to the protection of tribal self-government and to the tribes' pursuit of self-sufficiency through the traditional governmental function of raising revenue to operate their governments and provide services to their citizenry.

II. Congress Never Intended To Apply The NLRA To Indian Tribes, And Instead Exempted All Sovereign Entities From The Act

There is no basis on which the Board may seek to apply the NLRA to Indian tribes in the first place—Congress never even considered that possibility. It did, however, deliberately exempt all sovereign employers from the Act. Accordingly, there is absolutely no basis for the Board's claim that Congress delegated it authority to apply the NLRA to Indian tribes, much less the power to decide when Indian tribes are acting in their sovereign capacity and when they are not. Thin air will not support that claim. And as we show first, history makes that claim untenable.

A. In 1935, Congress Reaffirmed That Indian Tribes Are Sovereign Entities, With Inherent Sovereign Authority To Engage In Economic Development Activities To Enhance Tribal Self-Government.

The year before the NLRA was passed, Congress made the restoration of tribal self-government the cornerstone of federal Indian policy. In the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461–479, Congress reaffirmed that Indian tribes are sovereign entities, with inherent sovereign authority to govern their reservations, and committed the federal government to restoring tribal self-government through tribal economic development. President Roosevelt hailed the IRA as "embod[ying] the basic and broad principles of the administration for a new standard of dealing between the Federal Government and its Indian wards." Letter from President Franklin D. Roosevelt to Senator Burton K. Wheeler (April 28, 1934), S. Rep. No. 73–1080, at 3 (1934). And that "new standard of dealing" was desperately needed.

For decades prior to the enactment of the IRA, the Federal Government had been committed to the destructive allotment policy, which sought the "gradual extinction of Indian reservations and Indian titles," *Montana v. United States,* 450 U.S. 544, 559 n.9 (1981) (quoting *Draper v. United States*, 164 U.S. 240, 246 (1896)), and "the ultimate destruction of tribal government," *id.* Under that policy, tribal lands were allotted and the surplus sold to non-Indians, and the governmental institutions of Indian tribes had "very largely disintegrated or been openly suppressed" by the Interior Department. 78 Cong. Rec. 11,729 (1934) (remarks of Rep. Howard). Indeed, at that time "the Indian agent located upon an Indian reservation was a czar," as Senator Wheeler stated in the Senate debate on the IRA. *Id.* at 11,125.

The suffering of Indian tribes under the allotment policy was documented in the 1928 Meriam Report, which the Federal Government commissioned the Institute for Government Research to prepare to examine the status of American Indians. See Instit. for Gov't Research, *The Problem of Indian Administration* (Lewis Meriam et al. eds., 1928). The report, which provided much of the impetus for enactment of the IRA, found that: "[a]n overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the dominant white civilization." *Id.* at 3. Jobs were few, and economic development efforts were practically non-existent. An Indian "generally ekes out an existence through unearned income from leases of his land, the sale of land, per capita payments from tribal funds, or in exceptional cases through rations given him by the

government." *Id.* at 5. "Their education is usually slight, their knowledge of English poor, and their experience in business almost entirely wanting." *Id.* at 430.

Congress enacted the IRA in response to these conditions. As the Supreme Court would later observe, "[t]he overriding purpose of . . . [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari,* 417 U.S. 535, 542 (1974). To enhance self-government, the IRA authorized Indian tribes to adopt constitutions exercising "all powers vested in any Indian tribe or tribal council by existing law," as well as additional powers, including *inter alia,* the power to control the sale and disposition of tribal lands and tribal assets and to negotiate with federal, state, and local governments. 25 U.S.C. § 476(e). The IRA also recognized tribes' inherent sovereign authority to govern themselves under procedures of their own choice, whether specified in the IRA or not. Id. § 476(h). And it stopped any further allotment of tribal land. Id. § 461. To facilitate tribal economic development, the Act authorized the Secretary of the Interior to issue charters of incorporation authorizing Indian tribes to organize and operate business corporations, id. § 477, and established a revolving fund "for the purposes of promoting the economic development of . . . tribes and their members," *id.* § 470. Two years later (and thus one year after the NLRA was enacted), Congress extended the same machinery to Indian tribes in Oklahoma through the Oklahoma Indian Welfare Act of 1936 ("OIWA"), 25 U.S.C. § § 501–509.

The IRA and OIWA made emphatically clear that Indian tribes are sovereign entities possessing inherent sovereign authority, and they committed the federal government to enhancing tribal self-government through tribal economic development. It is absurd for the Board now to suggest that, at the very same time Congress adopted a "new standard of dealing" with the tribes that reaffirmed, restored and strengthened their sovereign status, Congress made Indian tribes the only sovereign entities in the United States that are subject to NLRA's private industrial labor regime—and that Congress did this bizarre about-face without whispering a word about it to anyone. In fact, Congress did nothing of the kind.

B. The NLRA's Text And Legislative History Plainly Show That Congress Did Not Apply It To Indian Tribes, And That the NLRA's Exemption for Sovereign Entities Applies To Indian Tribes

1. Indian tribes are not subject to the NLRA because its text and legislative history say nothing about Indian tribes.

The NLRA does not mention Indian tribes anywhere in its text or legislative history—not in the various drafts of the bill that become the NLRA, not in the congressional debates over its terms, and not in the hearings held and reports produced by Congress concerning the Act. In short, Congress never even considered applying the NLRA to tribes. That is hardly surprising, as the problems on which the NLRA was focused were far removed from those Congress had just addressed in the IRA. At the time of the NLRA, "congressional attention [was] focused on employment in private industry and on industrial recovery." *NLRB v. Catholic Bishop of Chi.,* 440 U.S. 490, 504 (1979) (citations omitted). The principle purpose of the NLRA was to "eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . " 29 U.S.C. § 151. The legislative history showed that Congress sought to address "an ever-increasing stoppage of the free flow of commerce between the several States and between this and other countries as a result of disturbances in some of our larger *industrial enterprises*." S. Rep. No. 73–1184, at 10–11 (1934), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act,* 1934 at 1111 (1949) [hereinafter NLRB Hist.] (emphasis added). The underlying concern was that the balance of power between private employers and employees tipped too far in favor of the employers, which had detrimental effects on commerce that had to be addressed, *see* 78 Cong. Rec. 3443 (1934) (statement of Sen. Wagner upon introducing S. 2926), *reprinted in* 1 NLRB Hist. at 15–16. To remedy these problems, Congress enacted the NLRA to address "the right of self-organization of employees in *industry* . . . " 79 Cong. Rec. 10,720 (1935) (statement of President Roosevelt upon signing S. 1958), *reprinted in* 2 NLRB Hist. at 3269 (emphasis added).

Not one word in the NLRA suggests that it was intended to affect the right of self-government of Indian tribes, and to limit, *sub silentio,* their inherent sovereign authority, which Congress had recognized just the year before in enacting the IRA. The contrary holding of *San Manuel* is therefore wrong and unsupportable.

2. Congress exempted sovereign entities from the Act, and because Indian tribes are sovereign entities, they too are exempt.

There is yet another reason that the Act does not apply to Indian tribes: Congress exempted sovereign entities in section 2(2) of the NLRA, 29 U.S.C. § 152(2). Sovereign entities were exempted from the NLRA right from the start, with little fanfare. Under the original bill, the term employer was defined to exclude "the United States, or any State, municipal corporation, or other governmental instrumentality . . . " S. 2926, 73rd Cong. § 3(2) (original Senate print, Mar. 1, 1934), *reprinted in* 1 NLRB Hist. at 2, and in the years leading up to 1935, Indian tribes were generally considered to be instrumentalities of the United States, *United States v. Rickert,* 188 U.S. 432, 437 (1903) (state taxation of Indian land barred because "[t]o tax these lands is to tax an instrumentality employed by the United States"). *See also,* Act of June 20, 1936, ch. 622, § 2, 49 Stat. 1542 (codified as amended at 25 U.S.C. § 412a) (declaring Indian homesteads "to be instrumentalities of the Federal Government"). A later version revised the sovereign exemption to state that the term employer "shall not include the United States, or any State or political subdivision thereof . . . " S. 1958, 74th Cong. § 2(2) (final print, July 5, 1935), *reprinted in* 2 NLRB Hist. at 3271. The sovereign exemption generated only modest attention. The Senate Report accompanying the original bill does not mention it, though it notes that the definition of "employer" is important. S. Rep. No. 73–1184, at 3 (1934), *reprinted in* 1 NLRB Hist. at 1102. *See also* S. Rep. No. 74–573, at 6 (1935), *reprinted in* 2 NLRB Hist. at 2305 (also omitting any discussion of the sovereign exemption).

The witness testimony on the issue confirms Congress's intent to exempt all governments from the Act, whether engaged in business activities or not. J.W. Cowper of John W. Cowper Co., Inc., complained that the exception for governmental bodies "may be reasonable enough if it applies purely to governmental agencies but where these governmental divisions are engaged in pursuits, competing with private enterprise, then there should be no exception and such agencies should be under the same restrictions as a corporation or private employer." *To Create A National Labor Board: Hearings Before the Comm. on Ed. & Labor on S. 2926,* 73d Cong. 295 (1934) (statement of John W. Cowper, President, John W. Cowper Co.), *reprinted in* 1 NLRB Hist. at 325. Objecting more broadly, the executive director of the International Juridical Association testified that his group could find "no reason why the United States should be exempted from the employers covered by the act and, therefore, urge the amendment of section 3 (2) by deleting the United States from the exemption." *Id.* at 1017 (brief of Isadore Polier, Exec. Dir., Int'l Juridical Ass'n), *reprinted in* 1 NLRB Hist. at 1055. But Congress neither deleted the exclusion nor limited it in the manner Mr. Cowper and Executive Director Polier urged. *See also Labor Disputes Act: Hearings Before the H. Comm. On Labor on H.R. 6288,* 74th Cong. 179 (1935) (statement of Francis Biddle, Chairman, NLRB), *reprinted in* 2 NLRB Hist. at 2653 (supposing that the reason governmental entities were excluded was so as not to "overload the bill").

Congress instead excluded all sovereigns from the Act. It did so by stating illustratively that "'employer' includes any person acting as an agent of an employer, directly or indirectly, but *shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . " 29 U.S.C. § 152(2) (emphasis added). The examples used in the text are not an exclusive list—the exemption applies to all domestic sovereigns, whether or not named in § 152(2), as the Board has long recognized (with the exception of its turnabout in the *San Manuel* decision). In its very first regulations, the Board so construed § 1A152(2) by recognizing the District of Columbia and all United States territories and possessions as exempt, though none are named in § 1A152(2). 29 C.F.R. § 102.7 ("The term *State* as used herein shall include the District of Columbia and all States, Territories, and possessions of the United States.") (emphasis added). And some 40 years after the NLRA was enacted, when the question of whether the Act applied to Indian tribes arose, the Board ruled that tribal governments, too, are exempt from the Act: "*it is clear beyond peradventure that a tribal council* such as the one involved herein—the governing body on the reservation—*is a government* both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts" and that "*the Tribal Council, and its self-directed enterprise on the reservation* that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act." Fort Apache, 226 N.L.R.B. at 506 (emphasis added) (footnotes omitted). The Board further explained that, just as the Court in *NLRB v. Natural Gas Utility District,* 402 U.S. 600, 604 (1971), had held that a utility district formed by private individuals was a political subdivision exempt under § 152(2) because it was administered by individuals responsible to public officials, "[s]o here we conclude that the Fort

Apache Timber Company is an entity administered by individuals directly responsible to the Tribal Council of the White Mountain Apache Tribe, hence exempt as a governmental entity recognized by the United States, *to whose employees the Act was never intended to apply*." *Id.* at 506, n.22 (emphasis added).

The courts, too, have recognized the broad "sovereign" exemption accorded under § 152(2), holding that governmental employers excluded by its terms include the Port Authority of New York and New Jersey, *Brown v. Port Auth. Police Superior Officers Ass'n,* 661 A.2d 312, 315–16 (N.J. Super. Ct. App. Div. 1995), the Commonwealth of Puerto Rico's Maritime Shipping Authority, *Chaparro-Febus v. Int'l Longshoremen Ass'n, Local* 1575, 983 F.2d 325, 329–30 (1st Cir. 1993), and the Virgin Islands Port Authority, *V.I. Port Auth. v. SIU de P.R.,* 354 F. Supp. 312, 312 (D.V.I. 1973). None of these entities are listed in § 152(2), all arguably engage in commercial activities, yet all have correctly been held to be exempt governmental employers.

That Congress never intended to apply the NLRA to sovereign entities, including Indian tribes, is confirmed by the 1947 amendments to the Act, enacted as the Labor Management Relations Act ("LMRA"), Pub. L. No. 80–101, 61 Stat. 136. The LMRA authorized labor organizations to sue employers in federal court to enforce collective bargaining agreements. 29 U.S.C. § 185(a). But in so doing, it did not abrogate the sovereign immunity of any government, tribal or otherwise, even though the sovereign immunity of Indian tribes was by then well established. *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 512 (1940). If Congress had viewed the NLRA as applicable to Indian tribes, or indeed any other sovereign, it would have waived their immunity to permit enforcement of collective bargaining agreements. That it did not do so only makes sense if the Act never applied to them in the first place.

Nevertheless, the Board ruled in *San Manuel* that Indian tribes are subject to the NLRA, insisting that because tribes are not named in § 152(2), they are subject to the Act. 341 N.L.R.B. at 1058. For the reasons just shown, that contention is wrong. Indeed, the Board's new position is actually done in by its own hand—its concession that neither the text nor the legislative history of the NLRA mention Indian tribes, *Sac & Fox Indus., Ltd.,* 307 N.L.R.B. 241 (1992), and its prior recognition that "the Act was never intended to apply" to Indian tribes, *Fort Apache,* 226 N.L.R.B. at 506 n.22.

III. Applying The NLRA To Indian Tribes Violates Federal Law and Abrogates The Inherent Sovereign Authority On Which Indian Tribes Rely to Pursue Self-Government And Self-Sufficiency Under The Self-Determination Policy

Indian tribes—with the strong support of Congress—are pursuing tribal self-government and self-sufficiency through economic development, including Indian gaming conducted under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § § 2701–2721. Since the self-determination policy was announced by President Nixon in 1970, Indian tribes have relied on their inherent sovereign authority to engage in economic activity to raise revenue to operate their governments and provide essential governmental services. And they have made significant progress—improving health and education services, building clinics, courthouses, and roads, and restoring the vibrancy of Indian communities.

The Board's effort to apply the NLRA to Indian tribes violates federal law because it interferes with tribal sovereign authority in the absence of clear congressional authorization. And the Board's *San Manuel* test compounds the illegality of its actions. Under that test, the Board claims authority to decide when Indian tribes are acting as a sovereign, and when they are acting as a commercial enterprise, and asserts exclusive jurisdiction over Indian tribes in all matters it deems to be commercial. But the Supreme Court has held that very distinction—between commercial and governmental activity—to be one that only Congress can make. *See Bay Mills,* 134 S. Ct. at 2037. Furthermore, in applying this test, the Board rejects the determination already made by Congress and the federal courts that Indian tribes engage in economic activity—including Indian gaming—as a sovereign function. Instead, the Board deems tribal gaming facilities, "typical commercial enterprise[s]." *San Manuel*, 341 N.L.R.B. at 1063. That test is contrary to federal policy and law, and imposing it on Indian tribes would abrogate their inherent sovereign authority, as we show below.

A. Congress And The Federal Courts Are Committed to The Pursuit of Tribal Self-Government And Self-Sufficiency Through Tribal Economic Development

1. Congress made tribal economic development a cornerstone of the self-determination policy.

Under the self-determination policy, Indian tribes are pursuing tribal self-government and self-sufficiency through the exercise of their inherent sovereign authority to engage in economic activity. In so doing, Indian tribes are raising revenue to operate their governments and provide essential governmental services. This is exactly how Congress intended that the self-determination policy would work. In announcing the self-determination policy, President Nixon declared that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91–363, at 7 (1970). Congress agreed, and in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450–450n, declared that "the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of the respective communities." 25 U.S.C. §450a(b). And since then Congress's support for the tribes' pursuit of self-sufficiency through tribal economic development has been steadfast. E.g., Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§3501–3506 (establishing Indian energy programs within the Department of Interior and the Department of Energy in order to "further the goal of Indian self-determination" and "assist consenting Indian tribes" in developing tribal energy resources); Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§4301–4307 ("the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster . . . economic self-sufficiency among Indian tribes").

The Supreme Court has given robust support to Congress' efforts in this arena. *See Cabazon,* 480 U.S. at 216–18 (describing "Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development" as "important federal interests," and listing statutes, regulations, and Presidential statements supporting self-determination through economic development, including through gaming); *Mescalero Apache Tribe,* 462 U.S. at 334–35 ("Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'") (citation omitted).

2. Congress and the courts have both determined that Indian gaming is a governmental activity, and that activity has significantly enhanced tribal self-sufficiency.

The most significant of the measures enacted by Congress to further tribal self-sufficiency is the Indian Gaming Regulatory Act of 1988 (IGRA). 25 U.S.C. §§2701–2721. IGRA authorizes Indian tribes to operate gaming on Indian lands "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," *id.* §2702(1); *see also* §2701(4) (defining these as principal goals of the Federal Indian policy), and "generating tribal governmental revenue," *id.* §2702(3). IGRA recognizes that Indian tribes have the "exclusive right to regulate Indian gaming" in their sovereign capacity, *id.* §2701(5), and provides a statutory basis for tribes to exercise that regulatory authority, *id.* §2702(2). That Indian tribes conduct gaming under IGRA in their sovereign capacity could not be clearer—indeed, IGRA expressly requires that Indian tribes enact ordinances which provide "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity" under the Act. *Id.* §2710(b)(2)(A), (d)(1)(A)(ii).

And even before IGRA was enacted, the Supreme Court had held that Indian gaming furthers "the congressional goal of *Indian self-government,* including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon,* 480 U.S. at 216 (citation omitted) (emphasis added), underscoring that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members," *id.* at 219. As one federal appellate court observed, in conducting gaming, "*[t]he Tribes . . . are engaged in the traditional governmental function of raising revenue. They are thereby exercising their inherent sovereign governmental authority*." *Indian Country, U.S.A.,* 829 F.2d at 982 (citations omitted) (emphasis added).

Tribes use the revenues from Indian gaming to fund governmental services. Indeed, IGRA requires that Indian tribes use net revenues from gaming "to fund tribal

government operations or programs; to provide for the general welfare of the Indian tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies . . . " 25 U.S.C. § 2710(b)(2)(B), (d)(1)(A)(ii). Indian tribes use gaming revenues to fund essential governmental functions, such as law enforcement, water treatment and sewage systems, road construction, education, housing, and resource management. Nat'l Gambling Impact Study Comm'n, *National Gambling Impact Study Commission Final Report* 6–14 to -15 (1999) (quoting tribal leaders' testimony to the Commission), available at *http://govinfo.library.unt.edu/ngisc/reports/6.pdf;* Ariz. Indian Gaming Ass'n, *Annual Report FY 2007 (2008),* available at *http://www.azindiangaming.org/images/annualreports/AIGA_AR07_LR.pdf. See Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) (IGRA makes tribes financial self-sufficient and "better positioned to fund their own sovereign functions, rather than relying on federal funding"). These funds enable tribes to fund, among other things, social services to tribal elders, native language preservation programs, suicide prevention programs for tribal youth, and college scholarships for tribal students. Sarah S. Pearson, Am. Youth Policy Forum, *Strengthening Indian Country Through Tribal Youth Programs* 9 (2009), available at *http://www.aypf.org/publications/documents/TYPReportfinal_000.pdf*; Kenneth W. Grant II et al., Native Nations Instit. for Leadership, Mgmt. & Policy & Harvard Project on Am. Indian Econ. Dev., *Social and Economic Consequences of Indian Gaming in Oklahoma* 15–24 (2003), available at *http://nni.arizona.edu/resources/inpp/2003_grant.et.al_JOPNA_social.economic.consequences.pdf*; Norimitsu Onishi, *With Casino Revenues, Tribes Push to Preserve Languages, and Cultures*, N.Y. Times, June 16, 2012, *http://www.nytimes.com/2012/06/17/us/chukchansi-tribe-in-california-pushes-to-preserve-language.html;* Beacon Econs. LLC, *Economic Impact Study: Measuring the Economic Impact of Indian Gaming on California* (2012), available at *http://www.cniga.com/20120625_CNIGA_Draft.pdf*. See Teresa Joy Clay, *Measuring the Impact of Reservation Gaming Revenues on Native American Education Achievement,* 21 J. of Pub. Budgeting, Accounting & Fin. Mgmt. 58, 62–63 (2009), available at *http://pracademics.com/attachments/article/761/Symp_Ar_2_Clay.pdf*; Jonathan B. Taylor, *The Economic Impact of Tribal Government Gaming in Arizona: Report 11* (2012) available at *https://www.azindiangaming.org/images/assets/economic-impact.pdf;* Press Release, NIGC, *2012 Indian Gaming Revenues Increase 2.7 Percent*, available at *http://www.nigc.gov/LinkClick.aspx?fileticket=Fhd5shyZ1fM=*.

No government can function without dependable revenues, and for tribes this means relying on revenues from tribal economic development—particularly Indian gaming—to fund their operations and the services they provide to their members. The earnings from tribal economic development activities are as essential to Indian tribes as sales, property, or income taxes are to States and local governments. "[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues.'" *Bay Mills,* 134 S.Ct. at 2043 (Sotomayor, J., concurring) (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts,* 36 Ariz. St. L.J. 137, 169 (2004)). "This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means." *Id.* More specifically, "States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources." *Id.* (citation omitted). Indian gaming is critical to filling this gap.

B. Under Settled Federal Law, Tribal Inherent Sovereign Authority Is Abrogated Only When Congress Clearly Intends That Result

If any change is to be made in the self-determination policy, or in the rights on which tribes rely to implement that policy, it is up to Congress—not the Board—to make that decision. As the Supreme Court very recently reaffirmed, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills,* 134 S. Ct. at 2030 (quoting *United States v. Wheeler,* 435 U.S. 313, 323 (1978)). To modify tribal powers, it must be shown that Congress intended that result, for "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 2031–32 (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58–60; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *United States v. Dion,* 476 U.S. 734, 738–39 (1986)).

The standards that apply to determine whether Congress has modified tribal powers are strict, as shown by the cases relied on by the Court in *Bay Mills.* The Indian Civil Rights Act, 25 U.S.C. ch. 15 (as amended), does not authorize actions for declaratory or injunctive relief against Indian tribes and will not be held to do so "unless and until Congress makes clear its intention to permit the additional intrusion

on tribal sovereignty that adjudication of such actions in a federal forum would represent . . . .'' *Santa Clara Pueblo*, 436 U.S. at 72. Statutory silence does not abrogate rights of tribal self-government because silence does not reflect congressional intent to do so. *LaPlante*, 480 U.S. at 17 (the general diversity statute, 28 U.S.C. § 1332, does not limit tribal rights of self-government because it ''makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government''). '''Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.''' *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 n.14 (1982)) (ellipses in original). And finally, ''Congress' intention to abrogate Indian treaty rights [must] be clear and plain,'' *Dion,* 476 U.S. at 738, which requires ''clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty,'' *id.* at 739–40.

Nothing in the NLRA satisfies these strict standards, for the Act says nothing at all about Indian tribes, and under settled law its silence leaves sovereign power intact. Accordingly, the Board's attempt to apply the Act to Indian tribes violates federal law. Whether to limit tribal sovereign authority is a decision for Congress to make, not the Board. *Bay Mills,* 134 S. Ct. at 2031–32.

C. Applying The NLRA To Indian Tribes Is Contrary To Federal Law And Doing So Under The San Manuel Test Would Abrogate Their Rights Of Self-Government

The test applied by the Board to determine whether to exercise jurisdiction over Indian tribes compounds the illegality of its actions. Under the *San Manuel* test, the Board decides, on a case by case basis, whether a tribal activity is a governmental function or a commercial activity, and it then asserts authority over any activity it deems to be commercial. *San Manuel,* 341 N.L.R.B. at 1063. The Board's reliance on that distinction usurps Congress's authority to decide such matters, and if allowed to go unchecked, the Board's assertion of authority will abrogate tribal sovereignty by interfering with tribal self-government and making the pursuit of tribal economic self-sufficiency dependent on the Board's permission. S. 248 is urgently needed to stop the Board from pursuing that result.

1. The commercial-governmental distinction the Board relies on in the San Manuel test violates federal law.

The *San Manuel* test relies on a distinction between commercial and governmental activity which is contrary to federal law. The Board claims that all ''commercial enterprises'' (whatever the Board determines they may be) are subject to the NLRA; and while ''traditional tribal or government functions'' may not be subject to the Act, that depends on how much ''leeway'' the Board decides to allow the tribe. *San Manuel,* 341 N.L.R.B. at 1063. The Board also asserts discretionary power to ''balance the Board's interest in effectuating the policies of the Act with the desire to accommodate the unique status of Indians in our society and legal culture.'' *Id.* at 1062. That test violates federal law because Congress and the Supreme Court have both determined that Indian tribes conduct gaming in their sovereign capacity. *See supra* at 16–19. Furthermore, if any such distinction were to be made, it could only be made by Congress. As the Supreme Court recently reaffirmed, ''[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress.'' Id. at 2037 (citations omitted). In *Bay Mills,* the Court held that it would not abrogate tribal sovereign immunity when a tribe engages in commercial activity because to do so would usurp Congress' authority. 134 S. Ct. at 2039. If the Supreme Court will not make this distinction, neither can the Board.

2. Applying the NLRA to Indian tribes would deny them the right to determine their own form of government.

Furthermore, applying the commercial-governmental distinction to tribal activity plainly abrogates tribal inherent sovereign authority. Indian tribes have the power to structure their governments as they see fit, *Santa Clara Pueblo,* 436 U.S. at 62–64, and ''to undertake and regulate economic activity within the reservation,'' *Mescalero Apache Tribe,* 462 U.S. at 335, including gaming activity, 25 U.S.C. § 2710; *Cabazon,* 480 U.S. at 221–22. Under this authority, a tribe may engage in economic activity through a tribal agency or department, *see, e.g., Cabazon,* 480 U.S. at 204–05 & n.2, a tribal enterprise, *see, e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 139 (1980), or a corporation chartered and owned by the tribe, *see, e.g., Inyo Cnty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony,* 538 U.S. 701, 704 (2003). In making that choice, the tribe does not relinquish any of its sovereign authority—only Congress can modify tribal sovereign authority,

which requires a showing of clear congressional intent to impose that result. *See supra* at 20–21. The NLRA does not do so. *See supra* at 4–13.

The Board's test is also completely unworkable. Under that test, a tribe cannot know whether a particular activity is "commercial" or "traditional" unless and until the Board decides that question, which the Board would not do so unless and until an unfair labor practice charge was filed with the Board under 29 U.S.C. § 160(b). [1] And even after the Board made its decision, a change in the activity could raise the question anew. To illustrate, many tribes provide a variety of medical services to their citizenry. As health care needs change, new services may be required—assisted living facilities or eyeglasses may be needed for elders, for example—would such a change mean that a previously "traditional" activity had become "commercial?" Or might the Board decide that the new program was "commercial" but existing programs remain "traditional?" And what if a tribe decided that in some instances it needed to charge a fee to help defray the cost of care, or if the composition of its workforce changed? A tribe could not know the answer to these questions unless and until a complaint was filed and adjudicated by the Board.

And splitting the tribal government in half—as the Board's test would do—would just be the beginning. The Board would then have authority to reorganize employees engaged in any activity it deems "commercial" into bargaining units under 29 U.S.C. § 159(b). In making this determination, the Board would have no obligation to respect the tribe's governmental structure, or organizational decisions, whether reflected in its constitution, laws, regulations, or policies. For example, different units might be recognized within each department or agency, or all persons doing the same kind of work for the tribe might comprise one unit, or perhaps some combination of the two. And each unit could demand that the tribe negotiate a collective bargaining agreement with it, and it alone. *Id.* § § 157, 159(a).

Imposing such a process on the tribe would abrogate its right to structure its government as it chooses, *Santa Clara Pueblo,* 436 U.S. at 62–64, by subjecting each and every such decision to review by the Board to determine whether an activity was or was not governmental, it would abrogate the tribe's right "to undertake and regulate economic activity," *Mescalero Apache Tribe,* 462 U.S. at 335, by conditioning the exercise of that right on the application of the NLRA to so-called commercial activity, and it would violate the tribe's right to make its own laws and be ruled by them, *Williams v. Lee,* 358 U.S. 217, 220 (1959), by allowing the Board to ignore tribal law in recognizing bargaining units.

3. The right to strike would make a tribe's ability to meet its governmental responsibilities dependent on its agreeing to meet the demands of tribal employees.

Indian tribes also have the power to determine the terms on which they will employ members and nonmembers to fulfill the responsibilities of tribal government. This power is a lesser included element of the power to exclude non-Indians from the reservation. As the Supreme Court has made clear: "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ." *Merrion,* 455 U.S. at 144. *Accord Morris v. Hitchcock,* 194 U.S. 384 (1904). That power is not extinguished when a tribe engages in commercial activity. *Merrion,* 455 U.S. at 146–47. Instead it "governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.* at 148. Tribal authority over employment relations is also an aspect of tribal inherent sovereign authority, under which "[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 dealings, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565–66 (citations omitted). In the exercise of these powers, a tribe plainly has au-

[1] A person initiates an unfair labor practice proceeding by filing a complaint with a NLRB Regional Director. 29 U.S.C. § 160(b); 29 C.F.R. § 101.2. The Regional Director allows the parties to seek settlement by submitting to him or her legal arguments, statements of fact, offers of settlement, or proposals of adjustment. 29 C.F.R. § 101.7. If there is no settlement, the Regional Director refers the case to an Administrative Law Judge (ALJ), who holds an adversarial hearing between the charged party and the NLRB's General Counsel. *Id.* § 101.10. See 29 U.S.C. § 160(b) (authorizing the Board's "designated agent" to take evidence at a complaint hearing). The ALJ issues a decision on the case, which is filed with the Board. 29 C.F.R. § 101.11. The parties can file exceptions to the ALJ's decision with the Board, *id.* § 101.11(b), which then sits like an appellate court in review of the ALJ decision, eventually filing its own opinion and order on the case, id. § 101.12(a); 29 U.S.C. § 160(c). The Board's order can be appealed to an appropriate federal circuit court by "any person aggrieved" by the order. 29 U.S.C. § 160(f); 29 C.F.R. § 101.14.

thority to prohibit a strike by its employees in order to ensure its ability to continue to operate its government and to meet its responsibilities to Indians and non-Indians who live, work and visit the reservation.

If the NLRA applied to Indian tribes, it would divest the tribes of that power by securing to its employees the right to strike under section 7 of the NLRA, 29 U.S.C. § 157. A strike at a tribal facility engaged in revenue raising activity would stop the generation of revenue until the end of the strike or until the tribe was able to replace all of its striking employees.[2] A strike—or even the threat of a strike—would put in jeopardy a tribe's ability to meet its governmental responsibilities to Indians and non-Indians who live, work, and visit the reservation. And it would give the bargaining representatives of the tribe's employees enormous power—a tribe would have to acquiesce to their demands or abdicate its responsibilities as a government. Unlike a private business, a government cannot wait out a strike. Its responsibilities to protect public safety and property and provide other essential government services are constant. The only way to prevent strikes would be for the tribe to negotiate a no-strike clause in a collective bargaining agreement—but at what price? How much is a government's ability to operate worth? In plain terms, the right to strike would violate the right of self-government and the power to exclude by vesting the right to decide whether the government could operate in the hands of the bargaining representatives of its employees.

President Franklin Roosevelt recognized and addressed exactly this problem in a letter to the President of the National Federation of Public Employees, written shortly after the NLRA was enacted. The President stated that "[u]pon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities." Letter from President Franklin D. Roosevelt to Luther C. Steward, President, Nat'l Fed'n of Fed. Emps. (Aug. 16, 1937), available at *http://www.presidency.ucsb.edu/ws/index.php?pid=15445* ("1937 Roosevelt Letter"). But "a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied." *Id.* President Roosevelt called such action "unthinkable and intolerable." *Id.* The President was correct, and his words apply equally to the public employees of Indian tribes.

4. The collective bargaining process could require the tribe to negotiate the terms on which its sovereign enactments would apply to its employees.

If the NLRA applied to Indian tribes, they would also be required to bargain with all Board-recognized units of employees over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). That is simply not feasible. Like other government employers, the "terms and conditions" of employment by Indian tribes are typically set by duly enacted laws and regulations, which bind employees and government agency officials alike. Agency officials have no authority to bargain over the application of tribal laws and regulations, or to agree to make changes in those laws, much less to do so on different terms with different bargaining units. President Roosevelt understood this as well. "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service." 1937 Roosevelt Letter. The employer is the "whole people, who speak by means of laws enacted by their representatives in Congress." *Id.* As a result, administrative officials and employees are "governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters." *Id.*

If the collective bargaining process that is set forth in the NLRA were applicable to Indian tribes, any of the tribe's laws affecting employment could be the subject of a collective bargaining demand, even laws and regulations that are required by federal law. For instance, IGRA requires that Indian tribes implement ordinances to require background checks, 25 U.S.C. § 2710(b)(2)(F)(i), and licensing, *id.* § 2710(b)(2)(F)(ii)(I), of employees. If the tribe refused a request for collective bargaining over that ordinance—or any other tribal law—it would be up to the Board to determine whether the request fell within the definition of "terms and conditions" under § 158(d) of the Act; if so, collective bargaining would be required. In collectively bargaining over such terms, tribes would be placed in the intolerable position

[2] Replacing employees can be a long and arduous process. Tribes must comply with their own laws regarding hiring practices, including any applicable ordinances that require preference be given to tribal members in hiring. Tribes engaged in gaming activities must also comply with IGRA, which requires tribes to conduct background checks and license many employees of their gaming facilities. 25 U.S.C. § 2710(b)(2)(F).

of bargaining to keep their own laws in force and intact. This converts tribal laws to a negotiating position—nothing more.

If the Board determined that such laws interfered with collective bargaining rights under 29 U.S.C. § 158(a)(1), or were discriminatory under § 158(a)(3), it could strike down even strike Indian-preference-in-employment laws, and drug and alcohol testing laws. Indian preference in employment has long been recognized by the Supreme Court as an effective tool to further self-governance. *See Mancari,* 417 U.S. at 535. And drug and alcohol testing are issues that must be considered by a tribe in making decisions on how to protect its employees' health and safety as well as the integrity of Indian gaming. *See* 25 U.S.C. § 2702(2) (a primary purpose of IGRA is to assure that Indian gaming is conducted fairly and honestly). If the Board has jurisdiction over tribal governments, the Board could effectively invalidate such laws.

And finally, any administrative or judicial decision of the tribe that resolved an employee dispute would be subject to review by the Board if the employee filed an unfair labor practice charge under 29 U.S.C. § 160(b). The Board would then determine whether enforcement of the decision constituted an "unfair labor practice." *Id.* Subjecting tribal enactments to review by the Board is a violation of the tribe's right to make its own laws and be governed by them. Tribes enact and enforce laws governing the reservation and the operation of their governments pursuant to their sovereign authority. *Santa Clara Pueblo,* 436 U.S. at 67. *See Wheeler,* 435 U.S. at 322. Subjecting tribal law to review in another sovereign's tribunals displaces that authority. *Santa Clara Pueblo,* 436 U.S. at 67. Displacing tribal court authority over areas in which the tribe has jurisdiction, including commercial relations between members and non-members, "undermine[s] the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams,* 358 U.S. at 222. Such a divestment of tribal sovereign authority can only occur when Congress expressly permits it, *see supra* at 20–21, which Congress has not done here. *See supra* at 4–13. Even if the Board's decision in such a case was ultimately overturned in federal court on appeal, the tribe would be subjected to years of costly litigation in order to secure that determination. Many tribes simply cannot afford that expense.

And at the end of the collective bargaining process, the tribe would be subject to a *de facto* statute—the collective bargaining agreement—which would govern all conditions of employment, superceding any inconsistent tribal laws, and that agreement would be enforceable only by the Board under section 10(a) of the Act, 29 U.S.C. § 160(a). This flips tribal sovereignty upside-down. It transforms tribal ordinances into the first offer in a negotiation with private actors. It gives bargaining representatives the power to pick and choose the tribal laws to which they will agree, and the amendments to those laws which they will require. And it gives the Board power to void tribal laws. These impacts would deprive Indian tribes the right to make their own laws and to be governed by them, *Williams,* 358 U.S. at 220.

IV. S. 248 Addresses The NLRB's Overreach And Recognizes Tribal Authority

S. 248 would amend section 2(2) of the NLRA, 29 U.S.C. § 152(2), to reaffirm that the Act does not apply to "any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands . . . ." S. 248 § 2(1). Doing so would not create a new exception under the NLRA. Rather, it would reaffirm the understanding that Congress had when it enacted the NLRA—that it does not apply to Indian tribes—and restore a longstanding statutory exemption for Indian tribes that the Board has only recently—and erroneously—abandoned. In so doing, S. 248 would prevent the Board from misusing its authority under the Act to interfere with tribal self-government and sovereign authority.

Congress before has enacted laws to recognize inherent tribal sovereign authority when a judicial ruling applied federal law in a manner that restricted tribal sovereignty. In *Duro v. Reina,* 495 U.S. 676 (1990), the Supreme Court ruled that an Indian tribe's courts lacked criminal jurisdiction over nonmember Indians. Congress subsequently amended the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(2), to make clear that Indian tribes have inherent sovereign authority to exercise criminal jurisdiction over all Indians. And the Supreme Court upheld Congress's action in *United States v. Lara,* 541 U.S. 193 (2004). Clearly, Congress has the power to remove restrictions on inherent sovereign authority imposed by a court, or an agency, or by a statute.

Similarly, in the Violence Against Women Reauthorization Act of 2013, § 904(b), Pub. L. No. 113–4, 127 Stat. 54, 121–22 (codified at 25 U.S.C. § 1304(b)), Congress recognized that, subject to certain procedural requirements, an Indian tribe has in-

herent sovereign authority to exercise criminal jurisdiction over non-Indians who commit crimes of domestic violence against Indians. In enacting this law, Congress lifted a restriction on tribal inherent sovereignty over non-Indians imposed by the Supreme Court in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). So, even if the NLRA gave the Board the legal authority to place limitations on inherent tribal sovereign authority—and it does not—Congress can remove those restrictions and restore the full breadth of tribal sovereignty, as it has done in other contexts.

Congress has the authority—and, we respectfully submit, under the federal trust responsibility, the duty—to enact S. 248 to protect Indian tribes' inherent authority to regulate and engage in economic activity, to regulate those entering upon tribal lands, and to administer tribal governments that are answerable to the tribal citizenry, rather than employees' bargaining representatives. Doing so will enable tribal governments to continue relying on revenues from tribal enterprises to fund essential governmental services. Finally, it will prevent the Board from nullifying tribal law and denying recognition to tribal judicial and administrative fora over employment matters.

In short, S. 248 should be enacted to protect tribal sovereignty from an entity—the Board—that claims the right to decide for Congress when Indian tribes are and are not sovereign.

PREPARED STATEMENT OF HON. BO MAZZETTI, CHAIRMAN, RINCON BAND OF LUISEÑO INDIANS

Introduction

Mr. Chairman and Members of the Committee, my name is Bo Mazzetti. I serve as Chairman of the Rincon Band of Luiseño Indians ("Rincon Band"), one of five elected members of the Rincon Band Tribal Council. On behalf of the Rincon Band, I would like to thank you for allowing me to submit this written testimony regarding S. 248, the "Tribal Labor Sovereignty Act of 2015" and its critical importance for the preservation of the sovereignty of the Rincon Band of Luiseno Indians and other Tribal governments nationwide.

About The Rincon Band And Harrah's Southern California Resort

The Rincon Band of Luiseño Indians governs a 5,000-acre reservation in Valley Center, and has 500 plus members. Established in 1875, the Rincon Band is a sovereign government, recognized by the U.S. Constitution, and federal government. A democratically elected tribal council has the executive, legislative, and legal authority to protect and promote the welfare of the tribal members and lands with powers equal to a city, county, or state. The Rincon Band owns Harrah's Resort Southern California, a gaming facility that supports approximately 1,200 jobs in North San Diego County, with a total of $98 million in annual labor income and $17.5 million in tax revenues to state and local governments. The profits from Harrah's Resort Southern California and other commercial enterprises are used to provide services such as police and environmental protection, health care, senior, youth and cultural programs, economic development and a tribal court. The tribal government also funds a tribal fire department, ambulance and paramedic unit, as well as increased Sheriffs' shifts that service the reservation and neighboring communities. Rincon's tribal enterprises are significant contributors to the North San Diego County economy, through job creation, purchase of local products and services, and tax generation. Annual community donations to regional non-profits support quality of life programs. The tribal council consists of Chairman Bo Mazzetti, Vice Chairwoman Stephanie Spencer, and Council Members Steve Stallings, Laurie E. Gonzalez and Alfonso Kolb, Sr.

The National Labor Relations Act and Tribal Governments

Congress expressly excluded federal and state governments from collective bargaining or related rights protected by the National Labor Relations Act of 1935 (NLRA). For many years after enactment of the NLRA, the National Labor Relations Board (NLRB) included Indian tribal governments within the NLRA's government exemption until *San Manuel Indian Bingo & Casino v. NLRB* in 2007. In that case, the NLRB abandoned its decades-long position on the exemption of tribal governments from the definition of employer without any clear expression from Congress to do so in the text of the NLRA. Adopting S. 248 would confirm that Indian tribal governments are sovereigns with retained rights to self-government over their members and territory, not private employers subject to the NLRA.

Conflicts Between the NLRA and the Rincon Band TLRO

In the late 90's, during gaming compact negotiations, the issue of labor relations was critical to the State of California. Discussions on that issue ultimately resulted in several Tribal governments, including the Rincon Band of Luiseño Indians, consenting to a Tribal Labor Relations Ordinance (TLRO) which was mandated by the 1999 Proposition 1A Compact. At the conclusion of litigation in *Rincon Band of Luiseño Indians v. Brown,* the TLRO was later extended into the Rincon Band Secretarial Procedures issued on February 8, 2013 by the Secretary of the Interior.

With numerous lawsuits pending in the Second, Sixth, Tenth, D.C. and Ninth Circuits, on the issue of the NLRA applicability to Indian tribal governments, the Rincon Band submitted to the Assistant-Secretary of Indian Affairs proposed amendments to the TLRO because it is not consistent with the NLRA. These inconsistencies establish a conflict between two co-equal federal frameworks that places the Rincon Band gaming operation at greater risk of non-compliance than other tribal governments. Since submission on May 7, 2014, the proposed amendments are still pending approval by the Assistant-Secretary of Indian Affairs.

The purpose of the proposed amendments are twofold, to: (1) minimize the scope of future litigation that might possibly occur with the NLRB by amending certain provisions of the TLRO that are inconsistent with the rights granted to employees and unions under the NLRA; and, (2) position the Rincon Band to successfully defend an NLRB legal challenge by amending the dispute resolution provisions without conceding the Rincon Band's tribal sovereignty and right to self-government to the jurisdiction of the NLRB, an institution without a shred of competence and expertise in the field of federal Indian law. The proposed amendments eliminate key differences between the TLRO and the NLRA with respect to the rights of employees to organize and constrain the potential application of the NLRA to the Rincon Band under the particular framework of the TLRO in the Secretarial Procedures.

TLRO Provisions Proposed for Amendment

The amendments revise provisions of the TLRO that appear to substantively deviate from the NLRA. First, the scope of employee exemptions under the TLRO is too broad to survive an NLRB challenge. Generally, the NLRA does not cover government employees, agricultural workers, independent contractors and supervisors. The existing TLRO exempts five classes of employees from the application of the TLRO.[1] The amendments reduce this class of five to three by deleting cage workers and dealers because under the NLRA neither class of worker would be exempt. If approved by the Assistant-Secretary, this proposed revision would make this provision of the TLRO consistent with the NLRA.

Second, union access to gaming employees under the TLRO has been revised to be consistent with the "reasonable" access requirement of the NLRA. The existing TLRO mandates union access to employee break rooms and lockers and allows employees to post written materials therein.[2] Under the NLRA, employers are required to provide unions reasonable access to employees to accommodate the exercise of their Section 7 rights.[3] These proposed revisions align the TLRO with the NLRA by imposing reasonable time and place restrictions with respect to union accessibility to gaming employees and posting of written materials in non-work areas.

Third, the TLRO provides a right to strike only in the event of a collective bargaining impasse.[4] The TLRO's blanket ban on strikes and boycotts under any other circumstance would likely violate the NLRA because the right is not qualified by the unlawful purposes proscribed by the NLRA.[5] If approved by the Assistant-Secretary, the amendments proposed for this section of the TLRO includes those actions proscribed in the NLRA.[6]

Fourth, the TLRO establishes four levels of dispute resolution proceedings. Any disputes arising under the TLRO must first be heard by a designated tribal body (e.g., Tribal Council or Grievance Board) before a second-level appeal can be made to the Tribal Labor Panel, or a thirdlevel of appeal can be lodged with the Tribal Court or a fourth-level of appeal can be filed in federal court.[7] The proposed amendments eliminate distinctions between the types of cases subject to dispute resolution and streamline the dispute resolution process by reducing the four levels of dispute

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[1] § 2(a) of the TLRO exempts: (1) supervisors, (2) gaming commission, (3) security, (4) cage operators, and (5) dealers.
[2] § 8 of the TLRO, Access to Eligible Employees.
[3] *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).
[4] § 11 of the TLRO, Collective bargaining impasse.
[5] § 11 of the TLRO, Collective bargaining impasse.
[6] 25 U.S.C. § 158(b)(4)(ii)(A), (B) and (D).
[7] § § 13(b), (c) and (d) of the TLRO.

resolution to three by eliminating the requirement for a proceeding before the Tribal Council. When the TLRO was enacted, the Rincon Tribal Court did not exist. In place of the Tribal Council, the proposed revisions establish the Tribal Labor Panel, a mutually selected group of 3 arbiters, as the first level of dispute resolution with second and third level rights of appeal to the Tribal Appellate Court and federal court. The TLRO's dispute resolution provisions manifest the exercise of tribal sovereignty and the right to self-government by a modern tribal government. And, even though the TLRO dispute resolution structure conflicts with that of the NLRA, which would establish the NLRB as the exclusive arbiter of disputes, neither the Tribe nor the Department of the Interior should amend the TLRO to jettison these fundamental attributes of tribal governance in favor of an institution, such as the NLRB, that is without any institutional competency or expertise in applying principles of federal Indian law.

Summary

Adopting S. 248 removes the risk that the NLRB could find that the Rincon Band's compliance with the TLRO constitutes an unfair labor practice under the NLRA. For the Rincon Band, S. 248 provides certainty that commercial activity and labor relations on the Rincon Reservation will be exclusively governed by the TLRO and the Secretarial Procedures framework, amended or not. Passage of S. 248 would protect tribal sovereignty by clarifying congressional intent to include tribal governments within the government exemption of the NLRA and end litigation pending in the Second, Sixth, Tenth, D.C. and Ninth Circuits on this issue.

The Rincon Band respectfully requests that Congress enact S. 248 and confirm that Tribal governments possess status equivalent to the federal government, states and their political subdivisions. S. 248 would provide a clear statement from Congress that tribal governments are exempt from the NLRA consistent with two centuries of Federal Indian policy of congressional support for tribal sovereignty, the right to self-government and self-determination.

Mr. Chairman and Members of the Committee, I thank you for your time and consideration.

PREPARED STATEMENT OF HON. THOMAS BEAUTY, CHAIRMAN, YAVAPAI-APACHE NATION

On behalf of the Yavapai-Apache Nation, I appreciate the opportunity to provide written testimony in support of S.248, the Tribal Labor Sovereignty Act of 2015. The Yavapai-Apache Nation ("Nation") is a rural tribe near Camp Verde, Arizona, approximately sixty miles north of the Phoenix metropolitan area. The Nation uses gaming revenues from its gaming operation, Cliff Castle Casino-Hotel, to develop its communities, provide educational, social and economic services to tribal members and improve the quality of life on the reservation. Passage of S.248 would respect and promote tribal sovereignty by affirming the rights of tribal governments to determine their own labor practices on their own lands and provide parity with other government employers.

The 1935 National Labor Relations Act ("NLRA") excludes federal, state and local government employers from its reach. Although the NLRA does not expressly exclude tribal government employers, the National Labor Relations Board ("NLRB") respected the sovereign status of tribal government employers for nearly seventy years before reversing course in 2004 in its decision in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004). Since then, the NLRB has been aggressively asserting jurisdiction over tribal labor practices when it determines tribal government employers are acting in a "commercial" rather than "governmental" capacity – an analysis it does not apply to state or local government employers.

Passage of S.248 would prevent unnecessary and unproductive overreaching by the NLRB into the sovereign jurisdiction of tribal governments by amending the NLRA to expressly treat tribal government employers the same as it treats state and local government employers. In addition, it would provide certainty and clarity to ensure that tribal laws relating to labor practices would be respected.

For these reasons, the Nation supports S.248 and it is our hope it can be quickly approved by the Committee on Indian Affairs and the full Senate.

White Earth Reservation Tribal Council
P.O. Box 418
White Earth, Minnesota 56591

May 12, 2015

The Honorable John Barrasso, Chairman
The Honorable Jon Tester, Ranking Member
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: White Earth Nation Position on S. 248 "Tribal Labor Sovereignty Act of 2015"

Dear Chairman Barrasso and Ranking Member Tester:

Please accept this letter on behalf of the White Earth Reservation Tribal Council (RTC) in support of S. 248, the "Tribal Labor Sovereignty Act of 2015." The White Earth Nation supports the purpose of the legislation to clarify that the reach of the National Labor Relations Act (NLRA) does not extend to tribally owned and operated enterprises or institutions on tribal lands.

The White Earth RTC firmly believes that the omission of "tribal governments" from the list of NLRA exempt governments, including federal, state and local governments, was an oversight. The purpose of the exemption for governments in the NLRA is an acknowledgment that governments have significantly different considerations in how they handle their operations compared to private enterprise. Governments need flexibility in meeting their responsibility to their citizens. Thus, the NLRA

left it to governments to best determine the laws that should govern their employee relations. Tribal governments face the same considerations as other governments when it comes to employee relations. Therefore, the NLRA should treat tribal governments the same as federal, state and local governments.

S. 248 proffers a fix to the National Labor Relations Board's (NLRB) faulty 2004 interpretation that the NLRA applies to tribal employers in its *San Manuel Casino & Bingo* decision. 341 N.L.R.B. 1055 (2004). Up until the 2004 *San Manuel* decision, the NLRB did not apply the NLRA to on-reservation tribal employment. However, in 2004, the NLRB changed its interpretation and drew a distinction between employment that is "governmental" or necessary for sovereignty, and conduct that is "commercial" in nature, or primarily for profit-making.

The White Earth Nation is charged with providing a full-service government to its citizens, including health clinics, human services programming, education, housing, roads, land management, public works, and court services. We must supplement and provide funding for virtually every program we operate as a government. As such, we also operate several tribal enterprises including a casino, a construction management service, a building supply company, gas stations and a business products store. These enterprises provide necessary funding for our tribal government.

Unlike federal, state and local governments, we cannot cultivate a sufficient tax base with the patchwork and restricted jurisdiction imposed by federal law. Furthermore, we cannot develop a comprehensive on-reservation regulatory system including fees and fines under existing federal policy and current case law. Our only meaningful alternative to fund our

essential governmental services necessary to operate our sovereign government is to engage in what the NLRB considers "commercial" activities. Given that these activities are completely necessary for the funding, operation and continued viability of the tribal government itself, drawing a distinction between "governmental" and "commercial" activities serves no purpose other than to ultimately undermine tribal sovereignty itself.

The NLRB has not drawn this distinction between "governmental" and "commercial" activities for state and local governments that engage in many of the same "commercial" activities as the White Earth Nation. The City of Mahnomen, Minnesota owns and operates a municipal liquor store. The White Earth Nation owns and operates a gas station one block away. Both operations are inherently "commercial" in nature. Both operations fund essential governmental services. Yet one is within the jurisdiction of the NLRB and one is not.

The White Earth Reservation Tribal Council implores Congress to speedily adopt S. 248. This measure is necessary to support tribal sovereignty and will simply place sovereign tribal governments on parity with local, state and federal governments. Finally, S. 248 serves only to clarify that the NLRA will have the same interpretation regarding tribal governments as it did for the nearly seventy years prior to the *San Manuel* decision.

Thank you for the opportunity to offer White Earth's position on this important matter.

Sincerely,

Erma Vizenor, Chairwoman
White Earth Nation

April 29, 2015

Hon. John Barrasso, Chairman
Hon. Jon Tester, Vice Chairman
Senate Committee on Indian Affairs
Hart Senate Office Building
Washington, DC

Dear Chairman Barrasso and Vice Chairman Tester:

We, the undersigned Indian tribal nations, tribal corporations, trade associations and state and local chambers of commerce, write in strong support of S. 248, the "Tribal Labor Sovereignty Act of 2015," which would respect and promote tribal sovereignty by affirming the rights of tribal governmental employers to determine their own labor practices on their own lands.

In 1935, the National Labor Relations Act (NLRA) was enacted to ensure fair labor practices, but excluded federal, state, and local governmental employers from its reach. Though the Act did not expressly treat Indian tribes as governmental employers, the National Labor Relations Board (NLRB) respected the sovereign status

of tribal governmental employers for close to seventy years before reversing course in 2004.

Since its decision in *San Manuel Indian Bingo* (341 NLRB No. 138, 2004), the NLRB has been aggressively asserting jurisdiction over tribal labor practices when it determines tribal government employers are acting in a "commercial" rather than a "governmental" capacity—an analysis it does not apply to state or local government employers.

S. 248 builds upon a principle that has been amply demonstrated by Indian tribes across the country: when tribal sovereignty is respected and acknowledged, economic success follows. S. 248 would prevent an unnecessary and unproductive overreach by the NLRB into the sovereign jurisdiction of tribal governments. By amending the NLRA to expressly treat tribal government employers and their enterprises and institutions the same as it treats state and local government employers, S. 248 would provide certainty and clarity to ensure that tribal ordinances relating to labor practices would be respected. This approach would best meet the needs of the tribes and the American business community more generally.

The undersigned groups strongly support S. 248, which would build upon recent congressional actions affirming tribal sovereignty such as the enactment of the Tribal General Welfare Exclusion Act in September, 2014. We urge you to support this important bill and to work towards its swift passage.

Sincerely,

American Indian Chamber of Commerce of South Carolina (SC)
American Indian Infrastructure Association (WY)
Arctic Slope Native Association (AK)
Arctic Slope Regional Corporation (AK)
Arizona Chamber of Commerce and Industry (AZ)
Battle Creek Area Chamber of Commerce (MI)
Big Valley Band of Pomo Indians of the Big Valley Rancheria (CA)
Brainerd Lakes Chamber of Commerce (MN)
Chickasaw Nation (OK)
Choctaw Nation of Oklahoma (OK)
Confederated Tribes of Siletz Indians (OR)
Confederated Tribes of the Chehalis Reservation (WA)
Confederated Tribes of the Colville Reservation (WA)
Connecticut Business and Industry Association (CT)
Diné Development Corp a wholly owned Navajo Nation business (AZ, NM)
Durango Chamber of Commerce (CO)
Greater Flagstaff Chamber of Commerce (AZ)
Ho-Chunk Nation (WI)
Jamestown S'Klallam Tribe (WA)
Little River Band of Ottawa Indians (MI)
Mashantucket Pequot Tribal Nation (CT)
Minnesota American Indian Chamber of Commerce (MN)
Mohegan Tribe of Connecticut (CT)
Muscogee (Creek) Nation (OK)
National Center for American Indian Enterprise Development (AZ)
National Congress of American Indians (DC)
National Native American Bar Association (AZ)
National Native American Chamber of Commerce (MO)
Native American Contractors Association (DC)
Nez Perce (ID)
Norman Chamber of Commerce (OK)
Oklahoma Indian Gaming Association (OK)
Pechanga Band of Luiseño Indians (CA)
Penobscot Indian Nation (ME)
Prairie Island Indian Community (MN)
Quapaw Tribe of Oklahoma (OK)
Red Cliff Band of Lake Superior Chippewa Indians (WI)
Rincon Band of Luiseño Indians (CA)
Rocky Mountain Indian Chamber of Commerce (NE)
Rocky Mountain Tribal Leaders Council (MT)
Saginaw Chippewa Indian Tribe (MI)
San Diego East County Chamber of Commerce (CA)
Sault Ste. Marie Tribe of Chippewa Indians (MI)
Seldovia Village Tribe (AK)
Shingle Springs Band of Miwok (CA)
Soboba Band of Luiseño Indians (CA)
Southern Ute Indian Tribe (CO)

Standing Rock Sioux Tribe (ND, SD)
Sycuan Band of the Kumeyaay Tribe (CA)
The Chamber Grand Forks/East Grand Forks (ND, MN)
TwinWest Chamber of Commerce (MN)
U.S. Chamber of Commerce (DC)
United South and Eastern Tribes (TN)
Viejas Band of Kumeyaay Indians (CA)
Wayland Area Chamber of Commerce (MI)

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AL FRANKEN TO HON. KEITH ANDERSON

Questions. Mr. Griffin mentioned in his testimony that other labor laws—the Americans with Disabilities Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act—have also been extended to cover tribes. Are any of the tribes represented today advocating to exempt tribal enterprises from these other labor laws? What is special about the National Labor Relations Act?

Answer. No, S. 248 does not in any way affect the ADA, OSHA, or ERISA. S. 248 addresses only the NLRA, amending it to expressly clarify that the definition of excluded governmental employers specifically includes tribal government employers.

The Shakopee Mdewakanton Sioux Community is a tribal government employer. It is not seeking legislative or administrative or judicial relief to exempt any of its tribal government enterprises from the ADA, OSHA, or ERISA. Enactment of S. 248 would amend only the NLRA, and would not affect the ADA, OHSA, ERISA, or any other federal statute.

The NLRA, unlike the ADA, OSHA, or ERISA, deals with the rights of employers and employees in the private sector as it relates to organizing and engaging in collective bargaining and in workplace strikes. The provisions of the NLRA were never applied to tribal or any other governmental employers. Then in 2004, the NLRB suddenly shifted and began to treat tribal governmental employers operating on tribal lands as if they were private sector employers for purposes of the NLRA. Overturning 70 years of precedence, the NLRB in 2004 reinterpreted the NLRA to provide it with authority to decide whether particular employment activity of a tribal government employer is "commercial" (over which the NLRB asserted NLRA jurisdiction) or "governmental" (over which the NLRB asserted no NLRA jurisdiction). The NLRB's changed position was an affront to tribal sovereignty. Tribal sovereignty must, at a minimum, mean that a tribe itself, not the NLRB, alone may decide whether the tribe's activity is governmental. If tribal government sovereignty is to be respected and given meaning in the context of tribal governments acting as employers, a tribal government alone (not the NLRB) should have the right to set its own collective bargaining laws that apply to its own conduct as a governmental employer.

The NLRA is different from the ADA, OSHA, and ERISA in that it focuses on the collective bargaining rights of employees of non-governmental employers. Unlike the ADA, OSHA and ERISA, which are administered and enforced by the U.S. Department of Justice and other federal agencies each of which has a government to government relationship with each tribal government, the NLRA is overseen by the NLRB whose orders are implemented by private sector, third-parties known as labor unions who have no government-to-government relationships with tribal governments.

The clarification proposed by S. 248 would not vest tribal governments with territorial sovereignty and authority to set labor relations for private sector employers within Indian Country. S. 248 addresses only tribal government sovereignty and authority to set labor relations for tribes themselves as governmental employers, including all of their tribal government enterprises that are designed to raise governmental revenues. S. 248 would expressly treat tribal governments like state governments are treated, similar to how Congress has amended the Federal Emergency Management Act, the Federal Unemployment Tax Act, and the Federal Tort Claims Act to treat tribal governments as are other governments.

Thank you for this opportunity to respond.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. HEIDI HEITKAMP TO RICHARD F. GRIFFIN, JR.

Question 1. In your testimony, you mention that you consulted on a case-by-case basis with tribes that would be impacted by jurisdictional expansion under the National Labor Relations Act (NLRA). Could you please explain if you also plan to con-

sult all tribes on a general basis as stipulated in Executive Order 13175 and updated in the President's November 2009 Executive Memorandum? I have heard from many tribes who do not feel the NLRB is adequately working with them on a government-to-government basis, especially since the agency made the unilateral decision to reverse its jurisdiction.

Answer. Consistent with Executive Order 13175, the Agency has and will continue to consult with Indian tribes who are potentially subject to the Board's jurisdiction. As I stated in my testimony, General Counsels for the Agency, including myself, have consulted with many tribes since the *San Manuel* decision including, but not limited to, the Saginaw Chippewa Indian Tribe, the Mashantucket Pequot Tribal Nation, and the Little River Band of Ottawa Indians. Following the principles of the President's Executive Order, the Agency will continue its consultations with tribes regarding the Act.

Question 2. If possible, could you describe some examples of insufficient personnel protections under tribal employers; are these practices widespread?

Answer. Given that the NLRB does not have independent investigative authority, the Agency is only able to investigate charges that are initiated by individual parties. As a result, it would be difficult to determine the extent to which the practices of tribal enterprises across the country may violate the Act. In those cases where charges have been filed and merit has been determined, individual tribal enterprises have been found to have violated the act by, for example, disciplining or terminating employees who have engaged in union organizing activities.

Question 3. Further, are there resources in place to help tribes access technical assistance to avoid certain practices? If there are best practices, how do you work with tribes to provide or disseminate such assistance?

Answer. The NLRB is committed to ensuring that workers and businesses, including tribal enterprises, are informed of their rights and obligations under the National Labor Relations Act and maintains an outreach program to educate individuals and groups regarding the statute. The Agency's outreach program includes a Speakers' Bureau of NLRB representatives who are available to make presentations to a variety of entities, including tribal enterprises. The Agency also maintains a free mobile application for iPhone and Android users to provide individuals with information regarding the National Labor Relations Act. Additionally, substantive information is available on the Agency's public website, including, among other things, a description of the Act and its provisions, along with copies of the Board's decisions, rules, and regulations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. HEIDI HEITKAMP TO RICHARD A. GUEST

Question 1. In your testimony, you mention the California labor ordinances created in partnership with local tribes to provide workers the right to unionize and collectively bargain. I think it's a show of resolve how California tribes worked with the state to develop the ordinance. Has similar collaboration and agreements been effective in other states in order to provide similar labor protections?

Answer. To my knowledge, there has not yet been similar collaboration among tribes, state officials and unions to reach agreement on provisions for workers to organize and collectively bargain pursuant to a tribal-state gaming compacts under the Indian Gaming Regulatory Act.

Question 2. How has the National Labor Relations Act (NLRA) affected the ability of tribes to include Indian preference when hiring within their enterprises? Do you see fewer or more tribal members being employed after the change in the position of the NLRB?

Answer. The unemployment rate on Indian reservations is much higher than elsewhere in the Country. One of the primary goals of any Indian tribe is to provide employment opportunities for its members. Most Indian tribes have enacted laws requiring employers on reservation to give preference to Indians in all phases of employment—recruitment, hiring, training, promotion, etc. Congress recognized and protected these Indian preference laws in Title VII of the Civil Rights Act, which excludes Indian tribes from the definition of "employer," and exempts businesses "on or near an Indian reservation" from coverage in order to allow preferential hiring of Indians. 42 USC 2000e(b) and e-2(i).

Application of the NLRA to Tribal enterprises would jeopardize this right to require and enforce Indian preference laws as to the Tribe's own employees. Because Indian preference laws generally affect employees' rights to promotion, training and retention, they constitute a mandatory subject of collective bargaining under the

NLRA. 29 USC 158(a)(5); NLRB, *Basic Guide to the National Labor Relations Act 20* (rev. ed. 1997) (procedures for discharge, layoff or recall are mandatory subjects of bargaining). Thus, an Indian tribe would be obligated to bargain with a union to retain its sovereign right to apply its Indian preference law and to create employment opportunities for its members. The union's duty to represent all members of the bargaining unit makes it likely that the union would object to an Indian preference law that benefits only some of the members of the unit. The union might insist that the Indian preference law not apply at all, or seek to condition its acceptance of the preferences on concessions by the Tribe on other issues. Requiring an Indian tribe to bargain to maintain its right to impose Indian preference laws seriously interferes with its core retained Tribal rights to make and impose its own laws, govern its economic enterprises, govern relations with its members, and govern its relations with non-members who voluntarily enter into a consensual employment relationship with the Tribe.

At present, litigation by Indian tribes against the NLRB and against application of the NLRA to tribal enterprises is on-going. Only time—and a failure by Congress to enact S. 248 and provide parity for tribal governments under the NLRA—will provide an answer to whether fewer or more tribal members are being employed after the change in the position of the NLRB.

Once again, thank you for the opportunity to provide this testimony for consideration by members of the Senate Committee on Indian Affairs.