STATEMENT OF
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UNITED STATES SENATE
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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

[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.

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

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[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).

factory 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,

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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).

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,

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[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.

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]

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[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

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 sovereign 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

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(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).

[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*).

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

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[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.

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.

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[22] *San Manuel*, 341 NLRB at 1062.

[23] *Id.* at 1062-63.

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 *Tuscarora/Coeur d'Alene* framework and responded to certain Tenth Circuit

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[24] *Yukon Kuskokwim*, 341 NLRB 1075, 1075-77 (2004).

[25] *San Manuel*, 475 F.3d at 1314-15.

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—w*here 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]

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[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)).

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.

[29] 74 Fed. Reg. 57881 (Nov. 5, 2009).

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.