

**Testimony of E. Paul Torres, Governor of the Pueblo of Isleta and  
Chairman of the All Pueblo Council of Governors  
Before the  
Senate Committee on Indian Affairs  
On S. 248, the Tribal Labor Sovereignty Act of 2015**

April 29, 2015

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<sup>1</sup> – the NLRB plows forward, undeterred.<sup>2</sup>

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.

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<sup>1</sup> 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).

<sup>2</sup> The Pueblo raised all of these issues in correspondence, and later in a motion to dismiss the NLRB proceeding, without effect.

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 located 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.