UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

THE PUEBLO OF ISLETA, a federally-recognized Indian Tribe, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the Board, MARK G. PEARCE, Chairman, KENT Y. HIROZAWA, PHILIP A MISCIMARRA, HARRY I. JOHNSON, III, AND LAUREN MCFERRAN, Defendants.	)	Civil Action No. _____

COMPLAINT FOR IMMEDIATE INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff, the Pueblo of Isleta, by and through its counsel, hereby alleges as follows:

I. NATURE OF THE ACTION

This is an action to protect the sovereignty of the Pueblo of Isleta ("Pueblo") from infringement by the National Labor Relations Board and its members (collectively the "Board") in violation of federal law, specifically this Circuit's clear rule that general federal laws do not apply to a tribal government's exercise of sovereign authority absent express congressional authorization, and that the NLRA does not contain such express authorization. *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010). At a hearing to commence on May 5, 2015 the Board intends – unless restrained – to apply the National Labor Relations Act

141170-1

("NLRA"), 29 U.S.C. §§ 151-169, to the Pueblo's regulation, operation, and management of gaming in the exercise of its inherent sovereign authority and pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, by subjecting the Pueblo to trial on unfair labor practice charges brought under Section 8(a) of the NLRA, 29 U.S.C. § 158(a). The Board is proceeding on behalf of an individual, Shawna Perea ("Perea"), whom the Board alleges was terminated for allegedly engaging in concerted activities protected under Section 7 of the NLRA, 29 U.S.C. § 157.

The Pueblo conducts gaming through its operation of the Isleta Resort & Casino ("IR&C"), which is unincorporated and wholly-owned by the Pueblo. The Pueblo's Tribal Council and Governor directly oversee and supervise the gaming activities at the IR&C in the exercise of the Pueblo's inherent sovereign authority to engage in economic activity and pursuant to IGRA and the regulations issued thereunder. The IR&C is a gaming location that is licensed by the Pueblo of Isleta Gaming Regulatory Agency ("POIGRA"), as required by the Pueblo's Permitted Gaming Ordinance, Ordinance No. 94-02, § 7 (Dec. 20, 1994), *as amended* Ordinance No. 95-12 (Mar. 15, 1995), *available at* http://www.nigc.gov/Reading_Room/Gaming_Ordinances.aspx (follow dated hyperlinks at "Pueblo of Isleta") [hereinafter Gaming Ordinance], IGRA, 25 U.S.C. § 2710(b)(1)(B), (d)(1)(A)(ii), and regulations issued thereunder. Indian tribes are authorized to conduct gaming as a government function under IGRA "to promot[e] tribal economic development, self-sufficiency, and strong tribal governments," *id.* § 2702(1), and may use gaming revenues only for governmental and charitable purposes, *id*. § 2710(b)(2)(B). Class III (casino) gaming may be

141170-1

conducted only in accordance with a tribal ordinance approved by the Chairperson of the National Indian Gaming Commission ("NIGC"), *id*. § 2710(d)(1)(A), and pursuant to a Tribal-State compact, *id*. § 2710(d)(1)(C), which the Secretary of the Interior has approved, *id*. § 2710(d)(8). The Pueblo has met these requirements. *See* Notice of Approval of Class III Tribal Gaming Ordinances, 60 Fed. Reg. 29,717 (June 5, 1995) (approving the amended Gaming Ordinance); Pueblo of Isleta and State of New Mexico Gaming Compact ("Compact"), *available at* http://www.bia.gov/cs/groups/xoig/documents/text/idc1-025061.pdf; Notice of approved amended Tribal-State Compacts, 72 Fed. Reg. 36,717 (Jul. 5, 2007) (approving the Compact). It is thus manifestly clear that the Pueblo's regulation, operation and management of gaming at IR&C by the Tribal Council and Governor is an exercise of the Pueblo's sovereign authority. *See also*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

It is the law of this Circuit that "federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs*, 600 F.3d at 1283 (footnote omitted) (emphasis added). Congress has not expressly authorized the application of the NLRA to Indian tribes. Indeed, neither the text nor the legislative history of the Act mention Indian tribes. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) (noting that "neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes" and holding that the NLRA did not divest the Pueblo of San Juan of its inherent sovereign authority to enact a right to work ordinance).

141170-1

Notwithstanding this Circuit's rule and its clear application here, the Board has scheduled a hearing to commence on May 5, 2015, at which it intends to apply the NLRA to the Pueblo, require the Pueblo to deliver thousands of tribal government documents to the Board, compel its officials to appear and testify, require the Pueblo to answer unfair labor practice charges that the Board has alleged, and put on trial the very existence of the Pueblo's sovereign authority to conduct governmental gaming at IR&C. The Board's actions, if not enjoined, will divest the Pueblo of its inherent sovereign authority to engage in and regulate economic activity to fund essential government functions, and violate the Pueblo's rights under IGRA, the Compact, and the Pueblo's own laws. These impacts on the Pueblo's sovereignty constitute irreparable harm. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) (citing *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.3d 709, 716 (10th Cir. 1989)) (prospect of significant interference with tribal self-government is irreparable harm). The Pueblo therefore brings this action for immediate injunctive and declaratory relief.

II. THE PARTIES

1. The Pueblo is a federally-recognized Indian Tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015). Under the Pueblo's Constitution, the Tribal Government is organized into three branches: Legislative, Executive and Judicial. Pueblo of Isleta Const. arts. IV, V, IX, *available at* http://www.isletapueblo.com/uploads/3/0/9/5/3095182/constitution82214.pdf. The Executive Branch is headed by the Governor and the Legislative Branch is composed of the Tribal Council, both of which are responsible, *inter alia*, for the development

141170-1

and conduct of the Tribal Government's economic development initiatives. The Pueblo's economic development initiatives are the primary source of revenues for the provision of government programs and services to tribal citizens, and include the Tribal Government's conduct of gaming under IGRA at IR&C. The conduct of gaming by the Pueblo is regulated by the POIGRA, which licenses gaming locations. The licensing of a gaming location provides no legal or corporate existence separate from the Pueblo, and IR&C has no separate legal or corporate existence. A Chief Executive Officer, appointed by the Tribal Council and serving at the pleasure of the Governor, manages the day-to-day operations of IR&C, and oversees its employees, all of whom are tribal government employees, as is the Chief Executive Officer.

2. Under the Pueblo's Constitution, the Pueblo governs within the same territory in central New Mexico that it has occupied from time immemorial. *See* Act of Dec. 22, 1858, ch. 5, 11 Stat. 374.

3. The National Labor Relations Board is a federal agency that administers the National Labor Relations Act, 29 U.S.C. §§ 151-169, and maintains offices nation-wide, including an office in Albuquerque, New Mexico.

4. Defendant Mark G. Pearce is the Chairman of the National Labor Relations Board and is sued in his official capacity.

5. Defendant Kent Y. Hirozawa is a member of the National Labor Relations Board and is sued in his official capacity.

6. Defendant Philip A. Miscimarra is a member of the National Labor Relations Board and is sued in his official capacity.

141170-1

7. Defendant Harry I. Johnson, III is a member of the National Labor Relations Board and is sued in his official capacity.

8. Defendant Lauren McFerran is a member of the National Labor Relations Board and is sued in her official capacity.

9. The defendant National Labor Relations Board and the individual defendants sued in their official capacity described in paragraphs 4-8 above are collectively referred to as the "Board."

III. JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1362 because it is brought by a federally-recognized Indian Tribe with a governing body duly recognized by the Secretary of the Interior and states substantial questions of federal law arising under federal statutory and common law.

a. The federal common law pursuant to which this Court has jurisdiction is articulated in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985), which holds that the scope of tribal sovereign authority presents a federal question under 28 U.S.C. § 1331.

b. The federal statutory law pursuant to which this Court has jurisdiction is IGRA, 25 U.S.C. §§ 2701-2721. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) (federal jurisdiction to interpret IGRA and resolve compact dispute); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 548-50 (8th Cir. 1996) (federal jurisdiction over claims alleging interference with tribal licensing process under IGRA); *Tamiami Partners, Ltd. ex rel.*

141170-1

Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1046-47 (11th Cir. 1995) (federal jurisdiction over claims based on IGRA and IGRA regulations).

11. Venue is proper in the District of New Mexico under 28 U.S.C. § 1391(b) because this District includes the Territory governed by the Pueblo under its Constitution, because the Pueblo regulates, operates, and manages gaming at licensed gaming locations within this District, and because the Board proceedings which this action seeks to enjoin are scheduled to commence on May 5, 2015, at United States Federal Building, 421 Gold Avenue SW, Albuquerque, New Mexico, which is located within this District.

IV. BACKGROUND

A. The Pueblo's Inherent Sovereign Authority to Undertake and Regulate Economic Activity.

12. The Pueblo has governed the same territory in what is now New Mexico from time immemorial. The Pueblo's sovereignty was recognized by Spain, then by Mexico, and now by the United States. *See United States v. Sandoval*, 231 U.S. 28, 39 (1913) ("The lands belonging to the several pueblos [such as the Pueblo of Isleta] vary in quantity, but usually embrace about 17,000 acres, held in communal, fee-simple ownership under grants from the King of Spain, made during the Spanish sovereignty, and confirmed by Congress since the acquisition of that territory by the United States."); *Pueblo de Isleta v. United States*, 7 Ind. Cl. Comm. 619, 619 (1959) ("[Isleta] now is and for centuries has been an autonomous Indian community . . . .").

13. Upon the transfer of sovereignty over what is now New Mexico from Mexico to the United States pursuant to the 1858 Treaty of Guadalupe Hidalgo, the United States

141170-1

recognized and confirmed the rights of the Pueblo which existed from time immemorial. Treaty of Guadalupe Hidalgo, U.S.-Mex., arts. VIII-IX, Feb. 2, 1848, 9 Stat. 922; Act of Dec. 22, 1858, ch. 5, 11 Stat. 374 (confirming the Pueblo's land claims and directing a patent to issue therefore). "Articles VIII and IX of that treaty protect rights recognized by prior sovereigns." *New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976).

14. On March 27, 1947, the Pueblo reorganized its government under the Indian Reorganization Act, 25 U.S.C. §§ 461-479, and the Department of the Interior duly approved its Constitution. Under the Constitution, the Pueblo exercises all the rights held by federally-recognized Indian tribes under federal law.

B. The Pueblo's Sovereign Right to Conduct Tribal Government Gaming is Secured by its Inherent Sovereign Authority, IGRA and its Compact.

15. The Pueblo possesses inherent sovereign authority to "manage the use of [tribal] territory and resources by both members and nonmembers" and to "undertake and regulate economic activity" on tribal territory. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983). That authority includes, *inter alia*, the right to undertake gaming activities on reservation lands when state public policy towards gaming is regulatory rather than prohibitory. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (rejecting state argument that Pub. L. No. 280 provided it with jurisdiction over on-reservation tribal gaming activities). Tribal government operated gaming furthers "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *id.* at 216 (quoting *Mescalero Apache*, 462 U.S. at 334-35), by providing revenue

141170-1

for the operation of tribal governments and the delivery of tribal services, *id.* at 218-19. Under *Cabazon*, the right to conduct gaming is a governmental right of the Pueblo, held in its sovereign capacity. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id*. at 219. *See Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) (recognizing gaming as a government function that is critical to self-sufficiency).

16. In 1988, Congress enacted IGRA, which establishes that gaming conducted by tribal governments is a sovereign function. Under IGRA "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). In enacting IGRA, Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-466, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Under IGRA, the right to conduct gaming is a governmental right of the Pueblo, held in its sovereign capacity.

17. The primary purposes of IGRA are 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), and "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players," *id*. § 2702(2). Under IGRA, Indian gaming is a governmental activity,

141170-1

which Indian tribes are responsible for regulating for purposes that include protecting the integrity of Indian gaming and preventing infiltration by organized crime, by, *inter alia*, reviewing key employees' associations.

18. Congress also found in IGRA that Indian tribes engage in gaming "as a means of generating tribal governmental revenue," *id*. § 2701(1), and that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," *id*. § 2701(4). In accordance with that policy, IGRA requires that tribal gaming revenues be used only to fund tribal government operations and programs, to provide for the general welfare of the tribe, to promote tribal economic development, and for charitable and local governmental purposes. *Id*. § 2710(b)(2)(B). These requirements effectively tax tribal government gaming at a rate of one hundred percent (100%).

19. At the time IGRA was enacted, the Board recognized that Indian tribes, as governmental entities recognized by the United States, were not subject to the NLRA. *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). At that time, it was also established that states and all other sovereign entities were exempt from the Act. *See* 29 U.S.C. § 152(2). Nothing in IGRA purported to alter or affect these exemptions.

20. In order to conduct class II and class III gaming under IGRA, *see* 25 U.S.C. § 2703(7) (defining class II gaming); *id.* § 2703(8) (defining class III gaming), an Indian tribe must enact an ordinance regulating that activity, including the conduct of gaming managers and key employees, and that ordinance must be approved by the Chairman of the NIGC. *Id*. § 2710(b)(1)(B), (d)(1)(A). The ordinance must provide, *inter alia*, for an adequate system that

141170-1

requires: background investigations of primary management officials and key employees of the gaming enterprise, as well as ongoing oversight of such officials, *id*. § 2710(b)(2)(F)(i); licensing of primary management officials and key employees, *id*. § 2710(b)(2)(F)(ii)(I). In addition, the ordinance must provide a standard for determining ineligibility for employment based on a person's activities, prior criminal record, or associations, in all instances that pose a threat to the public interest or effective regulation, *id*. § 2710(b)(2)(F)(ii)(II).

21. Pursuant to IGRA, the Pueblo's Tribal Council adopted its Gaming Ordinance on December 20, 1994, which regulates tribal government gaming conducted under the Compact. *See* Gaming Ordinance, § 1. The Pueblo's Gaming Ordinance was adopted by the Pueblo in the exercise of its inherent sovereign authority to engage in and regulate economic activity, and pursuant to the requirements of IGRA. The original Gaming Ordinance was approved by the Chairman of the NIGC pursuant to 25 U.S.C. § 2710(d)(2)(B) on April 15, 1994, Approval of Class III Tribal Gaming Ordinances, 59 Fed. Reg. 18,167 (Apr. 15, 1994), and the amendments to the ordinance were approved on June 5, 1995, 60 Fed. Reg. 29,717. Under IGRA, any further amendments to the Gaming Ordinance would also require the approval of the Chairman of the NIGC.

22. In enacting IGRA's provisions for class III gaming, Congress "grant[ed] the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996). A Tribal-State gaming compact is required to authorize class III gaming. 25 U.S.C. § 2710(d)(1)(C). "Congress struggled through several sessions to find a statutory scheme which would incorporate

141170-1

and balance the interests of tribes, states, and the federal government. The tribal-state compact was the device it ultimately chose." *Gaming Corp.*, 88 F.3d at 549.

23. Under IGRA, the regulation of tribal government class III gaming is to be accomplished by the terms of the Tribal-State compact. 25 U.S.C. § 2710(d)(3)(A) (compacts "govern[] the conduct of [class III] gaming activities"). IGRA lists comprehensively and exclusively the subjects that the terms of a compact may relate to, stating that:

> (C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –
>
> > (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> >
> > (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> >
> > (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> >
> > (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> >
> > (v) remedies for breach of contract;
> >
> > (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> >
> > (vii) any other subjects that are directly related to the operation of gaming activities.

Id. § 2710(d)(3)(C).

24. Congress relied on Tribal-State compacts to regulate class III gaming, as is explained in the Senate Report accompanying the Act:

141170-1

> [T]he Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming—many can and will.

S. Rep. No. 100-446, at 13-14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84. IGRA further provides that "[n]othing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(5).

25. Tribal-State compacts are subject to approval by the Secretary of the Interior. *Id.* § 2710(d)(3)(B). Once a valid compact is in effect, it has the force of federal law. *See id.* § 2710(d)(2)(C), (d)(3)(B).

26. The Pueblo of Isleta and State of New Mexico Gaming Compact (the "Compact"), approved by the Secretary of the Interior on July 5, 2007, *see* Indian Gaming, 72 Fed. Reg. 36,717 (July 5, 2007), provides for the regulation and operation of governmental gaming by the Pueblo. The Compact has the force of federal law.

27. The Pueblo, in the exercise of its inherent sovereign authority and pursuant to IGRA and the terms of the Compact, regulates, operates, and manages all tribal government-IGRA gaming, including IR&C, by and through the Pueblo's Governor, Tribal Council, and

141170-1

POIGRA, which is a government agency under the direction of the Tribal Council. POIGRA Regulations, § 2.2 (2007) (attached as Exhibit 1). The POIGRA has licensed IR&C, which has no legal or corporate existence separate from the Pueblo. IR&C is outside the city of Albuquerque, New Mexico, and within the Pueblo's Indian country, *see* 18 U.S.C. § 1151, and Indian lands, *see* 25 U.S.C. § 2703(4).

28. All persons working at IR&C are employees of the Pueblo. IR&C's Standard Operating Procedures ("SOPs") (attached as Exhibit 2) set forth personnel rules for its employees. The SOPs are subject to the supervision and approval of the POIGRA to ensure compliance with the Pueblo's Gaming Ordinance, the Compact, and IGRA. Exh, 1 § 2.2(G). The SOPs incorporate employment rules established by the Compact to which the Pueblo is required to adhere with respect to all employees in its gaming locations. Compact § 4(B)(6)-(7).

29. The SOPs also provides an employment preference for Tribal members, which states as follows: "[The Isleta Resort & Casino] adheres to the 1991 Tribal Preference Act that gives hiring preference to enrolled Isleta Tribal members and registered Native Americans." Exh. 2 § 08 (Staffing Policy).

30. IGRA, the regulations promulgated thereunder, the Pueblo's Gaming Ordinance, and the Compact provide for the Pueblo's exclusive regulation of all the Pueblo's tribal governmental-IGRA gaming operations, including those at IR&C, subject to limited state authority. The Compact refers to the POIGRA as the Tribal Gaming Agency. Compact § 2(P).

a. The Compact addresses the Pueblo's responsibilities with respect to the conduct of gaming. The Compact provides the POIGRA "will assure that the Tribe will . . .

141170-1

operate all Class III Gaming pursuant to this Compact, tribal law, the IGRA and other applicable Federal law." Compact § 4(A)(1). To this end, the Pueblo "shall adopt laws" concerning many aspects of its gaming operations, including laws for "providing to all employees of a gaming establishment employment benefits, including, at a minimum, sick leave, life insurance, paid annual leave and medical and dental insurance as well as providing unemployment insurance and workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs . . . ." Compact § 4(B)(6). Accordingly, the POIGRA's Regulations incorporate the Compact's requirements for the IR&C's employees. Exh. 1 § 6.6. And the Pueblo has enacted a comprehensive set of employment laws that provide protections to the IR&C's employees in the Pueblo's Labor & Employment Relations Ordinance, Ordinance No. 2010-096 (July 28, 2010) ("LERO") (attached as Exhibit 3), which includes the Pueblo's Fair Labor Standards, Family and Medical Leave, and Labor Relations provisions.

b. The Compact addresses the Pueblo's authority to issue licenses to covered gaming employees and provides that the Pueblo "shall adopt laws . . . prohibiting the employment of any person as Gaming Employee . . . who has not been licensed in accordance with the applicable requirements of federal and tribal law . . . ." Compact § 4(B)(2). Section 5 of the Compact provides detailed requirements for the Pueblo's licensing of gaming employees, *id.* § 5, and which are incorporated into the POIGRA's regulations, Exh. 1 Regulation 7.

c. The IR&C is bound to comply with the terms of IGRA, the Compact, and tribal law. Exh. 2 § 02 (Compliance).

141170-1

C. The National Labor Relations Board's Actions that Will Infringe on the Pueblo's Exercise of its Sovereign Authority.

31. The NLRA does not mention Indian tribes in its text or legislative history. And in 1976, the Board adopted the rule that federally-recognized Indian tribes and reservation tribal enterprises are exempt from the NLRA. *Fort Apache*, 226 N.L.R.B. at 506. The Board read the NLRA's exemption for governmental employers to encompass tribal government employers.

32. In *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), the Board abandoned the foregoing rule and held that it will now employ the so-called "*Tuscarora-Coeur d'Alene*" analysis to determine on a case-by-case basis whether to assert jurisdiction over Tribes and on-reservation tribal enterprises, *id.* at 1059-60. Relying on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), the Board asserted that federal statutes of general applicability "apply to the conduct and operations, not only of individual Indians, but also of Indian tribes," *San Manuel*, 341 N.L.R.B. at 1059 (citing *Tuscarora*, 362 U.S. at 116), and held that the NLRA applies to a tribal Indian enterprise, even if located on reservation lands, unless it falls within one of three exceptions: (1) that the NLRA would touch on exclusive rights of self-governance in purely intramural matters, (2) that the NLRA would abrogate rights guaranteed by Indian treaties, or (3) there is proof by legislative history or other means that Congress intended the NLRA not to apply to a tribal enterprise on the reservation. *Id.* If the application of jurisdiction is not barred by the *Tuscarora-Coeur d'Alene* analysis, the Board stated that it would then

141170-1

consider whether to decline to assert its jurisdiction in the exercise of its discretion. *Id*. at 1062-63.

33. On November 14, 2014, Perea filed a charge with the Board alleging that IR&C had engaged in unfair labor practices in violation of the NLRA. The specific charge was that "[w]ithin the last six months, [the Isleta Resort & Casino] discharged employee Shawna Perea because she engaged in protected concerted activities." Charge Against Employer, No. 28-CA-140945 (Nov. 14, 2015).

34. On December 18, 2014, the Pueblo informed the Board in response to the allegations set forth in the charge that the "law in the Tenth Circuit is clear – federally recognized Indian tribes are not subject to the NLRA or the jurisdiction of the NLRB." Letter from David C. Mielke, Attorney for the Pueblo, to Nicholas J. Brown, Labor Mgmt. Relations Assistant, NLRB, at 2 (Dec. 18, 2014). The Pueblo further stated that the charge "does not contain a single factual allegation specifying what protected concerted activities [Perea] claims to have engaged in." *Id.* at 1-2.

35. On January 30, 2015, the Regional Director for Region 28 of the Board issued a Complaint and Notice of Hearing. Complaint & Notice of Hearing, *Isleta Resort & Casino*, No. 28-CA-140945 (N.L.R.B. Jan. 30, 2015) ("Complaint"). The Complaint alleges a violations of Section 8(a)(1) of the NLRA for "interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the NLRA." Complaint, ¶¶ 4-5.

36. As a part of the remedy for the alleged violations, the Regional Director proposed a settlement agreement that would require the Pueblo to: (1) "make whole Shawna Perea by

141170-1

payment to her [of backpay]" and reinstatement, (2) "keep all Notices posted [in conspicuous places] for 60 consecutive days after the initial posting" to notify employees of their right to "[f]orm, join, or assist a union," "[c]hoose a representative to bargain with [IR&C] on [the employee's] behalf," "[a]ct together with other employees for [the employee's] benefit and protection," and "to freely bring issues and complaints to [IR&C] on behalf of yourself and other employees, including the [IR&C] standard operating procedures and drug testing policies." Settlement Agreement, No. 28-CA-140945 (Jan. 22, 2015).

37. On March 27, 2015, the Pueblo moved to dismiss the Complaint under 29 C.F.R. § 102.24(b) because the NLRA does not apply to the Pueblo, including the Isleta Resort & Casino, which is a division of the Tribal Government. The Pueblo of Isleta's Motion to Dismiss, No. 28-CA-140945 (Mar. 27, 2015). The Regional Director did not oppose the Motion. Nevertheless, on April 7, 2015, the Board proposed another settlement agreement with substantially the same terms as the settlement agreement proposed on January 22, except for the term that "nothing herein shall be deemed a waiver of [IR&C's] ability to contest the Board's jurisdiction on the basis of tribal sovereignty." Settlement Agreement at 2, No. 28-CA-140945 (Apr. 7, 2015). And on May 1, 2015, the Board denied the Pueblo's motion in a two sentence order.

38. On April 17, 2015, the Board issued a subpoena *duces tecum* to the Isleta Resort & Casino directing it to appear at the hearing on May 5, or at such time as the hearing may be rescheduled for, and produce a large volume of documents responsive to 48 requests, including those documents that relate to "[b]asic governmental institutions such as the Office of the

141170-1

Governor, [and] Tribal Council," the "Police Department and Courts System," the "[f]ull service Health Center," the "Social Services Department," the "Education Department," and various personnel records. Subpoena *Duces Tecum*, No. B-1-M4FCIP ¶ 12 (Apr. 17, 2015). On April 20, 2015, the Board issued four subpoenas *ad testificandum* to officials and employees of "Isleta Resort & Casino, an Enterprise of the Pueblo of Isleta" to appear and testify at the hearing on May 5. Subpoenas, Nos. A-1-M5418V, A-1-M536U5, A-1-M53SK3, A-1-M57NXB (Apr. 20, 2015). These subpoenas were received by the Pueblo on April 20, 2015.

39. On April 27, 2015, the Pueblo petitioned to revoke the subpoena *duces tecum* and subpoenas *ad testificandum* under 29 C.F.R. § 102.31(b) because the NLRA does not apply to the Pueblo, because the Pueblo's sovereign immunity bars the subpoenas, and because the subpoenas were overbroad in compelling documents housed in every division of the Tribal Government. The Pueblo of Isleta's Petition to Revoke Subpoenas, No. 28-CA-140945 (Apr. 27, 2015).

40. On April 27, 2015, the Pueblo moved the reschedule the May 5 hearing pursuant to 29 C.F.R. §§ 102.16(b) and 102.24(a) until such time as the Board rules on the Pueblo's unopposed motion to dismiss for lack of jurisdiction and the Pueblo's petition to revoke subpoenas. Motion to Reschedule Hearing, No. 28-CA-140945 (Apr. 27, 2015). On April 28, 2015, the Associate Chief Administrative Law Judge issued an order to show cause before 12:00 p.m. on April 30, 2015 why the Pueblo's motion to reschedule should not be granted. Order to Show Cause, No. 28-CA-140945 (Apr. 28, 2015). On April 29, 2015, the Regional Director referred the Pueblo's petition to revoke subpoenas to the Associate Chief Administrative Law

141170-1

Judge for consideration and ruling. Order Referring Respondent's Petition to Revoke Subpoenas, No. 28-CA-140945 (Apr. 29, 2015).

41. On April 29, 2015, the General Counsel for the Board informed the Pueblo that the Board would agree not to oppose the Pueblo's motion to reschedule the hearing only if the Pueblo stipulated to liability on the merits of the unfair labor practices charge in the Complaint.

42. On April 30, 2015, the General Counsel opposed the Pueblo's motion to reschedule the hearing. Shortly thereafter, the Associate Chief Administrative Law Judge denied the Pueblo's motion. This complaint was filed the next day.

COUNT I

43. The Pueblo realleges and incorporates by reference paragraphs 1 through 42 as if fully set forth herein.

44. The Pueblo regulates, operates, and manages all of its governmental gaming activities, including its operation of IR&C, as an exercise of the Pueblo's sovereign authority through the Governor and Tribal Council, and in the exercise of the Pueblo's inherent sovereign authority, and rights and obligations under IGRA, the Compact, and the Pueblo's laws. The NLRA therefore does not apply to the Pueblo absent express congressional authorization. *Dobbs*, 600 F.3d at 1283-84 & n.8. Congress has not expressly authorized the application of the NLRA to the Pueblo, and the NLRA is therefore inapplicable to the Pueblo, including tribal activities undertaken at IR&C. Accordingly, the Board's attempt to apply the NLRA to the Pueblo, including its activities at IR&C, is *ultra vires*, and patently violative of an express jurisdictional prohibition.

141170-1

45. The Pueblo faces immediate and irreparable harm from the Board's *ultra vires* attempt to apply the NLRA to the Pueblo in the absence of express congressional authorization, including the Board's imminent prosecution of an unfair labor practice charge against the Pueblo. The Board's actions would violate the Pueblo's rights of self-government and inherent sovereign authority by forcing the Pueblo to submit to the Board's jurisdiction and the Board's compulsory process.

46. The Pueblo has no adequate remedy at law.

COUNT II

47. The Pueblo realleges and incorporates by reference paragraphs 1 through 46 as if fully set forth herein.

48. The Board's subpoena *duces tecum* and subpoenas *ad testificandum* are barred by the Pueblo's sovereign immunity and therefore invalid and unenforceable. The sovereign immunity held by Indian tribes is a core element of tribal sovereign authority, *Bay Mills* at 2030, which protects tribes from all forms of judicial process, including subpoenas, *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1159-60 (10th Cir. 2014). The law is also settled that Indian tribes retain their "historic sovereign authority" when they engage in economic activity, *Bay Mills*, 134 S. Ct. at 2030; *accord Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998), and that tribal immunity extends to tribal officials who are acting within the scope of their official authority, *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010) (citing *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008)). Immunity extends to subpoenas served on tribal officials seeking evidence about the tribal

141170-1

government. *See Alltel Commc'ns, LLC v. DeHordy*, 675 F.3d 1100, 1104-06 (8th Cir. 2012). Allowing litigants to obtain sensitive governmental documents or to require testimony about tribal government through discovery to which the Pueblo has not consented would undermine tribal sovereignty and self-government by requiring tribal officials to submit to the compulsive powers of another sovereign's courts. *Id.* at 1103.

49. Unless a tribe has clearly consented to suit, its immunity can only be abrogated by an act of Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "'[T]o abrogate such immunity Congress must unequivocally express that purpose.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58)). Statutory silence does not abrogate tribal sovereign immunity; instead, it shows that Congress intended to leave sovereign immunity intact. *Id.* at 2038-39 & n.11.

50. The Pueblo is protected by sovereign immunity, *Lucero v. Lujan*, 788 F. Supp. 1180, 1184 (D.N.M. 1992), and as a division of the Pueblo's government, IR&C and its public employees acting within the scope of their authority are protected by the Pueblo's sovereign immunity as well, *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1153 (10th Cir. 2011) (suit against unincorporated tribal casino barred by sovereign immunity); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010).

51. The Board has issued subpoenas to Pueblo officials and employees which purport to compel them to turn over property of the Pueblo – an enormous quantity of records held by the

141170-1

Pueblo's government – and to appear to testify in an administrative hearing. The Board has no authority to contravene the Pueblo's sovereign immunity for purposes of gathering evidence from the Tribal Government. These subpoenas are therefore not enforceable, because sovereign immunity protects the Pueblo's government and its employees acting within the scope of their authority, unless and until it is waived or abrogated.

52. The Pueblo has not consented to suit, or to the discovery process of the Board under 29 U.S.C. § 161 and 29 C.F.R. § 102.31. And Congress did not abrogate tribal sovereign immunity in the NLRA because it makes no reference to Indian tribes in its text or legislative history. *San Juan*, 276 F.3d at 1196 (acknowledging same).

COUNT III

53. The Pueblo realleges and incorporates by reference paragraphs 1 through 52 as if fully set forth herein.

54. Applying the NLRA to the Pueblo, as the Board is now seeking to do, would require the Pueblo to collectively bargain with respect to, *inter alia*, its SOPs and drug testing policies, which are essential to protect the integrity of the Pueblo's gaming activities. Those requirements were adopted, *see* PORIGRA Regulations § 13.4, as an exercise of the Tribal Council and Governor's oversight of IR&C to ensure compliance with IGRA, the Compact, and tribal law. Collective bargaining over those requirements would violate the Pueblo's federal common law rights of self-government and power to exclude, the Pueblo's inherent sovereign right to undertake and regulate economic activities within its territory, its right to impose

141170-1

conditions on participation in tribal economic activity, and its right to apply and enforce its gaming laws under IGRA and the Compact.

55. More broadly, applying the NLRA to the Pueblo would make the Pueblo's inherent sovereignty and power to exclude, the Compact, the Pueblo's Labor & Employment Relations Ordinance, and the IR&C's SOPs, all of which the Pueblo relies on to operate, manage and regulate activities at IR&C, subject to the requirements of the collective bargaining process imposed by the NLRA. *See* 29 U.S.C. §§ 157-159. In such negotiations, the Pueblo would be required to bargain for the retention of its rights of inherent sovereignty, power to exclude, and the applicability of its laws. For example, the continued application of the Pueblo's employment preference to tribal members at the IR&C would be dependent on the bargaining process. The collective bargaining process would displace the Pueblo's laws and disable its law-making processes, thereby divesting the Pueblo of its rights as a sovereign. To illustrate, the LERO, which grants the IR&C's employees the right to collectively bargain, Exh. 3 § 1, limits this right by ensuring that "the obligation to bargain collectively shall not be construed as authorizing the Pueblo and/or [the IR&C] . . . to enter into an agreement that is in conflict with the provision of any other Pueblo law and/or Ordinance," Exh. 3 § 4(A), and that the LERO "shall not interfere in any way with the duty of the [POIGRA] to regulate the [IR&C] in accordance with the Pueblo's [Gaming Ordinance]," Exh. 3 § 10. Imposing the collective bargaining process on the Pueblo would subject the LERO to negotiations, which would violate federal law. "Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government

141170-1

may limit a tribe's exercise of its sovereign authority." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). Imposing the NLRA on the Pueblo is untenable because "neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes." *San Juan*, 276 F.3d at 1196. And "[s]ilence is not sufficient to . . . strip Indian tribes of their retained inherent authority to govern their own territory." *Id*. (citations omitted).

56. Applying the NLRA to the Pueblo, as the Board is now seeking to do, would also guarantee tribal government employees the right to strike. 29 U.S.C. § 157 (right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and or protection"); *id.* § 158(a)(1) (providing for enforcement of that right by the Board through its prosecution of an unfair labor practice charge). The Pueblo has already exercised its inherent authority and balanced its governmental prerogatives with the rights of its employees in the LERO. The LERO recognizes that "the Tribal Council desires fair treatment of employees . . . that provide services for the Pueblo government and Pueblo owned businesses." Exh. 3 at 1. The LERO established the Pueblo's Labor & Employment Relations Board, which has the authority to investigate unfair labor practices defined by tribal law. Exh. 3 art. II; Exh. 3 art. V, § 2. In the LERO, the Pueblo determined to include a no strike provision to avoid the possibility of imperiling governmental services if its public employees were to strike. Exh. 3 art. V, § 5. Conferring the right to strike would divest the Pueblo of its right of self-government in violation of federal law by conferring on the representatives selected by its employees, *see* 29 U.S.C. § 159(a), the power to bring the tribal government to a halt if their collective bargaining demands

141170-1

are not met. A strike by Pueblo employees working at IR&C would jeopardize the Pueblo's ability to operate its government, to protect the safety, health, and welfare of its members, residents, and visitors, and to provide Tribal services, all of which the Pueblo does in the exercise of its inherent sovereign authority, and in accordance with IGRA and its own laws. *See* 25 U.S.C. §§ 2702(1) (stating IGRA's purpose as promoting tribal economic development, self-sufficiency, and strong tribal governments), *id.* § 2710(b)(2)(B) (identifying governmental purposes for which gaming revenues may be expended); Compact § 1(E) (same); Gaming Ordinance § 3(A) (same). Conferring that political power on the employees' representatives would divest the Pueblo of its right of self-government. Furthermore, to eliminate the threat of a strike would require the consent of its employees' representatives through collective bargaining. 29 U.S.C. §§ 157, 158(d). As a result, the Pueblo's ability to continue to meet its governmental responsibilities would depend on the outcome of the bargaining process. Such a result is barred by the Pueblo's inherent sovereign authority and rights under IGRA and the Compact.

57. Applying the NLRA to the Pueblo, as the Board is now seeking to do, would also subject the Pueblo to the Board's power to determine the "unit appropriate for the purpose of collective bargaining . . . ." 29 U.S.C. § 159(b). This would divest the Pueblo of the right to determine, in the exercise of its inherent sovereign authority, the manner in which it will organize its government and engage in economic activity through its government.

58. Subjecting the Pueblo to the NLRA would also require it to bargain exclusively with representatives selected by its employees, *id.* § 159(a), which would divest the Pueblo of its power to determine who may enter its territory and with whom it will engage in economic

141170-1

activity. It would also divest the Pueblo of its sovereign power to exclude and right to administer and enforce its background check and licensing processes, Gaming Ordinance § 6, which are required by IGRA, 25 U.S.C. § 2710(b)(2)(F), and the Compact § 5, as a condition of entry to Pueblo facilities. At the same time, the Pueblo would remain responsible for regulating gaming by shielding it from "organized crime and other corrupting influences . . . ." 25 U.S.C. § 2702(2). This would impose a Hobson's choice on the Pueblo.

59. Applying the NLRA to the Pueblo would also subject the Pueblo's gaming laws to the jurisdiction of the Board. *See* 29 U.S.C. §§ 158, 160. This would deprive the Pueblo of its exclusive right to administer and enforce its laws, and its right to adjudicate disputes arising under those laws, all of which are held by the Pueblo under federal law.

60. The NLRA does not divest the Pueblo's inherent sovereign authority to engage in and regulate economic activity, nor does it deprive the Pueblo of its right to make its own laws and be ruled by them. The NLRA therefore does not apply to the Pueblo, including the Pueblo's operations at IR&C, the Board has no authority to apply the NLRA to the Pueblo, including IR&C, and the Board's attempt to do so is *ultra vires*.

61. Congress did not intend the NLRA to apply to Indian tribes. Nor did Congress intend the NLRA to abrogate tribal inherent sovereign authority to engage in and regulate economic activity. There is no language in the NLRA that abrogates those rights. The NLRA therefore does not apply to the Pueblo, including the Pueblo's operations at IR&C, and the Board has no authority to apply it to the Pueblo, including its operations at IR&C.

141170-1

62. The Pueblo faces immediate and irreparable harm from the Board's *ultra vires* attempt to apply the NLRA to the Pueblo, including the Board's imminent prosecution of an unfair labor practices charge against the Pueblo, which would violate the Pueblo's rights under IGRA, the Compact, and the Pueblo's laws implementing IGRA and the Compact, and would subject the Pueblo to a proceeding over which the Board lacks subject matter jurisdiction.

63. The Pueblo has no adequate remedy at law.

COUNT IV

64. The Pueblo realleges and incorporates by reference paragraphs 1 through 63 as if fully set forth herein.

65. Under IGRA, the Compact has the force of federal law. 25 U.S.C. § 2710(d)(2)(C), (d)(3)(B). IGRA, the Compact, and the Pueblo's laws implementing IGRA and the Compact, comprehensively and exclusively regulate all activities at IR&C, and none of those laws makes the NLRA applicable to the Pueblo's exercise of its sovereign authority through the operation, management and regulation of activities at IR&C.

66. Application of the NLRA to the Pueblo's regulation, operation, and management of IR&C would violate the Pueblo's rights under IGRA, the Compact, and its laws implementing the Compact.

67. Application of the NLRA to the Pueblo's regulation, operation, and management of IR&C is barred by IGRA, the Compact, and by the Pueblo's laws enacted pursuant to IGRA and the Compact. The Board's action would, *inter alia*, restrict the regulation and review of key employees under IGRA, the Compact, and the Pueblo's laws.

141170-1

68. The Pueblo faces immediate and irreparable harm from the Board's *ultra vires* attempt to apply the NLRA to the Pueblo, including the Board's imminent prosecution of an unfair labor practices charge against the Pueblo, which would violate the Pueblo's rights under IGRA, the Compact, and the Pueblo's laws implementing IGRA and the Compact, and would subject the Pueblo to a proceeding over which the Board lacks subject matter jurisdiction.

69. The Pueblo has no adequate remedy at law.

COUNT V

70. The Pueblo realleges and incorporates by reference paragraphs 1 through 69 as if fully set forth herein.

71. The trust relationship between Indian tribes and the United States, *see Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (establishing that Indian tribes are domestic dependent nations, and that their relations with the United States are subject to the trust responsibility); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832) (bringing Indian tribes' right of self-government, as well as their treaty and territorial rights, within the scope of the trust responsibility), extends to the entire federal government, *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (citing *United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir. 1986) (Beezer, J, concurring)), and thus includes the NLRB. Under the trust responsibility, the NLRB has a duty to consult with Indian tribes on federal actions that may affect their treaty right of self-government and inherent sovereign authority. The trust responsibility mandates a high degree of procedural fairness in the government's dealings with Indian tribes, *see Morton v. Ruiz*, 415 U.S. 199, 236 (1974), and includes a special duty to consult with tribes or Indians to ensure their

141170-1

understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions, *see, e.g., HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) ("'in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies'") (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 225 (1982 ed.)). As the court explained in *Okanogan Highlands Alliance v. Williams*, "[i]n practical terms, the trust relationship gives rise to a procedural requirement that the federal government 'at the very least . . . investigate and consider the impact of its action upon a potentially affected Indian tribe.'" No. CIV. 97-806-JE, 1999 WL 1029106, at *16 (D. Or. Jan 12, 1999) (quoting *N. Cheyenne Tribe v. Hodel*, No. CB 82-116-BLG (D. Mont. 1985), *on remand for modification of injunction*, 851 F.2d 1152 (9th Cir. 1988)), *aff'd*, 236 F.3d 468 (9th Cir. 2000). "This duty requires the government to consult with an Indian tribe in the decision-making process in an effort to avoid harm to reserved rights." *Id*. at *16. *See also Midwater Trawlers Coop. v. U.S. Dep't of Commerce*, 139 F. Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (right of federal government to consult with Indian tribes on treaty rights issues is well-grounded in the trust responsibility), *aff'd in part and rev'd in part on unrelated grounds*, 282 F.3d 710 (9th Cir. 2002).

72. President Obama's November 5, 2009 Memorandum on Tribal Consultation ("President's Consultation Memorandum"), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900887/pdf/DCPD-200900887.pdf, directs the full implementation of Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000) ("EO 13,175"), which requires that federal agencies consult with Indian tribes on

141170-1

matters that affect their interests, and is based on the federal trust responsibility. The Board has not implemented EO 13,175 as required by the President's Consultation Memorandum.

73. The Board's *San Manuel* decision and the process used by the Board to implement that decision have a direct effect on tribal inherent sovereign authority to engage in economic activity. Pursuant to the *San Manuel* decision, the NLRB has also assumed authority to decide, on a case-by-case basis, the limits of tribal treaty rights of self-government and inherent sovereign authority, as well as when an Indian tribe must do business with third parties, and on what terms.

74. Under the federal trust responsibility, the treaties between Indian tribes and the United States, and EO 13,175, the Board was required to consult with Indian tribes, including the Pueblo, before deciding to abandon its 30-year rule that on-reservation tribal enterprises are exempt from the NLRA, and replace it with the *Tuscarora-Coeur d'Alene* analysis. The Board expressly recognized in *San Manuel* that its prior precedent would compel dismissal under the NLRA's exemption for "political subdivisions" of a State, 341 N.L.R.B. at 1056-57 (citing *Fort Apache Timber Co.*, 226 N.L.R.B. at 504, 506 & n.22), and acknowledged that it was necessary to consider federal Indian policy in reaching its result, *id.* at 1059. Yet the Board did not attempt to consult with Indian tribes before deciding to reexamine the application of the NLRA to Indian tribes, and the impact of federal Indian policy on that reexamination.

75. Under the federal trust responsibility, the treaties between Indian tribes and the United States, and EO 13,175, the Board was required to consult with Indian tribes, including the Pueblo, before deciding to assert jurisdiction over on-reservation tribal enterprises on a case-by-

141170-1

case basis, rather than through rule-making. The Board did not consult with Indian tribes on any aspect of its implementation of the two-step process that the *San Manuel* decision created, including whether to implement these changes on a case-by-case basis, rather than through rule-making.

76. The Board had a duty under the federal trust responsibility and EO 13,175 to consult with the Pueblo before initiating unfair labor practice proceedings against the Pueblo. The NLRB did not initiate any such consultation prior to commencing those proceedings.

77. The Board's failure to consult with Indian tribes at any time prior to or after changing its position in 2004 on the applicability of the NLRA to Indian tribes, its failure to consult with Indian tribes in the course of implementing the authority it claims under the *San Manuel* ruling, and its failure to consult with the Pueblo before initiating an unfair labor practice charge against the Pueblo, violates the Board's federal trust obligation to consult with Indian tribes before taking action that will affect tribal inherent sovereign authority.

WHEREFORE, the Pueblo respectfully asks this Court to enter judgment in its favor and to:

A. Issue a declaratory judgment against Defendants declaring that the National Labor Relations Act does not apply to the Pueblo, the Pueblo's operations at IR&C, or any of the Pueblo's officials, agents, or representatives.

B. Enjoin the Board, and any of the Board's agents, officers, employees, or representatives from taking any action to apply the National Labor Relations Act to the Pueblo, the Pueblo's operation of IR&C, or any of the Pueblo's officials, agents or representatives.

141170-1

C. Award the Pueblo its costs, and such other and further relief as this Court deems just or equitable.

Dated: May 1, 2015

By: */s/ David C. Mielke*

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141170-1

VERIFICATION

I, E. Paul Torres, am the Governor of The Pueblo of Isleta ("the Pueblo"), a federally-recognized Indian Tribe. I have read the Complaint in *the The Pueblo of Isleta v. the National Labor Relations Board, et al.* filed in the U.S. District Court for the District of New Mexico. I am familiar with the facts relating to the claims asserted in the Complaint and verify that the facts alleged therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury, that the foregoing is true and correct.

May 5, 2015.

E. Paul Torres
Governor
Pueblo of Isleta
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