



## Respecting the Tribal Labor Sovereignty Act

by Ernest L. Stevens, Jr.

The autumn season is upon us and it is the time of year that many schools attempt to share the history of our nation's indigenous peoples. For many of America's schools, lessons covering the first Thanksgiving celebration are the only American Indian history taught throughout the entire year. As a result, many Americans are unaware that tribal governments have fought – and continue to fight – a battle to maintain our way of life and autonomy to govern all activities on our lands free of state and federal government control that began more than five centuries ago.

Through hundreds of treaties with the United States, Indian tribes ceded hundreds of millions of acres of our homelands to help build this great Nation. In return, the United States made promises to protect remaining Indian lands and to provide for the general welfare of reservation residents. These solemn promises were repeatedly violated through federal policies of removal, allotment, forced assimilation and termination that sought to destroy tribal governments, uproot our tribal economies and suppressed Native language and religion. Through it all, Native people persevered.

Acknowledging the failures of these policies, the United States repudiated the policy of termination and adopted a policy fostering self-determination. In the late 1960s and early 1970s, embracing the policy of self-determination, several tribes developed high stakes bingo and card games to establish a source to generate government revenue. After a series of legal battles, the United States Supreme Court in the 1987 *Cabazon* case upheld the right of tribal governments to operate gaming on Indian lands. One year later, Congress enacted the Indian Gaming Regulatory Act (IGRA), which acknowledges Indian gaming is a means of strengthening tribal governments and fostering economic self-sufficiency.

Most tribes lack an adequate tax base to generate government revenue. Indian lands are held in trust by the United States, and cannot be used to generate real estate taxes. With high unemployment rates, an income tax is not viable for most tribes. As noted above, tribal governments turned to Indian gaming as a means of generating revenue to fund essential tribal government programs that seek to improve health care, education, child and elder care, housing and much more.

In 2004, the National Labor Relations Board (NLRB), in *San Manuel Indian Bingo and Casino*, delivered a decision that disrupted this vital source of tribal governmental revenue. Congress enacted the National Labor Relations Act (NLRA) in 1935 to regulate private sector labor relations. Government employers were expressly exempted from the Act. Although the NLRA did not list all forms of government subject to the

exemption, the NLRB consistently interpreted the government exemption to include the District of Columbia, U.S. territories and possessions and tribal governments – as well as enterprises operated by these governments. The Board's 2004 *San Manuel* decision reversed decades of its own precedent to apply the NLRA to tribal government enterprises. As a result, tribal governments are the only sovereigns in the United States to be subject to the NLRA.

The NLRB's *San Manuel* ruling ignores the plain and simple fact that Indian tribes are sovereign governments – a fact that is acknowledged in the United States Constitution. In addition, the 2004 Board decision established a commercial versus governmental test that is only applied to tribal governments. This test is not applied to the hundreds of enterprises owned by state or local governments, the District of Columbia, or U.S. territories and possessions. Finally, the Board in its 2004 decision reasoned that Indian gaming is "commercial in nature – not governmental. Moreover, the operation of a casino ... can hardly be described as 'vital' to the tribes' ability to govern themselves." This statement is void of fact or reality, and completely ignores the purpose of Indian gaming.

Indian gaming is tribal government self-determination – period. Tribal gaming operations are wholly owned and operated by tribal governments. Commercial gaming enterprises conversely are for-profit individually owned operations. Equating Indian gaming to commercial gaming also completely ignores the text and intent of the IGRA. Congress imposed IGRA on Indian gaming operations to establish a system of federal regulation and "to provide a means of promoting tribal economic development, self-sufficiency and strong tribal governments." IGRA mandates that tribes use revenues generated from Indian gaming solely for government purposes. Likewise, Indian tribes employ a number of other non-gaming enterprises that may be considered "commercial" in nature, but the proceeds of which are also dedicated 100% to tribal government programs.

Again, for many tribal governments, Indian gaming operations, tribal timber operations and other tribal government enterprises constitute the sole source of governmental revenue that is used to fund tribal public safety, education, health, housing and other essential services to reservation residents. Ignoring these purposes and applying the NLRA to tribal government enterprises subject vital tribal government programs to shutdowns and work stoppages. It is unfortunate that decades of recognizing tribal governments on equal terms and footing with federal and state governments was undone. All governments

have the same responsibility to their constituents and that is to provide essential services and programs for those who are in need.

To put a stop to these threats, Indian Country for more than a decade now has worked with Congress, urging legislators to reverse the Board's misguided 2004 decision and to amend the NLRA to clarify that Indian tribes and tribal government enterprises must be treated as all other governmental employers. Answering this call to action, a couple of Senators have introduced the Tribal Labor Sovereignty Act (TLSA) (S. 248 and H.R. 511 respectively), which would make the needed amendment to the NLRA.

This issue and the message that Indian Country is sharing on Capitol Hill is not anti-union or anti-worker. The issue is 100% about tribal sovereignty, respect for Indian tribes as governments and the need to protect a source of government revenue that funds essential services and programs to reservation residents. Historically, many Native people have been trained and employed by unions and have built some of the finest skyscrapers, buildings and bridges this country has seen. Indian Country has a long history of working cooperatively with the major trade organizations to help construct most of the facilities that house tribal government enterprises.

Tribes and unions have a track record of working together on labor agreements pursuant to tribal laws and regulations,

not federally imposed mandates. Amending the NLRA to treat tribes as governments would not impact these agreements or future negotiations. Tribal employment practices and rights to due process have been in place for multiple generations and are no different than those of other governments or unions.

Indian Country has voiced strong and universal support of the TLSA. The House and Senate Committees of jurisdiction have each approved the TLSA and reported the bills out for floor consideration. Despite this progress, we have significant work to do to educate all Members of Congress about the importance of this legislation. I urge all of Indian Country to reach out to your Members of Congress in the House and Senate and the Obama Administration to support and protect tribal sovereignty and self-determination by passing the TLSA. Further, we must reach out to the many Members of Congress that have no Indian Country in their districts and educate them about the need for the TLSA, the need to respect Indian tribes as governments and their promise to uphold the Constitution of the United States, which acknowledges tribal sovereignty. It is time Congress did the same by passing the Tribal Labor Sovereignty Act (H.R. 511/S. 248). ♣

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