114TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
114–260

TRIBAL LABOR SOVEREIGNTY ACT OF 2015

SEPTEMBER 10, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 511]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 511) to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tribal Labor Sovereignty Act of 2015".

SEC. 2. DEFINITION OF EMPLOYER.

Section 2 of the National Labor Relations Act (29 U.S.C. 152) is amended—

(1) in paragraph (2), by inserting "or any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands," after "subdivision thereof,"; and

(2) by adding at the end the following:

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

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

"(17) The term 'Indian lands' means—

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

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

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

PURPOSE

H.R. 511, the *Tribal Labor Sovereignty Act of 2015,* protects tribal sovereignty and the right to tribal self-governance. The bill codifies the standard of the National Labor Relations Board (NLRB or Board) prior to 2004 by amending the *National Labor Relations Act* (NLRA) to provide that any enterprise or institution owned and operated by an Indian tribe and located on its land is not considered an employer, excluding such from coverage of the NLRA.

COMMITTEE ACTION

112TH CONGRESS

Subcommittee hearing examining proposals to strengthen the National Labor Relations Act

On July 25, 2012, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing entitled "Examining Proposals to Strengthen the National Labor Relations Act," reviewing decisions by the NLRB affecting tribal sovereignty, secret ballot elections, and employee compensation. The hearing also examined three legislative proposals: H.R. 972, the *Secret Ballot Protection Act*; H.R. 2335, the *Tribal Labor Sovereignty Act*; and H.R. 4385, the RAISE Act. The witness testifying on tribal sovereignty stated the NLRB finding that Indian tribal governments are not exempt from NLRA requirements was unfounded and violated treaty rights.[1] Witnesses before the subcommittee were the Honorable Robert Odawi Porter, President, Seneca Nation of Indians, Salamanca, New York; Mr. William L. Messenger, Staff Attorney, National Right to Work Legal Defense Foundation, Springfield, Virginia; Ms. Devki K. Virk, Member, Bredhoff and Kaiser, P.L.L.C., Washington, D.C.; and Dr. Tim Kane, Chief Economist, Hudson Institute, Washington, D.C.

114TH CONGRESS

H.R. 511, Tribal Labor Sovereignty Act of 2015, introduced

On January 22, 2015, Rep. Todd Rokita (R–IN) introduced the *Tribal Labor Sovereignty Act of 2015* with 14 cosponsors.[2] Recognizing the threat to tribal sovereignty posed by the NLRB's decision in *San Manuel Indian Bingo and Casino,*[3] the legislation provides any enterprise or institution owned and operated by an Indian tribe and located on its land is not considered an employer and therefore is not covered by the NLRA.

Subcommittee legislative hearing on H.R. 511

On June 16, 2015, the Subcommittee on Health, Employment, Labor, and Pensions held a legislative hearing on H.R. 511, the

[1] *Examining Proposals to Strengthen the National Labor Relations Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 112th Cong. 9 (written testimony of the Hon. Robert Odawi Porter).
[2] H.R. 511, 114th Cong. (2015).
[3] 341 NLRB No. 138 (2004).

Tribal Labor Sovereignty Act of 2015.[4] Witnesses included the Honorable Rodney Butler, Chairman, Mashantucket Pequot Nation, Mashantucket, Connecticut; Mr. Richard Guest, Senior Staff Attorney, Native American Rights Fund, Washington, D.C.; the Honorable Jefferson Keel, Lieutenant Governor, Chickasaw Nation, Ada, Oklahoma; and Mr. Gary Navarro, Slot Machine Attendant and Bargaining Committee Member for UNITE HERE Local 2850, Graton Casino and Resort, Rohnert Park, California. Witnesses testified H.R. 511 is necessary to clarify the rights of Indian tribes on Indian lands and provide parity for tribal governments with federal, state, and local governments under the NLRA.

Committee passes H.R. 511, Tribal Labor Sovereignty Act of 2015

On July 22, 2015, the Committee on Education and the Workforce considered H.R. 511, the *Tribal Labor Sovereignty Act of 2015*.[5] Rep. Todd Rokita (R–IN) offered an amendment in the nature of a substitute, making a technical change to clarify that an Indian tribe is not considered an employer covered by the NLRA. The Committee favorably reported H.R. 511 to the House of Representatives by voice vote.

SUMMARY

The *Tribal Labor Sovereignty Act of 2015*, H.R. 511, will codify the NLRB standard regarding Board jurisdiction that existed prior to the 2004 *San Manuel Indian Bingo and Casino* decision, amending the NLRA to provide that any enterprise or institution owned and operated by an Indian tribe and located on its land is not considered an employer under the NLRA.

COMMITTEE VIEWS

In 1935, Congress passed the *National Labor Relations Act* (NLRA), guaranteeing the right of most private sector employees to organize and select their own representative.[6] In 1947, Congress passed the most significant amendment of the NLRA, the *Taft-Hartley Act*,[7] abandoning "the policy of affirmatively encouraging the spread of collective bargaining . . . [and] striking a new balance between protection of the right to self-organization and various opposing claims."[8] The *Taft-Hartley Act* clarified that employees have the right to refrain from participating in union activity,[9] created new union unfair labor practices,[10] codified employer free

[4] *Legislative Hearing on H.R. 511, Tribal Labor Sovereignty Act of 2015: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. (2015).

[5] *H.R. 511, Tribal Labor Sovereignty Act of 2015: Markup Before the H. Comm. on Educ. and the Workforce,* 114th Cong. (2015).

[6] The NLRA does not cover all employees and employers in the United States. For example, public sector employers (state, local, and federal employees), employers covered by the *Railway Labor Act* (airlines and railroads), agricultural laborers, and supervisors are not covered by the act. 29 U.S.C. § 152(2)–(3).

[7] 29 U.S.C. § 141 et. seq.

[8] Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1974*, 61 HARV. L. REV. 1, 4 (1947).

[9] 29 U.S.C. § 157.

[10] *Id.* § 158.

speech,[11] and made changes to the determination of bargaining units.[12]

The NLRA established the NLRB, an independent federal agency, to fulfill two principal functions: (1) to prevent and remedy employer and union unlawful acts, called unfair labor practices or ULPs, and (2) to determine by secret ballot election whether employees wish to be represented by a union. In determining whether employees wish to be represented by a union, the NLRA is wholly neutral.[13]

Regulation of state labor relations

Congress understood the differences between the private and public sectors when it excluded states from the NLRA. States have promulgated varying labor laws based on the specific needs of the states. For example, most states permit collective bargaining and collective wage negotiations for public-sector workers, while a minority of states prohibits public-sector workers from such collective action.[14] Conversely, most states do not afford public-sector workers the right to strike.[15]

Tribal labor and employment law

Like the states, tribal nations have worked to protect the rights of their employees, passing labor and employment laws modeled after federal laws but tailored to the specific needs of the tribes. In testimony before the Subcommittee on Health, Employment, Labor, and Pensions, Rodney Butler, chairman of the Mashantucket Pequot Nation, described a number of provisions of the Mashantucket Pequot Labor Relations Law (MPLRL). The law guarantees "the Nation's employees the right to organize and bargain collectively with their employers" and "allows labor organizations to be designated as the exclusive collective bargaining representatives of employees." [16]

Chairman Butler stated:

> In sum, the MPLRL is modeled after other public sector laws, is similar to the NLRA in many aspects, and essentially furthers the policies and principles that are fundamental to federal labor policy as enforced by the Board. It provides employees of Tribal Employers with protections that are in many instances identical to or, in some respects, more effective than those provided to employees of private employers under the NLRA. At the same time, the Nation's labor law protects important tribal and federal objectives in preserving and enhancing the Nation's self-governance through the use and recognition of its institutions and the preservation of its sovereignty.[17]

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[11] *Id.* § 158(c).
[12] *Id.* § 159(d).
[13] *NLRB* v. *Savair Mfg.*, 414 U.S. 270, 278 (1973).
[14] Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, CTR. FOR ECON. AND POLICY RESEARCH, 4–8 (Mar. 2014), http://www.cepr.net/documents/state-public-cb-2014-03.pdf.
[15] *Id.* at 8–9.
[16] *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Rodney Butler at 5) (internal quotation marks omitted).
[17] *Id.*

Chairman Butler noted the Mashantucket Employment Rights Office has conducted at least six elections under the MPLRL, with four unions certified as the exclusive bargaining representatives of units of employees.[18] The Mashantucket Pequot Nation subsequently entered into collective bargaining agreements with those four unions.[19]

Similarly, the Navajo Nation's labor laws protect the right to collectively bargain while additionally including a right-to-work provision. Richard Guest, senior staff attorney of the Native American Rights Fund, discussed unionization rights under the Navajo Nation labor code in his testimony to the subcommittee. Mr. Guest stated that in 1985 the Navajo Nation council "incorporate[d] the most basic privileges of the [NLRA] to tribal employees, whom the council acknowledged were otherwise exempt from the NLRA."[20] This included the right to collectively bargain.[21] In 1990, the council voted for the Navajo Nation to become a "right to work" jurisdiction, disallowing labor organizations from collecting union dues from non-members.[22] Unions are collectively bargaining with the Navajo Nation and private employers on tribal land.

Mr. Guest stated:

> Collective bargaining is occurring on the Navajo Nation, with private enterprise as well as government. The United Mine Workers of America ("UMWA") represents employees at the Navajo Nation Head Start Program, a tribal government program. The Nal-Nishii Federation of Labor, AFL–CIO includes 12 labor organizations that represent miners, power plant workers, construction workers, school employees and city employees working on or near the Navajo Nation.[23]

Indian tribes have also addressed labor rights through the California tribal labor relations ordinances. In his testimony, Mr. Guest also described how in 1999 Indian tribes negotiated tribal-state gaming compacts in California.[24] A tribe would only qualify for the compact if it "adopt[ed] a process for addressing union organizing and collective bargaining rights of tribal gaming employees."[25] The negotiations resulted in the drafting of a Model Tribal Labor Relations Ordinance (Ordinance), which tribes with 250 or more casino-related employees were required to adopt.[26] The Ordinance is similar to the NLRA in many ways, including the right to organize and bargain collectively. However, the Ordinance also differs from the NLRA, with some differences favoring labor unions and some favoring Indian tribes.

Mr. Guest stated:

> The Ordinance provides labor unions at tribal gaming facilities with a number of advantages not provided for under the NLRA. Most importantly, under the Ordinance

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[18] *Id.*
[19] *Id.*
[20] *Id.* (written testimony of Richard Guest at 6).
[21] *Id.* at 7.
[22] *Id.*
[23] *Id.* at 8.
[24] *Id.*
[25] *Id.*
[26] *Id.*

> unions at tribal casinos: (1) have the right to enter onto casino property at any time to talk to employees and post leaflets and posters there in order to facilitate the organizing of employees; and (2) may engage in secondary boycotts after an impasse is reached in negotiations without suffering any penalty under the Ordinance.
>
> The Ordinance also provides tribes with certain advantages not enjoyed by employers under the NLRA. Most importantly, unions representing tribal casino employees may not strike, picket, or engage in boycotts before an impasse is reached in negotiations.[27]

These are but a few examples of labor and employment laws enacted by Indian tribes that are similar to the NLRA in protecting the rights of employees but differ from the NLRA in order to meet the specific needs of Indian tribes throughout the United States.

History of tribal sovereignty

Originally, there were few limits on tribal sovereignty. In 1823, the Supreme Court in *Johnson* v. *M'Intosh* held that Indian tribes had no power to grant or dispose of lands to anyone other than the federal government.[28] In 1832, the Supreme Court in *Worcester* v. *Georgia* further indicated Indian tribes did not have the authority to deal with foreign powers.[29] Aside from these limits, however, Indian tribes retained all the characteristics of independent sovereigns. The Supreme Court in *Johnson* stated Indian tribes "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." [30] In 1831, in *Cherokee Nation* v. *Georgia*, the Supreme Court noted the Cherokees had "the character of . . . a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself." [31]

Applicability of labor laws to Indian tribes

While tribal sovereignty has long been recognized, there has never been any doubt that Congress has the authority to enact limits. Congress can also choose to retain tribal sovereignty. Many federal labor laws specifically exclude Indian tribes from the definition of "employer," including Title VII of the *Civil Rights Act of 1964,* Title I of the *Americans with Disabilities Act*, and the *Worker Adjustment and Retraining Notification Act*. In contrast, statutes of general application, including the *Uniformed Services Employment and Reemployment Rights Act, Age Discrimination in Employment Act, Fair Labor Standards Act* (FLSA), *Family Medical Leave Act, Employee Retirement Income Security Act* (ERISA), and *Occupa-*

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[27] *Id.* at 9–10.

[28] 21 U.S. (8 Wheat.) 543, 574 (1823). The Court stated that because of the European discovery of Indian lands, Indian tribes' "power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." *Id.*

[29] 31 U.S. (6 Pet.) 515, 559 (1832):

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.

[30] 21 U.S. (8 Wheat.) 543, 574 (1823).

[31] 30 U.S. (5 Pet.) 1, 16 (1831).

tional Safety and Health Act (OSH Act), are silent regarding their application to Indian tribes. Federal courts have held that statutes of general application, such as the FLSA, ERISA, and the OSH Act, apply to Indian tribes and their businesses.[32]

However, there is a key distinction between these laws and the NLRA. These laws do not force Indian tribes into a binding relationship with a non-governmental third party.[33] As Jefferson Keel, Lieutenant Governor for the Chickasaw Nation, stated in his testimony to the Subcommittee on Health, Employment, Labor, and Pensions, "[W]e submit that the administrative imposition of a *private* labor model on any government, including a tribal government, is incompatible with the very nature of sovereignty and self-government."[34]

NLRB jurisdiction over Indian tribes

For almost 30 years, the NLRB held that "individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress specifically provided to the contrary."[35] However, in 2004 in *San Manuel Indian Bingo and Casino,* the Board adopted a "new approach to considering Indian owned and operated enterprises,"[36] holding that the NLRB has jurisdiction over all tribal activities. Relying on *San Manuel,* the Board now asserts jurisdiction on a case-by-case basis, depending on whether the activity is commercial or governmental in nature. In response to this unprecedented encroachment on tribal sovereignty, several members of Congress have introduced legislation to undo the precedent established under the *San Manuel* decision. Most recently, Rep. Todd Rokita (R–IN) introduced legislation to provide any enterprise or institution owned and operated by an Indian tribe and located on its land is not considered an employer, effectively excluding them from coverage of the NLRA.

From 1976 to 2004, the NLRB held that the location of an Indian business was determinative with respect to the NLRB's jurisdiction and that the text of the NLRA supported this location-based rule. In *Fort Apache*, the NLRB ruled the NLRA did not apply to a tribal government operating a timber mill on Indian land, finding the mill to be akin to a political subdivision of a state government and therefore exempt.[37] In *Sac and Fox Industries, Ltd*., the Board found the NLRA applicable to off-reservation tribal enterprises, such as logging mills.[38] Together, these cases created the "on Indian lands/off Indian lands" rule. If the Indian enterprise was located on Indian land generally, it was not subject to the NLRA, but those located off Indian land were subject to the NLRA.

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[32] *See, e.g., Solis v. Matheson,* 563 F.3d 425 (9th Cir. 2009) (applying FLSA to a retail business located on an Indian reservation and owned by Indian tribal members); *Smart v. State Farm Ins. Co*., 868 F.2d 929 (7th Cir. 1989) (applying ERISA to employee benefits plan established and operated by an Indian tribe for tribal employees); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174 (2d Cir. 1996) (applying the OSH Act to construction company owned by the Indian tribe that only operates within the tribal reservation).

[33] *See, e.g.,* 29 U.S.C. § 158(d) (obligation of employer and union to bargain collectively).

[34] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of the Hon. Jefferson Keel at 1) (emphasis added).

[35] *Fort Apache Timber Co*., 226 NLRB 503 (1976), *overruled by San Manuel Indian Bingo and Casino*, 341 NLRB No. 138 (2004).

[36] 341 NLRB 1055, 1064 (2004).

[37] *Fort Apache*, 226 NLRB at 506.

[38] 307 NLRB 241 (1992).

In 2004 in *San Manuel Indian Bingo and Casino,* a divided NLRB reversed course. Relying on controversial dicta in *Federal Power Commission v. Tuscarora Indian Nation* stating that a "general statute in terms applying to all persons includes Indians and their property interests,"[39] the NLRB held the NLRA applies to tribal governments, and federal Indian policy does not preclude application of the NLRA to commercial activities on tribal land.[40] In deciding *San Manuel*, the NLRB noted the NLRA does not expressly exclude Indian tribes.[41] Therefore, according to the NLRB, the issue is left to the Board's discretion. Now, relying on *San Manuel*, the Board would determine whether to assert jurisdiction based on the conduct at issue. Where the conduct is commercial in nature, employing significant numbers of non-Indians, and catering to non-Indian customers, the Board concluded that "the special attributes of [tribal] sovereignty are not implicated."[42] In contrast, when tribes are acting with regard to the particularized sphere of traditional tribal or governmental functions, the Board indicated it should defer to the tribes by declining to assert its discretionary jurisdiction.[43] Additionally, the Board would not assert jurisdiction if the application of the law would abrogate treaty rights or there was "proof" in the statutory language or legislative history that Congress did not intend the Act to apply to Indian tribes.[44] Then-Member Schaumber strongly dissented, stating that "rebalancing of competing policy interests involving Indian sovereignty is a task for Congress to undertake."[45] On appeal, the U.S. Court of Appeals for the District of Columbia Circuit upheld the NLRB's holding in *San Manuel*.[46]

In testimony before the Subcommittee on Health, Employment, Labor, and Pensions, Jefferson Keel, Lieutenant Governor of the Chickasaw Nation, criticized the NLRB's decision in *San Manuel* for diminishing tribal sovereignty. He stated:

> [The NLRB's San Manuel ruling] reversed seventy years of settled administrative practice and signaled an effort to expand federal administrative jurisdiction over tribal sovereigns. . . . [The Board's] approach had been widely criticized as contrary to established federal law which presumes a statute does not apply to abridge tribal sovereignty in the absence of express evidence that Congress intended such a result. Turning this settled rule of Indian law upside-down, the Board's newly-fashioned analysis shifts the burden to the tribal sovereign to show either that Congress intended to exempt the tribe from the statutory scheme, or that a tribe-specific element (such as intra-

[39] 362 US 99, 116 (1960). In his dissenting opinion in *San Manuel*, then-Member Schaumber argued this statement in *Tuscarora Indian Nation* is questionable dicta, lacks any foundation in Indian law, and has been abandoned, if not overruled, by the Supreme Court. 341 NLRB at 1070–74.

[40] 341 NLRB at 1057–62.

[41] *Id.* at 1058. In fact, neither the text of the NLRA nor its legislative history reference coverage of Indian tribes.

[42] *Id.* at 1062.

[43] *Id.* at 1063.

[44] *Id.* at 1059.

[45] *Id.* at 1065 (Schaumber, Member, dissenting).

[46] *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

> mural affairs or a controlling treaty provision) limits the Act's jurisdictional reach.[47]

Rodney Butler, chairman of the Mashantucket Pequot Nation, similarly criticized San Manuel in his testimony before the subcommittee:

> The San Manuel decision was not only a complete reversal of the NLRB's recognition of tribes as sovereigns, it is also an affront to Indian Country. It suggests that Indian tribes are incapable of developing laws and institutions to protect the rights of employees who work on our reservations. Our experience proves nothing could be further from the truth.[48]

Robert Odawi Porter, president of the Seneca Nation of Indians, also expressed concern in his testimony to the subcommittee about San Manuel's erosion of tribal sovereignty. He stated, "Many aspects of our treaty-recognized freedoms have been eroded over time. A prime example of this legal regression can be found in recent tribal labor management decisions taken by the [NLRB] and the federal courts in the [*San Manuel* case]."[49]

Witnesses further testified to the subcommittee that tribal sovereignty includes parity with federal, state, and local governments, which *San Manuel* has undermined. Regarding the Mashantucket Pequot Nation, Chairman Butler stated, "We seek to be treated just like every other sovereign under the NLRA—nothing more—nothing less."[50] In his testimony, Richard Guest of the Native American Rights Fund similarly argued for equal treatment of governments:

> [I]t is time for Congress to provide parity for tribal governments under the NLRA. In this context, parity encompasses the quality of being treated equally under the law alongside Federal, State and Local governments. Tribal governments are entitled to the same freedom to choose the appropriate time, place and manner for regulating union activity on Indian lands and collective bargaining for its employees.[51]

Lieutenant Governor Keel also stated, "All governments are entitled to equal respect under the law, precisely as Congress in 1935 intended."[52] In addition, regarding the Senecan Nation of Indians, President Porter noted, "We have always insisted that federal law treat our tribal governments as it treats other governments."[53]

In 2007 in *Foxwoods Resort Casino*,[54] the NLRB reinforced its decision in *San Manuel*. The Board noted that 98 percent of the Mashantucket Pequot Tribe's revenues were derived from the oper-

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[47] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of the Hon. Jefferson Keel at 4) (emphasis in original).
[48] *Id.* (written testimony of the Hon. Rodney Butler at 2).
[49] *Examining Proposals to Strengthen the National Labor Relations Act, supra* note 1, at 8–9 (written testimony of the Hon. Robert Odawi Porter).
[50] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of the Hon. Rodney Butler at 2).
[51] *Id.* (written testimony of Richard Guest at 1–2) (emphasis omitted).
[52] *Id.* (written testimony of the Hon. Jefferson Keel at 1) (emphasis in original).
[53] *Examining Proposals to Strengthen the National Labor Relations Act, supra* note 1, at 9 (written testimony of the Hon. Robert Odawi Porter).
[54] No. 34–RC–2230 (Oct. 24, 2007) (decision and direction of election).

ation of the casino, which it used to fund various endeavors aimed toward promoting the tribal community and tribal self-government.[55] However, the Board exerted jurisdiction because the casino was an exclusively commercial venture generating income for the tribe almost exclusively from the general public, competed in the same commercial arena with other non-tribal casinos, overwhelmingly employed non-tribal members, and actively marketed to the general public.[56]

In 2013 in *Soaring Eagle Casino and Resort*,[57] the NLRB exerted jurisdiction over another Indian tribe. The Saginaw Chippewa Tribe operates a casino on the Isabella Reservation in Isabella County, Michigan. Treaties made in 1855 and 1864 with the federal government afford the Saginaw exclusive use, ownership, occupancy, and self-governance of a permanent homeland in Isabella County.[58] Despite such strong treaty language, the NLRB, applying *San Manuel*, determined the general treaty language devoting land to a tribe's exclusive use was insufficient to preclude application of federal law.[59] As such, the Board exerted jurisdiction and ordered the tribe to rehire an employee who had been fired for union organizing, pay four years of back pay, and post notices in the workplace admitting it had violated federal labor law and reiterating employees' rights to unionize.[60]

In contrast, on June 4, 2015, after years of litigation, the NLRB in *Chickasaw Nation* [61] unanimously declined to assert jurisdiction. At issue in the case was whether the *Chickasaw Nation*, in its capacity as operator of the WinStar World Casino, is subject to the Board's jurisdiction. Applying *San Manuel*, the Board found the NLRA would abrogate treaty rights, specific to the Chickasaw Nation, contained in the 1830 Treaty of Dancing Rabbit Creek. As such, the Board declined to assert jurisdiction.[62]

Although the Board's decision in *Chickasaw Nation* recognized the tribe's rights as a government under the treaty, the decision only added to the uncertainty other Indian tribes face with respect to NLRA jurisdiction. In his testimony before the Subcommittee on Health, Employment, Labor, and Pensions, Lieutenant Governor Keel of the Chickasaw Nation stated:

> While the new Board ruling establishes an important precedent in recognizing the Chickasaw Nation's tribal rights as a government, it also creates enormous uncertainty for other American Indian tribes across the country whose treaty language (if any) may well differ from the Chickasaw Nation's treaty language. Further, it has the consequence of making the NLRB the arbiter of tribal treaty rights, instead of Congress and the Courts—even though the NLRB itself has repeatedly acknowledged it

[55] *Id.* at 4.
[56] *Id.* at 13.
[57] 359 NLRB No. 92, 2013 WL 1646049 (2013), *vacated* (2014), *aff'd,* 361 NLRB No. 73 (2014), *aff'd, Soaring Eagle Casino and Resort v. NLRB,* 791 F.3d 648 (2015).
[58] Soaring Eagle Casino and Resort, 2013 WL 1646049, *4.
[59] *Id.* at *12.
[60] *Id.* at *19.
[61] 362 NLRB No. 109, 2015 WL 3526096 (2015).
[62] 2015 WL 3526096, *3.

possesses no expertise whatsoever in Indian law or matters of tribal sovereignty.[63]

In June of 2015, in *NLRB v. Little River Band of Ottawa Indian Tribal Government*, a divided U.S. Court of Appeals for the Sixth Circuit ruled the NLRB may apply the NLRA to a Michigan casino operating on tribal land.[64] The majority held although the NLRA is silent on the issues, the statutory terms "employer" and "person" both encompass Indian tribes.[65] Additionally, the majority found nothing in federal Indian law forecloses application of the NLRA to the band's operation of its casino and regulation of its employees.[66] Dissenting, Judge David McKeague argued principles of tribal sovereignty should leave the band free to regulate its own labor relations at the casino.[67] In his testimony before the Subcommittee, Lieutenant Governor Keel cited the Sixth Circuit's decision upholding the Board's jurisdiction in *Little River Band* as evidence of the "arbitrary risk that arises from shifting control over tribal sovereignty to a quasi-independent federal agency." [68]

CONCLUSION

The cases described above illustrate the subjective nature of the Board's test and the need for statutory clarity with respect to NLRB jurisdiction over tribal enterprises. The Board, with no particular experience in federal Indian or treaty law, determines whether the NLRA would interfere with tribal sovereignty or abrogate treaty rights. Such a determination is highly subjective, leaving tribes covered by treaties with little certainty. Worse, sovereign tribes without treaties are almost certainly covered by the NLRA, creating different classes of tribes under the NLRA. The *Tribal Labor Sovereignty Act of 2015* creates parity with the states and between tribes ensuring tribal sovereignty.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Rep. Rokita and reported favorably by the Committee.

Section 1. Provides the short title is the "Tribal Labor Sovereignty Act of 2015."

Section 2. Amends the *National Labor Relations Act* to exclude Indian tribes, and any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands, from the definition of employer. Additionally, it defines the term Indian tribe, Indian, and Indian land.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

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[63] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of the Hon. Jefferson Keel at 4).
[64] 788 F.3d 537 (6th Cir. 2015).
[65] *Id.* at 543.
[66] *Id.* at 544–56.
[67] *Id.* at 556 (McKeague, J., dissenting).
[68] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of the Hon. Jefferson Keel at 4).

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 511, the *Tribal Labor Sovereignty Act of 2015,* protects tribal sovereignty and the right to tribal self-governance. The bill codifies the standard of the NLRB prior to 2004 by amending the NLRA to provide that any enterprise or institution owned and operated by an Indian tribe and located on its land is not considered an employer, excluding such from coverage of the NLRA.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 511 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against. No record votes were taken on H.R. 511.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goals of H.R. 511 are to protects tribal sovereignty and the right to tribal self-governance.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 511 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 511 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the commit-

tee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.R. 511 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 24, 2015.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 511, the Tribal Labor Sovereignty Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

KEITH HALL, *Director.*

Enclosure.

H.R. 511—Tribal Labor Sovereignty Act of 2015

H.R. 511 would add tribes to the list of entities that are excluded from the definition of "employer" for purposes of the National Labor Relations Act. Through the National Labor Relations Board (NLRB), the National Labor Relations Act protects the rights of most private-sector employees to form a union and to bargain collectively. Adding tribes to the list of excluded employers would treat them similarly to state and local governments. Currently, the NLRB generally asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation.µHowever, the NLRB does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

Enacting H.R. 511 would not significantly affect the workload of the NLRB, so it would have no effect on the federal budget. The bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 511 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

By excluding tribal enterprises located on tribal land from the definition of employer for purposes of the National Labor Relations Act, the bill would eliminate the right of employees of such enterprises to file a claim, individually or through a union, regarding certain labor practices. Currently, employees may file a claim against tribal employers over which the NLRB asserts jurisdiction alleging unfair labor practices under the act that prohibit or inter-

fere with collective activities to improve wages and working conditions. By eliminating the right of employees to file such claims with the NLRB, the bill would impose a private-sector mandate.

The direct cost of the mandate would be the value of forgone monetary awards resulting from claims that would have been filed with the NLRB in the absence of the bill. According to the NLRB, it currently receives about 20,000 to 30,000 claims in total each year from employees, unions, or employers alleging unfair labor practices and more than half of all claims are withdrawn or dismissed. Other claims may be settled by the parties or adjudicated by the NLRB. Successful claims may result in remedies such as reinstatement of discharged employees and back pay for the period of unemployment, as well as payment of dues, fines or other costs. In fiscal year 2014, claims with the NLRB resulted in about 2,400 cases in which employees were reinstated and in awards of about $45 million in back pay and other costs. In testimony, the NLRB indicated that it has asserted jurisdiction over tribal enterprises in four decisions since 2004. Based on those data, CBO estimates that the cost of the mandate would not be substantial and would fall below the annual threshold established in UMRA for private-sector mandates ($154 million in 2015, adjusted annually for inflation).

Successful claims filed with the NLRB also may result in a requirement on employers that would allow their employees to form a union and bargain collectively. Imposing such a requirement on employers may have a broader impact than that measured by the value of forgone monetary awards and settlements for claims brought before the NLRB. However, under UMRA that broader impact is not considered part of the direct cost of the mandate.

On June 25, 2015, CBO provided a cost estimate for S. 248 as ordered reported by the Senate Committee on Indian Affairs on June 10, 2015. The two bills are identical, and the estimated budgetary effect is the same. The private-sector mandate and the estimate of mandate costs is also the same. This estimate provides additional information about the basis of the estimate of mandate costs relative to annual threshold established in UMRA.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 511. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics

and existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

* * * * * * *

DEFINITIONS

SEC. 2. When used in this Act—

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

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

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or

having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

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

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

(17) The term "Indian lands" means—

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

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

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

* * * * * * *

MINORITY VIEWS

INTRODUCTION

The Tribal Labor Sovereignty Act of 2015 (H.R. 511) strips workers of their rights to organize and collectively bargain at any enterprise owned and operated by an Indian tribe that is located on tribal lands. It does this by excluding such tribal enterprises from the jurisdiction of the National Labor Relations Act by amending the definition of a covered "employer."

This bill arises in a dispute between two solemn and competing principles: the rights that Indian tribes possess as "distinct, independent political communities, retaining their original natural rights in matters of local self-government," [1] and the right of workers to organize, bargain collectively, and engage in concerted activities for mutual aid and protection.

Rather than attempting to reconcile these competing interests, H.R. 511 chooses sovereignty for some over the rights of others, and it strips hundreds of thousands of workers—most of whom are not members of tribes—of their voice in the workplace in one fell swoop just because they happen to work at a tribal enterprise on tribal lands.

As the AFL-CIO has noted, "workers cannot not be left without any legally enforceable right to form unions and bargain collectively in instances where they are working for a tribal enterprise which is simply a commercial operation competing with non-tribal enterprises."

This bill, which enjoys the support of the U.S. Chamber of Commerce, cloaks its anti-union agenda in the respectable garb of tribal sovereignty. It is another attempt in the quest to dismantle labor unions and strip workers of their ability to bargain for better pay and working conditions.

HISTORY OF NLRB JURISDICTION CONCERNING INDIAN TRIBAL ENTERPRISES

The National Labor Relations Act (NLRA) is silent with respect to its applicability to tribal enterprises. Prior to 2004, the National Labor Relations Board (NLRB) did not exercise jurisdiction over enterprises located *on* tribal lands,[2] but did do so for tribal enterprises located *off* tribal lands.[3] This bright-line geographic test was both over-inclusive and under-inclusive. For example, this test al-

[1] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

[2] In the 1976 *Fort Apache Timber Co.* case, the Board declined to assert jurisdiction, holding that sovereign tribal governments, including a tribe's "self-directed enterprise on the reservation," were "implicitly exempt" from the NLRA's definition of "employer." 226 NLRB 503, 504–06 (1976).

[3] Unlike the enterprise at issue in *Fort Apache Timber, Co.*, the Board ruled in 1992 that a tribally-owned and controlled factory operated off of the reservation was subject to NBLRB jurisdiction. *Sac & Fox Industries*, 307 NLRB 241 (1992).

lowed the NLRB to assert jurisdiction over an off-reservation hospital run by a tribal consortium primarily serving tribal members—a function of tribal self-governance and should have been excluded from coverage.[4] But the test also failed to include commercial enterprises on tribal lands where the majority of employees were not tribal members, the majority of its customers were not members of the tribe, and its functions did not touch on essential matters of self-governance.

THE 2004 NLRB'S DECISION IN THE SAN MANUEL CASE IS ROOTED IN LONGSTANDING JUDICIAL DOCTRINE REGARDING LAWS OF GENERAL APPLICABILITY TO INDIAN TRIBES

In 2004, during the Bush Administration, the NLRB altered its jurisdictional test over tribal enterprises in the *San Manuel Indian Bingo and Casino* case. A 4–1 majority that was led by former Republican Chair Robert Battista asserted NLRA jurisdiction over tribal enterprises, except where doing so would:

1) touch on tribal rights of self-governance in purely intramural matters;

2) abrogate rights guaranteed by an Indian treaty; or

3) be contrary to congressional intent as indicated in the legislative history or statutory language.

The *San Manuel* decision is rooted in longstanding judicial doctrine used to determine when federal statutes of general applicability should apply to Indian tribes:

• The Supreme Court stated in the 1960 Tuscarora Indian Nation case that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[5]

• Narrowing that doctrine, a 1985 Ninth Circuit Court of Appeals case known as *Donovan v Coeur d'Alene Tribal Farm*[6] determined that the Occupational Safety and Health Administration (OSHA) had jurisdiction to enforce federal health and safety laws at a farm operated by a tribe and located on a tribe's reservation provided that the law did not: 1) touch on tribal rights of self-governance in purely intramural matters; 2) abrogate rights guaranteed by Indian treaty; or 3) be contrary to congressional intent as indicated in the legislative history or statutory language. In applying this test, the Court stated:

> "The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is neither profoundly intramural . . . nor essential to self-government."

Using the same three-prong test in *Coeur d'Alene*, the NLRB's *San Manuel* decision carefully balances tribal sovereignty and the

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[4] *Yukon-Kuskokwim Health Corp. v. N.L.R.B.*, 328 NLRB No.86 (1999), *remanded*, 234 F.3d 714 (D.C. Cir. 2000).

[5] *FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960).

[6] *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985).

fundamental right of workers to organize. The *Coeur d'Alene* framework has since been applied by the Second, Sixth, Seventh, Ninth, and Eleventh Circuits.[7]

NLRB POLICY BALANCES TRIBAL SOVEREIGNTY AND WORKERS' RIGHTS TO ORGANIZE AND BARGAIN

In the *San Manuel* decision, the NLRB singled out its desire "to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture."[8] The Board noted that when a tribe "is fulfilling traditionally tribal or government functions" that do not involve "non-Indians or substantially affect interstate commerce," then "the Board's interest in effectuating the policies of the NLRA is likely to be lower."

Thus, the NLRB has found that some enterprises—such as a health clinic that serves primarily tribal members— are not suitable for federal jurisdiction where it is "fulfilling the Federal Government's trust responsibility to provide free health care to Indians."[9] The NLRB likewise decided that it lacked authority to assert jurisdiction over a casino run by the Chickasaw tribe in Oklahoma, because doing so would abrogate an 1830 treaty which exempted the tribe from federal laws unless they involved "legislation over Indian Affairs".[10] Both the tribal health clinic and the Chickasaw Tribe casino decisions block NLRB jurisdiction because these enterprises fall within one of the 3 exceptions articulated in *Coeur d'Alene*.

Using this same 3 prong test, the NLRB has exercised jurisdiction to protect worker rights guaranteed under the NLRA which involve casinos patronized and operated overwhelmingly by non-tribal members, because neither treaty rights, nor essential self-governance matters, were implicated."[11]

TRIBAL ENTERPRISES ARE GOVERNED BY OTHER EMPLOYMENT LAWS, BUT H.R. 511 ONLY SINGLES OUT WORKERS' RIGHTS TO ORGANIZE UNIONS AND COLLECTIVELY BARGAIN

Tribal sovereignty is not absolute with respect to federal laws of general applicability. Using the *Coeur d'Alene* framework, numerous courts have upheld the applicability of other federal employment laws to Indian tribes including:

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[7] *Soaring Eagle Casino & Resort v. NLRB* (July 1, 2015) granted the NLRB jurisdiction based on 6th Circuit precedent involving another tribal casino (*NLRB v. Little River Band of Ottawa Indians Tribal Government* (June 9, 2015)); however, the majority in the *Soaring Eagle* case disputed whether the *Coeur d'Alene* framework is the proper basis for determining whether federal statutes of general applicability should apply to Indian tribes.

[8] *San Manuel Indian Bingo and Casino*, 341 NLRB 1055, 1062 (2004) (Chairman Battista and Members Liebman and Walsh; Member Schaumber, dissenting), enforced, 475 F.3d 1306 (D.C. Cir. 2007).

[9] *Yukon Kuskolcwim Health Corp.*, 341 NLRB 1075 (2004) (on remand from the D.C. Circuit, 234 F.3d 714 (2000)).

[10] *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (June 4, 2015).

[11] *See, e.g., Little River Band of Ottawa Indians Tribal Gov't,* 361 NLRB No. 45 (Sept. 15, 2014), *enforced* No. 14–2239 2015 WL 3556005 (6th Cir. June 9,2015); *Casino Pauma,* 362 NLRB No. 52 (Mar. 31, 2015); *Soaring Eagle Casino & Resort, An Enterprise of the Saginaw Chippewa Indian Tribe,* 361 NLRB No. 73 (Oct. 27, 2014); *Mashantucket Pequot Gaming Enterprise d/b/a Fox-woods Resort Casino,* 353 NLRB No. 32 (2008)

- Fair Labor Standards Act (FLSA) [12]
- Occupational Safety and Health Act (OSHA) [13]
- Employee Retirement Income Security Act (ERISA) [14]
- Title III (public accommodations) of the Americans with Disabilities Act (ADA) [15]

Thus, the effort to focus solely on the National Labor Relations Act to the exclusion of other federal labor laws, suggests that animus toward labor unions motivates this legislation—which has been wrapped in the laudable garb of sovereignty.

PARITY AND SOVEREIGNTY ARE NOT VALID GROUNDS FOR TAKING AWAY WORKERS' RIGHTS, ESPECIALLY WHERE TRIBES ARE EXEMPTED FROM LABOR LAWS THAT COVER STATE AND LOCAL GOVERNMENTS

Proponents' primary argument in favor of H.R. 511 is that the NLRA does not apply to state and local governments, and tribes should have parity since they are also a sovereign government. Under this principle, tribes contend that they should be able to decide whether to allow employees to form unions or not under a tribal labor relations ordinance, just as state governments are free to decide whether to allow public employees to form unions or not. This parity argument falls short in three important ways:

1) *Tribal casinos and similar businesses are commercial enterprises* in direct competition with similar non-tribal businesses. Although these enterprises raise revenues for the tribe, these are not inherently governmental functions. Thus, the NLRB's regulation of labor relations does not impair an essential element of the tribe's sovereignty, especially in matters where the majority of employees are not tribal members. Courts have found that the total impact on tribal sovereignty from NLRA jurisdiction is "not sufficient to demand a restrictive construction of the NLRA." [16]

2) *Approximately 75% of the 600,000 employees of tribal casinos are non-Indians*." [17] Employees of tribal enterprises, who are not enrolled members of the tribe, are prohibited from having any voice or the right to advocate for the establishment or repeal of labor and employment laws, unlike comparable employment in local or state government. Since the majority of employees at tribal enterprises lack parity with the rights enjoyed by state and local government employees to petition their employer, the parity argument between

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[12] *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009). (The overtime provisions of the Fair Labor Standards Act apply to a retail business located on an Indian reservation and owned by Indian tribal members).

[13] *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) (applying OSHA to a tribe-operated construction business).

[14] *Smart v. State Farm Ins.*, 868 F.2d 929 (7th Cir. 1989) (concluding ERISA applied to a health center owned and operated by an Indian tribe on its reservation). Also: *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries,* 939 F.2d 683 (9th Cir. 1991). (Permitting the pension fund to sue the tribally-operated mill under ERISA will not usurp the tribe's decision-making powers).

[15] *Florida Paraplegic Association v. Miccosukee Tribe of Florida,* 166 F.3d 1126 (11th Cir. 1999) (Affirming that Title III of the Americans with Disability Act applies to restaurant and gaming facility operated by an Indian tribe).

[16] *San Manuel Indian Bingo and Casino*, 475 F.3d 1306 (D.C. Cir. 2007).

[17] Dwanna L. Robertson, *The Myth of Indian Casino Riches*, Indian Country Today Media Network (June 23, 2012) *http://indiancountrytodaymedianetwork.com/2012/06/23/myth-indian-casino-riches.*

tribal government and state and local government lacks a valid basis.

3) *Tribes are exempted from employment laws which apply to state and local governments*. State and local governments are covered by Title VII of the Civil Rights Act and the nondiscrimination provisions of the Americans with Disabilities Act, whereas Indian tribes are expressly exempted from coverage. If tribes want parity with state and local governments, they should be prepared to be covered by the same federal statutes as those applicable to local and state governments.

STRIPPING WORKERS' RIGHTS AND REMEDIES CAN LEAD TO LEGALLY SANCTIONED WORKER EXPLOITATION

As noted above, Title VII of the Civil Rights Act prohibits employment discrimination by all governments *except* tribal governments and enterprises. As a result, employees of a tribal enterprise who are subjected to sexual harassment or other forms of discrimination cannot bring a claim to the Equal Employment Opportunity Commission (EEOC) or in federal courts—even when the alleged perpetrator and victim are both non-tribal members employed at the tribal enterprise.

For example, a woman who took a job with a "swamp safari" run by a tribe in Florida filed suit against the tribe after her employers "repeatedly touched her, made sexual comments and degrading remarks, and even suggested that she could make a 'quick $10,000' from a wealthy client." [18] The U.S. District Court for the Southern District of Florida dismissed her case for lack of subject matter jurisdiction, citing the tribe's sovereign immunity. She was not affiliated with the tribe and had no further recourse.

In another case, several female former employees of Thunder Valley, a tribal casino in northern California, filed a class-action discrimination lawsuit in 2005. One woman reported having been sexually assaulted by a casino executive. A second woman reported that the same executive fondled and forcibly kissed her as well. Several other women reported suffering sexual harassment, age and sex discrimination, and wrongful termination. None of the plaintiffs were tribal members, nor was the alleged attacker. Regardless, their case was dismissed for lack of subject-matter jurisdiction and because of tribal sovereign immunity.[19]

An hourly worker—an enrolled member of the Pomo Tribe—who is employed at a tribal casino in Sonoma County, California testified before the Education and the Workforce Committee that without NLRA protections workers felt they had no recourse to address sexual harassment. He stated:

> "I have seen sexual harassment at the casino. A general manager going up to women telling them if they want promotions they had to sleep with him. The women were fired. We all complained. Managers at the Stations Casi-

[18] Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought By Non-Native American Employees of Tribally Owned Businesses*, 25 FLA. S. LAW REV. 679 (1998).

[19] Shivani Sutaria, *Employment Discrimination in Indian-Owned Casinos: Strategies to Providing Rights and Remedies to Tribal Casino Employees,* 8 J. LAW & SOCIAL CHALLENGES 132 (2006).

nos [which was managing the casino on behalf of the tribe] told us it was a sovereign nation.

It was bad enough that Title VII of the Civil Rights Act doesn't apply to Native businesses. Congress should not make the situation worse by taking away protections under the National Labor Relations Act. The NLRA enables workers who have been subjected to harassment and other forms of discrimination to get together and complain about it. Take away the NLRA, you don't only have sexual harassment but no ability to speak about it."[20]

Carving tribes out of Title VII coverage led directly to these unjust results. Similarly, carving tribes out of the NLRA may give rise to new forms of legally-sanctioned worker exploitation.

H.R. 511 WOULD JEOPARDIZE THE ENFORCEMENT OF EXISTING LABOR CONTRACTS AND UNDERMINE ESTABLISHED BARGAINING RELATIONSHIPS

Thousands of employees at commercial tribal enterprises—such as casinos—are currently covered by collective-bargaining agreements. If H.R. 511 were enacted, it is doubtful these labor contracts would remain fully enforceable. When a labor contract expires, a tribe could unilaterally terminate the established bargaining relationship with the union without legal consequence. Without a union, these jobs will likely revert to low-wage service jobs, instead of being jobs that allow workers to climb the ladder to the middle class.

UNION AGREEMENTS HELP HOURLY SERVICE WORKERS ESCAPE LOW WAGES AND BENEFITS AT TRIBAL GAMING ENTERPRISES

Most Indian casinos are large scale commercial operations, which overwhelmingly employ non-Indians and serve non-Indian customers. There were 449 tribal gaming facilities in 28 states, which earned more than $28 billion in revenue in 2013.[21] An estimated 43% of all legal gaming revenues in the U.S. is now generated at tribally-owned casinos.

- According to a 2013 report by UNITE HERE, the average low-wage California tribal casino worker makes $10.02 per hour or $20,841 annually. At this level, a family of four with one breadwinner would be living at 88% of the federal poverty level.
- UNITE HERE, which represents over 10,000 casino workers in California, reports that workers with collective bargaining agreements earned $7,558 (41%) more in combined wages and health insurance benefits than the industry average in California.[22]
- Where unions have organized at casinos in California, workers formerly trapped in poverty level jobs now have a foothold to get into the middle class as their wages have increased, their

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[20] Oral testimony of Gary Navarro, Legislative Hearing on H.R. 511, the *Tribal Labor Sovereignty Act of 2015,* Committee on Education and the Workforce, U.S. House of Representatives, June 16, 2015.

[21] *Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes,* U.S. Government Accountability Office, GAO–15–355 (2015), *http://www.gao.gov/assets/680/670603.pdf;* NIGC Tribal Gaming Revenues, National Indian Gaming Commission, *http://www.nigc.gov/Link__Click.aspx?fileticket=15QAX4uZyA%3d&tabid=67.*

[22] *The Emerging Standard: An Analysis of Job Quality in California's Tribal Gaming Industry,* UNITE HERE (October 2013).

health care costs have declined, and the number of families requiring government assistance for health care has decreased significantly.

Tribal casinos are not obligated to obey state minimum wage laws, which have a negative impact on casino workers in states where the minimum wage is higher than the federal minimum wage. Unions help close that gap.

THE CONGRESSIONAL BUDGET OFFICE (CBO) DETERMINED THAT ENACTMENT OF H.R. 511 WOULD HAVE AN ADVERSE ECONOMIC IMPACT ON WORKERS AT TRIBAL ENTERPRISES

The Congressional Budget Office found that "[B]y excluding tribal enterprises located on tribal land from the definition of employer for purposes of the National Labor Relations Act, the bill would eliminate the right of employees of such enterprises to file a claim, individually or through a union, regarding certain labor practices. Currently, employees may file a claim against tribal employers over which the NLRB asserts jurisdiction alleging unfair labor practices under the act that prohibit or interfere with collective activities to improve wages and working conditions. By eliminating the right of employees to file such claims with the NLRB, the bill would impose a 'private-sector mandate'" on such workers under the Unfunded Mandates Reform Act.

CBO found employees of tribal enterprises are burdened with economic costs under H.R. 511, which include "the value of forgone monetary awards resulting from claims that would have been filed with the NLRB in the absence of the bill" including a "reinstatement of discharged employees and back pay for the period of unemployment."[23] CBO noted that by eliminating the right of employees "to form a union and bargain collectively" there would be a broader adverse impact, but CBO did not consider this broader impact to be part of the direct cost of the mandate.

TRIBAL LABOR RELATIONS ORDINANCES ARE NOT AN ADEQUATE ALTERNATIVE TO NLRA JURISDICTION ABSENT MINIMUM STANDARDS

Proponents of H.R. 511 point to the adoption of Tribal Labor Relations Ordinances (TLRO) by some tribes as evidence that there is an adequate alternative for the protections offered by NLRA that will preserve tribal sovereignty.

Some tribes have been required to adopt TLROs, such as those in California, where the state has required TLROs as a condition of state-tribal gaming compacts under the Indian Gaming Regulatory Act. Tribes in other states have negotiated TLROs with unions who had first won recognition under the NLRA. However, other tribes in other states have chosen not to adopt a TLRO at all, because there was no requirement under a state compact. Each tribe enacts its own labor-management relations laws, if at all, without transparency or political accountability to non-tribal members employed by its commercial businesses. Moreover, there is no uniform set of rights and responsibilities for employers and work-

[23] Congressional Budget Office Cost Estimate for the Tribal Labor Sovereignty Act of 2015 (H.R. 511), August 24, 2015, *https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr511.pdf.*

ers that have to be included in tribal labor ordinances. Many TLRO's provide inadequate protections, and the field is marked by widespread inconsistency in the protection of rights, for example:

- The Fair Employment Practices Code of the Little River Band of Ottowa Indians in Michigan requires labor organizations to apply for and obtain a license from the tribe before organizing; it precludes bargaining over layoffs or recall of employees; and gives the Tribal Court exclusive authority over disputes involving the duty to bargain in good faith, which are not subject to appeal. These and other requirements severely limit freedom of association.
- The United Auto Workers (UAW) and three other unions reached an agreement with the Mashantucket Pequot Tribe at the Foxwoods Casino regarding the terms of a TLRO, which governs their collective bargaining relationship. However, this mutually agreeable TLRO would not have been established, except for the fact that the UAW had petitioned for and won an NLRB election to represent workers at the casino. If H.R. 511 were enacted, and the Tribe then chose to reinstate restrictive labor laws that it had previously adopted, there would be no legal or political recourse for the workers—the overwhelming majority of whom do not belong to the Mashantucket Pequot Tribe.
- Tribes must adopt a TLRO under their compact between the State of California and tribal casinos with more than 250 employees. While there are a number of similarities between the California TLRO and the NLRA, the tribes can restrict workers' choices when voting which union they want to select; long established rights to display union buttons while at work are prohibited; and unfair labor practices are adjudicated through a standing panel of 10 arbitrators rather than a labor relations agency. On the other hand, some compacts include neutrality agreements which allow for card check recognition instead of secret-ballot elections, and waive sovereign immunity to allow unions to seek enforcement of arbitration decisions in state court. However, if a tribe fails to adopt an acceptable TLRO, only the State of California has enforcement rights.

There is no federal requirement that TLROs must be at least as effective as the rights and remedies provided under federal labor law. If TLROs are to serve as a nationwide alternative to the NLRA, there will need to be statutory minimum standards and each TLRO would need to be assessed by a competent authority to ensure that workers' rights are substantially the same as those under the NLRA, even if they are not identical in all respects.

THE U.S. REQUIRES ITS TRADING PARTNERS TO IMPLEMENT INTERNATIONALLY RECOGNIZED LABOR STANDARDS, BUT H.R. 511 EXEMPTS U.S. WORKERS WHEN EMPLOYED BY INDIAN TRIBE

This bill advances a double standard: it deprives workers of the right to organize and bargain collectively at commercial enterprises operated by Indian tribes, while the U.S. government insists that our international trading partners abide by these same core rights as a way to create a level playing field for U.S. workers. As a member of the International Labor Organization (ILO), the United States is obligated to respect and promote the rights outlined in

the ILO Declaration on Fundamental Principles and Rights at Work, including:

- Freedom of association and the effective recognition of the right to collective bargaining;
- Elimination of all forms of forced or compulsory labor;
- Effective abolition of child labor; and
- Elimination of discrimination in respect of employment and occupation.

When negotiating with potential trading partners, Democrats and Republicans alike have insisted that other fully-sovereign nations adopt laws that would implement the core ILO standards. The U.S. Congress has ratified four free trade agreements—with Peru, Panama, Colombia and the Republic of Korea—which includes these rights and provides for dispute resolution for violations. Yet within our own borders, H.R. 511 would strip hundreds of thousands of the right to freedom of association and the right to collective bargaining at Indian tribal enterprises.

In short, H.R. 511 "repudiate[s] fundamental human rights that belong to every worker in every nation." [24]

THE TRIBAL LABOR SOVEREIGNTY ACT OF 2015 (H.R. 511) WILL ADVERSELY AFFECT THE ECONOMY

Committee Democrats have advanced policies to increase opportunity and reduce income inequality. One of the most effective tools to reduce income inequality is the right to organize and collectively bargain for better wages and working conditions. By providing workers with bargaining power, workers can reconnect the historical linkage between productivity and wage growth.

Weakening collective bargaining rights for workers employed at tribal enterprises would exacerbate the well documented pay-productivity gap that has persisted for the past 40 years. Between 1948 and 1973, productivity increased 96.7% while wages for the typical worker increased 91.3% in inflation adjusted terms. However, between 1973 and 2013, productivity increased 74.4% while compensation for the typical worker only increased 9.2%.[25] The broken link between productivity and pay is one reason for persistent wage stagnation in our economy.

Workers with collective bargaining agreements have better wages, more access to benefits, and safer working conditions. For example, 95% of employees have access to employer-provided health care versus 64% of non-union workplaces. Additionally, 94% of unionized workers last year have access to retirement benefits through employers, compared to 64% at nonunion workplaces.[26] These trends hold true in workplaces across the country, but are especially pertinent in the casino and gaming industry, which H.R. 511 would overwhelmingly affect.

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[24] Legislative Alert from the AFL CIO, July 21, 2015, regarding the Tribal Labor Sovereignty Act (H.R. 511).

[25] *The Erosion of Collective Bargaining Has Widened the Gap Between Productivity and Pay,* David Cooper and Lawrence Mishel, Economic Policy Institute (January 6, 2015). *http//www.epi.org/publication/collective-bargainings-erosion-expanded-the-productivity-pay-gap/*.

[26] *Employee Benefits in the United States,* New Release, Bureau of Labor Statistics, July 24, 2015.

PREVIOUS HOUSE CONSIDERATION OF LEGISLATION TO BLOCK NLRB JURISDICTION OVER TRIBAL ENTERPRISES

Floor amendments were offered to both the Fiscal Year 2005 and the 2006 House Labor, HHS Appropriations Acts which would have blocked the NLRB from enforcing the *San Manuel* decision. These amendments, which were offered by Representative J.D. Hayworth, were twice rejected on roll call votes: 225 to 187 on September 9, 2004, and 256 to 146 on June 24, 2005.[27]

AMENDMENTS

No Democratic amendments were offered at the July 22, 2015 markup.

H.R. 511 IS UNNECESSARY BECAUSE THE NATIONAL LABOR RELATIONS BOARD'S CURRENT APPROACH BALANCES TRIBAL SOVEREIGNTY AND WORKERS' RIGHTS

This legislation is not needed, because the NLRB's case-by-case approach balances two competing principles—protection of workers' rights and the preservation of tribal sovereignty. The bill's all-or-nothing approach is too sweeping, and there is no principled basis for excluding hundreds of thousands of workers from coverage under labor laws just because they happen to work in a commercial enterprise on tribal lands.

This bill cloaks an anti-union agenda in the respectable garb of tribal sovereignty. It is another attempt in the Majority's quest to dismantle labor unions and strip workers of their ability to bargain for better pay and working conditions. We urge the full House of Representatives to reject this legislation.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
HAKEEM S. JEFFRIES.
ALMA S. ADAMS.
MARK DESAULNIER.
JOE COURTNEY.
KATHERINE M. CLARK.
MARK POCAN.
GREGORIO KILILI CAMACHO SABLAN.
RUBEN HINOJOSA.

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[27] *Congressional Record,* September 9, 2004, pp. H.6951–6952 and June 24, 2005, pp. H.5153.