

TRIBAL LABOR SOVEREIGNTY ACT OF 2017

SEPTEMBER 25, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, 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. 986]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 986) 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 2017”.

**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 Indian or held by any Indian tribe or Indian 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. 986, the *Tribal Labor Sovereignty Act of 2017*, 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 on Proposals to Strengthen the NLRA*

On July 25, 2012, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing entitled “Examining Proposals to Strengthen the National Labor Relations Act,” to review 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 *Rewarding Achievement and Incentivizing Successful Employees 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.<sup>1</sup> 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

##### *Introduction of H.R. 511, Tribal Labor Sovereignty Act of 2015*

On January 22, 2015, Rep. Todd Rokita (R-IN) introduced H.R. 511, the *Tribal Labor Sovereignty Act of 2015*, with 14 cosponsors.<sup>2</sup> Recognizing the threat to tribal sovereignty posed by the NLRB’s decision in *San Manuel Indian Bingo and Casino (San Manuel)*,<sup>3</sup> the legislation provided that 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.

<sup>1</sup>*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).

<sup>2</sup>H.R. 511, 114th Cong. (2015). Substantively identical legislation was also introduced by Rep. Kristi Noem (R-SD) in the 112th and 113th Congresses.

<sup>3</sup>341 NLRB No. 138 (2004).

*Subcommittee Legislative Hearing on H.R. 511, Tribal Labor Sovereignty Act of 2015*

On June 16, 2015, the HELP Subcommittee held a legislative hearing on H.R. 511, the *Tribal Labor Sovereignty Act of 2015*.<sup>4</sup> 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 was 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 Passage of H.R. 511, Tribal Labor Sovereignty Act of 2015*

On July 22, 2015, the Committee on Education and the Workforce (Committee) marked up H.R. 511, the *Tribal Labor Sovereignty Act of 2015*.<sup>5</sup> Rep. Rokita 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, as amended, to the House of Representatives by voice vote.

*House Passage of H.R. 511, Tribal Labor Sovereignty Act of 2015*

On November 17, 2015, the House of Representatives passed H.R. 511, the *Tribal Labor Sovereignty Act of 2015*, by a vote of 249 to 177. A companion bill, S. 248, was introduced in the Senate by Sen. Jerry Moran (R-KS) and favorably reported by the Senate Committee on Indian Affairs. It was not taken up by the full Senate.

115TH CONGRESS

*Introduction of H.R. 986, Tribal Labor Sovereignty Act of 2017*

On February 9, 2017, Rep. Rokita introduced H.R. 986, the *Tribal Labor Sovereignty Act of 2017*, with nine cosponsors.<sup>6</sup> As with bills introduced in prior Congresses,<sup>7</sup> the legislation provides that 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.

<sup>4</sup>*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).

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

<sup>6</sup>H.R. 986, 115th Cong. (2017). This legislation was substantively identical to H.R. 511, introduced in the 114th Congress.

<sup>7</sup>341 NLRB No. 138 (2004).

*Subcommittee Legislative Hearing on H.R. 986, Tribal Labor Sovereignty Act of 2017*

On March 29, 2017, the HELP Subcommittee held a legislative hearing entitled “H.R. 986, *Tribal Labor Sovereignty Act of 2017*.”<sup>8</sup> Witnesses testified to the urgent need to prevent the NLRB from usurping power from sovereign Indian tribes. Witnesses at this hearing were the Honorable Brian Cladoosby, President, National Congress of American Indians, Washington, D.C.; the Honorable Nathaniel Brown, Delegate, 23rd Navajo Nation Council, Navajo Nation, Window Rock, Arizona; Mr. John Gribbon, California Political Director, UNITE HERE International Union, AFL–CIO, San Francisco, California; and the Honorable Robert J. Welch, Jr., Chairman, Viejas Band of Kumeyaay Indians, Alpine, California.

*Committee Passage of H.R. 986, Tribal Labor Sovereignty Act of 2017*

On June 29, 2017, the Committee marked up H.R. 986, the *Tribal Labor Sovereignty Act of 2017*.<sup>9</sup> Rep. Rokita offered an amendment in the nature of a substitute making technical changes to clarify the definition of “Indian lands,” which was adopted by voice vote. The Committee favorably reported H.R. 986, as amended, to the House of Representatives by a vote of 22 to 16.

SUMMARY

H.R. 986, the *Tribal Labor Sovereignty Act of 2017*, will codify the NLRB standard regarding Board jurisdiction that existed prior to the 2004 *San Manuel* decision, amending the NLRA to provide 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 NLRA, guaranteeing the right of most private sector employees to organize and select their own representative.<sup>10</sup> In 1947, Congress passed the most significant amendment of the NLRA, the *Taft-Hartley Act*,<sup>11</sup> 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.”<sup>12</sup> The *Taft-Hartley Act* clarified employees have the right to refrain from participating in union activity,<sup>13</sup> created new union unfair labor prac-

<sup>8</sup> *Legislative Hearing on H.R. 986, Tribal Labor Sovereignty Act of 2017: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017).

<sup>9</sup> *H.R. 986, Tribal Labor Sovereignty Act of 2017: Markup Before the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017).

<sup>10</sup> 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).

<sup>11</sup> 29 U.S.C. § 141 et. seq.

<sup>12</sup> Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1947*, 61 HARV. L. REV. 1, 4 (1947).

<sup>13</sup> 29 U.S.C. § 157.

tices,<sup>14</sup> codified employer free speech,<sup>15</sup> and made changes to the determination of bargaining units.<sup>16</sup>

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 intended to be wholly neutral.<sup>17</sup>

#### *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.<sup>18</sup> Conversely, most states do not afford public-sector workers the right to strike.<sup>19</sup>

#### *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 HELP Subcommittee, 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.”<sup>20</sup> 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.<sup>21</sup>

Chairman Butler noted the Mashantucket Employment Rights Office has conducted at least six elections under the MPLRL, with

<sup>14</sup>*Id.* § 158.

<sup>15</sup>*Id.* § 158(c).

<sup>16</sup>*Id.* § 159(d).

<sup>17</sup>*NLRB v. Savair Mfg.*, 414 U.S. 270, 278 (1973).

<sup>18</sup>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>.

<sup>19</sup>*Id.* at 8–9.

<sup>20</sup>*Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Rodney Butler at 5) (internal quotation marks omitted).

<sup>21</sup>*Id.*

four unions certified as the exclusive bargaining representatives of units of employees.<sup>22</sup> The Mashantucket Pequot Nation subsequently entered into collective bargaining agreements with those four unions.<sup>23</sup>

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."<sup>24</sup> This included the right to collectively bargain.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

Nathaniel Brown, a Navajo Nation council member, testified before the Subcommittee in a subsequent hearing and agreed with Mr. Guest that employees of the Navajo Nation have basic labor rights. He stated that a "Navajo worker's right to join a union is protected."

Indian tribes have also addressed labor rights through the California tribal labor relations ordinances. In his testimony, Mr. Guest described how in 1999 Indian tribes negotiated tribal-state gaming compacts in California.<sup>28</sup> 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."<sup>29</sup> 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.<sup>30</sup> The Ordinance is similar to the NLRA in many ways, including incorporating 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:

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (written testimony of Richard Guest at 6).

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of Richard Guest at 8).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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 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.<sup>31</sup>

Robert J. Welch, Jr., Chairman of the Viejas Band of Kumeyaay Indians from San Diego County, California, discussed in his testimony before the Subcommittee the tribal labor ordinance the Viejas Band passed in 1999. Chairman Welch stated:

On September 14, 1999, the Viejas Band passed its own law governing labor relations: a Tribal Labor Relations Ordinance (the “TLRO”). The TLRO, like similar voluntarily adopted state laws addressing labor relations for government agencies, contains numerous provisions that are similar to the NLRA, including detailed procedures for representation proceedings, a guarantee of rights to engage in concerted activity, enumeration of unfair labor practices by Tribes and unions, and procedures for secret ballot elections and union decertification. The TLRO, however, also diverges from the NLRA in matters that are unique to Tribal government gaming, including the recognition of an Indian hiring preference, the exclusion of certain employee classifications from organization (such as Tribal Gaming Commission employees), the ability for a Tribal Gaming Commission to require a labor organization to secure a gaming license, and the resolution of any labor disputes through binding arbitration before an independent Tribal Labor Panel (rather than the NLRB). The Viejas Band amended its TLRO in November 2016 to provide additional protections to employees and labor organizations.

Over 70 other Tribal governments in California have adopted their own, substantially similar, TLROs. The TLROs have worked well for over 17 years, have been publicly praised by California labor union representatives speaking before the California legislature, and would continue to be undermined by NLRB interference if H.R. 986 were not passed.<sup>32</sup>

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.

<sup>31</sup> *Id.* at 9–10.

<sup>32</sup> *Legislative Hearing on H.R. 986, supra* note 8 (written testimony of the Hon. Robert J. Welch, Jr., at 4–5).

### *History of Tribal Sovereignty*

Originally, there were few limits on tribal sovereignty. In 1823, the Supreme Court in *Johnson v. McIntosh* held that Indian tribes had no power to grant or dispose of lands to anyone other than the federal government.<sup>33</sup> In 1832, the Supreme Court in *Worcester v. Georgia* further indicated Indian tribes did not have the authority to deal with foreign powers.<sup>34</sup> 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.”<sup>35</sup> In 1831, in *Cherokee Nation v. Georgia*, the Supreme Court noted the Cherokee Nation had “the character of . . . a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself.”<sup>36</sup>

### *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 not limit 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 *American 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 *Occupational 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.<sup>37</sup>

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.<sup>38</sup> As Jefferson Keel, Lieutenant Governor for the Chickasaw Nation, stated in his testimony to the Subcommittee, “[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 sov-

<sup>33</sup> 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.*

<sup>34</sup> 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.

<sup>35</sup> 21 U.S. (8 Wheat.) 543, 574 (1823).

<sup>36</sup> 30 U.S. (5 Pet.) 1, 16 (1831).

<sup>37</sup> 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).

<sup>38</sup> See, e.g., 29 U.S.C. § 158(d) (obligation of employer and union to bargain collectively).

ereignty and self-government.”<sup>39</sup> Brian Cladoosby, President of the National Congress of American Indians, raised a similar concern in his testimony before the Subcommittee. He stated, “We are very concerned that the right to strike would allow outside forces—third parties with little or no connection to the tribal community—to control tribal government decisions.”<sup>40</sup>

#### *NLRB Jurisdiction over Indian Tribes*

For almost 30 years, the NLRB held “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.”<sup>41</sup> However, in 2004 in *San Manuel*, the Board adopted a “new approach to considering Indian owned and operated enterprises,”<sup>42</sup> holding 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 unnecessary encroachment on tribal sovereignty, several members of Congress have introduced legislation to undo the precedent established under the *San Manuel* decision. Most recently, Rep. Rokita 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 the location of an Indian business was determinative with respect to the NLRB’s jurisdiction and 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.<sup>43</sup> In *Sac and Fox Industries, Ltd.*, the Board found the NLRA applicable to off-reservation tribal enterprises, such as logging mills.<sup>44</sup> 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.

In 2004 in *San Manuel*, a divided NLRB reversed course. Relying on controversial dicta in *Federal Power Commission v. Tuscarora Indian Nation* stating a “general statute in terms applying to all persons includes Indians and their property interests,”<sup>45</sup> 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.<sup>46</sup> In deciding *San Manuel*, the NLRB noted

<sup>39</sup>Legislative Hearing on H.R. 511, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 1) (emphasis added).

<sup>40</sup>Legislative Hearing on H.R. 986, *supra* note 8 (written testimony of the Hon. Brian Cladoosby at 5).

<sup>41</sup>*Fort Apache Timber Co.*, 226 NLRB 503 (1976), *overruled by San Manuel Indian Bingo and Casino*, 341 NLRB No. 138 (2004).

<sup>42</sup>341 NLRB 1055, 1064 (2004).

<sup>43</sup>*Fort Apache*, 226 NLRB at 506.

<sup>44</sup>307 NLRB 241 (1992).

<sup>45</sup>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.

<sup>46</sup>341 NLRB at 1057–62.

the NLRA does not expressly exclude Indian tribes.<sup>47</sup> Therefore, according to the NLRB, the issue is left to the Board's discretion. Now, relying on *San Manuel*, the Board determines 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 "the special attributes of [tribal] sovereignty are not implicated."<sup>48</sup> 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.<sup>49</sup> Additionally, the Board does 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 NLRA to apply to Indian tribes.<sup>50</sup> Then-Board Member Peter C. Schaumber strongly dissented, stating "rebalancing of competing policy interests involving Indian sovereignty is a task for Congress to undertake."<sup>51</sup> On appeal, the U.S. Court of Appeals for the District of Columbia Circuit upheld the NLRB's holding in *San Manuel*.<sup>52</sup>

In testimony before the Subcommittee, 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 intramural affairs or a controlling treaty provision) limits the Act's jurisdictional reach.<sup>53</sup>

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.<sup>54</sup>

<sup>47</sup> *Id.* at 1058. In fact, neither the text of the NLRA nor its legislative history reference coverage of Indian tribes.

<sup>48</sup> *Id.* at 1062.

<sup>49</sup> *Id.* at 1063.

<sup>50</sup> *Id.* at 1059.

<sup>51</sup> *Id.* at 1065 (Schaumber, Member, dissenting).

<sup>52</sup> *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

<sup>53</sup> *Legislative Hearing on H.R. 511 supra* note 4 (written testimony of the Hon. Jefferson Keel at 4) (emphasis in original).

<sup>54</sup> *Id.* (written testimony of the Hon. Rodney Butler at 2).

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].”<sup>55</sup>

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.”<sup>56</sup> In his testimony, Richard Guest of the Native American Rights Fund similarly argued for equal treatment of governments, stating:

[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.<sup>57</sup>

Lieutenant Governor Keel also stated, “All governments are entitled to equal respect under the law, precisely as Congress in 1935 intended.”<sup>58</sup> 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.”<sup>59</sup>

Brian Cladoosby, President of the National Congress of American Indians, pointed out in his testimony before the Subcommittee, “[More than] 90,000 other units of government in America, who employ over 21 million Americans, are not subject to the NLRA. The Board in 2004 made tribal governments the only governments subject to the NLRA.”<sup>60</sup> Nathaniel Brown, Navajo Nation Council Member, also argued for parity in his 2017 testimony before the Subcommittee, stating, “[W]e are not asking for special treatment. The United States and States have been afforded this exemption [from the NLRA]. We simply want parity. If they are able to self-govern and be self-determined with regards to the NLRA, so should we.”<sup>61</sup>

Robert J. Welch, Jr., Chairman of the Viejas Band of Kumeyaay Indians, made a similar point in his testimony, stating:

As sovereign governments engaged in economic activities essential to fund government services, Tribes, such as the Viejas Band, should enjoy the same exempt status as the

<sup>55</sup> *Examining Proposals to Strengthen the National Labor Relations Act*, *supra* note 1, at 8–9 (written testimony of the Hon. Robert Odawi Porter).

<sup>56</sup> *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Rodney Butler at 2).

<sup>57</sup> *Id.* (written testimony of Richard Guest at 1–2) (emphasis omitted).

<sup>58</sup> *Id.* (written testimony of the Hon. Jefferson Keel at 1) (emphasis in original).

<sup>59</sup> *Examining Proposals to Strengthen the National Labor Relations Act*, *supra* note 1, at 9 (written testimony of the Hon. Robert Odawi Porter).

<sup>60</sup> *Legislative Hearing on H.R. 986*, *supra* note 8 (written testimony of the Hon. Brian Cladoosby at 3).

<sup>61</sup> *Id.* (written statement of the Hon. Nathaniel Brown at 2).

Viejas Band, should enjoy the same exempt status as the United States, State governments, and their government business. If exemption is appropriate for state lotteries, it should be for Tribal governments too.<sup>62</sup>

In 2007, in *Foxwoods Resort Casino*,<sup>63</sup> 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 operation of the casino, which it used to fund various endeavors aimed toward promoting the tribal community and tribal self-government.<sup>64</sup> 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.<sup>65</sup>

In 2013, in *Soaring Eagle Casino and Resort (Soaring Eagle)*,<sup>66</sup> 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 afforded the Saginaw exclusive use, ownership, occupancy, and self-governance of a permanent homeland in Isabella County.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup>

In contrast, on June 4, 2015, after years of litigation, the NLRB in *Chickasaw Nation* unanimously declined to assert jurisdiction.<sup>70</sup> 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.<sup>71</sup>

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, Lieutenant Governor Keel of the Chickasaw Nation stated the following:

While the new Board ruling establishes an important precedent in recognizing the Chickasaw Nation's tribal

<sup>62</sup> *Id.* (written statement of the Hon. Robert J. Welch, Jr., at 3).

<sup>63</sup> No. 34-RC-2230 (Oct. 24, 2007) (decision and direction of election).

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* at 13.

<sup>66</sup> 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).

<sup>67</sup> *Soaring Eagle Casino and Resort*, 2013 WL 1646049, \*4.

<sup>68</sup> *Id.* at \*12.

<sup>69</sup> *Id.* at \*19.

<sup>70</sup> 362 NLRB No. 109, 2015 WL 3526096 (2015).

<sup>71</sup> 2015 WL 3526096, \*3.

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 possesses no expertise whatsoever in Indian law or matters of tribal sovereignty.<sup>72</sup>

On June 9, 2015, in *NLRB v. Little River Band of Ottawa Indian Tribal Government (Little River Band)*, 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.<sup>73</sup> The majority held although the NLRA is silent on the issues, the statutory terms “employer” and “person” both encompass Indian tribes.<sup>74</sup> 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.<sup>75</sup> Dissenting, Judge David McKeague argued principles of tribal sovereignty should leave the band free to regulate its own labor relations at the casino.<sup>76</sup>

Less than a month after the *Little River Band* decision, another Sixth Circuit panel issued a decision in an appeal from the NLRB in *Soaring Eagle*. The *Soaring Eagle* panel stated its disagreement with the *Little River Band* decision. Regardless, the panel found it was bound by the *Little River Band* decision released just weeks earlier, and thus forced to rule the NLRA had jurisdiction over the Saginaw Chippewa Indian Tribe of Michigan, owner and operator of the Soaring Eagle Casino and Resort.<sup>77</sup> In June 2016, the Supreme Court declined to hear an appeal of the *Soaring Eagle* and *Little River Band* decisions.<sup>78</sup> 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.”<sup>79</sup>

Most recently, on October 11, 2016, an NLRB Administrative Law Judge found the Viejas Tribe was subject to the NLRA in *Viejas Band of Kumeyaay Indians*.<sup>80</sup> The tribe in that case has asked the full Board to review the issue of whether they are an employer under the NLRA.

These cases have seen varying outcomes and the opaque application of Indian treaty law, which creates a vague standard. The subjective nature of the *San Manuel* test and its threat to sovereignty have made this an issue of concern for tribes across the country. Representatives of the tribal community testified about the need for a legislative fix to clarify tribal sovereignty. For example,

<sup>72</sup>Legislative Hearing on H.R. 511, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 4).

<sup>73</sup>788 F.3d 537 (6th Cir. 2015).

<sup>74</sup>*Id.* at 543.

<sup>75</sup>*Id.* at 544–56.

<sup>76</sup>*Id.* at 556 (McKeague, J., dissenting).

<sup>77</sup>791 F.3d 648 (6th Cir. 2015), *rehearing en banc denied*, 791 F.3d 648 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016).

<sup>78</sup>136 S. Ct. 2509 (2016).

<sup>79</sup>Legislative Hearing on H.R. 511, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 4).

<sup>80</sup>Case No. 21–CA–166290 (Oct. 24, 2016).

Chairman Cladoosby stated the following in testimony before the HELP Subcommittee:

Where Tribal sovereignty is undermined or threatened in any way, we have no choice but to take a strong stand . . . . With [the *San Manuel*] decision, the Board upended 70 years of precedent and unilaterally disregarded Tribal labor law and made Tribal governments the only governments in the United States subject to the NLRA. With the Tribal Labor Sovereignty Act, Congress resolves any question about whether the NLRA applies to Tribal governments and reaffirms sovereign governmental rights of Indian Tribes to make their own labor policies that govern their own governmental employees.<sup>81</sup>

Additionally, Nathaniel Brown of the Navajo Nation Council testified before the HELP Subcommittee that H.R. 986 is a “step in the right direction toward honoring [Tribal] sovereignty and self-determination.”<sup>82</sup> At the same hearing, Chairman Welch of the Viejas Band of Kumeyaay Indians agreed. He stated the following:

H.R. 986 is about respecting the sovereignty of Tribes and affirming that they possess the same power as Federal, State, and local governments to regulate labor relations on sovereign lands . . . . Tribes should not be treated as second class governments. Viejas respectfully requests that Congress enact H.R. 986.<sup>83</sup>

#### 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, currently determines whether the NLRA would interfere with tribal sovereignty or abrogate treaty rights in a highly subjective manner, 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. H.R. 986, the *Tribal Labor Sovereignty Act of 2017*, creates parity with the states and between tribes, thus ensuring tribal sovereignty.

#### SECTION-BY-SECTION

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 2017.”

Section 2. Amends the NLRA 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 terms “Indian tribe,” “Indian,” and “Indian land.”

<sup>81</sup> *Legislative Hearing, supra* note 8 (oral testimony of the Hon. Brian Cladoosby).

<sup>82</sup> *Id.* (oral testimony of the Hon. Nathaniel Brown).

<sup>83</sup> *Id.* (oral testimony of the Hon. Robert J. Welch, Jr.).

## EXPLANATION OF AMENDMENTS

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

## 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. 986 codifies the pre- 2004 NLRB standard 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. 986 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.

Date: June 29, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 1 Bill: H.R. 986 Amendment Number: \_\_\_\_\_

Disposition: Adopted by a vote of 22 yeas and 16 nays

Sponsor/Amendment: Mr. Wilson - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. GUTHRIE (KY)	X			Mr. SABLAN (MP)			X
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)			X	Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Ms. STEFANIK (NY)	X			Ms. BLUNT ROCHESTER (DE)		X	
Mr. ALLEN (GA)	X			Mr. KRISHNAMOORTHY (IL)		X	
Mr. LEWIS (MN)	X			Ms. SHEA-PORTER (NH)		X	
Mr. ROONEY (FL)	X			Mr. ESPAILLAT (NY)		X	
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
Mr. ESTES (KS)	X						
Mrs. HANDEL (GA)	X						

TOTALS: Aye: 22 No: 16 Not Voting: 2

Total: 40 / Quorum: 14 / Report: 21

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 986 is to protect tribal sovereignty and the right to tribal self-governance.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 986 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. 986 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 Committee'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. 986 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 21, 2017.*

Hon. VIRGINIA FOXX,  
*Chairwoman, Committee on Education and the Workforce,  
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 986, the Tribal Labor Sovereignty Act of 2017.

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

Sincerely,

MARK P. HADLEY  
(For Keith Hall, *Director*).

Enclosure.

*H.R. 986—Tribal Labor Sovereignty Act of 2017*

H.R. 986 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. However, the NLRB does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

Enacting H.R. 986 would not significantly affect the workload of the NLRB and thus would have no effect on the federal budget. Because enacting the bill would not affect direct spending or revenues, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 986 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 986 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 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. 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 2016, claims with the NLRB resulted in about 600 cases in which employees were reinstated and in awards of about \$53 million in back pay and other costs. Case documents show that the NLRB has asserted jurisdiction over only a small number of tribal enterprises since 2004 (fewer than 10). 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 (\$156 million in 2017, 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 February 16, 2017, CBO issued an estimate for S. 63, the Tribal Labor Sovereignty Act of 2017, as ordered reported by the Senate Committee on Indian Affairs. That bill is identical to H.R. 986, and the estimates are the same for both bills.

The CBO staff contacts for this estimate are Christina Hawley Anthony (for federal costs) and Amy Petz (for private-sector mandates). 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. 986. 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 italic and existing law in which no change is proposed is shown in roman):

#### 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 italic 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 em-

ployer), 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 Indian or held by any Indian tribe or Indian 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

This bill would strip workers of their rights to organize and collectively bargain at any enterprise owned and operated by a recognized Indian tribe on tribal land. H.R. 986 amends the definition of a covered “employer” per the National Labor Relations Act (NLRA), which has the effect of excluding such tribal enterprises from the jurisdiction of the NLRA. All present Democratic members of the Committee opposed H.R. 986 during a roll call vote.

This bill arises from tension between two deeply-held principles: the rights that Indian tribes possess as “distinct, independent political communities, retaining their original natural rights in matters of local self-government,”<sup>1</sup> and the rights of workers to organize, bargain collectively, and engage in concerted activities for mutual aid and protection.

Rather than attempting to balance these important interests, H.R. 986 strips hundreds of thousands of workers—the majority of whom are *not* members of tribes—of their right to a voice in the workplace. As the International Labor Organization (ILO) has noted with regards to this legislation, this exclusion from the NLRA “would give rise to discrimination in relation to the protection of trade union rights which would affect both indigenous and non-indigenous workers simply on the basis of their workplace location.”<sup>2</sup>

The NLRA’s protection of employees’ rights to join unions is especially critical for this group of predominantly lower-wage workers. According to a 2013 report by UNITE HERE, the average California tribal casino worker without a union makes \$10.02 per hour or \$20,841 annually. At this level, a family of four with one breadwinner would be living at 88 percent of the federal poverty level. In contrast, workers with collective-bargaining agreements earned \$7,558 (41 percent) more in combined wages and health insurance benefits than the industry average in California.<sup>3</sup>

Wrapped in the garb of respect for tribal sovereignty, this bill is another attempt to dismantle labor unions and strip workers of their ability to bargain for better pay and working conditions.

### COMMITTEE ACTION ON H.R. 986

Committee Democrats did not offer amendments to H.R. 986 during the June 29, 2017 markup. The bill was approved on a roll call vote 22–16, with all Democrats present opposing.

<sup>1</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

<sup>2</sup> Letter from Corrine Vargha, ILO Director of International Labor Standards Department, to Richard Trumka, AFL–CIO President.

<sup>3</sup> *The Emerging Standard: An Analysis of Job Quality in California’s Tribal Gaming Industry*, UNITE HERE (October 2013).

PREVIOUS HOUSE FLOOR CONSIDERATION OF LEGISLATION TO  
BLOCK THE APPLICABILITY OF THE NLRA TO EMPLOYEES OF COM-  
MERCIAL TRIBAL ENTERPRISES

In the 114th Congress, the House Committee on Education and the Workforce reported the same bill (H.R. 511) on September 10, 2015. The House passed the bill by a 249–177 vote on November 17, 2015. Prior to the vote, the Obama administration issued a Statement of Administration Policy opposing the bill, but stated that the administration could support a compromise that would “exempt[] tribes from the jurisdiction of the [NLRB] only if the tribes adopt labor standards and procedures . . . reasonably equivalent to those in the National Labor Relations Act.”<sup>4</sup> The Majority has not expressed interest in exploring this option.

Floor amendments were offered to both the Fiscal Year 2005 and the 2006 House Labor-HHS Appropriations Acts that would have blocked the NLRB from enforcing the *San Manuel Indian Bingo and Casino* decision. These amendments, 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.<sup>5</sup>

THE NLRA’S APPLICATION TO TRIBAL ENTERPRISES IS SETTLED LAW  
AND ROOTED IN LONGSTANDING PRECEDENT

The NLRA is a statute of general applicability, and does not exclude tribal enterprises from its jurisdiction.<sup>6</sup> As observed by the Supreme Court in 1960, “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.”<sup>7</sup> To clarify this principle, courts apply the three-prong test established in the Ninth Circuit’s 1985 decision *Donovan v. Coeur d’Alene Tribal Farm*.<sup>8</sup> This test holds that a federal law of general applicability does not apply to a tribe if: (1) it touches upon a tribe’s intramural governance; (2) it abrogates rights guaranteed by an Indian treaty; or, (3) Congress indicates that a law should not apply to Indian tribes.<sup>9</sup>

In 2004, during the Bush Administration, the National Labor Relations Board (NLRB) in *San Manuel Indian Bingo and Casino* applied this three-prong test in deciding whether to assert jurisdiction over a tribal casino on tribal lands.<sup>10</sup> In doing so, the NLRB sought to harmonize its interpretation of the NLRA with the Supreme Court’s presumption that laws of general applicability apply to tribes.<sup>11</sup> Noting the three exceptions articulated in *Coeur d’Alene*, the NLRB went a step further and adopted a fourth exception where there are policy reasons not to assert jurisdiction in

<sup>4</sup>Barack Obama, Statement of Administration Policy: H.R. 511—Tribal Labor Sovereignty Act of 2015 (Nov. 17, 2015) [https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saphr511h\\_20151117.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saphr511h_20151117.pdf).

<sup>5</sup>*Congressional Record*, September 9, 2004, pp. H.6951–6952 and June 24, 2005, pp. H.5153.

<sup>6</sup>The NLRA defines the term “employer” to include “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 person subject to the Railway Labor Act. . . .”

<sup>7</sup>*FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

<sup>8</sup>751 F.2d 1113 (9th Cir. 1985).

<sup>9</sup>*Id.* at 1116.

<sup>10</sup>341 NLRB 1055 (2004), *enforced* 475 F.3d 1306 (D.C. Cir. 2007).

<sup>11</sup>*Id.* at 1059 (citing *Tuscarora*, 362 U.S. at 116).

order “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.”<sup>12</sup>

Applying this test, the NLRB found that it would generally apply the NLRA to tribal-owned businesses except when it meets any of the above exceptions. For example, the NLRB declined to exercise jurisdiction over tribal enterprises including a health clinic that served primarily tribal members in Alaska based on the fourth exception.<sup>13</sup> In another example, the Board declined jurisdiction over an Oklahoma casino run by the Chickasaw tribe that was party to an 1830 treaty which exempts the tribe from nearly all federal laws.<sup>14</sup> The case law distinguishes between proprietary interests, such as the operation of a casino, where the *Coeur d’Alene* tests would apply, and sovereign interests involving tribal self-governance, such as a tribal statute prohibiting union security agreements, where the NLRA jurisdiction would be foreclosed.<sup>15</sup>

The NLRB’s finding that the NLRA applies to tribal enterprises, barring the above exceptions, is now settled law. The Supreme Court decided against hearing two challenges to the NLRB’s *San Manuel* decision, and every court that has considered the *San Manuel* framework—the D.C. Circuit, the Sixth Circuit, and a federal district court in the Eighth Circuit—has upheld it.<sup>16</sup>

MANY EMPLOYMENT LAWS APPLY TO TRIBAL ENTERPRISES, BUT H.R. 986 SINGLES OUT WORKERS’ RIGHTS TO ORGANIZE UNIONS AND COLLECTIVELY BARGAIN

Using the *Coeur d’Alene* framework, numerous courts have upheld the applicability of other federal employment laws to Indian tribes, including:

- Fair Labor Standards Act (FLSA)<sup>17</sup>
- Occupational Safety and Health Act (OSHA)<sup>18</sup>
- Employee Retirement Income Security Act (ERISA)<sup>19</sup>
- Title III (public accommodations) of the Americans with Disabilities Act (ADA)<sup>20</sup>
- The employer mandate in the Patient Protection and Affordable Care Act (ACA)<sup>21</sup>
- The Family and Medical Leave Act (FMLA)<sup>22</sup>

Employment statutes are hardly the only federal laws that apply to Indian tribes under *Coeur d’Alene*. Courts have also applied the Federal Trade Commission Act, the Federal Truth in Lending Act,

<sup>12</sup>*San Manuel*, 341 NLRB at 1062.

<sup>13</sup>*Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004).

<sup>14</sup>*Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (June 4, 2015).

<sup>15</sup>*NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).

<sup>16</sup>*NLRB v. Little River Band of Ottawa Indians v. NLRB*, 788 F.3d 537 (6th Cir. 2015), cert. denied (U.S. June 27, 2016); *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), cert. denied (U.S. June 27, 2016); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007); *NLRB v. Fortune Bay Resort Casino*, 688 F.Supp.2d 858 (D. Minn. 2010).

<sup>17</sup>*Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009).

<sup>18</sup>*Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996).

<sup>19</sup>*Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.2d 683 (9th Cir. 1991); *Smart v. State Farm Ins.*, 868 F.2d 929 (7th Cir. 1989).

<sup>20</sup>*Florida Paraplegic Association v. Miccosukee Tribe of Florida*, 166 F.3d 1126 (11th Cir. 1999).

<sup>21</sup>*Northern Arapaho Tribe v. Burwell*, No. 14–CV–247 SWS, 2015 WL 4639324 (D. Wyo. July 2, 2015).

<sup>22</sup>*Bodi v. Shingle Springs Band of Miwok Indians*, 19 F. Supp. 3d 978 (E.D. Cal. 2014).

the Electronic Fund Transfer Act,<sup>23</sup> Section 6050I of the Internal Revenue Code involving the reporting of cash transaction in excess of \$10,000,<sup>24</sup> and numerous federal criminal laws<sup>25</sup> to tribal enterprises or persons when none of the three exceptions are met.

Thus, the effort to attack the jurisdiction of the NLRA to the exclusion of other federal labor laws suggests that animus toward labor unions motivates this legislation.

FOR EMPLOYEES OF TRIBAL ENTERPRISES, THE NLRA PROVIDES THE ONLY PROTECTION AGAINST DISCRIMINATION AND HARASSMENT, YET THE BILL PROVIDES NO LEGAL REMEDIES WHEN ISSUES LIKE DISCRIMINATION AND HARASSMENT ARISE IN TRIBAL ENTERPRISES

While most federal labor and employment laws do apply to tribal enterprises, two notable exceptions are the Age Discrimination in Employment Act<sup>26</sup> and Title VII of the Civil Rights Act.<sup>27</sup> Thus, employees of a tribal enterprise who are subjected to sexual harassment, for example, cannot bring a claim to the U.S. Equal Employment Opportunity Commission (EEOC) or in federal court—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 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.”<sup>28</sup> The U.S. District Court for the Southern District of Florida dismissed her case citing the tribe’s sovereign immunity under Title VII.<sup>29</sup> For workers such as these who have no protection from federal antidiscrimination laws, unions are the sole remaining recourse to combating discrimination and harassment, because they can negotiate a collective-bargaining agreement that enforces an employee’s right to be free from such conduct in the workplace.

PARITY AND SOVEREIGNTY SHOULD NOT OUTWEIGH WORKERS’ RIGHTS, ESPECIALLY WHEN TRIBES ARE EXEMPTED FROM LABOR LAWS THAT COVER STATE AND LOCAL GOVERNMENTS

Committee Republicans’ primary argument in favor of H.R. 986 is that the NLRA does not apply to state and local governments, and tribes should have parity as a governmental entity. Under this principle, Committee Republicans contend that tribes should be able to decide whether to allow employees to form unions under a tribal labor relations ordinance, just as state governments are free

<sup>23</sup> *FTC v. AMG Services, Inc.*, 2013 WL 787075, at \*12 (D. Nev. July 16, 2013), *report and recommendation adopted*, No. 2:12-CV-00536-GMN, 2014 WL 910302 (D. Nev. Mar. 7, 2014).

<sup>24</sup> *United States v. White*, 237 F.3d 170 (2d Cir. 2001).

<sup>25</sup> See, e.g., *United States v. Gallagher*, 275 F.3d 784 (9th Cir. 2001) (felon in possession of ammunition); *United States v. Funmaker*, 10 F.3d 1327 (7th Cir. 1993) (damaging or destroying property used in interstate commerce); *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983) (drug laws).

<sup>26</sup> *Williams v. Poarch Band of Creek Indians*, 2016 WL 6081345 (11th Cir. Oct. 18, 2016).

<sup>27</sup> Congress expressly excludes tribes from the definition of “employer” under Title VII. 42 U.S.C. § 2000e(b).

<sup>28</sup> 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).

<sup>29</sup> *Roselius v. McDaniel*, No. 95-6887, slip op. at 1 (S.D. Fla. Aug. 7, 1997) (dismissing case for lack of subject matter jurisdiction).

to decide whether to allow public employees to form unions. This parity argument falls short in three important ways:

*First, tribal casinos and similar businesses are commercial enterprises* in direct competition with similar non-tribal businesses. According to the National Indian Gaming Association (NIGA), the tribal gaming industry in the United States is a \$28 billion per year enterprise. California's tribal casinos are an \$8 billion per year enterprise eclipsing the Las Vegas strip (at \$6 billion per year).<sup>30</sup> Although these enterprises raise revenues for the tribe, courts have found that the total impact on tribal sovereignty from NLRA jurisdiction is not sufficient "to demand a restrictive construction of the NLRA."<sup>31</sup> 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.

*Second, approximately 75 percent of the 600,000 employees of tribal casinos are non-Indians.*<sup>32</sup> 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 employees in local or state government. Since the majority of employees at tribal enterprises lack parity with the political rights enjoyed by state and local government employees to petition their employer, the parity argument between tribal government and state and local government falls apart.

*Third, tribes are exempted from employment laws that apply to state and local governments.* State and local governments are covered by Title VII of the Civil Rights Act and the public accommodations provisions of the Americans with Disabilities Act. As noted above, Indian tribes are expressly exempted from coverage. Parity with state and local governments would require tribes also be subject to these employment laws.

#### TRIBAL LABOR RELATIONS ORDINANCES ARE NOT AN ADEQUATE ALTERNATIVE TO THE NLRA WITHOUT MINIMUM STANDARDS

Committee Republicans point to the adoption of Tribal Labor Relations Ordinances (TLRO) by some tribes as evidence of 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, although certain TLROs fall far short of the protections afforded under the NLRA.<sup>33</sup> Tribes in other states have negotiated

<sup>30</sup>Testimony of Jack Gribbon, California Political Director, UNITEHERE! International Union, AFL-CIO Before the Health, Employment, Labor and Pensions Subcommittee of the Committee on Education and the Workforce, U.S. House of Representatives, *Legislative Hearing on H.R. 986, the Tribal Labor Sovereignty Act of 2017, March 29, 2017*, p.1. <https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=401479>.

<sup>31</sup>*San Manuel Indian Bingo and Casino*, 475 F.3d at 1315.

<sup>32</sup>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>.

<sup>33</sup>Testimony of Jack Gribbon, California Political Director, UNITEHERE! International Union, AFL-CIO Before the Health, Employment, Labor and Pensions Subcommittee of the Committee on Education and the Workforce, U.S. House of Representatives, *Legislative Hearing*

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 ordinances, if at all, without transparency or political accountability to the non-tribal employees of its commercial businesses.

Without any accountability, H.R. 986 would allow tribes to enact laws that outright prohibit unions. Indeed, the Blackfeet Nation in Montana already has a Tribal Employment Rights Ordinance that states, “Unions are prohibited on the Blackfeet Indian Reservation.”<sup>34</sup> Under H.R. 986, this attack on the human right to join a union would have the force of law.

In contrast, the NLRA already allows tribal enterprises and unions to agree to TLROs that are acceptable to both parties. Evidence was introduced at the March 29, 2017 hearing that, after a union is certified as the employees’ bargaining representative by the NLRB, it may enter into an agreement with a tribe regarding the terms of a TLRO that would govern their collective bargaining relationship. The union would still be able to exercise its rights under the NLRA if the tribal enterprise fails to abide by the TLRO. If H.R. 986 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 tribal workers—the majority of whom are not members of the tribe.

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. 986 EXEMPTS U.S. WORKERS WHEN EMPLOYED BY INDIAN TRIBES

This bill deprives workers of the right to organize and bargain collectively at commercial enterprises operated by Indian tribes, even though the U.S. government insists that 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 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 recognition of the right to collective bargaining.

When negotiating with potential trading partners, Democrats and Republicans alike have insisted that other 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

on H.R. 986, *the Tribal Labor Sovereignty Act of 2017*, March 29, 2017, p.3. <https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=401479>.

<sup>34</sup>Blackfeet Tribal Employment Rights Ordinance & Safety Enforcement Act, Section 3–107 <http://www.btero.com/blackfeet—tero—2010.pdf>.

provides for dispute resolution for violations. Yet within our own borders, H.R. 986 would strip hundreds of thousands of the right to freedom of association and the right to collective bargaining at Indian tribal enterprises.

THE CONGRESSIONAL BUDGET OFFICE DETERMINED THAT ENACTMENT OF H.R. 986 WOULD HAVE AN ADVERSE ECONOMIC IMPACT ON WORKERS IN TRIBAL ENTERPRISES

The Congressional Budget Office (CBO) determined that H.R. 986 would “impose a private-sector mandate” under the Unfunded Mandates Reform Act by eliminating workers’ rights to file unfair labor practice claims with the NLRB. As explained by the CBO, “[c]urrently, 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 that right, H.R. 986 burdens employees of tribal enterprises with economic costs, including “the value of forgone monetary awards resulting from claims that would have been filed with the NLRB in the absence of the bill.”<sup>35</sup>

The CBO noted that, by eliminating the right of employees “to form a union and bargain collectively,” H.R. 986 would impose a broader adverse impact, but the CBO did not consider this broader impact part of the direct cost of the mandate.<sup>36</sup>

H.R. 986 IS UNNECESSARY BECAUSE THE NATIONAL LABOR RELATIONS BOARD’S CURRENT APPROACH BALANCES TRIBAL SOVEREIGNTY AND WORKERS’ RIGHTS

Finally, this legislation is not needed, because the NLRB’s case-by-case approach balances two important 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 garb of tribal sovereignty. It is another attempt by Committee Republicans 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.*  
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<sup>35</sup> Congressional Budget Office Cost Estimate for the Tribal Labor Sovereignty Act of 2017 (H.R. 986), July 21, 2017 <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr986.pdf>.

<sup>36</sup> *Id.*

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