H.R. 986, *TRIBAL LABOR SOVEREIGNTY ACT OF 2017*

COMMITTEE REPORT

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.[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

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.[2] Recognizing the threat to tribal sovereignty posed by the NLRB's decision in *San Manuel Indian Bingo and Casino* (*San Manuel*),[3] the legislation

[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). Substantively identical legislation was also introduced by Rep. Kristi Noem (R-SD) in the 112th and 113th Congresses.
[3] 341 NLRB No. 138 (2004).

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.

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*.[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 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*.[5] 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.[6] As with bills introduced in prior Congresses,[7] 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.

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[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] H.R. 986, 115th Cong. (2017). This legislation was substantively identical to H.R 511, introduced in the 114th Congress.
[7] 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*."[8] 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*.[9] 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.[10] In 1947, Congress passed the most significant amendment of the NLRA, the *Taft-Hartley Act*,[11] 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."[12] The *Taft-Hartley Act* clarified employees have the right to refrain from participating in union activity,[13]

[8] *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).
[9] *H.R. 986, Tribal Labor Sovereignty Act of 2017: Markup Before the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017).
[10] 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).
[11] 29 U.S.C. § 141 et. seq.
[12] Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1947,* 61 HARV. L. REV. 1, 4 (1947).
[13] 29 U.S.C. § 157.

created new union unfair labor practices,[14] codified employer free speech,[15] and made changes to the determination of bargaining units.[16]

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.[17]

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.[18] Conversely, most states do not afford public-sector workers the right to strike.[19]

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."[20] 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

[14] *Id.* § 158.
[15] *Id.* § 158(c).
[16] *Id.* § 159(d).
[17] *NLRB v. Savair Mfg.*, 414 U.S. 270, 278 (1973).
[18] 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.
[19] *Id.* at 8-9.
[20] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of the Hon. Rodney Butler at 5) (internal quotation marks omitted).

> Nation's self-governance through the use and recognition of its institutions and the preservation of its sovereignty.[21]

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.[22] The Mashantucket Pequot Nation subsequently entered into collective bargaining agreements with those four unions.[23]

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."[24] This included the right to collectively bargain.[25] 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.[26] 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.[27]

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.[28] 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."[29] The negotiations resulted in the drafting of a Model Tribal Labor Relations

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* (written testimony of Richard Guest at 6).
[25] *Id.* at 7.
[26] *Id.*
[27] *Id.* at 8.
[28] *Legislative Hearing on H.R. 511, supra* note 4 (written testimony of Richard Guest at 8).
[29] *Id.*

Ordinance (Ordinance), which tribes with 250 or more casino-related employees were required to adopt.[30] 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:

> 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.
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> 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.[31]

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.
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> 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

[30] *Id.*
[31] *Id.* at 9-10.

> before the California legislature, and would continue to be undermined by NLRB interference if H.R. 986 were not passed.[32]

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.[33] In 1832, the Supreme Court in *Worcester v. Georgia* further indicated Indian tribes did not have the authority to deal with foreign powers.[34] 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."[35] 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."[36]

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

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[32] *Legislative Hearing on H.R. 986, supra* note 8 (written testimony of the Hon. Robert J. Welch, Jr., at 4-5).

[33] 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.*

[34] 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.

[35] 21 U.S. (8 Wheat.) 543, 574 (1823).

[36] 30 U.S. (5 Pet.) 1, 16 (1831).

held that statutes of general application, such as the FLSA, ERISA, and the OSH Act, apply to Indian tribes and their businesses.[37]

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.[38] 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 sovereignty and self-government."[39] 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."[40]

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."[41] However, in 2004 in *San Manuel*, the Board adopted a "new approach to considering Indian owned and operated enterprises,"[42] 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.[43] In *Sac and Fox Industries, Ltd.*, the Board found the

[37] *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).
[38] *See, e.g.*, 29 U.S.C. § 158(d) (obligation of employer and union to bargain collectively).
[39] *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 1) (emphasis added).
[40] *Legislative Hearing on H.R. 986*, *supra* note 8 (written testimony of the Hon. Brian Cladoosby at 5).
[41] *Fort Apache Timber Co.*, 226 NLRB 503 (1976), *overruled by San Manuel Indian Bingo and Casino*, 341 NLRB No. 138 (2004).
[42] 341 NLRB 1055, 1064 (2004).
[43] *Fort Apache*, 226 NLRB at 506.

NLRA applicable to off-reservation tribal enterprises, such as logging mills.[44] 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,"[45] 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.[46] In deciding *San Manuel*, the NLRB noted the NLRA does not expressly exclude Indian tribes.[47] 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."[48] 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.[49] 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.[50] Then-Board Member Peter C. Schaumber strongly dissented, stating "rebalancing of competing policy interests involving Indian sovereignty is a task for Congress to undertake."[51] On appeal, the U.S. Court of Appeals for the District of Columbia Circuit upheld the NLRB's holding in *San Manuel*.[52]

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

[44] 307 NLRB 241 (1992).
[45] 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.
[46] 341 NLRB at 1057-62.
[47] *Id.* at 1058. In fact, neither the text of the NLRA nor its legislative history reference coverage of Indian tribes.
[48] *Id.* at 1062.
[49] *Id.* at 1063.
[50] *Id.* at 1059.
[51] *Id.* at 1065 (Schaumber, Member, dissenting).
[52] *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

> 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.[53]

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.[54]

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]."[55]

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."[56] 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.[57]

Lieutenant Governor Keel also stated, "*All* governments are entitled to equal respect under the law, precisely as Congress in 1935 intended."[58] In addition, regarding the Senecan

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[53] *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 4) (emphasis in original).
[54] *Id.* (written testimony of the Hon. Rodney Butler at 2).
[55] *Examining Proposals to Strengthen the National Labor Relations Act*, *supra* note 1, at 8-9 (written testimony of the Hon. Robert Odawi Porter).
[56] *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Rodney Butler at 2).
[57] *Id.* (written testimony of Richard Guest at 1-2) (emphasis omitted).
[58] *Id.* (written testimony of the Hon. Jefferson Keel at 1) (emphasis in original).

Nation of Indians, President Porter noted, "We have always insisted that federal law treat our tribal governments as it treats other governments."[59]

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."[60] 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."[61]

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 United States, State governments, and their government business. If exemption is appropriate for state lotteries, it should be for Tribal governments too.[62]

In 2007, in *Foxwoods Resort Casino*,[63] 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.[64] 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.[65]

In 2013, in *Soaring Eagle Casino and Resort* (*Soaring Eagle*),[66] 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.[67] Despite such strong treaty language,

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[59] *Examining Proposals to Strengthen the National Labor Relations Act*, *supra* note 1, at 9 (written testimony of the Hon. Robert Odawi Porter).
[60] *Legislative Hearing on H.R. 986*, *supra* note 8 (written testimony of the Hon. Brian Cladoosby at 3).
[61] *Id.* (written statement of the Hon. Nathaniel Brown at 2).
[62] *Id.* (written statement of the Hon. Robert J. Welch, Jr., at 3).
[63] No. 34-RC-2230 (Oct. 24, 2007) (decision and direction of election).
[64] *Id.* at 4.
[65] *Id.* at 13.
[66] 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).
[67] Soaring Eagle Casino and Resort, 2013 WL 1646049, *4.

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.[68] 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.[69]

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

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 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.[72]

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.[73] The majority held although the NLRA is silent on the issues, the statutory terms "employer" and "person" both encompass Indian tribes.[74] 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.[75] Dissenting, Judge David McKeague argued principles of tribal sovereignty should leave the band free to regulate its own labor relations at the casino.[76]

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[68] *Id.* at *12.
[69] *Id.* at *19.
[70] 362 NLRB No. 109, 2015 WL 3526096 (2015).
[71] 2015 WL 3526096, *3.
[72] *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 4).
[73] 788 F.3d 537 (6th Cir. 2015).
[74] *Id.* at 543.
[75] *Id.* at 544-56.
[76] *Id.* at 556 (McKeague, J., dissenting).

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.[77] In June 2016, the Supreme Court declined to hear an appeal of the *Soaring Eagle* and *Little River Band* decisions.[78] 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."[79]

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*.[80] 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, 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.[81]

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."[82] 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

[77] 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).
[78] 136 S. Ct. 2509 (2016).
[79] *Legislative Hearing on H.R. 511*, *supra* note 4 (written testimony of the Hon. Jefferson Keel at 4).
[80] Case No. 21–CA–166290 (Oct. 24, 2016).
[81] *Legislative Hearing*, *supra* note 8 (oral testimony of the Hon. Brian Cladoosby).
[82] *Id.* (oral testimony of the Hon. Nathaniel Brown).

relations on sovereign lands. . . . Tribes should not be treated as second class governments. Viejas respectfully requests that Congress enact H.R. 986.[83]

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."

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.

[83] *Id.* (oral testimony of the Hon. Robert J. Welch, Jr.).

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. [insert]

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: [insert]

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): [insert]