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 of the U.S. House of Representatives

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

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Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify today. My name is Jack Gribbon. I serve as the Political Director for UNITEHERE! in California. Our union represents hotel and casino workers in the United States and Canada, including 7,000 workers in tribal casinos in California. Accompanying me here today is Mary Elizabeth Carter, a member of UNITE HERE!, who has been employed at the Cache Creek Casino and Resort owned by the Yocha Dehe Band of Wintun Indians since 2013.

UNITEHERE!'s Involvement in the Tribal Gaming Industry

After the passage of the Indian Gaming Regulatory Act (IGRA) in 1988, the tribal gaming industry in CA was, according to the federal government, operating 14,000 "illegal" Class III slot machines on Indian lands that the State did not have jurisdiction to regulate absent a Tribal/State Compact. The federal government had ordered a "stand down" and was threatening the closure of the existing tribal casinos and stopping the development of additional casinos, if the tribes and the state did not reach agreement on compact terms.

In 1997 a number of Tribes in California who had been involved in Tribal/State Compact negotiations with then-Governor Pete Wilson's administration contacted UNITEHERE! for help. Some matters were controversial, and included, among other issues, workers' organizing rights under a Tribal Labor Relations Ordinance (TLRO) since the NLRB had not at that time asserted jurisdiction, as well as, local mitigation costs for infrastructure, police and fire, and other issues that some of the CA Tribes considered to be infringements on their sovereignty. UNITEHERE! worked with our partners in Indian Country, including the Pala Band of Mission Indians, the Yocha Dehe Band of Wintun Indians, the United Auburn Indian Community, the Jackson Rancheria and several others to help secure ratification of these compacts so that their operations would not be closed down or their opportunity to develop would not be impaired. We have continued to support those tribes who are amenable to workers' rights over the years including the Graton Rancheria, the North Fork Tribe, Los Coyotes, the Enterprise Rancheria, the Lytton Band of Pomo Indians, Jamul and others.

The Importance of NLRA Jurisdiction over Tribal Enterprises

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). Absent a robust tribal labor ordinance with a neutral dispute resolution process, employees of tribal enterprises have few rights to free speech on the job absent NLRA jurisdiction. This becomes particularly acute when it comes to workplace discrimination, including harassment. Title VII of the Civil

Rights Act of 1964 has been held not to apply to Indian tribes. Again, absent a robust tribal labor ordinance with a neutral dispute resolution process, the only way employees of tribal enterprises subject to harassment and other forms of discrimination may speak about them with any degree of safety is through the NLRA.

It is important to note that the decision of the NLRB under San Manuel was a measured decision with the sovereign rights of tribes given consideration and respect. The *San Manuel* decision provides that the NLRA applies only wherein its application:

1) Would not interfere with tribal rights of self-governance in purely intramural matters;

2) abrogate rights guaranteed by treaty; or

3) be contrary to congressional intent.

Consistent with the three exceptions under *San Manuel*, 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.

The NLRB also considers whether there are policy reasons to not to assert jurisdiction "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." Thus, the Board has declined to exercise jurisdiction over tribal enterprises including a health clinic that served primarily tribal members in Alaska based on this policy consideration.

However, the Board noted that the matter is different if a tribe is reaching out to participate in the national economy through a commercial enterprise employing many non-Indian employees, catering largely to non-Indians, and competing with non-Indian businesses. In that different circumstance, the balance of conflicting considerations favors Board jurisdiction, because the tribe's activity "affect[s] interstate commerce in a significant way."

Most importantly, the NLRB is clear that it has no jurisdiction over internal tribal governmental matters, but only over the protection of free speech and the protected concerted activity of employees in commercial tribal enterprises.

Tribal Employees vs. State and Local Government Employees

Some argue that employees of tribal enterprises should be treated like employees of state and local governments and be exempt from the NLRA. This is fundamentally wrong. Employees of state and local governments have protected free speech rights. Moreover, they can, and have been successful, in organizing as citizens with the right to vote to impact their governments in their communities.

The National Indian Gaming Association (NIGA) states that 75% of tribal gaming workers are not Native Americans (an estimated 150,000 nationally). In addition, when you include Native Americans who work in tribal casinos who are not members of the "owner tribe" the addition of "non-owner tribe" Native Americans increases the percentage to well over 85% of the work force who are not members of the owner tribe and can't (nor should they) have influence in internal tribal politics. In some cases, as few as 1% of the workforce are members of the tribe operating a casino. Non tribal members can't petition or campaign or, in any way,

influence internal tribal policies or elections, unlike state and local government employees. The only way that these workers who are not members of the owner tribe, but who are the engine behind these lucrative commercial businesses, have any rights to free speech and free association, is through the NLRA.

The Inadequacy of the "TLRO" as Replacement for the NLRA

Over the last 20 years of Tribal-State Compact negotiations in California, each administration from former Governor Pete Wilson's administration in the 1990s to Governor Jerry Brown's administration today, Tribal Labor Relations Ordinances have been negotiated in every compact. However, those TLROs are very different depending on which administration was part of the negotiations. There are at least 6 separate and distinct TLROs in Tribal-State compacts in the State. Some include binding arbitration for all disputes, including collective bargaining impasse. Many are much weaker and do not provide for binding arbitration for all disputes, and all of them provide that workers cannot strike or picket on tribal lands in order to resolve a dispute. Under Governor Gray Davis' administration, where the majority of tribes negotiated their existing TLROs, not one worker has been able to organize under those TLROs because of inherent weakness in the ordinance. In all cases, a labor organization will lose access to any of the terms of the TLRO, if it elects to resolve disputes through the NLRA.

Currently, under casino gaming compacts between the State of California and tribal casinos with more than 250 employees, tribes must establish a Tribal Labor Relations Ordinance or TLRO. The TLRO in CA only applies to casino employees, and not all casino employees. There are many other tribal enterprises (mining, construction, sand and gravel, commercial farming, retail, etc.) that are non-gaming enterprises which not subject to compact negotiations and, H.R. 986 will deprive these workers of their current free speech and free association rights.

There are examples of TLROs that are not neutral nor do they implement free speech or free association rights. The Tribal Labor Ordinance previously implemented by the Saginaw Chippewa Tribe in Michigan prohibited employees from forming or joining a union. It was also a firing offense for any employee to solicit for any purpose in any place.

Finally, with respect to the TLRO, should a new Governor in California decide to renegotiate Tribal/State Compacts and remove the current TLRO, the only way a worker would have protections for free expression and freedom of association on the job would be through the protections under the NLRA.

A Real Life Story Regarding Outcomes for Workers at a Tribal Enterprise under Collective Bargaining.

Mary Elizabeth Carter, who is with me today, has been working at the Cache Creek Casino and Resort owned by the Yocha Dehe Band of Wintun Indians since 2013. Because of the living wages and affordable family health care provided in the collective bargaining agreement between the Tribe and UNITEHERE!, Mary has been able to support her family during a period of her husband's unemployment when he was able to complete an electrician's apprenticeship. During that time she was also able to provide for their 3 children and also become the guardian of a "special needs" child while her husband was able to find full time employment as an electrician. Last year, Mary and her husband purchased a house for their family.

This is what free speech and freedom of association is all about. It's about living wages, employer provided health care, caring for children. Meanwhile, the Yocha Dehe Band of Winton Indians, a tribe with less than 50 members and the employer of over 2,500 individuals who are not members of the tribe, has a very successful commercial casino. Mary's experience is similar to the experiences of thousands of workers in CA tribal casinos who have negotiated collective bargaining agreements providing good working class jobs that support their families' futures.

Summary

While UNITE HERE workers enjoy the protections of Tribal Labor Ordinances at a number of casinos, they rely upon the National Labor Relations Act as a backstop if a TLRO is weakened or not enforced. This could happen when or if a state-tribal compact is amended in the future. The elimination of NLRA jurisdiction over tribal enterprises would undermine these collective bargaining agreements in tribal casinos and in many other commercial enterprises owned and operated by tribes in our country.

In closing, I would note that the International Labour Organization (ILO) raised concern about the deprivation of internationally recognized labor rights for workers employed at tribal enterprises under the Tribal Labor Sovereignty Act. In its letter regarding the legislation introduced in the 114th Congress (which is the same as H.R. 986) the ILO stated:

> "While elements of indigenous peoples' sovereignty have been invoked by the proponents of this bill, the central question revolves around the manner in which the United States Government can best assure throughout its territory the full application of the fundamental principles of freedom of association and collective bargaining… It is critical that the State (the national authority) takes ultimate responsibility for ensuring respect for freedom of association and collective bargaining throughout its territory."