MINORITY VIEWS
H.R. 986, "TRIBAL LABOR SOVEREIGNTY ACT" (TLSA)
115TH CONGRESS, 1ST SESSION
SEPTEMBER 15, 2017

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,"[1] 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."[2]

The NRLA'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.[3]

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.

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[1] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).
[2] Letter from Corrine Vargha, ILO Director of International Labor Standards Department, to Richard Trumka, AFL-CIO President.
[3] T*he 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 Commercial 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."[4] 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.[5]

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.[6] 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."[7] 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*.[8] 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.[9]

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.[10] 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.[11] 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

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[4] 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.
[5] *Congressional Record*, September 9, 2004, pp. H.6951-6952 and June 24, 2005, pp. H.5153.
[6] 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…"
[7] *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).
[8] 751 F.2d 1113 (9th Cir. 1985).
[9] *Id.* at 1116.
[10] 341 NLRB 1055 (2004), *enforced* 475 F.3d 1306 (D.C. Cir. 2007).
[11] *Id.* at 1059 (citing *Tuscarora*, 362 U.S. at 116).

assert jurisdiction in 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."[12]

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.[13] 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.[14] 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.[15]

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.[16]

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

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

[12] *San Manuel*, 341 NLRB at 1062.
[13] *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004).
[14] *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (June 4, 2015).
[15] *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).
[16] *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).
[17] *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009).
[18] *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996).
[19] *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).
[20] *Florida Paraplegic Association v. Miccosukee Tribe of Florida*, 166 F.3d 1126 (11th Cir. 1999).
[21] *Northern Arapaho Tribe v. Burwell*, No. 14-CV-247 SWS, 2015 WL 4639324 (D. Wyo. July 2, 2015).
[22] *Bodi v. Shingle Springs Band of Miwok Indians*, 19 F. Supp. 3d 978 (E.D. Cal. 2014).

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

Thus, the effort to attack the jurisdiction of the NRLA 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[26] and Title VII of the Civil Rights Act.[27] 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."[28] The U.S. District Court for the Southern District of Florida dismissed her case citing the tribe's sovereign immunity under Title VII.[29] 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

[23] *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).
[24] *United States v. White*, 237 F.3d 170 (2d Cir. 2001).
[25] *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).
[26] *Williams v. Poarch Band of Creek Indians*, 2016 WL 6081345 (11th Cir. Oct. 18, 2016).
[27] Congress expressly excludes tribes from the definition of "employer" under Title VII. 42 U.S.C. § 2000e(b).
[28] 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).
[29] *Roselius v. McDaniel*, No. 95-6887, slip op. at 1 (S.D. Fla. Aug. 7, 1997) (dismissing case for lack of subject matter jurisdiction).

free 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).[30] 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."[31] 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.[32] 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 TLRO's fall far short of the protections afforded under the NLRA.[33] Tribes in other states have negotiated TLROs with unions who had first won

[30] 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.
[31] *San Manuel Indian Bingo and Casino*, 475 F.3d at 1315.
[32] 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.
[33] Testimony of Jack Gribbon, California Political Director, UNITEHERE! International Union, AFL-CIO

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."[34] 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 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.

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.3. https://edworkforce house.gov/calendar/eventsingle.aspx?EventID=401479.

[34] Blackfeet Tribal Employment Rights Ordinance & Safety Enforcement Act, Section 3-107 http://www.btero.com/blackfeet_tero_2010.pdf.

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."[35]

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.[36]

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.

[35] 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.
[36] *Id.*

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