

H.R. 16, TRIBAL LABOR RELATIONS RESTORATION ACT OF 2005

HEARING

BEFORE THE
SUBCOMMITTEE ON EMPLOYER-EMPLOYEE
RELATIONS

OF THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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C O N T E N T S

	Page
Hearing held on July 20, 2006	1
Statement of Members:	
Hayworth, Hon. J.D., a Representative in Congress from the State of Arizona	5
Prepared statement of	7
Letters of support for H.R. 16	38
Johnson, Hon. Sam, Chairman, Subcommittee on Employer-Employee Re- lations, Committee on Education and the Workforce	2
H.R. 16, the Tribal Labor Relations Restoration Act of 2005	1
Prepared statement of	3
Statement of Witnesses:	
Garcia, Hon. Joe, president of the National Congress of American Indians and governor of Ohkay Owingeh (San Juan Pueblo)	25
Prepared statement of	27
Harvey, Philip L., associate professor of law and economics, Rutgers School of Law	20
Prepared statement of	22
Johnson, Hon. Ronald, assistant secretary/treasurer of the Prairie Island Indian Community	15
Prepared statement of	17
Additional Submissions:	
Marchand, Hon. Michael, chairman, Confederated Tribes of the Colville Reservation, prepared statement	33
Bozsum, Bruce "Two Dogs," chairman, Mohegan Tribal Council, letter of support	36

H.R. 16, TRIBAL LABOR RELATIONS RESTORATION ACT OF 2005

Thursday, July 20, 2006
U.S. House of Representatives
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:33 a.m., in room 2175, Rayburn House Office Building, Hon. Sam Johnson [chairman of the subcommittee] presiding.

Present: Representatives Johnson, Kline, Andrews, Kildee, Holt, McCollum, and Grijalva.

Staff present: Byron Campbell, Legislative Assistant; Kevin Frank, Coalitions Director for Workforce Policy; Rob Gregg, Legislative Assistant; Jessica Gross, Press Assistant; Richard Hoar, Professional Staff Member; Jim Paretto, Workforce Policy Counsel; Deborah L. Emerson Samantar, Committee Clerk/Intern Coordinator; Loren Sweatt, Professional Staff Member; Jody Calemine, Counsel, Employer and Employee Relations; Tylease Fitzgerald, Legislative Assistant/Labor.

Chairman JOHNSON [presiding]. A quorum being present, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce will come to order.

We are holding this hearing today to hear testimony on H.R. 16, the Tribal Labor Relations Restoration Act.

[The bill follows:]

109TH CONGRESS • 1ST SESSION

H. R. 16

To clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 2005

Mr. HAYWORTH (for himself, Mr. BOEHNER, and Mr. PAUL) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Tribal Labor Relations Restoration Act of 2005”.

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 business owned and operated by an Indian tribe and located on its Indian lands,” after “subdivision thereof”; and

(2) by adding at the end the following:

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

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

“(17) The term ‘Indian lands’ means—

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

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

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

Chairman JOHNSON. Under committee rule 12(b), opening statements are limited to the chairman and the ranking minority member of the subcommittee. Therefore, if other members have statements, they will be included in the hearing record.

With that, I ask unanimous consent for the hearing record to remain open 14 days to allow member statements and other extraneous material referenced during the hearing to be submitted in the official hearing record.

Without objection, so ordered.

Good morning, and welcome. Today, the subcommittee will examine an important topic as we exercise our oversight jurisdiction over the National Labor Relations Board and its administration of Federal labor law.

The topic of this morning’s hearing may seem narrow, but it in fact has profound implications. It affects those who rely on Congress and administrative agencies to set clear rules of law, to follow established precedent, and to ensure a level playing field with clear expectations of the law’s design.

For almost 40 years, the National Labor Relations Board in limited circumstances interpreted the National Labor Relations Act to extend to the activities of sovereign tribal governments. This is consistent with the goals of the act which carves out Federal jurisdiction of state and local sovereign governments.

Under the board’s prior rulings, tribal governments who operated on their own lands were afforded similar protection and excluded from the jurisdiction of the act. Put more simply, this meant that within the boundaries of their sovereign territory, they, like any other sovereign leadership, were free to govern themselves and set their own laws and policies.

In the spring of 2004, however, the National Labor Relations Board reversed itself and abandoned 40 years of precedent when it decided the case of San Manuel Indian Bingo and Casino. In the San Manuel case, the board rejected its longstanding view of the NLRA and ruled that it would no longer afford the same level of respect to sovereign Indian tribes engaged in business on their own tribal lands.

Rather, the board set itself up as a judge of not just Federal labor policy, but also of Federal Indian policy. The board said that it would exert jurisdiction over tribal activities if it felt the balance of those two policies made it necessary. This decision sent shock waves through not only the Indian community but throughout America, including those in Congress who long understood that Federal labor laws should not deal with sovereign tribes.

Moreover, it raises serious questions as to whether the board in this instance is overreaching by injecting itself into Federal policy-making outside the scope of its responsibilities. We will hear this morning from a number of people representing those who are most directly affected by the board's decision: representatives and leaders of sovereign Indian tribes with whom the United States government has forged a special relationship.

I also look forward to hearing the comments of others as to whether the NLRB has the authority to make this ruling under Federal law.

Most importantly, we will hear testimony on H.R. 16, the Tribal Labor Relations Restoration Act sponsored by our distinguished colleague from Arizona, Mr. Hayworth. He is a colleague of mine and on the Ways and Means Committee and also a good friend. He has been vigilant in this fight to ensure the rights of American Indians are protected. Mr. Hayworth's bill is straightforward. It would simply reverse the board's ruling and restore the prior balance of law.

I now yield to the distinguished minority leader of the subcommittee, Mr. Andrews, for whatever opening statement you wish to make.

[The prepared statement of Mr. Johnson follows:]

Prepared Statement of Hon. Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce

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In the San Manuel case, the board rejected its long-standing view of the NLRA, and ruled that it would no longer afford the same level of respect to sovereign Indian tribes engaged in business on their own tribal lands. Rather, the board set itself up as a judge of not just federal labor policy, but also of federal Indian policy.

The board said that it would exert jurisdiction over tribal activities if it felt the balance of those two policies made it necessary.

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Mr. Hayworth's bill is straightforward. It would simply reverse the board's ruling and restore the prior balance of law.

Mr. ANDREWS. Thank you, Mr. Chairman.

Good morning. We are very much looking forward to the hearing. We welcome our colleague and friend, Mr. Hayworth.

I have substantive concerns about the bill before us and procedural concerns which I hope are addressed in the hearing today, both by our colleague and by our witnesses.

Substantively, this bill and the San Manuel decision bring into conflict two desirable and important principles of American law. The first is the sovereignty of our Indian tribes, the importance that we place in self-governance, and sovereignty for these organizations.

The second is the doctrine of fairness to our workers, the right to organize, to bargain collectively, to assure oneself of a fair working environment. So reconciling these two substantive values is difficult, and the committee is going to have to think very much about that reconciliation.

The second procedural concern that I have has to do with the proper role of the committee in deciding matters that perhaps are not yet ripe. It is true that the National Labor Relations Board, of course, made a decision in May of 2004 in the San Manuel case, but the case has not yet reached its conclusion. The matter now rests before the D.C. Circuit Court of Appeals and is being briefed.

There will be some decision from the court of appeals, and I wonder whether it is the wisest thing for us to proceed legislatively until the courts have weighed in on the questions that are before us.

My friend, Mr. Kildee, has devoted many years and much energy to the issues that I have outlined. With the chairman's permission, I would like to yield the balance of my time to Mr. Kildee to speak to this issue.

Mr. KILDEE. I thank the gentleman for yielding to me.

Mr. Chairman, I want to thank you for holding this hearing today.

This is the first hearing on this issue. Since the administrative ruling by the National Labor Relations Board in 2004 in which the board determined it has jurisdiction to regulate the labor practices of tribal commercial enterprises even if they are located on sovereign tribal land, I have been committed to finding a permanent

legislative response that honors tribal sovereignty and respects workers' rights.

Congressman Hayworth, who serves as co-chairman of the Congressional Native American Caucus along with myself, and I requested this hearing to give interested parties an opportunity to formally voice their concerns. I look forward to this hearing today, and I am sure we will get a good deal of enlightenment. I look forward especially to hearing from my friend, Mr. Hayworth.

Thank you very much. I yield back.

Chairman JOHNSON. Thank you, Mr. Kildee. You know, I extend to you a special welcome, too. You are my friend and colleague, and I thank you for joining Mr. Hayworth in this hearing.

I now welcome Mr. Hayworth and extend a special welcome to you. I welcome all the witnesses and look forward to their testimony today.

We have two very distinguished panels of witnesses before us, and I thank them for coming.

Our first panel is one guy, the Honorable J.D. Hayworth, representative for the Fifth Congressional District of Arizona. As I noted in my statement, Mr. Hayworth is sponsor of H.R. 16.

And I think you know how the lights work here. You are recognized.

STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. HAYWORTH. Mr. Chairman, thank you very much. It is good to see you in that chair.

And to the ranking member, I was visiting earlier with you, and I think I can disclose to those who gather this morning. My friend, the gentleman from New Jersey, I said, "How are you?" He said, "I am ranking." What I failed to add was, "Could that continue a bit longer, preferably after November?" But all jokes aside, it is good to see my friend, the ranking member from New Jersey.

As I look at the dais, I see my good friend the colonel from Minnesota, another Minnesotan with whom I share a birthday, Ms. McCollum, and my Arizona colleague, Raul Grijalva. Thank you all for being here today.

And last but certainly not least, I wanted to single out for special praise my dear friend from Michigan. From the day when I came to the Congress of the United States, he worked with me, and years before my arrival here has worked on issues involving the first Americans. It is an honor to share responsibility in the Native American Caucus as a co-chair with my good friend, Dale Kildee.

Mr. Chairman, as always, I ask unanimous consent for my entire statement to be read into the record. I will try to offer a synopsis. However, you know, given my reputation for verbosity, that sometimes is a bit difficult.

The Tribal Labor Relations Restoration Act will insert simple, but necessary clarification language into the National Labor Relations Act clarifying that businesses owned by sovereign tribal governments and operated on tribal reservations were never intended to be governed under the act. The Constitution recognizes Indian tribes as sovereign political entities, along with the Federal Government, individual states and the political subdivisions thereof.

Until recently, each of these sovereign entities was exempt from the definition of “employer” under the NLRA and thus beyond the jurisdiction of the National Labor Relations Board. But over the last decade, the board has chosen to ignore years of past precedent and actively pushed to extend the NLRA’s reach to wholly owned tribal enterprises.

This effort came to fruition on June 3, 2004, when the board ruled that an enterprise wholly owned by the San Manuel Band of Indians and operated on the San Manuel’s recognized tribal land, must comply with the National Labor Relations Act. For decades previous, the NLRB had found that tribes were governmental entities exempt under the act.

For example, in the Fort Apache Timber Company ruling of 1976, the board determined that it lacked jurisdiction over the White Mountain Apache Tribe and a wholly owned and operated enterprise of that tribe, stating, “Consistent with the board’s discussion of authorities recognizing the sovereign government character of the tribal council in the political scheme of this country, the White Mountain Apache Reservation, it would be possible to conclude that the council is the equivalent of a state or an integral part of the government of the United States as a whole, and as such specifically excluded from the act, section two, subsection two definition of ‘employer.’ The board deems it necessary to make the finding here that the tribal council and its self-directed enterprise on the reservation is implicitly exempt as employers within the meaning of the act.”

The 1976 decision was reaffirmed in 1980 when a Federal district court concurred with the board’s position in the Confederated Tribes of the Warm Springs Reservation ruling. In this case, the court expressly agreed that the Confederated Tribes was “not an employer for purposes of the NLRA.” Both the 1976 and 1980 NLRB rulings were correct in their interpretation of the National Labor Relations Act when they found that tribally owned businesses operating on reservation lands are exempt under the act.

The decision in the San Manuel case, therefore, overturned this long-established precedent. It is up to Congress to correct the NLRB’s error and prevent this bureaucratic power grab. H.R. 16 is necessary to remove any ambiguity in the law and prevent future misinterpretations.

This bill has broad support throughout Indian Country. I have here a resolution passed by the National Congress of American Indians containing the 2004 NLRB decision. Now, NCAI represents over 250 tribes nationwide, and this resolution calls on Congress to reaffirm the sovereign rights of native tribes and to clearly state that tribal-owned businesses operating on reservation land are exempt from the National Labor Relations Act.

I have included this resolution with my testimony and have submitted it for the record. I look forward to hearing more on NCAI’s position from its president, Joe Garcia, in just a few minutes.

I would also like to include for the record some letters I have received and resolutions that have been passed by individual tribes from across the Nation expressing their opposition to the NLRB’s

ruling.* Make no mistake: To Indian Country, this issue has nothing to do with unions, but everything to do with sovereignty.

The issue here is not whether tribes should unionize their tribal enterprises. The issue is who should make that decision. Should it be up to the sovereign tribal governments? Or should it be up to the states or the Federal Government? I believe the Constitution gives that right to the tribes as sovereign governmental entities.

Native Americans are proud people, proud of their heritage, proud of their culture, and proud of their independence. Mr. Chairman, in my view the 2004 NLRB ruling in the San Manuel case discounts for the honor and the integrity of native people. It essentially declares that the United States does not trust sovereign tribal governments to treat employees fairly. The message is inaccurate and it is wrong, Mr. Chairman.

I thank you for the time and the attention to my remarks.

[The prepared statement of Mr. Hayworth follows:]

**Prepared Statement of Hon. J.D. Hayworth, a Representative in Congress
From the State of Arizona**

I would like to thank Chairman McKeon, Subcommittee Chairman Johnson and the entire committee for bringing this important issue before the committee.

My legislation, The Tribal Labor Relations Act of 2005, will insert simple but necessary clarification language into the National Labor Relations Act to make clear the fact that businesses owned by sovereign tribal governments and operated on tribal reservations were never intended to be governed under the Act. Clearly, sovereign tribes were intended to hold the same status under the Act as other sovereign entities, such as the federal government, individual states, and the political subdivisions thereof. Each of these sovereign entities is expressly exempt from the definition of "employer" under the Act and, thus, is beyond the jurisdiction of the National Labor Relations Board. H.R. 16 would provide clarity to the NLRA by explicitly stating that Indian tribes are also exempt from the definition of "employer" under the Act.

Unfortunately, over the last decade, the Board has chosen to ignore years of past precedent and has actively pursued wholly owned tribal enterprises under auspices of the NLRA. The Board's recent mission, to force sovereign tribes to accept and adhere to the requirements contained in the Act, came to fruition on June 3, 2004 when a Board ruling concerning the San Manuel Band of Mission Indians ignored decades of standing precedent and decreed that an enterprise wholly-owned by the San Manuel Band and operated on the San Manuel's recognized tribal land, must comply with the National Labor Relations Act.

This decision overturned multiple past rulings which upheld the sovereign rights of tribal government's by stating that the NLRA does not apply to tribally-owned and operated enterprises because they are governmental entities exempt under the Act.

For example, in the Fort Apache Timber Company ruling in 1976, the Board ruled that it lacked jurisdiction over the White Mountain Apache Tribe and a wholly owned and operated enterprise of the tribe, stating:

"Consistent with [the Board's] discussion of authorities recognizing the sovereign-government character of the Tribal Council in the political scheme of this country it would be possible to conclude that the Council is the equivalent of a State, or an integral part of the government of the United States as a whole, and as such specifically excluded from the Act's Section 2(2) definition of "employer." [The Board] deem[s] it necessary to make the finding here * * * that the Tribal Council, and its self-directed enterprise on the reservation * * * is implicitly exempt as employers within the meaning of the Act."

The 1976 decision was reaffirmed in 1980, when a federal court concurred with the Board's position in the Confederated Tribes of the Warm Springs Reservation ruling. In this case, the court expressly agreed that the Confederated Tribes was "not an employer for purposes of [the NLRA]."

Both the 1976 and 1980 NLRB rulings were correct in their interpretation of the National Labor Relations Act when it was found that tribal owned businesses oper-

*The letters referred to begin on page 38.

ating on reservation lands are exempt under the Act. The subsequent misinterpretation contained in the San Manuel case exemplifies the need for H.R. 16, which removes cause for future misinterpretation by explicitly stating that the sovereign rights of tribal government are to be recognized and respected under the Act in the same form as other sovereign entities.

I have received a resolution passed by the National Congress of American Indians concerning the 2004 NLRB decision. NCAI represents over 250 tribes nationwide and, in its resolution, the organization calls on Congress to reaffirm the sovereign rights of Native tribes and to clearly state that tribal owned businesses operating on reservation land are exempt the National Labor Relations Act. I will include this resolution with my testimony for the record.

Since being elected to the House of Representatives nearly twelve years ago, I have worked closely with Native Americans from across our nation and have learned much from the Native community. It is my hope that neither this committee nor this congress needs me to express the honor and integrity that is saturated within the culture of the first Americans, both of which have been the cornerstone of my dealings with Indian country.

It is my opinion that the 2004 NLRB ruling in the San Manuel case discounts both the honor and the integrity of Native people. It sends the message that the United States of America does not trust a sovereign tribal government to treat its employees fairly. This is the wrong message to send, and it must be corrected.

H.R.16 restores the initial intent of the National Labor Relations Act by acknowledging the sovereign rights of Indian tribes and exempting them from the Act. Additionally, it expresses the federal government's faith in the ability of Indian tribes to establish intra-governmental policies that will ensure fair working conditions for employees of tribal owned businesses that operate on tribal reservations.

Chairman JOHNSON. Thank you.

You know, I thank you for your leadership on this issue. We are going to hear from the tribal governments later this morning, but from your observations or conversations with the tribes, what impact will the San Manuel decision have on them?

Mr. HAYWORTH. Well, first and foremost, it leads to an erosion of sovereignty, diminution of what I believe is guaranteed in Article I, Section 8 of our Constitution. And that is such a profound change that it completely changes the historical precedent of just what it means to native people to have their own sovereign governments and be able to run their own affairs.

It would have broad implications across the width and breadth of our relationship, intergovernmental relationships, if you will. And as you will hear later today, many tribes pride themselves on their record of relations for employees in tribally owned enterprises. They believe, Mr. Chairman, that the decision to unionize or not to unionize should be left up to them.

That is the crux of the matter. If we really believe in self-government and in self-determination, why would we take this right from a sovereign governmental entity and put it into the hands of Washington bureaucrats?

Chairman JOHNSON. I wanted to make the comment, why do we put anything in Washington bureaucrats' hands?

[Laughter.]

Mr. Andrews, you are recognized for 5 minutes.

Mr. ANDREWS. Thank you.

I thank Mr. Hayworth for his testimony, and I recognize that he speaks for many people on both sides of the aisle for their concern of the sovereignty issues.

I wanted to explore for just a moment, J.D., the question of how far the sovereignty of the tribe goes when it runs into other constitutional considerations. Do you think that a person who is work-

ing for a tribal enterprise has Federal due process rights under the Constitution?

Mr. HAYWORTH. Well, Mr. Andrews, Mr. Chairman, I am not a lawyer nor have I ever played one on TV. I just joined with you as a lawmaker. As such, I simply want to state that of course every American enjoys constitutional rights.

As you pointed out in your opening statement, there are legitimate points of disagreement, as the old saying, where your rights end and where another person's begin. The question is, where is this delineation?

Mr. ANDREWS. Right.

Mr. HAYWORTH. And if we take away the most basic right of sovereignty, then we are basically I think providing a very slippery slope for other relations, intergovernmental relations for the tribe.

Mr. ANDREWS. Here is the concern that my question implies. Your bill restores the law that existed before the San Manuel decision. It essentially puts us back to where we were before the decision, but it does not include any provision for the protection of labor rights in the law itself. It leaves that decision to the tribal councils, the tribal government.

Now, I know the record is that the tribal councils almost without exception have ordinances which respect those rights. I am not in any way contending the tribal councils have been careless or indifferent to those rights. However, it does leave open the legal possibility that would be the case.

I wonder, to carry this sovereign argument a little further, you make the analogy about state governments and sovereign tribes. Well, of course, state governments are subject to the 14th Amendment, and, if acting in their capacity as an employer, they would discriminate against someone, they would be held accountable under Federal law.

But your bill doesn't provide for that kind of protection, does it? Because it seems to me you either have the obligations of a public entity like a state does under the due process clause, or you have the obligations of a private employer under the National Labor Relations Act.

Wouldn't it be the case that workers in these situations would have neither of those protections?

Mr. HAYWORTH. Mr. Chairman and Congressman Andrews, I believe what we are having here is really a comparison of apples and oranges, with all due respect. You are coming at this from another direction, and it is one that perhaps if you put your trust in what we can call innovations in regulatory law and in the supremacy of bureaucratic determinations by the executive branch, and that should be the venue that makes the decision by bureaucratic fiat.

I see it more as a dynamic there, rather than a question of jurisdiction or my pedestrian, as opposed to legal, opinion of where rights end or rights begin. I view this more as a process situation where we ask the question and the premise: Who governs best here in terms of this determination? We are here as elected officials. Tribal governments are constituted by elected officials, and not as an attorney or an amateur barrister, but as one who observes the process.

I believe in the primacy of local sovereign governments and in the determinations made by their duly elected officials, and in Article I, Section 8 of the Constitution, and the sovereignty and the sovereign immunity granted to the tribes, rather than to a body of regulatory law or a new finding by a bureaucratic board.

Mr. ANDREWS. I appreciate all that. I would just simply conclude by saying that my concern is that the powers of the sovereign government usually stop at the constitutional rights of an individual. I am not sure that is the case in this situation. I am sure it would be the case if the labor board's decision was upheld. So I don't know the answer to this question, but I think it is one we have to ask.

Thank you.

Chairman JOHNSON. Mr. Kline, you are recognized for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman. I assure you I won't take 5 minutes.

I am not a lawyer, nor have I ever played one on TV either, so I am now confused after listening to my learned colleague here.

Just recapping where we are, this bill, H.R. 16, does take us back to the situation that we had before the San Manuel decision. Is that correct? We would operate in the same way, recognize the full sovereignty of the Indian tribes. I am trying to keep it real simple here. That is what it does, is that correct?

Mr. HAYWORTH. Congressman Kline, Mr. Chairman, yes, that is what it does.

Mr. KLINE. That is it. OK. It seems like a good idea.

Thank you. I yield back.

Chairman JOHNSON. Thank you.

Mr. KILDEE, do you care to question?

Mr. KILDEE. Just a little conversation with Mr. Hayworth.

My state of Michigan, many states in this country, including states in the South where there are not many labor unions for state government, anyway, they have lotteries. Our state has a lottery. It is a very, very commercial lottery. It is not really run as a governmental function, although the money helps the people of the state of Michigan, as the lotteries or the casinos help the people in the sovereign tribes.

If the NLRB claims jurisdiction over casinos on sovereign Indian land, is there some thought that they might try to reach into the state of Michigan and say those lottery employees should also have protection of NLRA and NLRB?

Mr. HAYWORTH. Mr. Congressman, Congressman Kildee, you have brought up the argument, the essence of the slippery slope. It is one I addressed in another forum on the committee where Chairman Johnson and I serve, on Ways and Means. Sovereignty, once you encroach in one area, it is the slippery slope that invites an expansion of the bureaucratic fiat and, I think, an erosion of the basic sovereignty.

As I made the case, when there were those who sought to unconstitutionally levy taxes, you pointed out, on the lottery. I made the point that, for example, many businesses decide to incorporate in the state of Delaware. Well, why would we restrict the Delaware tribe and not 1 day see that same erosion of rights for the state of Delaware?

And so I think your observation is especially cogent and why we need to see this legislation enacted.

Mr. KILDEE. Thank you very much.

I yield back, Mr. Chairman.

Chairman JOHNSON. Mr. Grijalva, do you care to question?

Mr. GRIJALVA. Thank you, Mr. Chairman.

Chairman JOHNSON. You are recognized for 5 minutes.

Mr. GRIJALVA. Some points of clarification from my colleague, Mr. Hayworth.

There have been two attempts to pass an amendment on the Labor-HHS appropriations bill, which were essentially to deny NLRB's funding to implement the San Manuel decision. Both of those did not pass.

And I want to go back to the point that Mr. Andrews and my friend, Mr. Kildee, both mentioned. After those did not pass, there was some discussion, I don't know if you were part of it or not, but there was some discussion as to trying to get the parties, sovereign nations, labor and others, to try to work to reconcile the issue other than this either-or proposition that we have before us. I just want to know, did that process occur? If it failed, why did it fail?

And then the second part question is, is there some applicability of Federal law, ERISA, OSHA, that apply to sovereign nations and tribes? The NLRB is a point of contention here. Would you consider those other applications to also be an erosion, slippery slope of sovereignty?

And those are two general questions.

Mr. HAYWORTH. Mr. Chairman, Congressman Grijalva, I thank you for the questions.

As to your first point about process, I was not specifically invited to be part of the consultation process involving the AFL-CIO or SEIU or the Teamsters or anyone like that with Indian Country.

What I do believe speaks volumes, and as you will hear from the subsequent panel, is the resolution passed by the National Congress of American Indians, is the resolutions passed by various sovereign tribal governments and their letters of support for this legislation.

In terms of the process and/or worker protections and the protection of rights on tribal lands, I think obviously this just simply becomes a question, with apologies to using this trite old game-show title, who do you trust?

I believe, in keeping with other sovereign governments, whether they are townships, cities, counties, states or the Federal Government, the sovereignty of Native American tribes is recognized. It should not be in any way diminished, nor would there be, and I know this is not the intent of the gentleman from Arizona, but I believe what happens is the notion that, and again I don't think he is implying this in his question, but I think there is a mindset that develops that Washington knows best.

I think this offers a sterling example. When the National Labor Relations Board, with no historical precedent, but with simple bureaucratic fiat, says: We demand this, unelected officials trying to impose regulations on sovereign governments, and that is especially troubling. If you go into the whole array of law, but not being

a lawyer, that is the simple concept and it just comes down to who do we trust.

Mr. GRIJALVA. Let me reclaim my time, Mr. Hayworth. I agree with you. Having been here 3-plus years under the current leadership in Washington, no, you should not trust Washington. I agree entirely with you.

The clarification I was trying to get to is, we are talking, and I think it is central to the argument, the erosion of government-to-government relations with sovereign nations and the sovereignty of those nations. My point of clarification was, you know, at this instance we are talking about NLRB, but there are also applicable Federal laws like ERISA, OSHA, et cetera.

Are those considered, in your estimate, to be part of that erosion that you talked about?

Mr. HAYWORTH. You know, with all due respect, Mr. Chairman and to my good friend from Arizona, with whom I have worked to pass legislation on a bipartisan basis—

Mr. GRIJALVA. I agree.

Mr. HAYWORTH [continuing]. Dealing with tribes in his congressional district. You were asking me what is in essence an essay question, far afield from the topic today. There may not be a rule to germaneness, but my personal feelings or my reading of the law, as an American citizen who happens to be a Member of Congress, with all due respect, is beside the point.

What I readily concur is that there are various fault lines. As I said earlier, there are various points of tension within the whole concept of federalism, whether it applies to states or to tribal governments.

But for our purposes today, the record is clear. The National Congress of American Indians, sovereign tribe after sovereign tribe, has said: Reaffirm our sovereignty. And so this is one essence where I will say my opinion on other legal matters doesn't pertain today, but I thank you for inquiring.

Mr. GRIJALVA. Thank you, Mr. Chairman.

And thank you, Mr. Hayworth.

Chairman JOHNSON. The time of the gentleman has expired.

Ms. McCollum, do you care to question?

Ms. MCCOLLUM. I want a point of clarification with some of the statements that have been made.

Chairman JOHNSON. You are recognized.

Ms. MCCOLLUM. Thank you, Mr. Chair.

The sovereignty is nation to nation, the U.S. Government to the tribal government. Tribal governments work with state governments. They work with county governments. They work with local governments. But they are a nation. They are not a local unit of government to a local unit of government. The sovereignty is recognized at a national level.

So I think when we are talking, yes, tribes work cooperatively with city councils. They work cooperatively with counties. They work cooperatively with states. They do in my state, but they are a nation and it is a sovereign nation.

Sometimes when we start talking about these government-to-government relationships, having served on a city council, having served at the state level and served at the national level, we need

to keep always the relationship at a national level, at a nation-to-nation level, and just be mindful of the fact, yes, as I work with my cities, my states, my counties, I represent a Federal Government. I represent the nation.

When the tribes are negotiating and working with local units of government, from the national level, it is nation to nation, it is nation to city, it is nation to county. They are a sovereign nation.

Thank you, Mr. Chair.

Chairman JOHNSON. Mr. Holt, do you care to question?

Mr. HOLT. Yes, Mr. Chairman. Thank you.

Chairman JOHNSON. You are recognized.

Mr. HOLT. I thank the gentleman, our colleague.

We often speak about workers' rights and the NLRB as the adjudication and enforcement mechanism for recognizing those. I guess it leads me to ask the fundamental question of just how far does the tribal sovereignty go? Certainly, it would not supersede the Bill of Rights. Now, I recognize workers' rights do not have the same degree of primacy as the first amendments to the Constitution.

However, there is a general recognition of workers' rights. I would just like to ask, and I apologize for coming in late and maybe missing this clarification, but I would appreciate it if the gentleman would say just how far does that go, infringing on what we generally consider rights?

Mr. HAYWORTH. Mr. Chairman, Congressman Holt, I believe the Constitution of the United States is a document of limited and enumerated powers. I believe the Constitution means what it says and says what it means. So in Article I, Section 8, when it says that Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, that articulation offers both sovereignty and sovereign immunity.

I appreciated the comments of the gentlelady from Minnesota, but however you intend to define "sovereignty," that sovereignty is complete. Now, within the role of federalism and full faith and credit, and the relationship among the states or between individual states and the Federal Government, there is no doubt that there is primacy for the enumerated powers in the Constitution and the subsequent rights ensured by the first 10 amendments in the Bill of Rights.

As the gentleman pointed out, from New Jersey, he said almost in passing that worker rights were not part of the original 10 amendments to the Constitution. To sit here and enumerate what we consider to be rights and/or privileges, again with all due respect, I appreciate the gentleman's interest in what might be my pedestrian legal opinions, with no formal training.

All I can tell you is the scope of the hearing today is a simple one dealing with the insurance of sovereignty and the primacy that elected officials, both at the tribal level and elected officials here in Washington, are making decisions, rather than legal precedent being reversed by bureaucratic fiat, as we saw with the decision of the National Labor Relations Board vis-a-vis San Manuel.

Chairman JOHNSON. Thank you, Mr. Hayworth. I appreciate you being a part of this witness panel this morning. I thank you.

We would ask the second panel to take their seats.

And you may be excused.

Mr. HAYWORTH. Thank you, Mr. Chairman, and thanks to the members of the subcommittee.

Chairman JOHNSON. You are welcome to sit in and listen if you wish.

It is my pleasure to yield to Mr. Kline for the purpose of introducing our first witness, as soon as you sit down. You are welcome to do that, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman, now that the witnesses have had a chance to find their name tags and their seats.

Let me just say it is my great pleasure to introduce today Ronald Johnson, who is the assistant secretary and treasurer of the Prairie Island Tribal Council. That is a Dakota Sioux Tribe. In 1936, the Federal Government officially recognized the Prairie Island Indian Community as a reservation, awarding them 534 acres. This small but thriving community employs over 1,650 people in its gaming, government and business operations.

Mr. Johnson is currently serving his third term as secretary-treasurer and served as vice president of the previous tribal council. A Red Wing, Minnesota, native, Mr. Johnson formerly worked in the Prairie Island Indian Community as building and grounds manager of Treasure Island Casino. In addition to these duties, Mr. Johnson currently co-chairs the National Congress of American Indians, Department of Homeland Security.

He also works with the state of Minnesota on homeland security to recognize tribes as areas of concern. I might point out that the Prairie Island Community is on an island and shares that island with a nuclear power plant, an island in the Mississippi River.

Finally, Mr. Johnson has long been involved in youth activities to promote the importance of education and developing future leaders of Prairie Island Indian Community. I am particularly pleased today to welcome him here and look forward to his testimony.

Chairman JOHNSON. Thank you.

I would like to recognize Mr. Andrews for an introduction.

Mr. ANDREWS. Thank you, Mr. Chairman.

I would like to welcome and introduce my friend, Professor Phil Harvey from Rutgers University School of Law in Camden. Phil has been of invaluable assistance in my efforts in understanding many areas of public policy, welfare reform, employment law. He teaches extensively in those fields. He is both a scholar and a teacher, very active in his community. He and his wife Mary are raising a beautiful family.

Phil, we very much appreciate you taking time out of your scholarship and teaching to be with us today, and we welcome you.

Chairman JOHNSON. I will introduce the third witness from New Mexico.

I appreciate your being here. I go out there a lot.

The Honorable Joe Garcia is the Governor of the San Juan Tribe of Pueblo Indians. Mr. Garcia is also president of the National Congress of American Indians.

We appreciate you being here, sir.

Before the witnesses begin, I would like to remind members that we will be asking questions after the entire panel has testified. In addition, committee rule 2 imposes a 5-minute limit on all questions. I think you watched the lights down there. If it comes on

green, you have 5 minutes; the little yellow one comes on, you have 1 minute; when the red one comes on, we would like you to complete your testimony, if you don't mind.

With that, I will recognize Mr. Johnson for your testimony, sir.

**STATEMENT OF RONALD JOHNSON, ASSISTANT SECRETARY/
TREASURER, PRAIRIE ISLAND INDIAN COMMUNITY TRIBAL
COUNCIL**

Mr. JOHNSON. Thank you, Mr. Chairman.

Good morning, Chairman Johnson, Vice Chairman Kline and honorable members of the Subcommittee on Employee-Employer Relations. My name is Ron Johnson. I am a member of the Prairie Island Indian Community and currently sit as assistant secretary-treasurer for the tribal council.

I want to thank you for the opportunity to testify today on H.R. 16, which will clarify the rights of Indian and Indian tribes on Indian lands under the National Labor Relations Act.

The Prairie Island Indian Community is a federally recognized sovereign self-governing Indian tribe. Our first economic enterprise started in 1984 when we opened a bingo parlor, which started with less than 150 employees. Following the passage of the Indian Gaming Regulatory Act in 1988, my tribe successfully negotiated compacts with the state of Minnesota and our modest bingo operation was transformed into a casino.

As a result of this hard work, our employees and responsible management, our casino became a great economic success. In just over 20 years, our business evolved from a 150-employee bingo parlor to a 1,500-employee resort and casino that features a hotel, marina, a cruise yacht and an RV park.

The success of our casino has led to an expansion of our government services and to additional economic development, including our tribe's acquisition of a golf course and the opening of a new convenience store. We continue to explore additional opportunities and to create jobs to provide more economic benefit for our tribe and our surrounding areas.

Our tribe now employs approximately 1,600 people in our economic enterprise and government. We are the largest employer in Goodhue County in the state of Minnesota. We treat our employees right. We provide good-paying jobs in rural Minnesota, with great benefits that include health insurance, dental insurance, a 401(k), basic life, accidental death and disability insurance, and paid leave.

Over 80 percent of our employees are full-time employees, of which approximately 89 percent of them, if you exclude the seasonal workers, are eligible to receive full benefits. Because of the success of our economic enterprise, we are able to offer these wages and benefits without any assistance from the state of Minnesota.

We have a large number of rehires, people that for whatever reason have left our employment and came back to work at our enterprise because of our magnificent benefits and wage packages. It is better than most of the employment in the area of where we have our business, both union and non-union.

Our tribe's own best interest lies in ensuring fair treatment of all employees. We, like most tribes we know, already offer compensation, benefits, work conditions, and grievance procedures that

are better than those offered by union employees. Our employees are already encouraged to offer positive, constructive criticism under existing policies and procedures, and our tribe has implemented a problem resolution procedure that permits employees to voice concerns or complaints without being penalized.

In addition, employees whose misconduct results in suspension or revocation of their gaming license, which are required for all casino employees, have the additional right to a full evidentiary hearing before the gaming commission to contest any suspension or revocation.

In fact, the NLRB rejected the one charge that was filed against us after the NLRB determined that the NLRA applied to tribes and their business because there was no evidence that the employee was discharged for engaging in protective activity.

We understand that we must compete for the best employees. We treat our employees well because it is the right thing for the employees and it is good for our business, not because a Federal agency compels us to do so. Our tribe has used and continues to use and rely upon union vendors, contractors and trades for various goods, projects and services, including casino vendors and contractors who perform construction and repair work at our various tribally owned enterprises and facilities.

Over the years, we have enjoyed cooperative relationships with union vendors, contractors and trades, creating economic benefits for everyone. Each of the tribe's businesses are wholly owned enterprises on Prairie Island Indian Community. Treasure Island Resort and Casino, Dakota Station, located in the community lands held in trust by the United States of America for the benefit of the Prairie Island Indian Community.

These commercial ventures are the principal funding source for most of our governmental departments, programs and services. Revenues generated by the tribal businesses have been used to improve infrastructure of the reservation such as water treatment facilities, improved water and sewer systems.

And we have helped provide many essential services, along with health care, social services, educational programs, financial planning, governmental, judicial and tribal law enforcement that most communities take for granted.

H.R. 16 would amend the NLRA to confirm the exempt status of tribal employers in their on-reservation activities. H.R. 16 would not grant any status or rights to the tribes that did not previously exist under the prior 30 years of the NLRB decision, but merely return to the former status quo.

As governments engage in economic activity on Indian lands to fund essential government services, sovereign tribes, including ours, should enjoy the same exempt status as the United States government, corporations and the state and their political subdivisions. There is simply no reason to treat tribal government-operated businesses any different than other government entities.

As in the case with the other government entities, our activities are restricted by jurisdictional boundaries. We conduct our economic activity and perform essential government services on our tribal lands, as is in the case with the state and local governments.

We cannot freely relocate our enterprise to different locations to obtain a competitive business advantage or to access a larger population of potential employees. The Prairie Island Indian Community owns and operates a commercial enterprise on its land and the tribal council, as elected representatives of the community, manages the enterprise.

Chairman JOHNSON. Will you try to close it down when you can, please?

Mr. JOHNSON. I would like to just move on and just get to the position of, in closing, I would like to conclude here that our tribe does offer great benefit packages, and we do have a program that protects the employee; that they have a grievance policy they can follow, and there is a board that will hear that.

I would like to conclude that the NLRA should amend and clarify the exempt status of Indians and Indian Tribes on Indian lands. Our government-operated businesses are the livelihood of our tribe and help support the economics of our neighbors and friends. Our tribal government operates businesses, funds our most basic essential government services, to resources needed to revitalize our culture and tradition.

The tribe understands that we depend on the efforts of all of our employees for the tribe's growth and well-being. We have already implemented policies and procedures to promote the fair treatment of all our employees, and additional Federal regulation is not warranted. Therefore, Indian tribes and businesses owned and operated by Indian tribes should be exempt from NLRA.

Thank you. And if you have any further questions, I will be glad to answer.

[The prepared statement of Mr. Johnson follows:]

**Prepared Statement of Hon. Ronald Johnson, Assistant Secretary/
Treasurer of the Prairie Island Indian Community**

Good morning Chairman Johnson, Vice-Chairman Kline and honorable members of the Subcommittee on Employer-Employee Relations. My name is Ron Johnson. I am a member of the Prairie Island Indian Community and the Assistant Secretary/Treasurer of the Prairie Island Indian Community Tribal Council. Thank you for the opportunity to testify today on the proposed legislation to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act.

The Prairie Island Indian Community is a federally-recognized, sovereign, self-governing Indian Tribe organized under 25 U.S.C. § 476, and is governed under the terms of the Constitution and Bylaws adopted by the Tribal members on May 23, 1936, and approved by the Secretary of the Interior on June 20, 1936. We are located in the state of Minnesota along the banks of the Mississippi River north of the City of Red Wing. My Tribe is the Mdewakanton Dakota Community; the literal translation of Mdewakanton is "dwellers of Spirit Lake." The Mdewakanton are one of the seven sub-tribes who make up the alliance called the Oceti Sakowin—the Seven Council Fires. Most of the world knows our alliance as the Sioux, but we call ourselves Dakota, Lakota or Nakota, a word that means "ally" or "friend" in all three of the dialects of our language. Tinta Wita or Prairie Island has provided for the needs of my people for centuries; it is a spiritual place. Over the years, this land has provided sustenance and shelter for my Tribe.

More recently, Prairie Island has provided my Tribe with economic opportunities. Our first economic enterprise started in 1984 when we opened a bingo parlor known as Island Bingo. Although we started with less than 150 employees, our Tribal members worked hard to make certain that the enterprise was well run and provided good jobs. Our employees' hard work and dedication contributed to the success and growth of our bingo parlor during those first years of operation.

Following the Cabazon decision, and the subsequent passage of the Indian Gaming Regulatory Act (IGRA) in 1988, my Tribe successfully negotiated compacts with

the State of Minnesota and our modest bingo operation was transformed into a casino, known as Treasure Island Resort & Casino. As a result of the hard work of our employees and Tribal Members, responsible management by our casino directors and Tribal Council, and aggressive regulation by our Gaming Commission, Treasure Island became a great economic success, both for my Tribe and the State of Minnesota. In just over 20 years, Treasure Island evolved from a small bingo parlor with less than 150 employees to a resort and casino with approximately 1500 employees that features over 2,500 slots, 44 table games, a 10-table poker room and a 550-seat high stakes bingo hall, along with five restaurants, a 250-room hotel, indoor pool, 137-slip marina, the Spirit of the Water cruise yacht and an RV park.

The success of our casino has led to an expansion of our government services and to additional economic diversification, including our Tribe's acquisition of Mount Frontenac Golf Course in 2000 and the opening of Dakota Station gas and convenience store in 2005. Our Tribe now employs approximately 1,600 people in our economic enterprises and governmental programs. We are the largest employer in Goodhue County, offering good-paying jobs in rural Minnesota with great benefits that include health insurance, dental insurance, 401(k), basic life accidental death and disability insurance, and paid leave. Over 80 percent of our employees are full-time employees (approximately 89 percent if you exclude seasonal workers) eligible to receive full benefits. Because of the success of our economic enterprises, we are able to offer these wages and benefits without any assistance from the State of Minnesota. Our Community continues to explore additional opportunities to create more jobs and provide more economic benefit for our Tribe and the surrounding area.

Our Tribe understands that we depend on the efforts of all of our employees for the Tribe's growth and well-being. We are committed to providing the best possible working conditions and strive to treat all our employees fairly and with dignity and respect. Indeed, the Tribe's own best interest lies in ensuring fair treatment of all employees. Our employees are encouraged to offer positive and constructive criticism, and our Tribe has implemented a problem resolution procedure that permits employees to voice concerns or complaints about any condition of employment, rules of conduct, policies, practices, or disciplinary actions without being penalized, formally or informally. In addition, employees whose misconduct results in the suspension or revocation of their gaming license (required for all casino employees) have the additional right to a formal hearing before the Gaming Commission to contest the suspension or revocation.

If we as a tribal employer mistreat our employees we will not be able to fill our employment needs, our employees will perform poorly, and our facilities will certainly suffer. And especially with regard to our casino and hospitality services, we understand very well that we are in a competitive service industry and the welfare of our enterprises depends on contented employees. Our Tribe, like other Tribes, treats employees well because it is the right thing for the employees and it is good for business, not because a federal agency compels us to do so.

Our Tribe has used and continues to use and rely upon union vendors, contractors and trades for various goods, projects and services, including casino vendors and contractors who perform construction and repair work at our various tribally-owned enterprises and facilities. Over the years we have enjoyed cooperative relationships with union vendors, contractors and trades, creating economic benefits for everyone.

Each of the Tribe's businesses are wholly-owned enterprises of the Prairie Island Indian Community. Treasure Island Resort & Casino and Dakota Station are located on Community lands held in trust by the United States of America for the benefit of the Prairie Island Indian Community. These commercial ventures are the principal funding source for most of our governmental departments, programs and services, including administration, education, water resources, roads, public safety, health care, social services, and natural resources. Revenues generated by tribal businesses have been used to improve the infrastructure of the reservation (water treatment facility, improved water and sewer systems), and have helped provide many essential services (healthcare, social services, educational programs, financial planning, governmental, judicial, tribal law enforcement) that most communities take for granted.

H.R. 16—Tribal Relations Restoration Act of 2005

The San Manuel decision constituted a dramatic change in over 30 years of National Labor Relations Board (NLRB) precedent that afforded tribe's—for their on-reservation activities—the same status under the National Labor Relations Act (NLRA) as other sovereign entities such as the United States, the states and their political subdivisions, which are exempted from the definition of "employer" under the NLRA and, thus, beyond the jurisdiction of the NLRB. H.R. 16 would amend to the NLRA to confirm the exempt status of Tribal employers in their on-reserva-

tion activities, and reverse the harmful decision of the NLRB in the San Manuel decision. H.R. 16 would not grant any status or rights to the tribes that did not previously exist under the prior 30 years of NLRB decisions, but merely return to the former status quo.

As governments engaged in economic activity on Indian lands to fund essential government services, sovereign tribes including ours should enjoy the same exempt status as the United States, government corporations, and the states and their political subdivisions. As is the case with other governmental entities, our activities are restricted by jurisdictional boundaries. We conduct our economic activity and perform essential governmental services on our tribal lands. And as is the case with state and local governments, we cannot freely relocate our enterprises to different locations to obtain a competitive business advantage or to access a larger population of potential employees. There is simply no reason to treat tribal government-operated businesses any differently than other governmental entities.

Indian Tribes as Sovereign Nations Should Be Afforded the Same Status as Federal and State Governments and Subdivisions

Indian Tribes are distinct political entities that retain their inherent powers of self-government absent Congressional action to restrict those powers. A State cannot limit the powers of a Tribe. Tribes have had the inherent right to govern themselves “from time immemorial.”¹ Tribal governments have the same powers as the federal and state governments to regulate their internal affairs, with a few exceptions. Tribes have the power to form a government, decide their own membership, the right to regulate property, the right to regulate commerce, and the right to maintain law and order. Accordingly, Indian Tribes should also be exempted from the NLRA’s definition of employer, just as federal and state governments are exempted.

Tribal Government-Operated Businesses Should Also Be Exempted

The Supreme Court has held that State “political subdivisions” excluded from the NLRA’s coverage are defined as entities that are either “(1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.”² The Prairie Island Indian Community owns and operates the commercial enterprises on its lands, and the Tribal Council as the elected representatives of the Community manages the enterprises. Because our commercial enterprises are operated by individuals who are responsible to our public officials, they are akin to the state “political subdivisions” exempted from the NLRA’s coverage.

The tragic history of Indian Tribes’ relationship with the United States further underscores how Tribes’ economic activity on Indian lands constitutes an essential government function. A string of failed federal initiatives effectively stripped Indian Tribes of their ancestral lands, took away their livelihood, and forced them on to desolate reservations. The destruction of Tribes’ traditional way of life and the limited and mostly unproductive reservation land base resulted in widespread economic devastation throughout Indian Country. Indeed, Prairie Island was a place of severe poverty as recently as the 1990’s. The soil of the island is sandy and has limited value for farming. Consequently, throughout much of this history, Tribes, including Prairie Island, lacked the financial means to effectively exercise their governmental powers.

For many Tribes, including Prairie Island, their tribal-operated commercial enterprises have provided the only successful means to raise funds to be able to exercise their powers of self-government. Without the financial means to exercise powers of self-government, Tribes would struggle to survive as sovereign nations. Accordingly, Tribes and their tribal government-operated commercial enterprises should not be treated any differently than states and their political subdivisions. H.R. 16’s amendments to the NLRA would rectify this discrepancy.

NLRB Jurisdiction Over Tribes Impairs Tribal Sovereignty

H.R. 16 would also ensure that the NLRA is viewed in light of the longstanding federal policies that promote tribal self-government, self-sufficiency, and economic development. A tribe’s ability to establish and control the terms and conditions of employment for its member and nonmember employees is an essential aspect of self-government that clearly “has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”³ For these reasons, Indian tribes have been excluded from the definition of employers in other federal employment legislation such as Title VII of the Civil Rights Act and the American’s with Disabilities Act.⁴ According to South Dakota Senator Mundt, the rationale for the tribal exemption in Title VII was to protect “the welfare of our oldest and most distressed American minority, the American Indians” to allow them to “conduct their

own affairs.”⁵ Federal law also expressly permits the use of Indian preference by employers on or near reservations.⁶

Indian Gaming Promotes Tribal Economic Development, Self-Sufficiency, and Strong Tribal Governments

The need for H.R. 16’s clarification of the rights of Indians and Indian tribes on Indian lands is readily apparent when one considers the potential application of the NLRA to tribal gaming enterprises. The Indian Gaming Regulatory Act (IGRA) constitutes a clear statement that “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”⁷ Indeed, the Indian Gaming Regulatory Act (IGRA) was enacted to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.⁸ The Prairie Island Indian Community and other Minnesota tribes have experienced significant economic development since IGRA’s enactment in 1988, resulting in greater self-sufficiency and stronger tribal governments.

Treasure Island Resort & Casino is operated pursuant to IGRA as a governmental enterprise for the express purpose of funding essential governmental programs and services offered by the Prairie Island Indian Community to its members. Revenue generated by tribal gaming has been used to improve the infrastructure of the reservation (water treatment facility, improved water and sewer systems), and helped provide many essential services (healthcare, social services, educational programs, financial planning, governmental, tribal court, and law enforcement) that most communities take for granted.

Tribal gaming also provides thousands of jobs and other economic opportunities in Minnesota, and contributes hundreds of millions of dollars in salaries, wages, benefits, vendor purchases, and taxes to Minnesota’s economy every year while easing the burden on state and county public assistance programs.⁹ Because tribal government-operated gaming enterprises are so vital to tribal economic development, self-sufficiency, and strong tribal government, Tribes and their tribal government-operated commercial enterprises should be excluded from NLRA coverage.

Conclusion

The National Labor Relations Act should be amended to clarify the exempt status of Indians and Indian tribes on Indian lands. Our tribal government-operated businesses are the lifeblood of our Tribal Community and help support the economies of our neighbors and friends. Our tribal government-operated businesses fund our most basic and essential government services, including water and sewer, housing, paved roads, health care and educational opportunities, and provide the resources needed to revitalize our culture and traditions. Our Tribe understands that we depend on the efforts of all of our employees for the Tribe’s growth and well-being, and we have already implemented policies and procedures to promote the fair treatment of all of our employees. Additional federal regulation is not warranted and could unnecessarily increase labor costs. Therefore, Indian tribes and businesses owned and operated by Indian tribes should be exempt from the NLRA.

Pidamaya. Thank you. I welcome any questions you may have.

ENDNOTES

¹ See *Worcester v. Georgia*, 515, 558 (1832).

² *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971).

³ *Montana v. United States*, 450 U.S. 544, 566 (1981).

⁴ 42 U.S.C. § 2000e(b) (Title VII) and 42 U.S.C. § 12111(5)(B)(i) (ADA).

⁵ 110 Cong. Rec. 12702 (1964).

⁶ 42 U.S.C. § 2000e-2(i).

⁷ 25 U.S.C. § 2701(4).

⁸ 27 U.S.C. § 2702(1).

⁹ See the Statewide Economic Impact analysis compiled by the Minnesota Indian Gaming Association at the following link: <http://www.mnindiangaming.com/template—info.cfm?page=4>.

Chairman JOHNSON. Thank you, sir.
Dr. Harvey, you are recognized.

**STATEMENT OF PHILIP L. HARVEY, PH.D., ASSOCIATE
PROFESSOR, RUTGERS SCHOOL OF LAW**

Dr. HARVEY. Thank you, Mr. Chairman, other members of the subcommittee.

I do not intend to use my time this morning to discuss the merits of the San Manuel decision, though I would be happy to answer questions about it that you may have.

Instead, I would like to address the question of what Federal law in this area should try to do, whether or not the San Manuel decision comes out one way or the other after the court of appeals has discussed it. In other words, regardless of what the courts say the law is in this area, what should Federal policy be?

I think the reason that is an interesting question is because there really are two legitimate conflicting or potentially conflicting goals here: the goal of honoring and respecting the sovereignty of American Indian tribes on the one hand; and the goal of honoring and respecting the right of association of American workers, Indian and non-Indian alike, on the other hand, to form, join and assist trade unions.

It is working out law and policy to reconcile these two legitimate goals that ought to be the task that certainly the subcommittee and the Congress should entertain. Now, the goals that I have identified are consistent not only with deeply rooted principles of American law, but I also want to emphasize that they are consistent with obligations that the United States has accepted as a nation under international human rights law.

The United States has ratified in 1992 the International Covenant of Civil and Political Rights, which means that it is part of the law of the land under the Constitution, and the International Covenant includes language that affirms both the importance of recognizing the sovereignty and right to self-determination of peoples. In Article I, all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

It doesn't tell us exactly what the line should be in determining the degree of sovereignty exercised by Indian tribes, but it certainly affirms that it is an important principle that must be kept in mind, of which Congress must be mindful in legislating in this area.

It also, in Article XXII, says that everyone shall have the right to freedom of association with others, the same freedom of association recognized in Article I—excuse me, in the First Amendment to the U.S. Constitution, including the right to form and join trade unions for the protection of his interest. No restrictions may be placed on the exercise of this right other than those which are proscribed by law and which are necessary in a democratic society in the interests of national security or public safety or a few other things are mentioned.

So the principles of human rights law are clear. It is not for either the central government or a local government or a state government or a tribal government to decide whether workers shall unionize. It is for the workers themselves. It is an aspect of their right of association to decide that they want to or not, and it is the role of the law to protect that right. Protecting that right is a point at which the sovereignty of all nations, including the Federal Government as well as tribal nations, ends.

Now, is it possible for us to reconcile these two goals? I think it is. We can pursue and recognize both goals simultaneously and in fact advance both goals simultaneously by recognizing the right of

Indian tribes to legislate in this area, to enact ordinances regulating the labor relations of employees within their jurisdiction, but requiring that those ordinances provide protections at least as great as those provided by the NLRA and consistent with the international human rights obligations that the United States has voluntarily taken on.

That is a course of action that would both honor and respect and indeed enhance the sovereignty of the Indian tribes because it would invite them into an area of governance that presently the states enjoy, but has not historically been one in which they have been active, and would give them a status to enforce, as well as make their law in that area, provided that in doing so they also comported with our obligation to protect the rights of individual workers, Indian and non-Indian alike, in their employment.

Finally, I would like to point out that this course of action is one that has been followed, and there is precedent for it in American law. The Occupational Safety and Health Act has a provision which allows states who want to to preempt the Federal Occupational Safety and Health Act by adopting their own occupational safety and health regulatory system, provided it provides protections at least as great as those afforded by OSHA.

The courts enforce, the administrative bodies deciding whether or not the states have satisfied that condition, and of course I think that is an essential characteristic of any workable system because it is ultimately the courts that we rely on to tell us where those appropriate laws have been drawn.

So I think that the model that we find in OSHA could easily be adapted to solve this problem by giving Indian tribes the right to preempt the NLRA, provided they do so with local ordinances that provide equal protection to the rights of their workers.

Thank you.

[The prepared statement of Dr. Harvey follows:]

Prepared Statement of Philip L. Harvey, Associate Professor of Law and Economics, Rutgers School of Law

The National Labor Relations Board (NLRB or Board) decision in *San Manuel Indian Bingo and Casino*, 341 N.L.R.B. 138 (2004), invites reflection on how federal law should honor the possibly competing goals of properly respecting the sovereignty of American Indian tribes and the right of Indians and non-Indians alike to form, join and assist trade unions. My statement will address that issue, with emphasis on the principles that I believe should guide a possible legislative response to the case. My general point will be that the Congress can and should seek to advance both the goal of enhancing tribal sovereignty and the goal of protecting the associational rights of Indian and non-Indian workers. It can best do this, I suggest, by granting Indian tribes the right to preempt NLRB jurisdiction by adopting labor relations ordinances, ultimately enforceable in the federal courts, that afford rights to their employees that are at least as protective as those afforded by the NLRA and which also are consistent with the human rights obligations of the United States.

Respecting the Sovereignty of American Indian Tribes and the Right of Association of Indian and Non-Indian Workers

(1) The goal of any legislative response to the *San Manuel* case should have two objectives. Rather than seeking to reaffirm or enhance the sovereignty of Indian tribes at the expense of employee rights or to reaffirm or enhance employee rights at the expense of tribal sovereignty, the Congress should seek to enhance both tribal sovereignty and the associational rights of both Indian and non-Indian workers. Moreover, it should do this whether or not the Board's order in *San Manuel* is enforced by the courts.

(2) This dual goal is consistent with long-standing principles of American law. The sovereignty that Indian tribes are recognized to possess is rooted in their history and affirmed in treaties the federal government has concluded with them. While opinions may differ as to the nature and extent of that sovereignty in particular instances, I believe there is broad agreement that enhancing the sovereignty of Indian tribes and expanding their capacity to address the needs of their members will serve the interests of both tribal members and the broader American public of which they form a part. A commitment to protecting the right of workers in the United States to form, join and assist trade unions also is deeply rooted in American law—most notably in the enactment of the NLRA—and while strong disagreements may exist over the proper boundaries of those rights, I believe there is broad agreement that the public interest is served by their continued protection.

(3) This dual goal also comports with international human rights standards that the United States has committed itself to observing. The International Covenant on Political and Civil Rights (ICCPR), U.N. Doc. A/6316 (1966), which the United States ratified in 1992, affirms the right of all peoples to “self-determination,” to “freely pursue their economic, social and cultural development,” and to “freely dispose of their natural wealth and resources.” ICCPR, art. 1. While this language does not dictate the nature or extent of the sovereignty American Indian tribes should enjoy, it does underscore the fact that they are entitled, as a matter of right, to special deference by virtue of their unique historical status within the United States.

The ICCPR also provides that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” and that “[n]o restriction may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” ICCPR, art. 22. As with the right to self determination recognized in Article 1 of the ICCPR, the right of association recognized in Article 22 does not dictate the specific legal rights workers must be accorded, but it does underscore that the United States has a legal duty to guarantee these rights to all persons, including individuals employed at enterprises owned and operated by Indian tribes.

Article 2 of the ICCPR makes this clear. It provides that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The United States has assumed a duty under the ICCPR to protect the right of both Indian and non-Indian workers employed in tribal enterprises to form, join and assist trade unions, and any attempt to accord them a lesser level of protection than other workers in the United States would likely violate this duty.

The United States also has an obligation “arising from the very fact of [its] membership” in the International Labor Organization (ILO) “to respect, to promote and to realize, in good faith and in accordance with the Constitution [of the ILO], the * * * freedom of association and the effective recognition of the right to collective bargaining.” ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998 (the ILO Declaration) (emphasis added). This obligation (i.e., compliance with the ILO Declaration) subsequently has been incorporated into the Inter-American Democratic Charter, OAS Doc. OEA/Ser/P/AG/Res. 1 (2001), and both the US-Chile Free Trade Agreement (US-Chile FTA), Pub. L. No. 108-77, 117 Stat. 909, 911 (2003), and the US-Singapore Free Trade Agreement (US-Singapore FTA), Pub. L. 108-78, 117 Stat. 948 (Sept. 3, 2003).

(4) I am not suggesting that these obligations create any legally enforceable rights for American workers either on or off tribal lands. The United States ratification of the ICCPR, for example, expressly noted that the rights recognized in the Covenant should not be considered self-executing, and neither the US-Chile FTA nor the US-Singapore FTA appear to contemplate the creation of self-executing labor rights either. Still, as duly ratified treaties of the United States, these agreements are part of the “supreme Law of the Land,” U.S. Const. art. VI, § 2., and they impose obligations on the federal government that Congress should feel bound to fulfill.

For example, both the US-Chile FTA and the US-Singapore FTA contain virtually identical provisions, pursuant to which “[t]he Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 18.8 are recognized and protected by its domestic law * * * [E]ach Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor

rights set forth in Article 18.8 and shall strive to improve those standards in that light.” US-Chile FTA, art. 18.1.1 & 18.1.2. The “internationally recognized labor rights set forth in Article 18.8” include “(a) the right of association” and “(b) the right to organize and bargain collectively.”

The Congress, of course, may decline to implement these provisions, but in so doing, it would cause the United States to default on its international obligations—something I presume most Members would be loathe to do. Indeed, there are probably no international obligations that it is more important for the United States to honor than its human rights obligations.

My point is simple. When the Congress considers legislation that touches on either the sovereignty of American Indian tribes or the rights of workers to form, join and assist trade unions, it should be mindful of and seek to satisfy the human rights obligations the United States has assumed with respect to the subject matter of the proposed legislation. In this instance, that means being mindful of and seeking to satisfy the United States’ obligation to honor both the rights of American Indian Tribes arising out of their limited sovereignty and the associational rights of all persons in the United States referenced in the ICCPR and the ILO Declaration.

Possible Legislative Responses to San Manuel

(5) The bill which is the subject of this hearing (HR 16 IH) is inconsistent with the dual goals I have suggested should be the object of any legislative response to the San Manuel case, and it also is inconsistent with both the policy goals embodied in U.S. labor law and the human rights obligations the United States has assumed.

The bill is inconsistent with the dual policy goals I have identified because it seeks to extinguish one (protecting the right of association) for the sake of honoring the other (respecting the sovereignty of Indian tribes). It is inconsistent with the policy goals embodied in U.S. labor law, because it would fail to guarantee protection of the rights enumerated in Section 7 of the NLRA for both Indian and non-Indian employees who otherwise might be subject to the jurisdiction of the NLRB, and it would fail to maintain the level playing field and equality of bargaining power that the NLRA seeks to maintain among and between employers and employees engaged in interstate commerce. Finally the statute would be inconsistent with the human rights obligations of the United States because it would not guarantee the right of association of persons employed by tribal enterprises operating on tribal land.

(6) A better legislative strategy, in my view, would be one that sought to honor both the sovereignty of Indian tribes and the right of association of their employees. The best way to achieve these dual goals in my view, would be to grant Indian tribes the right to enact and administer labor relations ordinances on their own lands that would preempt the jurisdiction of the NLRB, but only on condition that the legal regimes they establish are at least as protective of the associational rights of their employees as the NLRA, and that they also conform with the obligations of the United States under the ICCPR and ILO Declaration.

Although these objectives could be at least partly achieved by amending Section 10 of the Act to permit the Board to enter into the same kind of cessionary agreements with Indian tribes that it is now authorized to enter into with States and Territories, legislation along those lines would, I believe, unnecessarily limit the authority of Indian Tribes to establish legal regimes more protective of the associational rights of their employees than the NLRA, and it also would leave the Board with the unilateral authority to enter or not to enter such cessionary agreements.

A strategy that would more fully honor the sovereignty of Indian tribes while also allowing for enhanced protection of the right of association of tribal employees, would be to add a provision to the “Limitations” sections of the NLRA (presently Sections 13-18) that would permit tribes to preempt the NLRA by adopting labor relations ordinances and enforcement regimes that provided legal protections for the right of association of their employees that are equal to or greater than those provided by the NLRA and which also conform to the internationally recognized labor rights referenced in the ICCPR and the ILO Declaration. Approval of a tribal labor relations regime could be vested in the Board to ensure that the tribal plan complied with these requirements, and the Board’s decision in that regard could be made reviewable by the Circuit Courts of appeal. Enforcement of the rights established pursuant to a tribal plan would be vested in the tribes themselves, with the U.S. Courts of Appeal being given jurisdiction to review cases in which a complaining employee asserts that s/he has not been accorded rights at least equal to those afforded under the NLRA and/or consistent with internationally recognized labor rights.

Such legislation would enhance the right of association of tribal employees by guaranteeing them protection at least equal to that afforded by the NLRA, and it also would enhance the sovereignty of American Indian tribes by authorizing them to develop and administer a labor relations regime of their own devising in conformity with both U.S. and internationally recognized labor standards.

(7) This legislative strategy is not only workable, but there is precedent for it in the statutory design of the Occupational Safety and Health Act (OSHA). Section 667 of OSHA establishes a mechanism whereby States may "assume responsibility for development and enforcement therein of occupational safety and health standards," 29 USC § 667(b), provided the proposed regulatory regime "will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6555 of this title which relate to the same issues," *id.* § 667(c)(2). Authority to approve and monitor state plans pursuant to this provision is vested in the Secretary of Labor, and the Secretary's decisions in that regard are made reviewable in the Circuit Courts of Appeal, *id.* § g.

OSHA does not grant this preemptive right to Indian tribes, but the reverse preemption model it embodies could be adapted quite easily for incorporation in the NLRA and applied to Indian tribes (and possible to states as well). The Congress need not choose between honoring the sovereignty of Indian tribes and protecting the associational rights of American workers. It can and should do both.

Chairman JOHNSON. Thank you, sir.
Governor Garcia, you are recognized.

**STATEMENT OF HON. JOE GARCIA, GOVERNOR, PUEBLO OF
SAN JUAN, NEW MEXICO**

Mr. GARCIA. Good morning, everyone.

Greetings from Ohkay Owingeh, formerly known as San Juan Pueblo, in New Mexico. Good morning, Mr. Chairman, Chairman Johnson, Ranking Member Andrews and all of the committee members. Thank you for being here. Thank you for allowing me to testify today.

I would also like to thank personally Congressman Hayworth, the sponsor of H.R. 16, and Congressman Kildee, who happen to be the co-chairs of the Native American Caucus. Thank you.

At the outset, let me say that the tribal leaders throughout the country recognize the contributions that the labor unions have made to working people in the United States. However, today I am here as Governor of Ohkay Owingeh and the president of NCAI in support of H.R. 16 because it recognizes the sovereign governmental rights of Indian tribes to make their own labor policies based on the conditions on their reservations.

H.R. 16 would restore the intent of Congress that tribal governments should not be treated as private employers under the National Labor Relations Act. The National Labor Relations Board has tried to create a false distinction between what it thinks are the governmental functions of the tribes, such as health care and the commercial activities of the tribe such as gaming enterprises.

We believe the Indian Gaming Regulatory Act is quite clear that tribal gaming is a government activity to raise revenue for tribal government functions. Indian gaming is much more akin to a state lottery than to commercial gaming. My tribe, Ohkay Owingeh, has been involved in litigation over labor issues.

In 2002, the 10th Circuit Court of Appeals affirmed the power of the tribe, of my pueblo, to outlaw forced union membership. In that case, the NLRB wanted to force every employee working for a tribally owned and operated sawmill on pueblo land to support a certain union. The tribal council felt strongly that the tribal council

should make the labor policy on tribal lands. Many of our tribal members have very low incomes, and we did not feel that they should be forced to pay union dues. By a nine-to-one margin, the 10th Circuit agreed.

More broadly, there are at least four ways that the application of the National Labor Relations Act will adversely affect tribal sovereignty.

First, guaranteeing tribal employees the right to strike would threaten tribal government services. Federal employees and state employees do not have the right to strike because government services are too important to the public.

On most reservations, there is only one major employer, and it is a tribal enterprise. We don't have an effective tax base yet. The tribal enterprise is often the only major source of tribal revenue, so it must keep operating in order to keep the schools open and the police department functioning, as a couple of examples. Allowing unions the right to strike would give outside forces unreasonable leverage over the tribal government.

Second, treating Indian tribes as private employers would interfere with tribal authority to require Indian preference in hiring. The vast majority of Indian tribes have laws requiring employers on-reservation to give preference to Indians. This right is protected by Title VII of the Civil Rights Act and affirmed by the Supreme Court.

Preference laws are important because 50 percent of Indians residing on reservations are unemployed. Indian tribes should not be required to bargain with a union to retain their Indian preference laws.

Third, treating Indian tribes as private employers would interfere with the tribal power to exclude non-members. The power to exclude is one of the most fundamental powers of tribal government. However, if the NLRA applies to tribes as employers, rights to exclude would be in jeopardy. For example, a hearing on arbitration could lead to reinstatement and return of employees that the tribe had fired and banned from the reservation for misconduct.

Fourth, and finally, a union with many tribal members could interfere with tribal government internal politics. On large reservations, the majority of the employees are tribal members. A powerful union leader could manipulate votes in tribal elections. The union could strike immediately before a tribal election. The union could demand health care benefits that are better than other tribal members. Because of the small size of tribal communities, unions could dominate tribal politics in a way that would benefit union members, but hurt the tribe.

In conclusion, I want to reiterate that Indian tribes support strong relationships with their employees. Tribal enterprises have not succeeded by fighting with their employees, but by building partnerships. But this partnership has to be founded on the recognition that a tribe is a government and the labor policies must come from within the tribe's government, rather than being imposed from the outside.

I am confident that tribal leaders want to work with labor and with Congress to resolve these issues to preserve tribal sovereignty

and get back to work on building better lives for our tribal members and our employees.

I thank the committee for the opportunity to appear today and would be happy to answer questions if you have any. Thank you.
[The prepared statement of Mr. Garcia follows:]

Prepared Statement of Hon. Joe Garcia, President of the National Congress of American Indians and Governor of Ohkay Owingeh (San Juan Pueblo)

Introduction

Good morning Chairman Johnson, Ranking Member Andrews, and all of the distinguished members of this Committee. Thank you for the invitation to testify today and for your commitment to Indian people and for upholding the trust and treaty responsibilities of the federal government. I would also like to thank Congressman J.D. Hayworth, the main sponsor of H.R. 16, and Congressman Dale Kildee, who joined Mr. Hayworth in urging that this hearing be held.

My name is Joe Garcia, I am the President of the National Congress of American Indians (“NCAI”), and I am also the Governor of Ohkay Owingeh (formerly known as the Pueblo of San Juan). For those unfamiliar with the NCAI, it is the oldest, largest, and most representative Indian tribal organization in the nation. The NCAI was founded in 1944 in response to federal ill-considered policies affecting Indian tribes then being debated in Congress. These policies—known as Tribal Termination—were disastrous for Indian tribes and Indian people and only recently have Indian communities resurrected their governments and their economies.

There are 562 Indian tribal governments in the United States, and we enjoy demographic, cultural, political, and economic diversity like no other communities in our great nation. It is a mistake to see Indian country as monolithic and subject to one-size fits all Federal policies, as that envisioned lately by the National Labor Relations Board.

Tribal Labor Matters Best Left to Indian Tribes

At the outset, I want to say that tribal leaders recognize and appreciate the significant contributions that labor unions have made to working people in the United States. Many of our people have worked as union members on farms and in factories. We greatly appreciate the efforts of labor unions to improve wages and working conditions.

The member tribes of NCAI have deliberated labor matters over the years and have voiced their strong support for H.R. 16. Attached is a copy of NCAI Resolution No. MOH-04-028, duly adopted by our membership on June 23, 2004. Accordingly, I am here in support of H.R. 16 solely because it confirms the sovereign governmental right of Indian tribes to make and live by their own labor policies based on the economic and social conditions existing on their lands. Many Indian tribes have exercised that sovereign authority to welcome labor unions and encourage union organization. But that is a choice for Indian tribal governments—not Federal bureaucrats or labor leaders—to make in a way that protects the functions of tribal government and the tribal members living on reservation. In my testimony, I will discuss the experiences that my Pueblo, Ohkay Owingeh, has had with labor unions, and the broader concerns that NCAI has because of the differences between tribal governments and private businesses in the labor union context.

H.R. 16 would restore the intent of Congress to treat tribal governments the same as state and local governments under the National Labor Relations Act (“NLRA”). The NLRA specifically exempts Federal, state and local governments from its definition of “employer.” The NLRA, however, is totally silent about Indian tribal governments. The NLRA was enacted in 1935, during the Great Depression, and given the lack of economic development on Indian reservations at that time; it is not surprising that the law makes no reference to Indian tribes. However, for over thirty years, the National Labor Relations Board (“Board”) has interpreted the NLRA to include tribal governments in its general exemption for government entities because of Congress’s intent to exempt all government entities. The Board has also ruled that territorial governments, such as Puerto Rico and Guam, are also exempt under NLRA.

Recently, however, the Board in *San Manuel Indian Bingo and Casino*, 341 NLRB 138 (2004), reversed this thirty year old precedent and unilaterally expanded its jurisdiction to include Indian tribes, even when the tribe is operating on reservation to raise governmental revenue and provide employment to tribal members. Rather than treat tribal governments like states and local governments as envisioned by the NLRA, the Board created an artificial distinction between “governmental” func-

tions of tribes, such as health care, and the “commercial” activities of tribes, such as a gaming. Even with this distinction, the Board ignored Congress’ recognition in the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 et seq., that Indian tribal gaming is a governmental function. Indian gaming is a government activity because it raises revenue for tribal government functions. In this way, Indian gaming is much more akin to state lotteries than to commercial gaming. The NCAI believes that Congress should restore the implicit intent in the NLRA to treat tribal governments the same as state and local governments. If the Board’s decision is allowed to stand, then the only governments that are not exempt from the NLRA will be tribal governments.

Statements by members of Congress at the time IGRA was passed also make it clear that IGRA was not intended to undermine tribal government regulatory authority on the reservation. As Senator Daniel K. Inouye, IGRA’s main sponsor and long-time Chairman of the Senate Committee on Indian Affairs, stated on the floor shortly before IGRA cleared the Senate:

There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use.

On the contrary, the tribal power to regulate such activities, recognized by the U.S. Supreme Court * * * remain fully intact. The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in Class III gaming warranted utilization of existing State regulatory capabilities in this one narrow area. No precedent is meant to be set as to other areas. (134 Cong. Rec. S24024-25, Sept. 15, 1988)

My Pueblo, Ohkay Owingeh, has won litigation over this issue. On January 11, 2002, the Tenth Circuit Court of Appeals, in *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), affirmed the power of my Pueblo to pass a right-to-work law prohibiting compulsory union membership on its lands.

In that case, the Board wanted to force every employee working for a tribally owned and operated sawmill on tribal land to financially support labor unions. The Tribal Council, of which I am a member, felt strongly that the Tribal Council, rather than the Board or labor unions, should make the labor policy affecting tribal members. Many of our tribal members have very low incomes and the Tribal Council did not feel that they should be forced to join a labor union or pay union dues without their consent. The Tribal Council enacted a right-to-work law to give tribal members the right to choose whether or not to join or financially support a labor union rather than being forced to do so. The Board argued that my Pueblo had no authority to pass a right-to-work law because only states and territories were allowed to do under the NLRA. By a nine to one margin, the Tenth Circuit upheld the right of my Pueblo to pass a right-to-work law even though Indian tribes are not expressly mentioned in the NLRA along with states and territories. Rather, the Tenth Circuit relied on Congress’ intent to exempt all government entities, which it ruled included tribal governments. The important principle of this case is the Tenth Circuit’s acknowledgement that Congress intended for Indian tribal governments to be treated the same as state and territorial governments. It is this principle that we ask Congress to restore in the NLRA today through H.R. 16.

It is also important that the Committee understand that in many ways Indian America is an emerging market, often with vulnerable populations and delicate economies and that labor union policy on Indian lands is an important aspect of economic regulation that should be left to Indian tribal governments as a matter of self-determination and self-sufficiency in the same way that states and local governments are allowed to develop their own policies.

More broadly, there are at least four ways that the Board’s attempt to expand its jurisdiction into Indian country would substantially interfere with important attributes of tribal sovereignty in ways that have not been authorized or even considered by Congress.

First, guaranteeing tribal employees the right to strike would preempt tribal law and threaten tribal government services. We are very concerned that the right to strike would allow outside forces to control tribal government decisions. On most reservations there is only one major employer and it is a tribal government enterprise, usually a casino or an agriculture or timber operation. Tribal enterprises are unlike private industry and they don’t have the option of bankruptcy. It is often the only major source of tribal revenue, so it must keep operating in order to keep the schools open and the police departments staffed and vigilant. Allowing unions the right to strike would give them inordinate leverage to demand larger and larger shares of the tribal enterprise revenue, revenues that are intended to provide desperately needed services on the reservation.

Government services are critically important to a large segment of the public, and the public is especially vulnerable to “blackmail” strikes by government employees. This is the reason that government employees are generally barred from striking. Federal employees and most state employees generally do not have the right to strike. See 5 U.S.C. 71 16(b)(7), 7311; DiSabatino, *Who Are Employees Forbidden to Strike Under State Enactments or State Common-Law Rules Prohibiting Strikes by Public Employees or Stated Classes of Public Employees*, 22 A.L.R. 4th 1103 (1983).

Tribal governments have as urgent a need as state or local governments to uninterrupted performance of services to the community, and are more vulnerable. Many tribal governments have little or no discretionary funding other than revenue from their economic enterprises.

Strikes against tribal enterprises that the Board dismissively describes as “commercial in nature—not governmental” could easily disrupt tribal services to a greater degree than state or local governments because other governments can rely on the bulk of their revenues coming from their tax base, which Tribes conspicuously lack. The Board has made the implausible assumption that Congress intended to expose tribal governments to strikes by tribal employees—an exposure the Act spares other governments.

Second, treating Indian tribes as private employers under the NLRA would interfere with tribal authority to require Indian preference in employment. With the approval of Congress and the courts, the vast majority of Indian tribes have laws requiring employers on reservation to give preference to Indians in all phases of employment. Preference laws are important because the unemployment rate on Indian reservations is much higher than anywhere else in the country. The Bureau of Indian Affairs estimates that 50 percent of Indians residing in Indian country are unemployed. See Dept. of Interior, Bureau of Indian Affairs, 1997 Labor Market Information on the Indian Labor Force: A National Report, at 4 (1998). Congress recognized and protected tribal preference laws in Title VII of the Civil Rights Act, which excludes tribes from the definition of “employer” and exempts businesses “on or near” Indian reservations. In *Morton v. Mancari*, 417 U.S. 535 (1974), the U.S. Supreme Court unanimously upheld this provision.

Application of the NLRA to tribal enterprises would jeopardize a tribes’ right to enforce its Indian preference laws. If tribal employees chose a union it would become “exclusive representative of all the employees.” The union would have the duty of equal treatment and nondiscrimination among its members. The tribe would be obligated to bargain with the union to retain its sovereign right to apply its Indian preference laws. The union might resist the application of Indian preference, or seek to condition its acceptance on concessions by the tribe on other issues. Requiring a tribe to bargain to retain its Indian preference laws seriously interferes with the tribe’s core retained rights to make and enforce its own laws. In view of Congress’s strong support of Indian preference, it cannot reasonably be assumed that Congress intended to force tribes to bargain with unions to preserve their Indian preference laws. Yet this is what follows from the Board’s new interpretation of the NLRA.

Third, and similarly, treating Indian tribes as private employers would interfere with the tribal power to exclude non-members in the employment context. The tribal power to exclude from reservation lands is one of the most fundamental powers of tribal government and the partial source of tribal civil jurisdiction over non-members. The power to exclude includes the power to “place conditions on entry, on conditioned presence, or on reservation conduct.” See, *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130 at 144 (1982).

However, if the NLRA applies to tribes as employers, their right to exclude in that context would be abrogated. For example, a hearing or arbitration required under the NLRA could lead to reinstatement and return of employees that the tribe had fired and banned from the reservation for misconduct. The Board makes the unreasonable assumption that Congress intended to interfere with this core right of tribal sovereignty.

Fourth, and finally, a union with many tribal members could substantially interfere with tribal government internal politics. On larger reservations the majority of the employees are tribal members. A powerful union leader could manipulate union votes in tribal elections. The union could strike or threaten to strike immediately before an election. The union could demand health care benefits that are better than other tribal members. The union could bargain to limit employment in order to raise wages and interfere with the tribal government’s plans to employ as many tribal members as possible. Because of the relatively small size of tribal communities, unions could sow considerable political and social discord and dominate tribal politics in a way that would benefit union members but operate to the detriment of the tribe as a whole.

In conclusion, I want to reiterate that Indian tribes support strong relationships with their employees. I was recently visiting the San Manuel reservation for a celebration of the 20th Anniversary of the opening of the tribe's casino. At the ceremony, the tribal council honored the twenty-one employees who had worked at the casino for the entire twenty years. It was more like a family reunion, as the tribal council members hugged and thanked the employees. It was obvious that the San Manuel Tribe treats its employees very well if they are willing to work for 20 years as a bingo floor clerk. I also noted that San Manuel has a positive working relationship with the union that represents its employees.

My point is that tribal enterprises have not succeeded by fighting with their employees; rather tribal enterprises prosper by building partnerships with their employees that benefit all. But a partnership with a tribal government has to be founded on the recognition that a tribe is a government and the mechanism for setting tribal policies must come from within the tribe's government, rather than being imposed from the outside.

I am confident that Indian tribal leaders want to work in partnership with labor unions and with Congress to resolve these issues and get back to work on building better lives for our tribal members and our employees.

I thank the Committee for the opportunity to appear today and would be happy to answer any questions you might have.

Chairman JOHNSON. Thank you, sir.

We appreciate the testimony of all of you.

Mr. JOHNSON, I wonder if you could tell us more about the rights that your workers currently enjoy without the intercession of the NLRB?

Mr. JOHNSON. Thank you, Mr. Chairman.

Currently, as employees of Treasure Island Resort and Casino, there is a process, there is a due process that is followed in there. Our employees once they are employed, they have a right to, if they feel like they were improperly terminated or if their termination was wrongfully done to them, or they feel there was something amiss, they have an option to approach and file a grievance, a grievance which consists of a board that will sit and hear their problems.

Because remember, at stake, when you work for a gaming facility, you have a license that is awarded to you to work in a gaming facility. Once that license is revoked, you are not allowed to work in any native-owned casino throughout the United States here.

So what we do is give them those rights to come back and appeal their termination to the board, and they make a determination if the policies and procedures were followed, and the employee was either a good or bad employee, and we give them that right through the board to either reinstate their employment or to uphold the decision of terminating him.

Chairman JOHNSON. Thank you, sir.

For the members' information, we have a vote going, as you know. I intend to continue for another 10 minutes. If we finish, we will; if we don't, we will come back, pending your choices.

I see there are only three of us, other than Andrews and I, left. So Mr. Andrews, you are recognized for 5 minutes.

Mr. ANDREWS. Thank you, Mr. Chairman.

Mr. JOHNSON, I just want to ask you about the grievance procedure you just mentioned. Who appoints the grievance board that would hear the grievance?

Mr. JOHNSON. The grievance boards consist of one tribal councilmember, the general manager, the director of that department, and the human resource director is involved in it. I am miss-

ing one, it would be a party of five of a board. We always have an odd number on the board to break up that vote in case there is a tie on a vote, so we have five members that consist of that.

Mr. ANDREWS. Are all the members, though, either employed by the employer or somehow associated with the employer?

Mr. JOHNSON. Yes, they are.

Mr. ANDREWS. OK.

Dr. Harvey, here is the concern that I have. Before I say it, let me say, Governor Garcia, I appreciated the close of your testimony where you indicated your willingness to work with all parties here. I think that is very welcome and I appreciate it very much.

The concern I have, Dr. Harvey, is let's say that an employee that we are talking about here stands outside of her place of employment and leaflets, and suggests that what is going on inside by the employer is unfair and wrong.

Am I correct in assuming that if the law before the San Manuel decision were to be restored, that is if H.R. 16 were passed, and there were no labor ordinance with that particular tribe, and that employee was discharged, putting aside any constitutional arguments about that, that the discharge would stand for leafleting and trying to organize a union? Is that correct?

Dr. HARVEY. That is correct.

Mr. ANDREWS. And it is further my understanding that you proposed a solution that strikes me as something of a compromise. Instead of the full rules of the National Labor Relations Act applying, if I understand your testimony correctly, what you are saying is this: The tribe would be given the opportunity to enact a labor ordinance, and if that labor ordinance met standards of fairness such as those that you have outlined in your testimony, then the ordinance would stand. It would preempt the National Labor Relations Act.

For example, let me ask you, would the right to leaflet in pursuit of collective bargaining and organizing be one of those standards that would be required?

Dr. HARVEY. Presumably, it would, though a distinction would probably be recognized as to where the leafleting occurred, as presently is the case under the NLRA with respect to private employers.

Mr. ANDREWS. But I assume there would be a generic standard about the right to speak out about conditions in the workplace.

Dr. HARVEY. Yes, there would have to be for the ordinance to satisfy standards.

Mr. ANDREWS. And then it is your proposal that if the ordinance satisfies the standards, it would hold? It would preempt Federal labor law?

Dr. HARVEY. Yes, not only with respect to the rules that are applied, but also with respect to the administration of the law. So they would be able to enforce as well as define the law, provided that there was final court review by the U.S. courts to determine that the rights that were implemented were in fact in accord with the requisite standards.

Mr. ANDREWS. Who would you suggest would adjudicate the question of whether the ordinances met the standards that you have articulated?

Dr. HARVEY. I think that that would be most appropriately done following exhaustion of tribal remedies, so that the tribe would have a set of remedies, either their court system or arbitral system or some kind of system would finally come to a decision, either the rights were violated or they were not. And if the disappointed party thought that rules had been applied that did not meet national and international standards, then they would be permitted to appeal to the courts of appeal with respect to that question only.

Mr. ANDREWS. Am I reading your testimony correctly to conclude that it is your position that workers on Indian reservations already have these rights by virtue of the international conventions that we have recognized?

Dr. HARVEY. Well, unfortunately, the rights recognized in the International Covenant are not self-executing. The Senate made that clear when they ratified it. So the issue is not whether the rights are the basis of a lawsuit now. They are not. The point is that Congress I think has an obligation to be mindful of these international obligations of the United States and make sure that the United States does not go into default.

Mr. ANDREWS. But would it be an accurate characterization of your position to say that workers on reservations have these rights? They simply don't have a means of vindicating these rights without either National Labor Relations Act coverage or coverage in the mode that you suggest?

Dr. HARVEY. Yes. The fundamental principle in human rights law is that people have these rights, and it is the obligation of governments to create mechanisms to protect them. They have the rights. We need mechanisms to protect them, mechanisms created either by the tribes or by Congress.

Mr. ANDREWS. Thank you, Phil.

Chairman JOHNSON. Mr. Kline for a comment.

Mr. KLINE. Yes, thank you, Mr. Chairman.

In the interest of time and the fact that the clock is running down for us voting, I just would like to take 1 minute to thank all of the witnesses for being here today. It seems clear to me that we have an issue of sovereignty where we have the tribes potentially being given by the San Manuel decision even less sovereignty than state and local governments.

Clearly, the tribes have a unique situation, as very clearly articulated by Mr. Garcia, where you are restricted in where you can move to. You have requirements to employ tribal members. So you are even further restricted and need, it would seem to me, even more latitude.

So, a very interesting hearing. Thank you very much for joining us today.

I yield back, Mr. Chairman.

Chairman JOHNSON. Mr. Kildee for a comment.

Mr. KILDEE. Very briefly. You may want to reply in writing to this, and we will submit, without objection, some questions in writing.

In your testimony, you seem to indicate that H.R. 16, in that the United States would default on its international obligations. Do you believe that the United States is currently fulfilling its international obligations in light of the fact that NLRA expressly ex-

empties state and local governments, municipalities and cities, from NLRA activity, even in their economic enterprises?

Dr. HARVEY. It certainly isn't default by virtue that it exempts them. It would be in default only if the laws of those states and municipalities failed to provide the requisite protection and the Federal Government failed to take action.

Mr. KILDEE. And they do in the South. In the South, they forbid public employees. I have a bill in to try to get police and fire the right to bargain collectively in the South. So if some of the southern states would be in violation of the international law that you referred to, the tribes might be in violation.

Dr. HARVEY. Yes. I think that is true, and not only true with respect to state law, but also Federal law because there are groups of private employees that are not covered by the NLRA, farmworkers for instance. So that the obligation under international law to extend these protections to them has also not been fulfilled.

Mr. KILDEE. OK. I will submit this to you in writing also, Mr. Chairman, without objection.

Chairman JOHNSON. No objection.

I want to thank the witnesses for your valuable time and testimony, and both the witnesses and members for their participation.

Let me just ask you, where is the pueblo in New Mexico that you are from?

Mr. GARCIA. Ohkay Owingeh, also known as San Juan Pueblo, is located between Santa Fe and Taos. It is about 40 miles north of Santa Fe.

Chairman JOHNSON. OK. Well, I have a place in Angel Fire, and I know where Santa Fe is. My son is out there.

Mr. GARCIA. Come by and stop by.

[Laughter.]

Chairman JOHNSON. Thank you all for your participation.

If there is no further business, the subcommittee stands adjourned.

[Whereupon, at 11:41 a.m., the subcommittee was adjourned.]

[Additional materials submitted for the record follow:*

[The prepared statement of Mr. Marchand follows:]

Prepared Statement of Hon. Michael Marchand, Chairman, Confederated Tribes of the Colville Reservation

Introduction

Good morning Chairman Johnson, Vice-Chairman Kline, Congressman Andrews and distinguished members of the Subcommittee. My name is Michael Marchand and I am the Chairman of the Colville Business Council, the governing body of the Confederated Tribes of the Colville Reservation ("Colville Tribe" or "Tribe"). Today, I am pleased to provide our views on H.R. 16, the "Tribal Labor Relations Restoration Act of 2005," and the National Labor Relation Board's decision in San Manuel Indian Bingo and Casino ("San Manuel"), which was the impetus for this legislation.

As explained in more detail below, the San Manuel decision constitutes an unwarranted and serious infringement of Indian tribes' right to govern their own affairs. If ultimately upheld on appeal, the decision will only result in uncertainty for Indian tribes in their regulation of on-reservation employment. We believe that H.R. 16 is an important first step in addressing these concerns and commend Congressman Hayworth for his leadership and attention to this important issue for Indian tribes.

*Submitted and placed in permanent archive file, San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055(2004), <http://www.nlr.gov/nrb/shared-files/decisions/341/341-138.pdf>. (Submitted for the record by Chairman Sam Johnson).

Background on the Colville Tribe

The Colville Indian Reservation is located in north central Washington State and comprises over 1.4 million acres of trust and allotted lands. Although now considered a single Indian tribe, the Confederated Tribes of the Colville Reservation is, as the name states, a confederation of 12 smaller aboriginal tribes and bands from across eastern and central Washington. A majority of our 9,200 tribal members live on the reservation.

Our location is quite remote from the main commercial corridors in Washington State. The nearest entrance to an interstate highway is approximately 100 miles from Nespelam, the seat of our tribal government. Our reservation encompasses lands within Okanogan and Ferry counties,¹ the economies of which are primarily dependent on agriculture, limited mineral development, and timber. The Federal government, on its own behalf or on behalf of the Colville Tribe, holds the majority of the land in both counties.

Notwithstanding these challenges, the Colville Tribe has become a major contributor to these local economies. The Colville Tribe, together with its corporate entity, the Colville Tribal Enterprise Corporation, employs over 2,000 people, many of whom are non-Indians. Many of our tribal member employees own fee property off the reservation and all contribute taxes to the local economy. As one of the largest employers in north central Washington, our tribal payroll contributes substantial sums to our non-Indian neighbors as well.

The San Manuel Decision

As the Subcommittee knows, on May 28, 2004, the National Labor Relations Board in San Manuel reversed course on 30 years of precedent and held that the NLRA presumptively applies to Indian tribes. San Manuel involved an unfair labor practice complaint brought against an on-reservation, tribally controlled casino.

In its decision, the Board established a new standard: the NLRA will apply to Indian tribes and on-reservation tribal employers unless application would (1) “touch exclusive rights of self-government in purely intramural matters”; (2) would abrogate treaty rights; or (3) policy considerations—such as the commercial or governmental nature of the employer’s business, the number of Indian employees employed or the percentage of the employer’s sales to non-Indians—weigh against the Board’s exercise of jurisdiction.

Applying this new standard to the San Manuel Tribe’s casino, the Board concluded that policy considerations weighed in favor of asserting jurisdiction. In doing so, the Board noted that “the casino is a typical commercial enterprise, it employs non-Indians, and it caters to non-Indian customers.”

The San Manuel Decision Conflicts With Tribal Sovereignty

The Colville Tribe is regularly approached by labor unions and, though the Tribe is not categorically opposed to the concept of unions, it is of the firm opinion that it as a tribal government has the inherent authority to decide in the first instance whether, to what extent, and under what circumstances outside interests may influence the employment relationship between the Colville Tribe and its employees.

Application of the NLRA to Indian tribes interferes with this relationship. For example, under certain conditions Federal law allow Indian tribes to exercise an employment preference for members of Federally recognized Indian tribes. Most Indian tribal governments adhere to this practice, commonly referred to as “Indian preference,” and have enacted tribal ordinances and regulatory regimes implementing it.² In our case, the Colville Tribe invests substantial resources to ensure that we hire qualified tribal members when vacancies within the Tribe or our tribal enterprises become available.

If qualified tribal members are not available to fill certain vacancies, the Tribe has in some cases hired individuals on an interim basis to work with and train tribal members for eventual replacement. Throughout the years, many of the top management positions in the Tribe’s enterprises have been held by tribal members who ascended to those positions after completing training programs. All of this has been made possible in part by our ability to exercise Indian preference.

Application of the NLRA to Indian tribes jeopardizes the entire concept of Indian preference. If the NLRA were to apply to Indian tribes, tribes’ Indian preference policies would almost certainly be subject to negotiation during collective bargaining

¹ The Colville Tribe also exercises governmental authority over off-reservation allotments in a number of other counties.

² The Bureau of Indian Affairs, an agency of within the Department of the Interior, also exercises Indian preference for certain positions. The U.S. Supreme Court upheld this practice in *Morton v. Mancari*, 417 U.S. 535 (1974).

and unions could categorically refuse to agree to any part of the policies. Such an impasse in negotiations would raise the possibility that arbitrators would decide whether or not Indian preference would be permissible or even strikes. Such a perverse result would turn back the clock on a system that has benefited Indian tribes and tribal economies for decades.

Under San Manuel the NLRA Could Apply to a Broad Range of Non-Gaming Tribal Employers

While the San Manuel case involved a tribal casino, if ultimately upheld the decision will almost certainly be construed by some to encompass non-gaming economic enterprises—or even tribal governments themselves.

The Colville Tribe operates small casinos. Given our rural location, however, our gaming revenues have rarely approached \$25 million in any fiscal year and have declined steadily over the past several years. Unlike some Indian tribes with gaming facilities located near major metropolitan areas or interstates, we are not a wealthy gaming tribe. Even so, our gaming revenues have allowed us to expand governmental services to our people and provide jobs to Indians and non-Indians alike in an otherwise economically-depressed area.

None of this would matter under the San Manuel decision. Our small rural gaming facilities would be treated the same as those facilities operated by the wealthiest of Indian tribes. While national unions may adhere to the common misconception that all Indian tribes with gaming are “rich,” the Colville Tribe is living proof that this is not the case.

To the contrary, the Colville Tribe’s primary source of income is timber. We own two saw mills that produce dimensional lumber, plywood and veneer. Collectively, these two saw mills support several hundred Indian and non-employees. Under the San Manuel decision, these non-gaming enterprises that provide the backbone of our tribal economy might also be covered by the NLRA.

Clarity Is Needed on Application of the NLRA to Indian Tribes

The San Manuel decision raises more questions that it answers. Most notably, while the decision presumes that the NLRA applies to Indian tribes, how the three exceptions the Board established would apply in practice is uncertain at best. For example, the decision implies that commercial activities are more likely to be exempted from application of the NLRA than governmental activities. However, the decision does not rule out the possibility that the NLRA might also apply to critical health and safety personnel such as tribal police officers and firefighters. This leaves open the possibility that these critical services could be interrupted in the event of a strike. The governmental exemption in Section 2(2) of the NLRA recognizes that strikes by public employees would jeopardize public safety and allows governments to determine for whether and to what extent their employees should be allowed to strike. At the very least, Indian tribal governments deserve the same level of certainty when providing for the safety of their people.

The Colville Tribe Sees H.R. 16 as a Good Starting Point

Again, we applaud Congressman Hayworth for introducing H.R. 16 and believe that the legislation is good starting point for providing much needed clarity on this issue. The legislation would exempt from the NLRA those tribally owned and controlled businesses that are located on land held in trust status (or subject to a restriction against alienation) by the United States for the benefit or an Indian tribe or an individual Indian.

The Colville Tribe hopes that the Committee will expand the scope of H.R. 16 to include a categorical exemption for Indian tribal governments. The implications of San Manuel are real and have the potential not only to infringe on Indian preference and tribal sovereignty, but also on the ability of Indian tribes to ensure the safety of their people.

The Colville Tribe appreciates the opportunity to provide this statement and looks forward to working with the Committee on this important legislation.

[Letter of support from Mr. Bozsum follows:]

August 4, 2006.

Hon. SAM JOHNSON,
*Chairman, Subcommittee on Employer-Employee Relations, Committee on Education
 and the Workforce, U.S. House of Representatives, Washington, DC.*

Hon. ROB ANDREWS,
*Ranking Member, Committee on Education and the Workforce, U.S. House of Rep-
 resentatives, Washington, DC.*

DEAR CHAIRMAN JOHNSON AND CONGRESSMAN ANDREWS: On behalf of the Mohegan Tribe I am pleased to submit this statement for the record in support of the Tribal Labor Relations Restoration Act of 2005 (H.R.16), legislation introduced by Congressman J.D. Hayworth. I respectfully request that this statement be included in the Hearing Record for the legislative hearing on H.R. 16 held on July 20, 2006.

Introduction to the Mohegan Tribe. The Mohegan Tribe of Connecticut (the "Tribe") is a sovereign, federally-recognized Indian nation with a reservation on the Thames River near Uncasville, Connecticut. The Tribe gained Federal recognition in March 1994, and currently includes nearly 2,000 members, most of who reside in Connecticut near ancestral Tribal lands. The Tribe is governed by its Constitution, re-affirmed in April, 1996. The nine-member Tribal Council has executive and legislative responsibilities not otherwise granted to the Council of Elders. Members serve four year, staggered terms. The Tribe exercises full civil jurisdiction and concurrent criminal jurisdiction over its reservation lands.

For the reasons set out below, the Tribe has a keen interest in H.R.16 and the impetus for the bill: the 2004 decision by the National Labor Relations Board ("NLRB") in San Manuel Indian Bingo and Casino. As the Committee may know, the Tribe owns and operates a large resort casino—the Mohegan Sun—that is one of the largest employers in the State of Connecticut with nearly 10,000 jobs created and sustained by the operations of the casino, hotel, and related amenities.

The Tribe Strengthens the Area's Economic, Employment, and Cultural Foundations. Along with Foxwoods, the hotel and casino complex operated by the Mashantucket Pequot Tribal Nation, the Tribe is one of Connecticut's largest source of tax revenue, and the second largest contributor to the State budget after the Federal government. In addition to these direct benefits to the State and our employees, the Tribe pays millions of dollars each year to other Connecticut companies, creating hundreds of additional jobs. By all accounts, the Tribe's activities in southeast Connecticut are economically significant and as the following makes clear, are overwhelmingly positive:

- Mohegan Sun and Foxwoods, along with the two tribal governments and the Tribe's other economic enterprises, employ more people in Connecticut than any other single entity.
- The 25% slot payment—one we willingly pay—contributed more than \$400 million to the State's revenues in 2003. That's not only more than any other state employer pays the state; it is more than all other Connecticut corporations pay in corporate tax combined.
- Last year, Mohegan Sun paid more than \$4 million to Connecticut companies for products and services. We assume Foxwoods paid nearly as much. Those payments support hundreds of Connecticut jobs.
- The State's own Tourism Office recently announced the results of a survey revealing that the main reason tourists come to Connecticut is to visit the two casinos, officially recognizing that Indian gaming is driving the rise of tourism, Connecticut's fastest growing industry.
- In the early 1990's, Connecticut was the only state in the union whose population was decreasing. Since the casinos opened and began creating thousands of new jobs, that trend has reversed, and the state is growing again.
- State-sponsored research in the 1990s predicted that southeastern Connecticut would have an unemployment rate over 20% by the year 2000. Today, that rate stands at less than five percent because of our operations.
- In 2001, when the Tribe began thinking about its future water needs, we didn't devise our own solutions. We brought together a coalition of leaders and planners from Norwich and other surrounding towns, and coordinated the development of a long-term water management plan that will ensure the region's water supply for decades.
- Mohegan Sun and Foxwoods contribute millions of dollars to state non-profit causes every year, funding programs for everything from Connecticut Special Olympics to local youth organizations.

When Indian gaming first began to blossom, many people—Indian and non-Indian alike—sounded the clarion call that gaming would taint Native beliefs, render Indian people "less Indian" and in the process destroy the foundations of Indian cul-

ture. I think it obvious that just the opposite has happened: gaming has filled tribal coffers and made possible a variety of cultural preservation activities including language retention, sacred site protection, and a host of others.

Buoyed by a healthy revenue stream, the Tribe is making an extensive effort to preserve and strengthen its cultural traditions, thus ensuring that its heritage and history live on. The heart of this effort was and remains a small museum on Mohegan Hill in Uncasville, Connecticut. The museum was created in 1931 by Tribal leader John Tantaquidgeon and maintained by his son Harold and daughter Gladys, who served as Tribal medicine woman until her passing in 2005.

The Tribe's Labor Policies Are Pro-Worker and Comport with Fundamental Fairness. We offer two extremely generous health care plans to our employees one of which continues to be without cost to them. To ensure fairness, we have a review process in which employees can dispute termination and disciplinary action, which includes colleagues and a peer of their choice. We offer one free meal per day to every full time employee as well as unlimited salads and cold service items thought their work day. Prior to expanding our resort we built a state of the art employee center which includes a computer lab, bank, dry cleaner, pharmacy, and a wellness center.

The NLRB Decision is an Erosion of Fundamental Tribal Rights. As the Committee knows, the National Labor Relations Act ("NLRA") is the main Federal law regulating relations between unions and employers and guarantees the right of employees to organize (or not to organize) a union and to bargain collectively with their employers. The NLRA applies to "employers," and section 2(2) of the NLRA defines "employer" as "any person acting as an agent of an employer, directly or indirectly," but does not include the United States, State governments, or political subdivision thereof.

On May 28, 2004 the NLRB issued its decision in *San Manuel Indian Bingo and Casino*, 341 NLRB 138 (2004), concerning application of the NLRA to an on-reservation casino operated by the San Manuel Band of Mission Indians. The Board previously held in decisions dating back to the 1970s that on-reservation, tribally-controlled businesses were political subdivisions of the United States and therefore exempt under section 2(2) of the NLRA. Overruling 30 years of its own precedent, the NLRB decided that the NLRA presumptively applied to the San Manuel Band's casino and established a new standard for determining whether the Board will assert jurisdiction over Indian tribes or on-reservation tribal businesses. On October 5, 2005, the Board affirmed its May ruling and in the wake of the affirmation, the San Manuel Band has decided to appeal the decision in Federal court.

The *San Manuel Indian Bingo and Casino* decision makes clear that the Board will presume that the NLRA applies to Indian owned and operated businesses, including those operated by tribal governments, unless they fall within one of the limited exceptions. This means that, in the view of the Board, tribal employers are presumptively required to accommodate union activity under the NLRA and negotiate and enter into collective bargaining agreements with non-Indian unions. This is clearly in opposition to fundamental tribal self-governance.

The *Hayworth Bill Is Necessary to Protect Tribal Authority*. H.R. 16 would restore the original intent of Congress that tribal governments should not be treated as private sector employers under the NLRA. For over forty years, Federal courts have interpreted the NLRA to include tribal governments in its general exemption for government entities because Congress clearly intended to exempt all government entities. Unlike private businesses, governments cannot safely interrupt their operations because of labor strife nor should they be forced to negotiate fundamental matters of jurisdiction.

In addition to recapturing the intent of Congress, H.R. 16 also rests on the solid, well-respected principle of Indian Self Determination. Since July, 1970, when President Nixon issued his Special Message to Congress on Indian Affairs, the goals of Federal Indian policy have straightforward and successful: to strengthen Indian tribal governments and create vigorous tribal economies. These goals, taken together, represent the policy of Indian Self Determination. In the intervening 35 years, much progress has been made on both scores and year-to-year, Indian tribes increase the sophistication of their governmental operations and succeed in fostering economic growth and job creation on their lands.

H.R. 16 is a necessary and proper exercise of congressional action because it confirms the sovereign governmental right of Indian tribes to make and live by their own labor policies based on the economic and social conditions existing on their lands. Many Indian tribes exercise that sovereign authority to welcome labor unions and encourage union organization. This choice is a choice for sovereign Indian tribes, and not for the NLRB, labor bosses, or Federal bureaucrats. Both legally and practically, Indian tribes are responsible for the care and well-being of their mem-

bers and their employees and decisions that surround the question of unionization must be made in a way that protects the functions of tribal government and the tribal members living on reservation.

I want to thank you for your willingness to hold the hearing on H.R. 16 and to listen to the views of Indian tribes from across our nation. If you have questions about the Tribe, its operations, or this statement, please contact me directly or my Chief of Staff, Chuck Bunnell at (860) 862-6120.

Sincerely,

BRUCE "TWO DOGS" BOZSUM,
Chairman, Mohegan Tribal Council.

[Letters of support submitted to Mr. Hayworth follow:]

NATIONAL CONGRESS OF AMERICAN INDIANS

**The National Congress of American Indians
Resolution #MOH-04-028**

TITLE: Congressional Clarification of Treatment of Indian Tribes as Governments for Purposes of the National Labor Relations Act

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the United States Constitution, U.S. Supreme Court decisions and hundreds of treaties, federal statutes, and regulations all recognize that Indian Tribes are distinct governments; and

WHEREAS, Indian gaming, like State lottery operations, is a method of generating governmental revenue, which is used to rebuild tribal community infrastructure, provide essential programs for Indian citizens, and provide contributions to charitable organizations and local communities; and

WHEREAS, a number of individual Indian Tribes have made the sovereign governmental decision to work with labor organizations to represent the rights of their respective tribal governmental employees; and

WHEREAS, Congress, through the National Labor Relations Act (NLRA), exempts governmental employers from application of the Act; and

WHEREAS, the National Labor Relations Board (NLRB), in San Manuel Indian Bingo & Casino, ignored congressional intent to exempt governments from application of the NLRA by finding that the Act applies to tribal governmental employers of gaming operations.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby urge the United States Congress to reaffirm that Indian Tribes operating governmental gaming facilities pursuant to IGRA are exempt from the

National Labor Relations Act, and to clarify that states are prohibited from including labor conditions in compacts negotiated pursuant to IGRA; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted at the 2004 Mid-Year Session of the National Congress of American Indians, held at the Mohegan Sun H. el and Casino, Uncasville, CT on June 23, 2004 with a quorum present.

TEX G. HALL,
President.

Adopted by the General Assembly during the 2004 Mid-Year Session of the National Congress of American Indians, held at the Mohegan Sun Hotel and Casino, in Uncasville, CT on June 23, 2004.

EXECUTIVE OFFICE OF THE GOVERNOR & LIEUTENANT GOVERNOR,
 GILA RIVER INDIAN COMMUNITY,
Sacaton, AZ, September 9, 2004.

Hon. J.D. HAYWORTH,
House of Representatives, Washington, DC.

DEAR CONGRESSMAN HAYWORTH: On behalf of Gila River Indian Community, I want to thank you for the leadership you have shown in Congress in trying to resolve the important problem of the recent National Labor Relations Board ("NLRB") decision in San Manuel Indian Bingo and Casino, which attempts to assert NLRB jurisdiction over tribal governments and tribally operated enterprises. We wanted to inform you of the Community's support for your amendment to the Fiscal Year 2005 Labor-Health and Human Services appropriations bill that would disallow the NLRB from moving forward with enforcing this erroneous decision and exercising jurisdiction over tribal governments and tribally-operated enterprises.

The NLRB decision, as you know, goes against decades of the NLRB's own precedent and directly infringes upon the sovereignty of every Indian tribe in the United States, and that is why we are concerned. The decision also ignores federal court decisions treating Indian Tribes as governments for purposes of the NLRA. Like many tribes, we would like to see a permanent fix for this problem, but recognize that your amendment will allow for the necessary time period for continued negotiations on a reasonable long-term fix.

We thank you for the opportunity to submit our views on this matter, and please do not hesitate to contact me if you have any questions. Thank you again for your strong leadership on this and so many other important issues affecting Indian tribes.

Sincerely,

RICHARD NARCIA,
Governor.

CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION,
Sacramento, CA, September 9, 2004.

DEAR CONGRESSMAN: The member Indian tribes of the California Nations Indian Gaming Association (CNIGA) urge you to support an amendment offered by Rep. J. D. Hayworth (R-AZ) to prevent the National Labor Relations Board (NLRB) from enforcing its misguided decision in San Manuel Indian Bingo and Casino, 341 NLRB 138 (May 28, 2004). The proposed amendment is to the FY 2005 Labor, HHS appropriations bill.

In the decision referenced above, the Board overruled 30 years of its own precedent and disregarded a number of federal court decisions that treat Indian tribes as governments for purposes of the National Labor Relations Act. State and local governments are exempt from the Act. Historically, the Board and the courts have extended the same respect to tribal governments. Without adequate explanation or analysis, the Board deemed San Manuel's government-owned operation a commercial enterprise, not worthy of treatment as a government employer. This misguided decision affects every Indian tribe in the Nation.

Tribal governments provide critical government services in their jurisdictions and should not be held hostage to the provisions of the NLRA. Unlike private businesses, tribal enterprises generate revenues that fund public safety, law enforcement and other governmental services that, if interrupted, would cause significant harm to the tribal communities.

While we urge the Congress to seek a permanent legislative solution to address the NLRB's San Manuel decision, the Hayworth amendment will provide an interim fix during which all interested parties can work toward a reasonable long-term solution to the problem created by the decision.

Sincerely,

ANTHONY MIRANDA,
Chairman.

CHEROKEE NATION,
Tahlequah, OK, September 9, 2004.

DEAR CONGRESSMEN: Cherokee Nation would like to express its support for Congressman Hayworth's amendment to the FY 2005 Labor, Health and Human Services Appropriations bill.

This amendment will prevent the National Labor Relations Board from enforcing its misguided decision in San Manuel Indian Bingo and Casino, 341 NLRB 138 (May 28, 2004). In that decision, the Board overruled 30 years of its own precedent and ignored a number of federal court decisions treating Indian Tribes as governments for purposes of the NLRA. State and local governments are exempt from application of the NLRA and the past, the Board and the courts have provided that same respect to tribal governments. Without adequate explanation or analysis, the Board deemed the tribal government-owned operation in question a commercial enterprise, not worthy of governmental treatment. This decision represents a complete disrespect for the status of tribes as governmental employers.

Indian tribes provide crucial government services on Indian lands, and government operations can't be held hostage to the provisions of the NLRA. The Hayworth amendment will provide a period of time, during which all interested parties can negotiate a reasonable long-term approach to resolve the problems posed by the decision.

Cherokee Nation respectfully asks for your support on the Hayworth amendment.
Sincerely,

CHAD SMITH,
Principal Chief.

THE HOPI TRIBE,
Kykotsmovi, AZ, September 7, 2004.

Hon. J.D. HAYWORTH,
U.S. House of Representatives, Washington, DC.

DEAR REPRESENTATIVE HAYWORTH: On behalf of the Hopi Tribe of Arizona, I am writing to share the tribe's support for your amendment to the Fiscal Year 2005 Labor-HHS Appropriations bill that would prevent funds from being used to implement the National Labor Relations Board's San Manuel decision. Like you, we believe that decision was contrary to tribal sovereignty and congressional intent and will be reversed in the courts. However, it is important to prevent its enforcement until that final resolution occurs.

As you know, the National Labor Relations Board (NLRB) steadfastly held for nearly 40 years that tribes are units of government and, as such, are exempt from the National Labor Relations Act's (NLRA's) definition of employer. Notwithstanding this long history, the NLRB recently ruled that it has jurisdiction over employment disputes at tribally-owned businesses, even when those businesses are located on Indian reservations. This ruling ignores the fact that tribes are governments and use revenues earned, from tribal businesses to provide essential government services.

The NLRB's decision made much of the fact that some tribal businesses, including gaming enterprises, have grown successful. Apparently, the NLRB believes that sovereignty applies only to certain tribal businesses, but this is a mistaken and distorted notion. Non-gaming tribes such as Hopi are working to spur economic development for tribally-run businesses so that this revenue can make up for our lack of an adequate tax base. Like state and local governments, the Hopi Tribe cannot afford to have revenue from its economic development ventures suspended or cut off by a crippling strike.

Again, we support your amendment to the Labor-HHS Appropriations bill and thank you for your leadership on this important issue of tribal sovereignty.

Sincerely,

WAYNE TAYLOR, JR.,
Chairman/CEO.

TRIBAL CHAIRMAN'S OFFICE,
CHEYENNE RIVER SIOUX TRIBE,
Eagle Butte, SD, August 11, 2004.

Hon. J.D. HAYWORTH,
Member of Congress, Scottsdale, AZ.

DEAR MR. HAYWORTH: I thank you for your concern and commitment to our Native People and their sovereign rights. The recent ruling by the National Labor Relations Board determining that the National Labor Relations Act applies to tribal activities located on reservation lands is clearly a threat to the foundation of Indian Law and violates Tribal Sovereignty. Therefore, I am in full support of H.R. 4680, the Tribal Labor Relations Act. This legislation would be a tremendous benefit to

Native American Tribes, allowing tribes to further develop economic development opportunities on their reservations, unhindered by ambiguities in federal law

I have contacted South Dakota Members of Congress to support H.R. 4680 and if there is anything further that I can assist you with please do not hesitate to contact me.

Sincerely,

HAROLD C. FRAZIER,
CRST Tribal Chairman.

RINCON LUISEÑO BAND OF INDIANS,
Valley Center, CA, August 3, 2004.

Hon. J.D. HAYWORTH,
Rayburn House Office Building, Washington, DC.

DEAR CONGRESSMAN HAYWORTH: Thank you for your letter dated July 8, 2004 regarding H.R. 4680 and your efforts to protect the principle of tribal sovereignty. As members of the Rincon Band, we sincerely thank you for your efforts on behalf of all Native Americans.

It is imperative that H.R. 4680 be passed. We will do what we can in our small way to support this legislation.

Let me also take this opportunity to thank you, on behalf of the Tribal Council, for not only attending the recent event we held with Harrah's Resort & Casino, but also for giving us the chance to present our position to you in regard to the recent legal action we took against the state of California. We know you have a very busy schedule, and greatly appreciated the opportunity to discuss this issue with you.

If there is any specific effort we might do to further support H.R. 4680, please do not hesitate to contact us.

Sincerely,

JOHN D. CURRIER,
Chairman.

UNITED SOUTH AND EASTERN TRIBES, INC.

USET Resolution No. 2005:027

SUPPORT FOR HR 16 • TRIBAL LABOR RELATIONS RESTORATION ACT OF 2005

WHEREAS, United South and Eastern Tribes, Incorporated (USET) is an inter-tribal organization comprised of twenty-four (24) federally recognized Tribes; and

WHEREAS, actions of the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors is comprised of delegates from the member Tribes' leadership; and

WHEREAS, on January 4, 2005, HR 16, the Tribal Labor Relations Restoration Act of 2005 was introduced in Congress; and

WHEREAS, HR 16 has been referred to the House Committee on Education and the Workforce; and

WHEREAS, HR 16, if enacted, would amend the National Labor Relations Act to provide that any business owned and operated by an Indian Tribe and located on its Indian lands is not considered an employer for purposes of the Act; and

WHEREAS, enactment of HR 16 will recognize the inherent sovereign rights of Indian Tribes to govern all Tribal affairs including Tribal businesses and its employees without interference from third parties; therefore be it

RESOLVED that the USET Board of Directors supports HR 16, Tribal Labor Relations Restoration Act of 2005.

CERTIFICATION

This resolution was duly passed at the USET Impact Week Meeting, at which a quorum was present, in Arlington, VA, on Thursday, February 10, 2005.

KELLER GEORGE,
President.

EDDIE L. TULLIS,
Secretary.

FOREST COUNTY POTAWATOMI COMMUNITY,
Crandon, WI, June 24, 2005.

RYAN SCROTC,
Native American Caucus.

DEAR MR. SCROTC: I write on behalf of the FCP Tribe to express our concern over remarks made during the June 7th, 2005 meeting of the Senate Interior Appropriations Subcommittee. Suggestions were made to look at a new formula "that gives those (tribes) who don't have the benefit of casinos a larger share of the government's assistance."

Our tribe is fundamentally opposed to means testing for the funding of Federal Indian programs. Many federal programs designed to benefit Indian Tribes are a direct result of treaty obligations that the United States incurred in return for vast concessions of tribal homelands. Many other federal programs simply acknowledge the Constitutional status of Indian Tribes as governments. These programs afford tribes the same access to federal programs that benefit State and local governments. We do not object to the many federal programs that are need or poverty based: such as general assistance programs, low-income housing, heating assistance, and others that are based on general per capita income-not on gaming revenue. However implementing means testing related to Indian gaming revenues on the federal programs based in treaty and trust obligations and the governmental status of Indian Tribes, such as health care, law enforcement and road construction, would be contrary to the trust duties, treaty obligations, and the Constitutional recognition of Indian tribes as governments.

It is true that Indian gaming has lifted some tribes out of generations of poverty and welfare. Yet Indian gaming is not a panacea for all of Indian country's ills. Too many of our people continue to suffer poverty and disease. Many tribes that have gaming continue to struggle to provide basic governmental services to their citizens.

The success of tribal gaming operations depends on a number of factors, including locations, management, and the strength of the local economy. The success of State government-run lotteries also depends on many of these same factors. However, Congress would never consider implementing a means testing approach to distributing federal programmatic funds to State and local governments that looked to the success for the various state lottery programs. Congress must extend this same comity to tribal governments, and not single out Indian gaming. Instead, we urge you to seek new methods—through legislation or other avenues—to generate economic development in Indian country to meet the longstanding unmet needs faced by tribes in providing governmental services to their citizens. Do not penalize the one proven method of economic self-sufficiency for tribal governments.

We respectfully request that you consider these factors when discussing the allocation of monies for Indian tribes and reject any suggestions to means test federal aid against the governmental revenue generated from gaming. We greatly appreciate your support of Indian country and your consideration of this important request.

Sincerely,

AL MILHAM,
Vice Chairman.

OFFICE OF THE TRIBAL CHIEF,
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Choctaw, MS, August 26, 2004.

Hon. JOHN A. BOEHNER,
Hon. J.D. HAYWORTH,
U.S. House of Representatives, Washington, DC.

DEAR REPRESENTATIVES BOEHNER AND HAYWORTH: On behalf of the Mississippi Band of Choctaw Indians, I write to thank you for introducing H.R. 4906, the Tribal Labor Relations Restoration Act of 2004. H.R. 4906 confirms that tribal sovereignty and congressional intent will be protected under the National Labor Relations Act.

As you know, the Commerce Clause of the United States Constitution grants Congress the exclusive power to "regulate commerce" with American Indian tribes. Accordingly, Congress has specifically exempted tribes from several major employment laws, including Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act, and the Workers Adjustment and Retraining and Notification Act. Additionally, tribes are implicitly exempted from federal employment laws based on principles of sovereign immunity and tribal self-determination. Among those is the National Labor Relations Act (NLRA). Indeed, the National Labor Rela-

tions Board (NLRB) consistently and rightly held for nearly forty years that tribes are units of government and, as such, are exempt from the NLRA's definition of employer.

Notwithstanding this long history, the NLRB recently ruled that it has jurisdiction over union disputes arising at tribally-owned businesses on Indian reservations. This ruling ignores the fact that tribes are governments and use revenues earned from tribal businesses to provide essential government services. Like other tribes, the Choctaw need this revenue because of the lack of an adequate tax base. And, like other governments, the Choctaw can not afford to have this revenue suspended or cut off by a crippling strike. Health care, law enforcement, infrastructure, and many other pressing needs would be adversely affected if this component of self-determination were permanently stripped from our tribe.

H.R. 4906 is a well-crafted measure that will reverse the NLRB's erroneous decision and restore tribal sovereignty. The Mississippi Band of Choctaw Indians appreciates your leadership on this important issue and looks forward to working with you to secure enactment of your bill.

Sincerely,

PHILLIP MARTIN,
Tribal Chief.

EXECUTIVE OFFICE OF THE CHAIRMAN,
WHITE MOUNTAIN APACHE TRIBE,
Whiteriver, AZ, July 12, 2004.

Hon. J.D. HAYWORTH,
Rayburn House Office Building, Washington, DC.

Re: Tribal Labor Relations Act of 2004

DEAR CONGRESSMAN HAYWORTH: The White Mountain Apache Tribe appreciates and supports legislation you have recently introduced, the Tribal Labor Relations Act of 2004; which would specifically exempt federally recognized Indian Tribal governments from the application of the National Labor Relation Act and the jurisdiction of the National Labor Relation Board. The recent NLRB decision in the San Manuel case represents a direct attack on our Tribal sovereignty and our right of self-determination. There can be no greater intrusion upon our right to manage our own internal affairs and the relationships amongst our employees than to subject our homeland to union organizers and the jurisdiction of the NLRB which does not understand the unique political relationship that Indian Tribes have With the United States government.

Lacking a Tribal property or income tax base, Indian Tribes must generate needed revenue through the economic development of their natural resources, Tribal government sponsored enterprises, tourism, and more recently, gaming. Only Tribal governments may own and operate Indian Casinos. The Indian Gaming Regulatory Act (IGRA) requires that revenue from Gaming be used to benefit Tribal Governmental programs in the area of health, education, and welfare. Unionization union activities on our aboriginal and reserved trust lands will disrupt our gaming and other governmental enterprises, undermine our right to exclude non-members, and diminish our sovereign authority river lands and activities within our ReserVation boundaries.

The White Mountain Apache Tribe appreciates your quick and protective response to the ill-advised NLRB/San Manuel decision.

Sincerely yours,

DALLAS MASSEY,
Chairman.

RESERVATION TRIBAL COUNCIL,
BOIS FORTE BAND OF CHIPPEWA,
Nett Lake, MN, August 3, 2004.

Hon. J.D. HAYWORTH,
U.S. House of Representatives, Washington, DC.

DEAR CONGRESSMAN HAYWORTH: This is in response to your July 8, 2004 letter to former Chairman Donald concerning H.R. 4680 and your efforts to re-affirm that businesses owned and operated by Indian tribes are not subject to the National Labor Relations Act (NLRA).

I was sworn in as Chairman of the Bois Forte Band on July 13, 2004, and am pleased to see that you have introduced this important legislation. The Bois Forte

Band believes that Indian tribal governments should be treated as a state government for purposes of the NLRA. Other federal statutes have treated tribal governments the same as state governments, and doing so preserves the principle of tribal sovereignty and recognizes the unique status of Indian tribes.

I want to make it clear that we support your legislation because it supports tribal governments and not because we are in any way opposed to organized labor. The Bois Forte Band recognizes the role of organized labor and has entered into project labor agreements with local unions on all of our major economic development projects. We believe that such agreements are the best way to implement tribal policies of Indian preference in employment while at the same time providing opportunities for union workers.

Sincerely yours,

KEVIN W. LEECY,
Chairman.

ONEIDA NATION HOMELANDS,
Verona, NY, August 5, 2004.

Hon. J.D. HAYWORTH,
U.S. House of Representatives, Washington, DC.

DEAR CONGRESSMAN HAYWORTH: On behalf of the Oneida Indian Nation, I would like to thank you for your letter regarding the introduction of H.R. 4680, the "Tribal Labor Relations Act." This bill reaffirms that businesses fully owned and operated by Indian tribes are not considered employers subject to the National Labor Relations Act ("NLRA"). We commend you and your office for your continuing leadership on this very important issue.

As you know, Keller George, a member of the Oneida Indian Nation's Men's Council, and the president of the United South and Eastern Tribes, Inc., testified before the House Resources Committee on April 17, 2002 in support of similar legislation introduced by you in the 107th Congress. He testified about the growing concern in Indian Country over so-called "unionization agreements," which would be included as part of tribal-state gaming compacts. We are concerned that some states are using IGRA to circumvent the NLRA by insisting on rules that tip the delicate labor-management balance strongly in favor of unions. These provisions deny employees of Indian-run casinos the right to a free choice in deciding whether or not they want to join a union.

Your legislation would overturn a decision by the Nation Labor Relations Board on May 28, 2004, that reversed 30 years of precedent by holding that the NLRA does not exempt Indian tribes. Under the United States Constitution, Indian tribes are sovereign governments, and they have an inherent right to decide whether to enter into labor agreements.

Consequently, we fully support H.R. 4680, and we look forward to working with you and your staff on an issue that has important consequences for Indian Country.

Please do not hesitate to contact me with any questions.

Na ki wa,

RAY HALBRITTER,
Nation Representative.

EWIIAAPAAYP TRIBAL OFFICE,
EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,
Alpine, CA, August 9, 2004.

Hon. J.D. HAYWORTH,
U.S. House of Representatives, Washington, DC

Re: H.R. 4680

DEAR CONGRESSMAN HAYWORTH: The Ewiiapyaap Band of Kumeyaay Indians supports H.R. 4680, the Tribal Labor Relations Act. The Tribe supported the draft of this bill by letters to you dated June 17, 2004, and to Congressmen Kildee, Rahall, and Rangell dated June 18, 2004.

Should there be any questions regarding this matter, please contact the Tribe's Executive Director. Thank you.

Sincerely,

HARLAN PINTO, SR.,
Chairman.

EWIIAAPAYP TRIBAL OFFICE,
Alpine, CA, June 17, 2004.

Hon. J.D. HAYWORTH,
Hon. DALE KILEE,
Hon. NICK RAHALL,
Hon. CHARLIE RANGELL,
U.S. House of Representatives, Washington, DC

DEAR CONGRESSMEN: As the Chairman of the Ewiiapyaap Band of Kumeyaay Indians, I am writing to express my strong support for your proposed bill to amend the National Labor Relations Act "to ensure that Indian tribes and any organizations owned, controlled, or operated by Indian tribes are not considered employers for purposes of such Act." This bill is desperately needed to stop the erosion of tribal sovereignty, and I hope you will vigorously push for its passage and enactment.

Please let us know what we can do to further our common goal of seeing this legislation gned into law. In the meantime, please accept my best regards.

Should there be any questions regarding this matter, please contact the Tribe's Executive Director. Thank you.

Sincerely,

HARLAN PINTO SR.,
Chairman.

LEGAL DEPARTMENT,
FOREST COUNTY POTAWATOMI COMMUNITY,
Milwaukee, WI, June 23, 2005.

Hon. JOHN BOEHNER,
Chairman, Education and Workforce Committee, U.S. House of Representatives, Washington, DC.

Hon. JERRY LEWIS,
Chairman, Appropriations Committee, U.S. House of Representatives, Washington, DC.

DEAR CHAIRMAN BOEHNER AND CHAIRMAN LEWIS: I write to offer the Forest County Potawatomi Community's support for legislation that would clarify that tribal governments enjoy status equal to state and local governments under the National Labor Relations Act. In particular, the Tribe strongly supports an amendment to be offered by Congressman Hayworth to the FY 2006 Labor, Health and Human Services Appropriations bill that will prohibit the National Labor Relations Board from implementing its San Manuel decision. That decision—issued last year—held for the first time that the tribal governments can be subjected to the requirements of the National Labor Relations Act, although the same is not true regarding any other governments.

The San Manuel decision was a significant break with longstanding precedent under which the NLRB and the courts held the NLRA inapplicable to sovereign tribes.

The Hayworth amendment is intended to return the law to the way it was before the NLRB's radical departure in San Manuel, and to protect tribes from the application of the NLRA. The NLRA is a labor law designed for private sector employers, not governmental employers. The San Manuel decision, if allowed to stand, threatens to burden a range of operations, including hospitals and schools, to federal mandates in a manner that is fundamentally inconsistent with tribal governments status. The Hayworth amendment is needed to ensure that tribal governments are treated as other governments are under federal law, and to ensure that tribes can continue to use their resources to provide services and benefits to members of their communities as other governments do.

Thank you for your consideration of this important issue.

Sincerely,

JEFF CRAWFORD,
Attorney General.

NATIONAL INDIAN GAMING ASSOCIATION,
Washington, DC, June 23, 2005.

DEAR CONGRESSMAN: I write on behalf of the National Indian Gaming Association (NIGA), and NIGA's 184 Member Tribes, with regard to Congressman J.D. Hayworth's amendment to the FY 2006 Labor-HHS Appropriations bill.

On May 28, 2004, the NLRB overturned 30 years of its own precedent and ignored a number of federal court decisions acknowledging Indian Tribes as governments for purposes of the NLRA. See *San Manuel*, 341 NLRB No. 138. Without explanation or analysis, the Board deemed the tribal government-owned operation in question a commercial enterprise ignoring facts that the revenue generated is used solely for tribal governmental purposes.

Since the decision, unions and their union organizers have undertaken a concerted effort to extend the *San Manuel* decision nationwide and undermine the inherent rights of Tribal Governments to regulate their own workforce. They justify their actions on the idea that tribal government employees, both Indian and non-Indian, have no recourse in labor disputes.

In fact, Tribes have a proven track record as one of the best employers the country. Tribal Government owned enterprises consistently offer higher paying wages with benefit packages similar to employers off the reservation. Additionally, Tribes have their own Labor laws that contain comprehensive personnel policies and procedures. Many include internal dispute resolution mechanisms and waive tribal sovereign immunity in employment matters where they are based on claims brought in tribal court and based on tribal policy, tribal law, or tribal constitution.

Like State and local governments that are exempt from the National Labor Relations Act (NLRA), Indian Tribes provide crucial government services to tribal citizens. Congress exempted State and Local Governments from the NLRA because of their ability to protect their own government labor force and avoid costly labor battles that could result in the stoppage of essential government services. For the same reasons, Tribal Governments have been and should continue to be exempt from the NLRA. Tribal citizens depend on tribal police and fire departments to stay open and that essential Tribal government services will be delivered. If a Tribal Government's major source of funding is subject to NLRB jurisdiction it could cause disruptions in the delivery of tribal government services while disputes, such as the one in *San Manuel*, weave their way through the federal administrative and judicial processes.

We urge Congress to consider the impacts of the *San Manuel* decision and support Congressman Hayworth's amendment.

Sincerely,

ERNEST L. STEVENS, JR.,
Chairman.

