**Statement of the Honorable Brian Cladoosby**

**President of the National Congress of American Indians and**

**Chair of the Swinomish Indian Tribal Community**

**Testimony before the**

**United States House of Representatives**

**Committee on Education and the Workforce**

**Subcommittee on Health, Employment, Labor and Pensions**

**Hearing on *H.R.986 – The Tribal Labor Sovereignty Act of 2017***

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*INTRODUCTION*

Good morning Chairwoman Foxx, Ranking Member Scott, and distinguished members of this Subcommittee. Thank you for your invitation to testify today and for your commitment to upholding the Constitution of the United States, and with it the governmental status of Tribal Nations and the trust and treaty responsibilities of the federal government. Tribal sovereignty is an essential aspect of our governmental status. I thank you for focusing today's hearing on tribal sovereignty.

I would like to thank Representative Rokita for sponsoring H.R. 986, the Tribal Labor Sovereignty Act of 2017, and thank his bi-partisan colleagues who have co-sponsored it, Representatives Cole, Noem, Moore, Lujan Grisham, Peterson, Mullin, Cheney, LaMalfa, Gosar and Lewis.

I've been honored to serve as President of the National Congress of American Indians for the past four years. NCAI is the oldest, largest, and most representative tribal government organization in the nation. NCAI urges Congress to move quickly to enact H.R. 986 to fix a problem created by the National Labor Relations Board's decision to single out Indian tribes as the only form of government in the United States subjected to the National Labor Relations Act.

NCAI views the enactment of the Tribal Labor Sovereignty Act as a crucial step for Congress to take to ensure that the United States consistently respects the sovereignty of tribal governments, and does so by explicitly adding "tribes" to the definition of governmental entities exempt from the National Labor Relations Act of 1935.

*TRIBAL LABOR MATTERS ARE BEST LEFT TO INDIAN TRIBES*

At the outset, I want to say that many tribal leaders recognize and appreciate the significant contributions that labor unions have made to working people in the United States, including those working in Indian Country. Many of us have worked on farms and in factories and on jobsites all over the United States. We greatly appreciate the efforts of labor unions to improve wages and working conditions for American men and women in the workforce.

For years, the member tribes of NCAI have deliberated over tribal labor matters and have voiced their enduring and strong support for the Tribal Labor Sovereignty Act. Attached please find a copy of NCAI Resolution SD-15-056, Support for Tribal Labor Sovereignty Act. NCAI supports H.R. 986 because it affirms the sovereign governmental right of Indian tribes to make their own labor policies that govern their own governmental employees based on the economic and social conditions existing on tribal lands. A significant number of Indian tribes exercise that sovereign authority by welcoming labor unions and encouraging union activity and organization of the tribal workforce under tribal law. But sovereignty means that is a choice reserved for Indian tribal governments --- not a choice made for a tribe by federal bureaucrats.

H.R. 986 will restore the intent of Congress that tribal governments should not be treated as private sector employers under the National Labor Relations Act ("NLRA"). The NLRA was enacted in 1935 in the midst of the Great Depression to address growing upheavals in private industry. Congress exempted all government employers and all government-owned and operated businesses from the Act and from the reach of the National Labor Relations Board ("NLRB" or "Board"). Although the NLRA did not specifically list out every type of exempted government (e.g., it did not expressly identify the governments of the District of Columbia, U.S. Territories, or Indian tribes), for decades the Board properly and consistently interpreted the governmental employer exemption to include the governments of the District of Columbia, the U.S. Territories and possessions, and the various Indian tribes.

In 1976, in *Fort Apache Timber Company and Construction*, the Board considered application of the NLRA to a commercial timber and construction company owned and operated by the White Mountain Apache Tribe, which has its principal office and place of business located at the tribal government headquarters on its Reservation near White River, Arizona. The Board examined and acknowledged the commercial nature of the Tribe's corporation in ruling that the Tribe's corporation did not fall within the NLRA's definition of a private sector "employer" but instead was within the Act's governmental employer exemption.

> Consistent with our 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.' We deem it unnecessary to make that finding here, however, as we conclude, and find that the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.

In 2004 the NLRB did an about-face in *San Manuel Indian Bingo and Casino, 341 NLRB 138,* and -- without either receiving new statutory language from Congress or consulting tribes -- declared that Congress intended the Act to apply to tribal government employers engaged in revenue raising activity. The Board created a new *governmental v. commercial* test to determine whether it will apply the NLRA to tribal governmental employers. In *San Manuel,* the Board found that "the tribe's operation of the casino is not an exercise of self-governance…. The casino is a typical commercial enterprise, it employs non-Indians, and caters to non-Indian[s]." This rationale ignores the stated goals and intent of the federal Indian Gaming Regulatory Act as well as the function and importance of Indian gaming revenues to tribal government operations, programs and community services.

The 2004 *San Manuel* decision upended seventy years of precedent and unilaterally disregarded tribal labor law and instead imposed NLRB jurisdiction on a tribal government's relationship with its own governmental workforce when a tribe is operating on tribal lands to raise governmental revenue and provide employment to tribal members. This interpretation of the Act is in direct conflict with the Act's exemption of governmental employers. Over 90,000 other units of government in America, who employ over 21 million Americans, are not subject to the NLRA. The Board in 2004 made tribal governments the only governments subject to the NLRA.

*LIKE OTHER GOVERNMENTS, TRIBAL GOVERNMENTS*
*RELY ON ENTERPRISES TO GENERATE GOVERNMENTAL REVENUES*

Congress's wisdom in exempting governmental employers from the NLRA is plain. Applying a private sector model of forced collective bargaining over all conditions of employment, under the threat of protected strikes, is a formula for bringing a government to its knees. Giving an outside party the power to call a strike of a government's workforce requires that governmental employer to choose between surrendering its sovereign right to enact laws or being shut down by work stoppages. This is particularly problematic for tribal governments who lack an effective tax base and are obliged to engage in economic activity to raise revenue to fund programs and services to their members and neighbors. Indian lands are held in trust by the U.S. and cannot be subjected to real estate taxation, high reservation unemployment makes income taxation unworkable, and restrictive Supreme Court rulings have severely limited tribal government sales taxes. As a result, for many tribal governments—Indian gaming operations, tribal agriculture, energy and timber operations, and other tribal government enterprises constitute the sole source of governmental revenue that is used to fund tribal public safety, education, health, housing and other essential services to residents of Indian Country.

Let me make one point very clear -- the Tribal Labor Sovereignty Act is a very limited "fix." It will not create "union free zones" on Indian lands. By its own terms, H.R.986 only applies to employers who are, #1, tribal governments, and #2, who operate on their own Indian lands. So

for private sector employers located on Indian lands, H.R.986 would have no effect or application.

Tribal government enterprise activities are as critical to the delivery of essential government services as is a tax base to any other government. Unlike private businesses, no government can safely shut down its enterprise operations because of labor disputes. Our police and fire departments, our schools and hospitals, our courts, and our tribal legislatures must stay open, and they require funding from tribal enterprises. Likewise, it is a basic aspect of tribal sovereignty for Indian Nations to control our relations with our own governmental employees on our own lands. A tribal governmental employer exemption from the NLRA, as H.R. 986 provides, is crucial to our existence as sovereign tribal governments.

*THE NLRB'S SAN MANUEL DECISION TURNED ON AN UNWARRANTED AND UNFAIR FOCUS ON TRIBAL GOVERNMENT GAMING*

Although tribal governments operate many types of enterprises with government employees, most often in natural resources management, much of the focus of this tribal labor relations issue has been on Indian gaming enterprises. The Indian Gaming Regulatory Act ("IGRA") expressly states its purpose "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." 25 U.S.C. Section 2702(1) (Declaration of Policy). In addition, IGRA mandates that tribal governments use net revenues from Indian gaming solely for government purposes: to fund tribal government operations or programs; to provide for the general welfare of the tribal community; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies. 25 U.S.C. Section 2710(b)(2)(B). Indian gaming revenues are often the sole source of non-federal funds to improve reservation health care, education, public safety, and the general welfare of Native communities. Tribal gaming has also helped begin to rebuild tribal infrastructure, roads, water and telecommunications systems, and much more. In sum, tribal governmental gaming is essential to furthering the congressional goals of tribal self-government and self-sufficiency.

The NLRB makes no commercial vs. governmental distinction for state and local government commercial enterprises, including state lottery and other gaming-related governmental operations. Disparate treatment of Indian tribes for purposes of the NLRA violates the longstanding federal policy of Indian Self-Determination.

The IGRA is quite clear in treating tribal gaming as governmental in nature and not commercial gaming. Tribal gaming is a government activity to raise desperately needed revenue for tribal government functions. In this way, tribal gaming is much more akin to state lotteries than to commercial gaming.

Statements by members of Congress at the time IGRA was deliberated make clear that IGRA was not intended to undermine tribal government regulatory authority on the reservation. As Senator Daniel K. Inouye, one of IGRA's main sponsors in the Senate 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)

*H.R.986 RE-AFFIRMS TRIBAL SOVEREIGNTY IN LABOR RELATIONS*

It is important that the Committee understand that in many ways tribal communities are an emerging market, often with vulnerable economies and that labor policy on Indian lands is an important aspect of economic regulation that should be left to Indian tribes as sovereign governments. There are at least four ways that the NLRB's flawed interpretation of its governing statute substantially interferes with important attributes of tribal sovereignty in ways that have not been contemplated or authorized 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 --- third parties with little or no connection to the tribal community --- 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. 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 labor 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 in tribal communities. 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. 7116(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). Where government employees do have the right to strike, the government itself has alone made its own sovereign decision to expose itself as an employer to a strike. It is the antithesis of sovereignty for one government to make that decision for another government. Yet this is precisely what the Board did in its 2004 *San Manuel* decision.

Tribal governments have as urgent a need as state or local governments to uninterrupted performance of services to the community, and are demonstrably more vulnerable. Many tribal governments have little or no discretionary funding other than revenue from their economic enterprises. Strikes against tribal enterprises that the NLRB dismissively describes as "commercial in nature – not governmental" could easily disrupt tribal programs and services to a greater degree than state or local governments because other governments can rely on the bulk of their revenues coming from a tax base which tribes lack. The NLRB 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 enacted tribal laws requiring employers doing business in Indian Country to give preference to Indians in all phases of employment. Preference laws are important because the unemployment rate in Indian communities is much higher than anywhere else in the country. On many large, rural reservations a majority of adults are unemployed or out of the workforce. Congress recognized and explicitly 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 tribe's right to enforce its Indian preference laws. If tribal employees chose a union it would become the "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 negotiate with the union in order to exercise 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 NLRB's construction of the NLRA.

*Third,* treating Indian tribes as private employers interferes with the fundamental right of tribes to exclude non-members in the employment context. The tribal power to exclude from tribal 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 lawfully banned from the reservation for misconduct. The NLRB 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.

*ENACTING H.R. 986 WOULD NOT DEPRIVE ANYONE OF THEIR RIGHTS*

Non-native employees working for tribal governments are in no different position than are out-of-state employees working for local or state government. Millions of Americans cross state and local government borders every day to go to work, including to state and local government jobs. Nowhere is this more clear than in Washington, DC, where workers from Northern Virginia, DC and Maryland commute daily across state lines to work for state or local governments. None of these employees have voting rights to participate in the political process of the state or local government of their employer. For example Census Bureau reports detail how many police officers live in the cities where they serve. On average, among the 75 U.S. cities with the largest police forces, 60 percent of police officers reside outside the city limits. Just 12 percent of officers in the Metropolitan Police Department in Washington, D.C. live in the District — and only 7 percent of officers in Miami live within city limits. Even with these numbers, no one can suggest that out-of-jurisdiction employees are unfairly unable to influence their governmental employers. To the contrary, Indian tribes, like other governmental employers, have a huge interest in ensuring that their employees are satisfied and productive in serving community needs. In fact, tribal government employers regularly are hailed as the best employers in their regions.

*H.R. 986 IS NOT A "TROJAN HORSE" VIS A VIS OTHER WORKFORCE LAWS*

Some have suggested the legislation before this subcommittee is nothing more than a "Trojan Horse" that, if enacted, will inevitably lead to other bills frustrating the application of other federal workforce laws to activities on Indian lands. This is simply untrue: the Tribal Labor Sovereignty Act will not affect the implementation of any other federal law regulating the workplace. Each of those laws is from a different era and deals with Indian tribes on its own terms. For example the Americans with Disabilities Act of 1990 specifically exempts Indian tribal governments from the definition of "employer." Today Indian tribes have worked diligently to create accessible workplaces using their own sovereign authority to do so, providing an excellent example of how tribal governments whose sovereignty is respected will advance worker protection as a matter of tribal self-determination.

*CONCLUSION*

In conclusion, I want to reiterate that Indian tribes support strong relationships with their employees. Indian reservations are not in urban centers and have suffered from decades of unemployment, poverty and federal neglect. We have to work hard to attract and retain good employees. The exercise of tribal sovereignty has led to development of tribal enterprises and has been one of the major success stories of the rural economy in many economically depressed tribal areas. However, these are still Indian reservations. The only reason people commute to jobs on Indian reservations is because tribes compete favorably against other employers, offering better wages and working conditions. It defies reality to suggest that Indian tribes are able to

disadvantage non-Indian employees who have mobility to find better pay and working conditions elsewhere. We are not aware of any tribe that does not have extensive process for employees to make complaints and to appeal adverse employment decisions. 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.

The Tribal Labor Sovereignty Act builds upon a principle that has been long established by Indian tribes across the country: when tribal sovereignty is respected and acknowledged, successful, accountable and responsible governments and economies follow. This is not merely a legal issue but a moral imperative of protecting and defending the sovereignty of America's Indian tribes, and guarding against any discrimination against those tribes. There is no good reason to treat tribal governments in any way different from other governments. Federal law should uphold, not undercut, parity of treatment and equality of opportunity for tribal governments.

Thank you for your commitment to maintaining the integrity and effectiveness of tribal governments, and for guarding against actions that would deny to those governments the same rights accorded other state and local governments.