UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS

LEGISLATIVE HEARING ON H. 511
"TRIBAL LABOR SOVEREIGNTY ACT OF 2015"

WRITTEN TESTIMONTY OF
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I. Introduction

Chairman Roe, Ranking Member Polis, and Distinguished Members of the Subcommittee:

The Native American Rights Fund (NARF) is a national, non-profit legal organization dedicated to securing justice on behalf of Native American tribes, organizations, and individuals. Since 1970, NARF has undertaken the most important and pressing issues facing Native Americans in courtrooms across this country, and here within the halls of Congress.

We are honored to be invited to provide testimony to the Subcommittee regarding H.R. 511, the "Tribal Labor Sovereignty Act of 2015" – a bill to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act (NLRA). The purpose of our testimony is to demonstrate that, in furtherance of its longstanding policies of Indian self-determination, tribal self-governance and tribal economic self-sufficiency, it is time for Congress to provide ***parity*** for tribal governments under the NLRA. In this context, ***parity***

encompasses the quality of being treated equally under the law alongside Federal, State and Local governments. Tribal governments are entitled to the same freedom to choose the appropriate time, place and manner for regulating union activity on Indian lands and collective bargaining for its employees.

II. Parity with the Federal, State and Local Governments

The National Labor Relations Act was enacted by Congress in 1935 to govern labor relations in the private commercial sector. Under section 2 of the NLRA, the term "employer" is defined to include "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ." Therefore, workers in the public sector— employees of federal, state and local governments—were not afforded the rights and protections of the NLRA. Based on sound policy determinations, Congress provided those governments an opportunity to choose how to best regulate union organizing, collective bargaining and labor relations with their workers given the essential and, oftentimes, sensitive nature of their employment.

H.R. 511 recognizes that those same sound policy determinations apply with equal force to tribal governments.

A. Parity with the United States

In 1978, forty-three years after it passed the NLRA, Congress enacted the Federal Labor Relations Act ("FLRA)," 5 U.S.C. § 7101 *et seq.,* regulating labor relations for most federal workers. The FLRA specifically aims to "prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. § 7101(a)(2). Congress

determined that the rights of federal workers to organize, bargain collectively, and participate in labor organizations: "(1) safeguards the public interest, (2) contributes to the effective conduct of public business; and (3) facilitates and encourages the amicable settlement of disputes between employers and employees involving conditions of employment." 5 U.S.C. § 7101(a)(1).

However, the FLRA does not apply to all federal employers or employees. Coverage extends to individuals employed in an "agency," 5 U.S.C. § 7103(a)(2), but specifically excludes members of the military, noncitizens who work outside the United States, supervisory and management personnel, and various Foreign Service officers. 5 U.S.C. § 7103(a)(2)(B). It also excludes all employees of certain federal agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, and the United States Secret Service. 5 U.S.C. § 7103(a)(3).

Although patterned after the NLRA, based on the Federal government's unique public-service needs, obligations and vulnerabilities, the FLRA mandates certain proscriptions and prescriptions not contained in the NLRA. One important example is the scope of the authorized collective bargaining process. Under the NLRA, private-sector employees are entitled to collectively bargain with respect to wages, hours, benefits, and other working conditions. Under the FLRA, federal employees can only collectively bargain with respect to personnel practices. Under the FLRA, there is no right to negotiate working conditions such as wages, hours, employee benefits, and classifications of jobs.

A second important difference is the right of private sector employees to engage in "concerted action," like workplace strikes. Under the FLRA, there is no right to strike for federal workers. In fact, the FLRA specifically excludes any person who participates in a workplace strike from the definition of "employee," 5 U.S.C. § 7103(a)(2)(B)(v), and it specifies that it is an

unfair labor practice for labor unions to call or participate in a strike, a work stoppage, or picketing that interferes with the operation of a federal agency. 5 U.S.C. § 7116(b)(7)(A).

B. Parity with the States

According to a 2002 Report by the Government Accountability Office ("GAO"), about 26 states[1] and the District of Colombia had statutorily-protected collective bargaining rights for essentially all State and local government workers; 12 states[2] had collective bargaining only for specific groups of workers (e.g. teachers, firefighters); and 12 states[3] did not have laws providing rights to collective bargaining for any government worker. "Collective Bargaining Rights," GAO-02-835, p. 8-9 (September 2002). According to the Report, most State government workers who are entitled to collective bargaining rights under state law are prohibited from striking. Instead, those States provide compulsory binding interest arbitration (a procedure unavailable under the NLRA). *Id.* at p. 10.

In a January 2014 Report, *Regulation of Public Sector Collective Bargaining in the States,* the Center for Economic and Policy Research (CEPR) reviewed the rights and limitations on public-sector bargaining in the 50 states and the District of Colombia in order to answer three key questions: (1) whether workers have the right to bargain collectively; (2) whether unions can bargain over wages; and (3) whether workers have the right to strike (a copy of the Report is attached as Appendix A). The CEPR did not update the numbers provided by GAO, but it did

[1] Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin. As with the NLRA, the state laws that provide collective bargaining rights to public employees often exclude various groups of employees (e.g., many states expressly exclude management officials) from coverage. GAO 02-835, at note 12.

[2] Georgia, Indiana, Idaho, Kansas, Kentucky, Maryland, Missouri, Nevada, North Dakota, Oklahoma, Tennessee, and Wyoming. Three of these states, Indiana, Kentucky and Missouri, extend collective bargaining rights to certain public employees through an executive order from the governor. GAO 02-835, at note 14.

[3] Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and West Virginia. Texas prohibits collective bargaining for most groups of public employees, but firefighters and police may bargain in jurisdictions with approval from a majority of voters. GAO 02-835, at note 13.

provide helpful charts to better illustrate the types of policy choices State governments are making in regulating the rights of government workers: Chart 1, "Legality of Collective Bargaining for Select Public-Sector Workers" lists the states which regulate collective bargaining for specific workers is legal, illegal, or simply no ; Chart 2, "Legality of Collective Wage Negotiation for Select Public-Sector Workers"; and Chart 3, "Legality of Striking for Select Public-Sector Workers." As you review each chart, you can see that certain states make it illegal, or do not protect the rights of certain government workers, to engage in collective bargaining or wage negotiations, with most states making it illegal for these government workers to strike.

And of final note, according to the National Right to Work Legal Defense Foundation (http://www.nrtw.org/), 25 States have enacted right to work laws and 25 States do not have right to work laws.[4] Therefore, half of the State legislatures have determined that—as a matter of State labor relations policy—a worker in a Right to Work State not only has the right to refrain from becoming a union member, but cannot be required to pay anything to the union unless the worker chooses to join the union.

III. Regulating Labor Relations on Indian Lands

Before its 2004 decision in *San Manuel Indian Bingo and Casino*, the National Labor Relations Board did not exercise jurisdiction over tribal-owned businesses located on Indian lands. In *Fort Apache Timber Co.* (1976), and *Southern Indian Health Council* (1988), the NLRB held that tribal-owned businesses operating on tribal lands were exempt from federal

[4] The 25 states that have right to work laws are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

labor law jurisdiction as "governmental entities."[5] However, in *Sac & Fox Indus.* (1992), the NLRB held that the provisions of the NLRA would apply to a tribal-owned business operating outside the reservation. Thus, prior to 2004, the NLRB drew a distinction regarding its jurisdiction based on whether the tribal business was located on Indian lands (no jurisdiction) versus off-reservation (jurisdiction). In considering H.R 511, the Subcommittee should be mindful that the 566 federally-recognized Indian tribes enjoy demographic, cultural, political and economic diversity, and should not be subject to any one-size fits all approach.

A. The Navajo Nation Labor Code

Enacted by resolution in 1985, the Navajo Preference in Employment Act ("NPEA") serves as the Navajo Nation's general labor code. 15 N.N.C. Sec. 601 *et seq*; Resolution No. CAU-63-85 in 1985, and amended through Resolution No. CO-78-90 in 1990. Incorporated into the NPEA is a clause which enables unionization on the Navajo Nation. 15 N.N.C. Sec. 606 Union and Employment Agency Activities; Rights of Navajo Workers

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.
B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

It was the legislative intent of the council in 1985 to incorporate the most basic of those privileges of the National Labor Relations Act ("NLRA") to tribal employees, whom the council

[5] The NLRB did exercise jurisdiction over non-Indian enterprises operating. For example, in *Simplot Fertilizer Co.* (1952), the NLRB exercised jurisdiction over a union's attempt to organize a non-Indian phosphate mining company leasing Shoshone-Bannock tribal land in Idaho. Also *see Texas-Zinc Minerals Corp*. (1960), and *Devils Lake Sioux Mfg. Corp.* (1979).

acknowledged were otherwise exempt from the NLRA. The rights of Navajo Nation employees to collectively bargain were debated and CAU-63-85 ultimately passed. 14 NTC 8/1/1985. The 1990 Navajo Nation council debated whether to include in the amendments "closed shop" language, which would permit labor organizations to collect union dues from non-members. This sparked much debate in the council, which ultimately decided 34 to 33 to ensure the Navajo Nation is a "right to work" jurisdiction, and amended the Labor Investigative Task Force's proposed amendments to strike the "closed shop" language otherwise amending 15 N.N.C. Sec. 606. 28 NNC 10/25/90

The NPEA confers upon the Human Services Committee ("HSC") of the legislative council the authority to "promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act." 15 N.N.C. Sec. 616. *See* Resolution No. HSCJY-63-94 Adopting the Navajo Preference in Employment Act Regulations to Provide Rules and Enforcement Procedures to Permit Collective Bargaining for Employees of the Navajo Nation, Its Agencies or Enterprises

These regulations provide additional guidance as to, for example, management's role of neutrality, prohibited employer practices, how to become an exclusive bargaining agent, the process for certification, an impasse resolution in the event of failed bargaining, and the process for decertification of a bargaining agent. A copy of the Collective Bargaining Regulations passed by the Office of Navajo Labor Relations is attached as Appendix B. The regulations state: "Like the Act, the goal of these regulations is to promote the harmonious and cooperative relations between the Navajo Nation, its agencies and enterprises and Navajo Nation employees through collective bargaining."

Collective bargaining is occurring on the Navajo Nation, with private enterprise as well as government. The United Mine Workers of America ("UMWA") represents employees at the Navajo Nation Head Start Program, a tribal government program. The Nal-Nishii Federation of Labor AFL-CIO includes 12 labor organizations that represent miners, power plant workers, construction workers, school employees and city employees working on or near the Navajo Nation.

B. California Tribal Labor Relations Ordinances

In negotiating tribal-state gaming compacts in 1999, Indian tribes in California agreed to adopt a process for addressing union organizing and collective bargaining rights of tribal gaming employees, or the compact is null and void. From these negotiations, a *Model Tribal Labor Relations Ordinance* ("Ordinance") was crafted, and tribes with 250 or more casino-related employees were required to adopt the Ordinance (a copy is attached as Appendix C). In its 2007 Report, *California Tribal State Gambling Compacts 1999-2006*, the California Research Bureau provided the following summary:

- Under the ***Model Tribal Labor Relations Ordinance*** ("Ordinance"), employees have the right to engage in employee organizations, bargain collectively, and join in concerted activities for the purpose of collective bargaining. The Ordinance defines unfair labor practices on the part of a tribe or a union, guarantees the right to free speech, and provides for union access to employees for bargaining purposes. (Excluded employees include supervisors, employees of the tribal gaming commission, employees of the security or surveillance departments, cash operations employees or any dealer.)

  Key Issues: Certification of union representation and dispute resolution

- Upon a showing of interest by 30 percent of the applicable employees, the tribe is to provide the union an election eligibility list of employee names and addresses. A secret ballot is to follow. An elections officer chosen by the tribe is to verify the authorization cards and conduct the election. If the labor organization receives a majority of votes, the election officer is to certify it as the exclusive collective bargaining representative for the unit of employees. Decisions may be appealed to a tribal labor panel.

- The Ordinance establishes procedures to address an impasse in collective bargaining, including the union's right to strike outside of Indian lands, and to decertify a certified union.

> It also creates three levels of binding dispute resolution mechanisms, beginning with a tribal forum, followed by an arbitration panel, and finally tribal court and federal court. Collective bargaining impasses may only proceed to the first level of binding dispute resolution, in which a designated tribal forum makes the decision.

California Tribal State Gambling Compacts 1996-2006, at p. 33-34 (a copy of the Labor Standards section, P. 33-39, of the Report is attached as Appendix D). In a presentation to the International Association of Gaming Attorneys in September 1999, the following observations were provided regarding the Ordinance as a product of compromise between powerful forces, including:

> 1. the public policy of providing economic support for Indians from non-tax sources through Indian gaming;
>
> 2. the drive by the State of California to reclaim some of the economic benefit it had forfeited to Nevada by blocking the expansion of gaming in California[3];
>
> 3. the expectation of employees working at Indian casinos that they will have the same rights as employees working at non-Indian enterprises;
>
> 4. the need and desire by many tribes to maintain and expand their gaming operations; and
>
> 5. the wish by other interested parties in the gaming business (most importantly, Nevada gaming companies and unions representing their employees) to create, at a minimum, a "level playing field" by eliminating the competitive advantage enjoyed as a result of the non-union status of California's Indian casinos.

The full written presentation is available at http://corporate.findlaw.com/litigation-disputes/the-california-tribal-labor-relations-ordinance-overview-and.html.

The Ordinance provides labor unions at tribal gaming facilities with a number of advantages not provided for under the NLRA. Most importantly, under the Ordinance unions at tribal casinos: (1) have the right to enter onto casino property at any time to talk to employees and post leaflets and posters there in order to facilitate the organizing of employees; and (2) may engage in secondary boycotts after an impasse is reached in negotiations without suffering any penalty under the Ordinance.

The Ordinance also provides tribes with certain advantages not enjoyed by employers under the NLRA. Most importantly, unions representing tribal casino employees may not strike, picket or engage in boycotts before an impasse is reached in negotiations. Since 1999, a number of new tribal-

state gaming compacts have been negotiated, or renegotiated, some with additional provisions regulating labor, but all requiring the adoption of the 1999 Model Tribal Labor Relations Ordinance.

The examples of the Navajo Nation and the California tribes exemplify the growing list of Indian tribes who are regulating labor relations with their employees. Mr. Chairman, we hope that you and each member of the Committee will recognize that each of the 566 tribes—as governments—must have the opportunity to make their own policy judgments regarding labor relations on their reservations based on the values and priorities which best serve the needs of their community. In general, there are four areas of concern for Indian tribes: (1) a guaranteed right to strike threatens tribal government revenues and the ability to deliver vital services; (2) the broad scope of collective bargaining for "other working conditions" will undermine federal and tribal policies requiring Indian preference in employment; (3) pre-emption of the power to exclude which is a fundamental power of tribal government diminishes the ability of tribes to "place conditions on entry, on conditioned presence, or on reservation conduct"; and (4) the potential for substantial outside interference with tribal politics and elections.

IV. Conclusion

In closing Mr. Chairman, NARF would simply remind you and members of the Subcommittee that under the Indian Gaming Regulatory Act ("IGRA"), Congress recognized "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701, and declared its purpose was "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. § 2702.

Congress said that, and we believe Congress meant it! Tribal gaming is a part of the structure of tribal government—a means of generating much-needed revenues to support tribal programs and services. Within IGRA, Congress stated "net revenues from any tribal gaming are not to be used for purposes other than-- (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B). Thus, Congress determined that tribal gaming is a governmental activity of Indian tribes. In spite of this fact, the NLRB, which by its own admission has no expertise in Indian affairs, has determined that tribal gaming is simply on par with non-Indian casinos as a private commercial activity.

Congress must act, and must act soon, to explicitly include "Indian tribes" within the exemption to the definition of "employer" in the NLRA.