

**TESTIMONY OF ROBERT J. WELCH, JR.
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BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
EDUCATION AND THE WORKFORCE COMMITTEE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

HEARING ON H.R. 986 – "TRIBAL LABOR SOVEREIGNTY ACT OF 2017"

MARCH 29, 2017

Good morning. My name is Robert Welch, Jr. and I serve as Chairman for the Viejas Band of Kumeyaay Indians (the "Viejas Band"), one of seven elected members of the Viejas Tribal Council. On behalf of the Viejas Band, I would like to thank you for allowing me to testify today regarding H.R. 986, the "Tribal Labor Sovereignty Act of 2017". H.R. 986 is critical for the recognition of the sovereignty of Tribal Governments like Viejas, and would ensure that tribal governments are afforded the same dignity and respect as all other governments within the United States to make and be governed by their own labor laws tailored to the unique needs of their governments and employees.

ABOUT THE VIEJAS BAND AND VIEJAS CASINO & RESORT

The Viejas Band, one of the 12 remaining bands of the Kumeyaay Indian Nation, resides on a 1,600-acre reservation in the Viejas Valley, east of the community of Alpine in San Diego County, California. The Kumeyaay people have lived in the San Diego County region for over 10,000 years. Prior to the passage of the Indian Self-Determination and Education Assistance Act of 1975, the story of the Viejas Band, like that of many other tribes in California and throughout the nation, was one of struggle, resilience, and survival against genocide, enslavement, forced removal from ancestral lands, termination, assimilation, and extreme poverty. Following this critical shift towards Tribal self-determination, in 1976, the Viejas Band was able to secure funds in order to create its first Tribal enterprise: Ma Tar Awa RV Park. While the Indian Self-Determination and Education Assistance Act of 1975 helped start Tribes on a path towards rebuilding their governments, the revenue producing opportunities it created were not substantial enough to promote economic self-sufficiency, and most Tribes still relied heavily on federal funding to support their governments. And without a sizeable population base to generate tax revenue, Tribes desperately needed a mechanism, under their control, to generate

meaningful government revenue and control their own destinies. That is where Tribal government gaming stepped in.

The U.S. Supreme Court's ruling in *Cabazon*¹, the passage of the Indian Gaming Regulatory Act of 1988² ("IGRA"), and the execution of Tribal-State gaming compacts recognized and preserved the rights of Tribes to utilize government gaming to generate critical revenue, in the same way that many States earn substantial revenues through government-operated lotteries.

Today the Viejas Band proudly owns and operates Viejas Casino & Resort, which is the primary source of revenue for the Viejas Tribal Government. The revenues generated by Viejas Casino & Resort fund the types of essential governmental departments, services, and programs that many non-Indians take for granted, such as education, health, housing, water, roads, fire, and public safety. In addition, Viejas Casino & Resort provides over 1,600 jobs to the local community, including employment opportunities for citizens of the Viejas Band, annually contributes millions of dollars to the local economy through the purchase of goods and services, and is a proud supporter of many charitable organizations throughout San Diego County. Tribal government gaming has been a success story for the Viejas Band and our local community. It has made self-determination and economic self-sufficiency a reality, and is essential to the continued prosperity of the Viejas Band and its people.

THE NATIONAL LABOR RELATIONS ACT AND INDIAN TRIBES

The National Labor Relations Act ("NLRA") was first enacted in 1935. At that time, Indian tribes around the country were trying to recover from the devastating impacts of allotment. The NLRA was intended to provide collective bargaining rights to employees of large corporations. For that reason, most governments were exempted from the NLRA, including the United States, states, and local governments. Unfortunately, Indian tribes had almost no employees, as all government and enterprise operations were handled by the Bureau of Indian affairs, thus, the thought of including Tribal governments in the list of exempted governments did not occur to the drafters of the NLRA. This oversight, however, was handled administratively by the National Labor Relations Board ("NLRB").

Underpinning the exemption for governments in the NLRA was an acknowledgment that governments have significantly different considerations in how they handle their business when compared to private enterprises. Governments are not driven by pure profit motive; rather, they are driven by the responsibilities and authorities given them by their citizens. To best meet those responsibilities and exercise those authorities, governments need flexibility. Thus the NLRA left it to governments to determine what laws would best govern their employee relations. Tribal governments are no different. The operations and enterprises of a Tribal government, even those that raise revenues, are not driven by purely profit motives, but by the responsibility to deliver services and meet the present and future needs of its citizens. Ultimately, it is the sovereign responsibility of a Tribal government to determine how it can best deliver services and meet the needs of its people.

¹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

² 25 U.S.C. 2701 *et seq.*

Gaming, whether through private commercial operations like Las Vegas casinos, or through governmental operations like Tribal gaming under IGRA or state lotteries, is a unique business that requires significant regulation and oversight. The unique regulatory and oversight needs of the business led to enactment of IGRA by the U.S. Congress, promulgation of significant regulations by the National Indian Gaming Commission, and enactment of a substantial body of Tribal law and regulation. Subsequent interactions with state governments has further led to the numerous Tribal-State compacts adopted around the country. To adequately address all of these laws, regulations, and agreements, while at the same time developing a well-trained, educated, and happy workforce, Tribal governments need great flexibility.

The Viejas Band's history in Tribal government gaming is a great example in how these sometimes conflicting responsibilities can be reconciled by careful consideration, balancing of interests, and great flexibility.

H.R. 986 AND THE NLRB DECISION IN *SAN MANUEL*

H.R. 986, as its title suggests, is about respecting and protecting the sovereignty of Tribal governments. It is about affirming that Tribal governments possess the same powers as the federal government, states and local governments, to govern labor relations on sovereign lands. H.R. 986 would reverse the NLRB's improper and about-face change in policy in the 2004 *San Manuel* decision³, when the NLRB ignored thirty years of precedent to rule, for the first time, that the NLRA applies to Tribal governments. Finally, H.R. 986 would set the record straight, once and for all, regarding Congress' intent as to the exemption of Tribal governments from the NLRA. As sovereign governments engaged in economic activities essential to fund government services, Tribes, such as the Viejas Band, should enjoy the same exempt status as the United States, State governments, and their government business. If exemption is appropriate for state lotteries, it should be for Tribal governments too.

THE VIEJAS BAND AS AN EMPLOYER

Opponents of H.R. 986 will likely characterize this measure as "anti-union". They will also likely suggest that imposition of the NLRA upon Tribal governments is essential to protect the rights of non-tribal member employees. But the voluntary actions of the Viejas Band, and many other Tribal governments across the U.S., fundamentally expose the fallacy of those myths. As one of the largest employers in east San Diego County, the Viejas Band takes its role as an employer very seriously. The Viejas Band recognizes the key role that all of its employees play in the growth, success, and well-being of Viejas Casino & Resort, and by extension the Viejas Band itself. That is why the Viejas Band continually strives to treat all of its employees fairly and with respect. The Viejas Band provides its employees with competitive salaries and great benefits, including health, dental, and vision insurance, basic life insurance, a 401(k) program with employer matching, a college tuition reimbursement program, a robust wellness program with fitness club dues reimbursement, and paid leave and vacation, to name a few. The Viejas Band treats its employees well because it is the right thing to do, not because it has been compelled to do so by some federal or state laws or agencies.

³ *San Manuel Indian Bingo & Casino*, 341 N.L.R.B 1055 (2004).

THE HISTORY OF UNION ORGANIZING AT VIEJAS CASINO & RESORT

The history of labor organization at Viejas Casino & Resort is a striking example of why the application of the NLRA is unnecessary for Tribal governments, in the same way it is unnecessary for federal, state, and local governments.

In August 1998—long before anyone, including the NLRB, believed the NLRA should be applied to Tribal governments—the Viejas Band entered into a voluntary election agreement with Communications Workers of America ("CWA"), to provide access to service employees working at Viejas Casino & Resort for purposes of organizing. The voluntary election agreement provided for an election trigger (union authorization cards signed by 30% of the service employees) and a secret ballot election process supervised by an independent arbitrator.

In January 1999, a secret ballot election occurred and CWA was certified as the bargaining representative for approximately 30% of the Viejas Casino & Resort workforce. Shortly thereafter, the Viejas Band and CWA commenced negotiating the first collective bargaining agreement. The negotiation process concluded in October 1999, with the Viejas Band and members of the CWA ratifying a first of its kind collective bargaining agreement between a Tribal government and a labor organization in the State of California.

Every stage of the process, from organizing activity to ratification of a collective bargaining agreement, reflected a choice made by the Viejas Band in the exercise of its sovereignty as a Tribal government. None of those procedures were compelled or forced upon the Viejas Band. And each stage started and concluded without the involvement of the NLRB or the application of the NLRA.

The Viejas Band's exercise of its sovereignty demonstrates why Tribal governments should be empowered to exercise sovereignty in labor relations, rather than have it stripped away by federal laws or agencies. The Viejas Band's actions were received positively by its represented employees, other Tribes, and other labor organizations. In fact, a few months after the ratification of the historic collective bargaining agreement, the Viejas Band was honored by the San Diego-Imperial Counties Labor Council, AFL-CIO, at its 12th annual Worker's Memorial Dinner with its Spirit of Cooperation Award.

THE TRIBAL LABOR RELATIONS ORDINANCE

On September 14, 1999, the Viejas Band passed its own law governing labor relations: a Tribal Labor Relations Ordinance (the "TLRO"). The TLRO, like similar voluntarily adopted state laws addressing labor relations for government agencies, contains numerous provisions that are similar to the NLRA, including detailed procedures for representation proceedings, a guarantee of rights to engage in concerted activity, enumeration of unfair labor practices by Tribes and unions, and procedures for secret ballot elections and union decertification. The TLRO, however, also diverges from the NLRA in matters that are unique to Tribal government gaming, including the recognition of an Indian hiring preference, the exclusion of certain employee classifications from organization (such as Tribal Gaming Commission employees), the ability for

a Tribal Gaming Commission to require a labor organization to secure a gaming license, and the resolution of any labor disputes through binding arbitration before an independent Tribal Labor Panel (rather than the NLRB). The Viejas Band amended its TLRO in November 2016 to provide additional protections to employees and labor organizations.

Over 70 other Tribal governments in California have adopted their own, substantially similar, TLROs. The TLROs have worked well for over 17 years, have been publically praised by California labor union representatives speaking before the California legislature, and would continue to be undermined by NLRB interference if H.R. 986 were not passed.

THE UNRESOLVED IMPACTS OF SAN MANUEL ON THE TLRO AND IGRA

During its 14 years as the bargaining representative, CWA never once challenged the TLRO, or attempted to invoke action by the NLRB against the Viejas Band. But that changed in August 2014, when a represented employee filed a petition before the NLRB to decertify the CWA as the bargaining representative pursuant to the NLRA. The NLRB asserted that it had jurisdiction over the decertification election in light of the *San Manuel* decision and did not agree that the TLRO decertification procedures controlled. In addition, Viejas was informed that a majority of the represented employees had signed on to the decertification petition, such that the Viejas Band would alienate hundreds of employees if it objected to the NLRB process. It was a no-win situation, under which the Viejas Band was essentially compelled to agree to NLRB jurisdiction to avoid expensive litigation concerning NLRB jurisdiction and thereby angering its employees with the delay it would cause. The Viejas Band reluctantly stipulated to the NLRB election.

Through the NLRB election process, a new and previously unknown union, the United Food and Commercial Workers Local 135 ("UFCW"), was allowed to intervene at the eleventh hour and was added to the election ballot, which would not have been permitted under the TLRO. During the "campaign" process immediately preceding the election, the NLRB notified the Viejas Band that it was required to comply with the NLRA election procedures. Through the election, the UFCW was selected as the new representative for represented employees at Viejas Casino & Resort. The UFCW was certified by the NLRB as the bargaining unit representative on September 30, 2014. Shortly thereafter, the UFCW and the Viejas Band commenced collective bargaining. The UFCW commenced negotiations under the NLRA, whereas the Viejas Band commenced negotiations under the TLRO, and problems immediately arose.

Due to the differences between the TLRO and the NLRA, there was substantial disagreement on certain issues addressed by the TLRO, including the ability for the Viejas Tribal Gaming Commission to require the UFCW to secure a gaming license. In contrast to CWA, the UFCW refused to be licensed and filed an unfair labor practice charge with the NLRB. The Viejas Band, of course, objected to the jurisdiction of the NLRB and contested the unfair labor practice charge on the merits.

Fortunately, in March 2015, and prior to the NLRB issuing any decision, Viejas and the UFCW were able to complete negotiations on a collective bargaining agreement and temporarily resolve their differences, including UFCW's voluntary agreement to licensure by the Viejas Tribal Gaming Commission. But the collective bargaining agreement remains silent as to whether the

TLRO or the NLRA governs labor relations for Viejas Casino & Resort, which created an environment ripe for future jurisdictional disputes between the NLRA and the TLRO.

The *San Manuel* decision also clearly conflicts with IGRA creating even more uncertainty. The Viejas Band's TLRO is an indisputably sovereign act adopted pursuant to the Viejas Band's compact with the state of California. The D.C. Circuit, in its opinion in *San Manuel*, observed that the enactment of a TLRO, and the negotiation of a gaming compact under IGRA, are governmental acts. The Viejas-California Compact was approved by the United States Secretary of the Interior, as required by IGRA. And the plain language of IGRA recognizes that gaming operations are governmental activities of Tribes and identifies gaming on tribal lands as "a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S. C. § 2702(1). Against this background, the *San Manuel* decision fundamentally negates two sovereign acts by the Viejas Band: the Tribal State Compact and TLRO, which were specifically adopted by the Viejas Band, approved by and the State of California, and approved by the Secretary of the Interior, in accordance with IGRA.

The uncertainty and continued threat of NLRB intrusion into tribal governance undermines the ability of a tribal government, like the Viejas Band, to carry out its ultimate responsibility to deliver essential government services and meet the present and future needs of its citizens.

NLRB v. VIEJAS BAND OF KUMEYAAY INDIANS – CASE NO. 21-CA-166290

The old adage "no good deed goes unpunished" is an apt characterization of the current encroachment by the NLRB upon the sovereignty of the Viejas Band. Through the improper assertion of jurisdiction by the NLRB, the Viejas Band has been forced to defend an enforcement action arising out of the Viejas Band's payment of bonuses to represented employees in December 2015, which were bonuses that the Viejas Band had no obligation to pay at all.

During collective bargaining in January 2015, the Viejas Band and UFCW negotiated compensation for represented employees. The Viejas Band informed UFCW that it intended to pay year-end bonuses to unrepresented employees if Viejas Casino & Resort financially performed to budget during 2015. The Viejas Band offered to structure bonuses into the collective bargaining agreement as well. UFCW rejected annual bonuses and insisted upon larger annual percentage wage increases instead. Consequently, the parties reached a collective bargaining agreement that contained the annual wage compensation structure preferred by UFCW, and contained no requirement for the Viejas Band to pay any bonuses to represented employees.

Fortunately, 2015 was a financially successful year for Viejas Casino & Resort. At year end, the Viejas Band was able to pay bonuses to its unrepresented employees as budgeted. Due to the financial success, the Viejas Band was also in a position to pay bonuses to its represented employees so that all of its employees could share in the success. One challenge the Viejas Band had to address, however, was structuring bonuses. The Viejas Band wanted to treat both groups of employees fairly, so the Viejas Band decided to structure bonus amounts in order to equalize the overall annual compensation increase received by represented and unrepresented employees during 2015. Because represented employees received a high percentage wage increase earlier

in 2015, the Viejas Band paid a lesser bonus to its represented employees, and thereby equalized overall year-over-year employee compensation increases for 2015. The Viejas Band determined that paying a lesser bonus was better for its represented employees than adhering to the terms of the collective bargaining agreement and paying no bonus at all.

The Viejas Band notified UFCW of its decision to pay a bonus immediately before it was announced to all employees, and three days before it was to be paid. UFCW had the opportunity during those three days to object to the bonus or demand negotiation. It did neither.

Instead, UFCW waited until after the bonuses were paid and then filed charges with the NLRB alleging that the Viejas Band engaged in discriminatory unfair labor practices under the NLRA. UFCW completely disregarded the TLRO.

During the past 14 months, the Viejas Band has been defending against the NLRB's enforcement action at considerable expense, including contesting the NLRB's jurisdiction, responding to NLRB subpoenas requiring the production of multiple government records, participating in a multi-day trial before an NLRB administrative law judge ("ALJ"), and drafting numerous trial briefs and exceptions challenging the ALJ's adverse ruling.

The NLRB has not yet taken any further action on the ALJ's ruling, but if it affirms the ruling, the Viejas Band will be forced to commit additional government resources over the next several years to have the ruling reviewed by the Ninth Circuit and potentially the U.S. Supreme Court. The passage of H.R. 986, however, would immediately end the NLRB's meddling in the tribal governance of the Viejas Band, would restore the sovereignty of the Viejas Band and its labor laws, and would save U.S. taxpayers and tribal governments from the substantial legal costs of ongoing and future actions by the NLRB against tribal governments. Moreover, it would reaffirm the power of the Viejas Band to look out for the best interests of all of its employees consistent with the Viejas Band's tribal law (the TLRO).

CONCLUSION

In conclusion, H.R. 986 is about protecting Tribal sovereignty. The Viejas Band and other Tribes across the nation serve as key examples of how Tribal governments, when allowed to exercise their sovereignty, are capable of developing laws that protect the rights of workers within a fair framework, while continuing to meet the strict regulatory needs of their gaming enterprises. The Viejas Band believes that its agreement with the State of California, and its adoption of the TLRO, should be respected. The NLRA and NLRB should have no application or role in labor relations upon the Viejas reservation.

The Viejas Band respectfully requests that Congress enact H.R. 986 and reaffirm that Tribal governments possess the same status as the federal government, states and their political subdivisions. This is not an issue to be left for the courts decide what Congress "intended". H.R. 986 should set the record straight, once and for all, regarding Congress' intent to exempt Tribal governments and their government enterprises from the NLRA. Thank you.