

**Prepared Statement of the Honorable Joe Garcia**  
**President of the National Congress of American Indians and**  
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**Testimony before the**  
**United States House of Representatives**  
**Committee on Education and the Workforce**  
**Subcommittee on Employer-Employee Relations**  
**Hearing on *The Tribal Labor Relations Restoration Act of 2005 (H.R.16)***

**July 20, 2006**

*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” functions 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. 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. 4<sup>th</sup> 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 20<sup>th</sup> 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.