Testimony of Nathaniel Brown
Navajo Nation Council Member
The Navajo Nation

Before the
United States House Education and the Workforce Committee
Subcommittee on Health, Employment, Labor & Pensions

Hearing on
HR 986 – Tribal Labor Sovereignty Act of 2017

Wednesday, March 29, 2017

Yá'át'ééh (hello) Chairman Walberg, Ranking Member Sablan, and members of the Committee. My name is Nathaniel Brown and I am a member of the Navajo Nation Council. I am testifying on behalf of Russell Begay, the President of the Navajo Nation. Thank you for this opportunity to present testimony on HR 986, the Tribal Labor Sovereignty Act of 2017.

Let me start off by stating that we support this legislation as well as its companion bill in the Senate, S. 63. The Tribal Labor Sovereignty Act of 2017 is a step in the right direction, towards honoring our sovereignty and self-determination.

SOVEREIGNTY

We are a sovereign nation. We have been here since time immemorial. We have signed treaties with Spain, Mexico, and the United States in 1868. We continue to honor the Treaty of 1868, which is approaching its 150th anniversary.

We also have the inherent right to self-determination and self-governance. In exercising these principles, the Navajo people have developed our own government made up of an executive, legislative and judicial branch. Our executive and legislative leaders are elected by the Navajo people. Our judicial branch judges are appointed by the President of the Navajo Nation and confirmed by the legislative branch, similar to the federal government. We also develop, pass and execute our own laws. When we pass laws, we expect that these laws shall govern and that our laws are not superseded by or pushed aside by the laws of another governmental entity, including the federal government.

PARITY WITH STATES AND LOCAL GOVERNMENTS

As part of their jurisdictional standards, we understand that the National Labor Relations Act (NLRA) excludes "the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof" from its definition of "employer." 29 U.S.C. § 152(2). In addition, the National Labor Relations Board (NLRB), as part of their jurisdictional standards,

states that "Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations" are exempt from NLRA.[1] Our understanding is that Congress, as a policy matter, afforded the federal government, state governments and their entities this exemption because of the essential and sensitive nature of their work. Furthermore, Congress recognized these local governments' ability to self-govern.

The NLRA was passed in 1935 and at that particular time, Indian tribes may have not been considered in many pieces of legislation. It was probably not even contemplated that the NLRA might have jurisdiction over Indian tribes until the 1976 *Fort Apache Timber Co.* matter. It has been a long time coming, more than 80 years, and we have the opportunity to resolve this issue. In requesting passage of this bill, we are not asking for special treatment. The United States and States have been afforded this exemption. We simply want parity. If they are able to self-govern and be self-determined with regards to the NLRA, so should we. We are simply asking that our right to self-govern is acknowledged and not brushed aside by an external agency.

CLARITY AND CERTAINTY

We need to have clarity and certainty in regards to this issue. From my understanding, the NLRB in 1976 took the position in *Fort Apache Timber Co.*, 226 NLRB 503, not to assert their jurisdiction, holding that tribal governments, including a tribal enterprise, were exempt from the NRLA's definition of employer. However, in 2004, the NLRB administratively reversed and flip-flopped its position in the *San Manual Indian Bingo & Casino*, 31 NLRB 138. Suddenly it held that the board has jurisdiction over a tribally-owned enterprise. In our view, those decisions should remain consistent and should not change because a different board may have a different view of the law and what facts should apply.

Our own Navajo Department of Justice attorneys also note that there is a problem of consistency between circuits where different federal circuit courts use different tests on the NLRA's application. In *NLRB vs San Juan Pueblo*, the Tenth Circuit applied a governmental/proprietary distinction to hold the Pueblo could regulate labor relations independent of the NLRA. 276 F.3d 1186 (10th Cir. 2002). However, in *San Manuel Indian Bingo and Casino v. NLRB*, the D.C. Circuit held the NLRA applied, adopting a sliding scale of sovereignty test, and deeming a casino to not be a "traditional act" performed by a government. 475 F.3d 1306 (D.C. Cir. 2007). Then, in two other cases, the Sixth Circuit held the NLRA applied to two tribal casinos. In the first case, the panel adopted the Ninth Circuit's Coeur D'Alene approach to laws of general applicability, holding the NLRA applies to tribal governments unless one of three exceptions exist, including whether "the law touches exclusive rights of self-governance in purely intramural matters," *Donovan v. Coeur D'Alene Tribe*, 751 F.2d 1113, 1116 (1985); *see* also *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (2015). In the second, the panel felt compelled to follow *Little River Band*, despite their disagreement with the approach, but the majority also rejected an argument that the tribe's treaty exempted its casino from the NLRA, despite a Tenth Circuit opinion reaching the opposite conclusion for the Navajo Nation in the context of OSHA. *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (2015). As you can see, the different

[1] National Labor Relations Board. Jurisdictional Standards. Retrieved March 27, 2017 from https://www.nlrb.gov/rights-we-protect/jurisdictional-standards

circuits have applied different tests to determine whether the NLRA applies, creating significant confusion and uncertainty. Further, despite these conflicts within the Sixth Circuit and among the several circuits, the U.S. Supreme Court denied cert., leaving the inconsistent approaches intact.

Therefore, as I stated previously, we need clarity and certainty on this issue and HR 986 can provide a level of certainty so that the NLRB can have a consistent view even if board members change from time to time.

GOVERNMENTAL VS. COMMERCIAL

One troubling trend that we see in the NLRB's approach in the *San Manual Indian Bingo & Casino* matter is that they have taken into consideration whether a tribal enterprise is "fulfilling traditionally tribal or governmental functions" or whether the tribe's activity is more commercial involving non-Indians and substantially affecting "interstate commerce." In fact, as a part of their jurisdictional standards, the NLRB "asserts jurisdiction over the *commercial enterprises* owned and operated by Indian tribes, even if they are located on a tribal reservation."[2] However, they do not assert jurisdiction "over tribal enterprises that carry out *traditional tribal or governmental functions*."[3] This type of consideration is troubling when a federal body can assert its jurisdiction when Indian tribe is participating in an activity the body considers outside a traditionally tribal or governmental function, such as commercial activity. Federal courts also make these distinctions when considering NLRA jurisdiction. We also face a similar test on whether an Indian tribe is eligible for tax exempt bonding. As far as I know, states and local governments do not have to go through this type of test, so why should we.

Navajo as well as other Indian tribes do not have a tax base and it is difficult to implement a tax when unemployment rate hovers above 40-50 percent. As such, Navajo relies on the revenue of its enterprises to fund the tribal government and its services. Revenues from tribal enterprises do not go to the benefit of individual investors like it would in a private corporation, rather it goes toward essential governmental services such as healthcare, education, scholarships, public safety, housing, veterans' benefits, employment, etc. This should carry a lot of weight, but the NLRB dismisses this consideration in *San Manuel Indian Bingo & Casino*.

We must stray from this type of thinking in the federal government. Since Congress passed the Indian Self-Determination Act, Indian tribes have continued to advance and have entered the commercial world in order to help fund a continual shortage of federal funding to provide needed services on the reservation. An Indian tribe's use of tribal enterprise in a commercial arena to help fund needed services should not be used to hamper or punish an Indian tribe.

NAVAJO LAWS

The Navajo Nation has passed its own laws governing labor, including the Navajo Preference in Employment Act (NPEA) that provides protection for its employees. It provides for rules on

[2] *Id*.
[3] *Id*.

preference in employment, wages, health and safety, appeals, hearings, etc. Navajo also has the system in place to handle disputes on those issues through an administrative appeals and judicial court system. A Navajo worker's right to join a union is protected pursuant to the NPEA under 15 N.N.C. § 606, which states as follows:

> § 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.
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> 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.

As a result, the Navajo tribal government has entered into three collective bargaining agreements under our Division of Public Safety, our Executive Branch, and our Head Start department. From my understanding, there are some private sector labor union agreements in place for employees on the Navajo Nation.

Some Indian tribes have developed and passed right to work laws and that should be their prerogative. Navajo does not necessarily have explicit right to work laws, but whether an employee is required to join a union under a collective bargaining agreement has been determined by the vote of the employees. In two of our collective bargaining agreements, the employees voted to require employees of the units to join the union and pay fees. In the other agreement, the employees voted to make it voluntary. Again, each Indian tribe should be able to determine its own direction on labor issues. Therefore, we ask that unions work with tribes just like they do with the federal government and states, and recognize our tribal sovereignty.

CONCLUSION

Thank you for holding this hearing. Again, we support this legislation because it supports our sovereignty and self-determination. It will also greatly simplify and provide clarity to this issue. We appreciate the leadership of this subcommittee and we look forward to working with the Chairman and Ranking Member to pass this important legislation. Thank you. Ahéhee'.