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THE TRIBAL LABOR SOVEREIGNTY ACT: DO INDIAN TRIBES FINALLY HOLD A TRUMP CARD?

Vicki J. Limas*

I. Introduction

In each congressional term since 2007, Republican lawmakers, with some Democratic supporters, have introduced bills titled “Tribal Labor Sovereignty Act.”¹ The proposed legislation would amend the National Labor Relations Act² (“NLRA”) to explicitly exclude from coverage federally recognized Indian tribes³ that operate tribally owned enterprises on tribal lands.⁴ During the previous two administrations, however, a bill reached a vote only once.⁵ The latest identical bills, Senate Bill 63⁶ and House Bill 986,⁷ were introduced January 9 and February 9, 2017, respectively, with bipartisan sponsors in the House and Republican sponsors in the Senate.

The failure of previous bills has been attributed to the organized labor lobby,⁸ and it can be inferred that the bills failed to advance because Democratic lawmakers perceived anti-union or anti-worker motivation, the

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1. H.R. 3413, 110th Cong. (2007); H.R. 1395, 111th Cong. (2009); H.R. 2335, 112th Cong. (2011); S. 1477, 113th Cong. (2013); H.R. 511, 114th Cong. (2015); S. 248, 114th Cong. (2015); H.R. 986, 115th Cong. (2017); S. 63, 115th Cong. (2017).

2. 29 U.S.C. §§ 151-169 (2012).

3. Although the term “Indian nation” is more generically descriptive of the governmental status of the indigenous political groups within the United States, the term “Indian tribe,” in its expansive sense to include groups designated as “tribes,” “bands,” “nations,” “pueblos,” “communities,” etc., will be used in this article because the various federal statutes and the proposed legislation being discussed use the term “Indian tribe” and define it to include such designations.

4. See *infra* text accompanying notes 21-22.

5. In the 114th Congress, the House approved House Bill 511 by a vote of 249 to 177. 161 CONG. REC. H8272 (daily ed. Nov. 17, 2015).

6. S. 63, 115th Cong. (2017).

7. H.R. 986, 115th Cong. (2017).

8. See Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 123, 161 (2016).

latter being the position of organized labor.⁹ In 2015, President Obama was reported to have opposed the legislation unless it mandated that tribal law provide the same protections as the NLRA.¹⁰ In reality, the purpose of the bills was to preserve the sovereignty of Indian tribes, as governments, to adopt labor laws that are appropriate to the needs of their particular governments, which Congress recognized in 1935 when it excluded other governmental entities from coverage of the NLRA.

Support for the Tribal Labor Sovereignty Act has grown in each congressional term, with an increasing showing of bipartisan support from Democrats whose states have tribal presence.¹¹ The Tribal Labor Sovereignty Act may finally pass in the new administration of President Trump. Although the 115th Congress's plate is full this year as the new administration deals with the investigation of Russia's influence on the 2016 election, national security, tax reform, immigration, and health care, the pieces are in place for passage of the Tribal Labor Sovereignty Act this term. The pieces include Republican, pro-business majorities in each house; a president who, as a businessman, has experience with issues tribes face in running their businesses and whose platform emphasized local, as opposed to federal, regulation; and a Secretary of the Interior who, as a congressman, sponsored the Tribal Labor Sovereignty Act and supports tribes' sovereign right of self-determination.

II. *The Tribal Labor Sovereignty Act*

The NLRA, enacted in 1935, governs the relationship between employees and non-governmental employers that operate enterprises affecting commerce. It protects employees' rights to organize, to choose a representative for the purpose of collective bargaining with an employer

9. See, e.g., Dan Frosch & Melanie Trotman, *Native American Casinos Seek Labor Law Exemption; House-Passed Bill Has Bipartisan Support, but Unions Oppose Loss of Workers' Collective-Bargaining Rights*, WALL STREET J. (Nov. 27, 2015), <http://www.wsj.com/articles/native-american-casinos-seek-labor-law-exemption-1448650225> (available by subscription); Testimony of Jack Gribbon, California Political Director, UNITEHERE! International Union, AFL-CIO: Legislative Hearing on H.R. 986, the Tribal Labor Sovereignty Act of 2017 (Mar. 29, 2017), https://edworkforce.house.gov/uploadedfiles/gribbon_-_testimony.pdf.

10. Frosch & Trotman, *supra* note 9.

11. H.R. 2335, 112th Cong. (2011); H.R. 511, 114th Cong. (2015); H.R. 986, 115th Cong. (2017). In the 112th Congress, one Democrat, Dan Boren of Oklahoma, supported House Bill 2335. In the 114th Congress, two Democrats, Michelle Lujan Grisham of New Mexico and Collin Clark Peterson of Minnesota, supported House Bill 511. House Bill 986 is supported by Ms. Grisham and Mr. Peterson and Gwen Moore of Wisconsin.

over terms and conditions of employment, and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹² It also prohibits certain employer and union conduct, known as “unfair labor practices.”¹³ The NLRA established the National Labor Relations Board (“NLRB”), which has rulemaking, investigatory, and adjudicatory authority, with enforcement through the federal courts.¹⁴ The NLRA explicitly does not apply to governmental employers. Its definition of “employer” excludes “the United States or any wholly owned Government corporation, Federal Reserve Banks, or any State or political subdivision thereof.”¹⁵

Not surprisingly, Congress made no mention of Indian tribes in the NLRA. It passed the Wheeler-Howard Act, commonly called the Indian Reorganization Act (“IRA”),¹⁶ one year earlier in 1934. One of the provisions of the IRA allows Indians to organize constitutional forms of government.¹⁷ A scholar explained the common sense reason that Indian tribes were not mentioned in the NLRA:

[T]he motive force for the IRA, namely that tribes could administer their own affairs with less interference from Washington, D.C. . . . was a novel concept to those non-Indians concerned with the administration of Indian affairs at the time. Certainly, it did not envision that tribes would one day become employers Indian tribes were not left out of the NLRA inadvertently; . . . Congress at that time could not imagine that tribes would take part in the national economy in the way they have, or even have the capability to do so.¹⁸

Indian tribes now run governments, and many operate large-scale enterprises to fund their governments. They employ many workers and make laws governing their relationship with those workers. The sponsors of the Tribal Labor Sovereignty Act recognize that Indian tribes are sovereign governmental entities, just like the entities that the NLRA excludes. The

12. 29 U.S.C. § 157 (2012).

13. *Id.* § 158.

14. *Id.* §§ 153-156, 160-161.

15. *Id.* § 152(2).

16. 25 U.S.C.A. §§ 5101-5129 (Westlaw through Pub. L. No. 115-51).

17. *Id.* § 5123.

18. Brian P. McClatchey, *Tribally-owned Businesses Are Not “Employers”*: *Economic Effects, Tribal Sovereignty, and NLRB v. San Manuel Band of Mission Indians*, 43 IDAHO L. REV. 127, 149 (2006).

purpose of the proposed legislation, as stated in the Report accompanying S. 63, is to “amend and clarify the National Labor Relations Act . . . so that federally-recognized Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises that are located on its [sic] Indian lands *would be provided equity and parity under the law with respect to other governmental employers.*”¹⁹

Specifically, the Tribal Labor Sovereignty Act amends the exclusionary language in section 152(2) of the NLRA’s definition of “employer,” quoted above, by adding “‘or any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on Indian lands,’ after ‘subdivision thereof.’”²⁰ It further adds at the end of section 152(2) three subsections with definitions of “Indian tribe,” “Indian,” and “Indian lands.” “Indian tribe” is defined in the proposed legislation as “any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indian because of their status as Indians.” “Indian” is defined as “any individual who is a member of an Indian tribe.” While “Indian lands” is defined as

all lands within the limits of any Indian reservation; any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation; and any lands in the State of Oklahoma that are within the boundaries of a former reservation (as defined by the Secretary of the Interior) of a federally recognized tribe.²¹

Thus, tribes and the enterprises they own and operate on tribal reservations, trusts, or restricted lands would explicitly not be subject to federal regulation under the NLRA; rather, they would be subject to regulation by the tribes themselves.

III. Congressional Reaction to Decisions Applying the NLRA to Indian Tribes

The first bill proposing the Tribal Labor Sovereignty Act²² corresponds to the 2007 D.C. Circuit decision, *San Manuel Indian Bingo & Casino v.*

19. S. REP. NO. 115-3, at 1 (2017) (emphasis added).

20. S. 63, 115th Cong. (2017); H.R. 986, 115th Cong. (2017).

21. S. 63, 115th Cong. (2017); H.R. 986, 115th Cong. (2017).

22. H.R. 3413, 110th Cong. (2007).

NLRB,²³ which upheld the NLRB's application of the NLRA to a casino owned and operated by the San Manuel Band of Serrano Mission Indians on its land in California. The NLRB's 2004 decision²⁴ to interpret the NLRA as applicable to Indian tribes represented a significant departure from its previous longstanding position that, although Indian tribes were not explicitly exempted from coverage by the NLRA, they were implicitly exempt because they are governmental entities.²⁵

In the wake of *San Manuel*, the NLRB has asserted jurisdiction over union elections at tribal casinos and unfair labor practice charges against tribes operating casinos.²⁶ Two cases were appealed to the Sixth Circuit, *NLRB v. Little River Band of Ottawa Indians Tribal Government*²⁷ and *Soaring Eagle Casino & Resort v. NLRB*,²⁸ which held—using different rationales from each other and from *San Manuel*—that the NLRA covered Indian tribes. The *Soaring Eagle* panel disagreed with the *Little River Band* panel's rationale and would actually have found the NLRA not to apply to the tribe, but it was bound by *Little River Band's* precedent.²⁹ Although the courts' rationales differed, they emphasized common facts: that the majority of employees and customers of the tribal casinos were not members of the tribes.³⁰ All three decisions downplayed the governmental status of tribes and the effect that application of the NLRA would have upon the tribes' ability to pass laws or otherwise regulate their labor relations. These decisions rested on faulty legal grounds and deviated from

23. 475 F.3d 1306 (D.C. Cir. 2007). A case in the Ninth Circuit held that the NLRA applied to Indian tribes, in the context of enforcement of a subpoena duces tecum issued by the NLRB against the tribe; the issue of whether the NLRB had jurisdiction over a tribal organization was not decided at the administrative level. *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003).

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

25. *See Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976); *Southern Indian Health Council, Inc.*, 290 N.L.R.B. 436 (1988). *Contra Sac & Fox Indus.*, 307 N.L.R.B. 241 (1992) (The Board applied the NLRA to a tribally owned factory operating off tribal land).

26. *See, e.g., Foxwoods Resort Casino*, 352 N.L.R.B. 771 (2008); *Lytton Rancheria of Cal.*, 361 N.L.R.B. No. 148 (2014); *Little River Band of Ottawa Indians Tribal Gov't*, 361 N.L.R.B. No. 45 (2014); *Soaring Eagle Casino & Resort*, 361 N.L.R.B. No. 73 (2014); *Casino Pauma*, 363 N.L.R.B. No. 60 (2015).

27. 788 F.3d 537 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2508 (2016).

28. 791 F.3d 648 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016).

29. *Id.* at 669.

30. *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1308 (D.C. Cir. 2007); *Little River Band*, 788 F.3d at 540; *Soaring Eagle*, 791 F.3d at 652.

established federal Indian law jurisprudence, for which they have been widely criticized.³¹

The clash between the application of the NLRA to Indian tribes and the tribes' sovereign authority to make laws to regulate their workplaces is illustrated by the Tenth Circuit's decision in *NLRB v. Pueblo of San Juan*,³² which held that the NLRA did not pre-empt a tribal right-to-work law. Although it did not directly address the issue of whether the NLRA applies to tribes, its rationale precludes a conclusion that tribes are covered employers under the NLRA. The NLRA recognizes the authority of a "State or Territory" to enact laws that prohibit compulsory membership in a labor organization.³³ The Tenth Circuit found the Pueblo to be a sovereign "policy-making unit" analogous to a state or territory.³⁴ Such status is incompatible with the status of being an employer covered by the NLRA.³⁵

Finally, application of the NLRA to a particular tribe may be barred by the tribe's rights under a treaty with the United States. Although the Sixth Circuit held in *Soaring Eagle Casino* that the Saginaw Chippewa Tribe's 1864 Treaty with the United States would not be abrogated by application of the NLRA,³⁶ at the same time, the NLRB declined to assert jurisdiction over the Chickasaw Nation's Winstar Casino because it determined that application of the NLRA would abrogate the Nation's rights under two treaties.³⁷

The sponsors of the Tribal Labor Sovereignty Act cite these discordant rulings as grounds for the proposed legislation: "[G]iven the split

31. It is beyond the scope of this article to explain and critique the rationale of these cases. Professor Alex Skibine has done so recently in a comprehensive discussion. Skibine, *supra* note 8, at 130-55. For criticism of the *San Manuel* cases, see, for example, Brian H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007); Vicki J. Limas, *The Tuscaroorganization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467; McClatchey, *supra* note 18. For discussions of the applicability of the NLRA and other federal labor and employment statutes to Indian nations generally, see, for example, Kaighn Smith Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations Within the Reservation*, 2008 MICH. ST. L. REV. 505; Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004).

32. 276 F.3d 1186, 1198 (10th Cir. 2002).

33. 29 U.S.C. § 164(b) (2012).

34. *Pueblo of San Juan*, 276 F.3d at 1200.

35. See Limas, *supra* note 31, at 481.

36. *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 661 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016).

37. *Chickasaw Nation D/B/A Winstar World Casino*, 362 N.L.R.B. No. 109, at 5 (2015).

interpretations from the Circuit courts and the Board, legislation is needed to ensure clarity and parity in the application of the NLRA to Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises that are located on its [sic] Indian lands.”³⁸

IV. Indian Tribes Are Not Like Private-Sector Employers

It is no coincidence that the NLRB’s reversal of position and the resulting litigation target tribal casinos. Gross revenues from Indian gaming have grown from \$24.9 billion in 2006 to \$29.9 billion in 2015.³⁹ They employ hundreds of thousands of workers,⁴⁰ many of whom are not Indian or not members of the tribe that employs them. Union representation of workers is declining continuously.⁴¹ Commentators have noted that tribal casino workers may be viewed as “easy targets” by organized labor “turn[ing] to the service sector to shore up its dwindling base”⁴² and desirous of “rais[ing] money by assessing mandatory dues.”⁴³

Organized labor views tribal casinos the same way it does casinos owned and operated by the private sector, whose employees are largely organized.⁴⁴ But, unlike casinos that are operated by private entities for the purpose of generating wealth to individuals and corporate shareholders, tribal casinos, by law, must be owned and operated by Indian governments for the purpose of generating revenue for their governmental infrastructures and for services to their citizens. Indian tribes’ gaming operations are governed by the Indian Gaming Regulatory Act⁴⁵ (“IGRA”), which requires that “the Indian tribe will have the sole proprietary interest and

38. S. REP. NO. 115-3, at 3 (2017).

39. *Graph: Gross Gaming Revenue Trending*, NAT’L INDIAN GAMING COMM’N, https://www.nigc.gov/images/uploads/reports/2015_Gross_Gaming_Revenue_Trending.pdf (last visited Sept. 23, 2017).

40. McClatchey, *supra* note 18, at 132 (citation omitted).

41. *Union Members—2016*, U.S. DEP’T LABOR (Jan. 26, 2017), <https://www.bls.gov/news.release/union2.nr0.htm> (reporting the number of unionized workers across the country has declined by 3.1 million since 1989; the percentage of the American workforce that was unionized in 2016 was 10.7, compared to 20.1 in 1989).

42. See McClatchey, *supra* note 18, at 133, 132.

43. Robert Odawi Porter, *Unions See Indian Casinos and Think: Jackpot*, WALL ST. J. (Dec. 6, 2015), <http://www.wsj.com/articles/unions-see-indian-casinos-and-think-jackpot-1449445336> (available by subscription).

44. See, e.g., *Gaming: 100,000 Workers Strong*, UNITEHERE!, <http://unitehere.org/industry/gaming> (last visited Sept. 23, 2017) (stating that UNITEHERE! represents 100,000 gaming industry employees across the country).

45. 25 U.S.C. §§ 2701-2721 (2012).

responsibility for the conduct of any gaming activity.”⁴⁶ The IGRA further provides that net revenue from such operations be used only “to fund tribal government operations or programs;” “to provide for the general welfare of the Indian tribe and its members;” “to promote tribal economic development;” “to donate to charitable organizations;” or “to help fund operations of local government agencies.”⁴⁷ Congress’s purpose in enacting the IGRA 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.”⁴⁸

Indian tribes cannot raise revenue through taxation of their citizens, as can federal, state, and local governments.⁴⁹ Congress recognized this fact in enacting the IGRA and other legislation such as the Indian Self-Determination and Education Assistance Act⁵⁰ (“ISDEAA”), which “gives tribes the right to assume the responsibility, and associated funding, to carry out programs, functions, services and activities . . . that the United States government would otherwise be obliged to provide to Indians and Alaska Natives.”⁵¹ Since the Nixon administration in the 1970s, federal policy and legislation have been geared toward providing opportunities for tribes to take control of their own destinies as governments.⁵²

However, federal regulation of Indian tribes’ economic development activities, particularly through application of the NLRA, runs counter to the federal policy of tribal self-determination and the tribes’ ability to govern. Like states, most tribes have enacted laws governing employment relations on lands within their jurisdiction and the terms of tribal employment. These laws may include preference laws to alleviate unemployment and a lack of training on tribal lands; collective bargaining laws that do not allow strikes in order that government services will not be disrupted by labor discord; right to work laws like that of the San Juan Pueblo discussed above; and procedures and remedies tailored to a tribe’s specific situation. The rights and responsibilities afforded by these laws will differ from those afforded

46. *Id.* § 2710(b)(2)(A).

47. *Id.* § 2710(b)(2)(B).

48. *Id.* § 2702(1).

49. See generally Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

50. 25 U.S.C.A. §§ 5301-5310, 5321-5332, 5345-5347, 5351-5354, 5361-5368, 5381-5399 (Westlaw through Pub. L. No. 115-51).

51. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 4 (2014-2015).

52. *Id.* at 3-5.

by the NLRA. Indeed, the disputes between the NLRB and the San Juan Pueblo, San Manuel Band and Little River Band cited above involved the tribes' attempts to enforce their own labor laws.⁵³ Robert J. Welch, Chairman of the Viejas Band of Kumeyaay Indians, testified at a recent hearing on the Tribal Labor Sovereignty Act about his tribe's experience with the inordinate costs and labor disruptions caused when an employee petitioned under the NLRA to decertify the union that had been representing tribal employees under tribal labor laws, and when a union representing tribal employees decided to abandon adherence to the tribe's labor law and filed an unfair labor practice charge under the NLRA.⁵⁴ In addition, application of the NLRA could run afoul of more general tribal powers such as the right to exclude non-members and impose traditional forms of punishment, such as banishment, on tribal members, as Brian Cladoosby, President of the National Congress of American Indians, testified.⁵⁵

Sponsors of the Tribal Labor Sovereignty Act refer to Congress's recognition in the ISDEAA and other federal legislation that tribes must be able to exercise authority in their economic development activities and that deference must be given to "tribal personnel, wages, and labor laws in carrying out programs."⁵⁶ In other words, tribal laws, rather than the NLRA, must apply to tribal enterprises on tribal lands.

V. The Trump Administration and the Tribal Labor Sovereignty Act

The extent to which President Trump understands the sovereign status of Indian tribes, their government-to-government relationship with the United States, and the role of their business enterprises in generating government

53. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1188 (10th Cir. 2002); San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1314 (D.C. Cir. 2007); NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 540-41 (6th Cir. 2015).

54. Testimony of Robert J. Welch, Jr., Chairman, Viejas Band of Kumeyaay Indians: Hearing on H.R. 986 – "Tribal Labor Sovereignty Act of 2017" (Mar. 29, 2017), https://edworkforce.house.gov/uploadedfiles/welch_-testimony_3.29.pdf; see also Testimony of Nathaniel Brown, Navajo Nation Council Member: Hearing on HR 986 – Tribal Labor Sovereignty Act of 2017, at 4 (Mar. 29, 2017), https://edworkforce.house.gov/uploadedfiles/nathaniel_brown_testimony_on_tlsa_final.pdf (discussing the need for "unions [to] work with tribes just like they do with the federal government and states").

55. See Statement of the Honorable Brian Cladoosby, President of the National Congress of American Indians and Chair of the Swinomish Indian Tribal Community: Hearing on H.R. 986 – Tribal Labor Sovereignty Act of 2017, at 6 (Mar. 29, 2017), https://edworkforce.house.gov/uploadedfiles/cladoosby_-_testimony_3.29.pdf.

56. S. REP. NO. 115-3, at 3 (2017).

income is not entirely clear. Mr. Trump's most direct remarks on record about tribal sovereignty occurred in 1993, when he testified in a congressional hearing on implementation of the IGRA,⁵⁷ which involved law enforcement issues in Indian gaming.⁵⁸ At that time, Mr. Trump was the largest investor in the Atlantic City casino business,⁵⁹ owning three casinos there.⁶⁰ Mr. Trump's testimony focused on what he perceived to be an unfair business advantage posed by tribal casinos. During that testimony, he averred that an Indian tribe "is only a sovereign nation in that Indians don't have to pay tax."⁶¹ He also alleged that organized crime was "rampant" in Indian casinos⁶² and tribes were not capable of protecting their businesses;⁶³ questioned the "Indian blood" of a Connecticut tribe, saying, "they don't look like Indians to me;"⁶⁴ and suggested that the tribe should have to share its gaming revenues with all Indians.⁶⁵ The tone of Mr. Trump's rhetoric, which was criticized by the legislators,⁶⁶ contrasted with the more measured tone of Mr. Trump's prepared statement, in which he stated he was not suggesting organized crime had infiltrated Indian casinos.⁶⁷ He also acknowledged in the prepared statement his understanding that "federal laws like the Taft-Hartley, like the jurisdiction of the National Labor Relations Board do not apply. They also cease to exist at the tribal land doorstep."⁶⁸ However, he made the latter point critically, ostensibly out of concern for workers' rights.⁶⁹ Mr. Trump's

57. 25 U.S.C. §§ 2701-2721 (2012).

58. *Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources*, 103rd Cong. 8 (1993) (prepared statement of Hon. Bill Richardson, Chair) [hereinafter *Implementation of Indian Gaming Regulatory Act: Oversight Hearing*].

59. *Id.* at 163 (statement of Hon. Robert G. Torricelli, Representative in Congress from New Jersey).

60. *Id.* at 179 (prepared statement of Donald Trump, President, Trump Organization).

61. *Id.* at 176, 234 (statement of Donald Trump).

62. *Id.* at 175 (statement of Donald Trump).

63. *Id.* at 187 (statement of Donald Trump).

64. *Id.* at 242 (statement of Donald Trump).

65. *Id.* at 250, 251 (statement of Donald Trump).

66. *Id.* at 235, 237-238, 239-240 (statement of Donald Trump). Congressman George Miller, Chairman of the Committee on Natural Resources, remarked, "In my 19 years on this committee, I don't know when I have heard more irresponsible testimony than I just heard from this panel." *Id.* at 239 (statement of George Miller).

67. *Id.* at 182 (prepared statement of Donald Trump, President, Trump Organization).

68. *Id.* at 184 (statement of Donald Trump).

69. *Id.*

prepared statement also mentioned his federal lawsuit challenging the constitutionality of the IGRA.⁷⁰

Prior to and following Mr. Trump's testimony, however, he or his business representatives approached various tribes to partner in their casino ventures. When confronted in the hearing with affidavit evidence from the chairman of the Agua Caliente Band of Cahuilla Indians that Mr. Trump had initiated a meeting with him and other tribal officials to discuss partnering in a casino venture, Mr. Trump denied that he had done so, but admitted that others in the private gaming industry had reached out to tribes.⁷¹ Newspaper reports document several later attempts: In 1997, Mr. Trump reportedly agreed to fund the Paucatum Indians' research to obtain federal recognition in exchange for "a management fee based on a percentage of [their] future casino revenues,"⁷² but the deal fell through when the Paucatum united with the Eastern Pequots, who had been negotiating with other investors.⁷³ In 2006, Mr. Trump's representatives proposed unsuccessfully to partner with the Narragansett Indian Tribe.⁷⁴ In 2000, Mr. Trump did enter into a management agreement on a casino owned by the Twenty-Nine Palms Band of Mission Indians in California, which opened in 2004, with his contract reportedly securing him 30% of the casino's revenue.⁷⁵ The tribe bought out his interest in 2004.⁷⁶

70. *Id.* at 185; see also Wayne King, *Trump, in a Federal Lawsuit, Seeks to Block Indian Casinos*, N.Y. TIMES (May 4, 1993), <http://www.nytimes.com/1993/05/04/nyregion/trump-in-a-federal-lawsuit-seeks-to-block-indian-casinos.html?pagewanted=print>. For a brief discussion of the history of this lawsuit, in which no decision was issued, see Neil Scott Cohen, Note, *In What Often Appears to Be a Crapshoot Legislative Process, Congress Throws Snake Eyes When It Enacts the Indian Gaming Regulatory Act*, 29 HOFSTRA L. REV. 277, 294, n.129 (2000).

71. *Implementation of Indian Gaming Regulatory Act: Oversight Hearing*, *supra* note 58, at 251-66 (statement of Donald Trump).

72. Shawn Boburg, *Donald Trump's Long History of Clashes with Native Americans*, WASH. POST (July 25, 2016), https://www.washingtonpost.com/national/donald-trumps-long-history-of-clashes-with-native-americans/2016/07/25/80ea91ca-3d77-11e6-80bc-d06711fd2125_story.html?utm_term=.a8647ec64069.

73. Rick Green, *Judge Orders Eastern Pequot to Testify: Trump Lawyer Charges Fraud in Casino Battle*, HARTFORD COURANT (Sept. 11, 2004), http://articles.courant.com/2004-09-11/news/0409110069_1_tribe-trump-promised-land-casino-federal-recognition.

74. Katherine Gregg & Mark Reynolds, *Jockeying Intensifies on Casino Legislation*, PROVIDENCE J., May 24, 2006, at A1.

75. Matt Pearce, *Outbid, Outhustled, Outmuscled: Donald Trump Has Tried to Break into Southern California, but His Attempts Have Mostly Been Thwarted or Abandoned*, L.A. TIMES (Oct. 23, 2016), <http://www.latimes.com/politics/la-na-pol-trump-california-20161017-snap-20161017-snap-story.html>.

Mr. Trump's self-serving statements as a casino owner and his subsequent business dealings with tribes indicate a "complicated" relationship with Indian gaming, as characterized in a recent news story about the Wilton Rancheria's efforts to put land into trust to build a casino near Sacramento, California.⁷⁷ A spokesperson from another California gaming tribe was quoted in that story as saying,

"A lot will depend on who will be secretary of the interior and who will be chairman of the National Indian Gaming Commission. . . . Will there be less regulation and bureaucratic inertia, or will he favor doing away with gaming exclusivity and even tribal sovereignty as analogous to affirmative action and preferences? The fact that (Trump) has a casino background means he may be hands-on."

Indeed, Mr. Trump's hearing statements, as well as his lawsuit challenging IGRA, might suggest a troubling view that IGRA (and perhaps, by extension, other Indian legislation) provides unfair, racially based preferences to Indian tribes rather than an understanding of the government-to-government relationship between tribes and the federal government and the latter's trust responsibility to tribes. However, another news story reported that Trump advisors assured Jason Giles, executive director of the National Indian Gaming Association, and other tribal officials that Mr. Trump's previous statements "aren't representative of the current administration."⁷⁸

While President Trump has detractors among Indian people, particularly those angered by his immediate green light on completion of the Dakota Access Pipeline and promise to build a wall on the Mexican border,⁷⁹ others

76. *Id.*

77. Mark Anderson, *Elk Grove Casino May Face Obstacles Under Trump*, SACRAMENTO BUS. J. (Dec. 8, 2016), <https://www.bizjournals.com/sacramento/news/2016/12/08/elk-grove-casino-may-face-obstacles-under-trump.html?s=print>.

78. Philip Marcelo, *Tribes Hope Trump's 'America First' Helps First Americans*, AP NEWS (Feb. 20, 2017), <https://www.apnews.com/1ea1afcdeb5d449480a6e3f8fa5c3e9b/Tribes-hope-Trump's-'America-first'-helps-first-Americans>.

79. *Id.*; see also Maya Fitzpatrick & Rebecca Hersher, *'He Needs to Listen to Us.'* Protesters Call on Trump to Respect Native Sovereignty, TWO-WAY: BREAKING NEWS FROM NPR (Mar. 10, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/10/519628736/he-needs-to-listen-to-us-protesters-call-on-trump-to-respect-native-sovereignty>.

are buoyed by his emphasis on infrastructure rebuilding, energy development, and diminished federal regulation.⁸⁰

President Trump's own views on the proposed Tribal Labor Sovereignty Act are difficult to predict. His business holdings no longer include casinos.⁸¹ He is familiar with the tension in labor-management relations.⁸² He favors local regulation. Those factors should work in tribes' favor.

On the other hand, President Trump's Secretary of the Interior, Ryan Zinke, who reportedly enjoys fairly wide support in Indian Country,⁸³ has voiced a commitment to tribal sovereignty and self-determination, and is on record for supporting the Tribal Labor Sovereignty Act. Prior to his appointment, Secretary Zinke was a representative from Montana and a sponsor of the proposed legislation.⁸⁴

A week following his confirmation, Secretary Zinke testified along with a number of tribal officials before the Senate Committee on Indian Affairs oversight hearing on priorities for the Trump administration. Secretary Zinke opened his remarks by stating, "Regardless of political party, our duty as Americans is to uphold our trust responsibilities and consult and collaborate on a meaningful basis on a government-to-government basis with Tribes from Maine to Alaska."⁸⁵ With regard to tribal economic

80. See generally Marcelo, *supra* note 78; Arren Kimbel-Sannit, *Tribes Eye Trump: Some Welcoming, Some Wary of New Administration*, CRONKITE NEWS: ARIZONA PBS (Jan. 23, 2017), <https://cronkitenews.azpbs.org/2017/01/23/tribes-eye-trump-some-welcoming-some-wary-of-new-administration/>; Alex DeMarban & Lisa Demer, *What Will Federal Policies Affecting Alaska Natives Look Like Under the Trump Administration?*, ALASKA DISPATCH NEWS (Nov. 13, 2016), <https://www.adn.com/alaska-news/2016/11/12/native-leaders-losing-ally-in-obama-see-cause-for-worry-and-hope-with-a-president-trump/>.

81. Aaron Claverie, *Trump Presidency a Roll of the Dice for Local Tribes*, PRESS-ENTERPRISE (Riverside, Cal.) (Dec. 29, 2016, 7:46 A.M.), <http://www.pe.com/2016/12/29/trump-presidency-a-roll-of-the-dice-for-local-tribes/>; *Trump Taj Mahal Casino Out of Bankruptcy, into Carl Icahn's Hands*, WALL ST. J. (Feb. 26, 2016), <https://www.wsj.com/articles/trump-taj-mahal-casino-out-of-bankruptcy-into-carl-icahn-hands-1456545458> (available by subscription).

82. See *Trump Taj Mahal Casino Out of Bankruptcy, into Carl Icahn's Hands*, *supra* note 81; Wayne Parry, *Trump Plaza Closing Beach Bar, Citing Union Costs*, NEWSOK (Aug. 31, 2012), <http://newsok.com/article/feed/426606>. See also news articles about Trump properties collected at UNITEHERE!, <http://unitehere.org/> (last visited Sept. 23, 2017) (search in search bar for "Trump properties").

83. See Erin Mundahl, *Tribes Hopeful for Good Relationship with New Interior Secretary*, INSIDESOURCES (Mar. 3, 2017), <http://www.insidesources.com/tribes-hopeful-new-interior-secretary-ryan-zinke/>.

84. Tribal Labor Sovereignty Act, H.R. 511, 114th Cong. (2015).

85. Testimony of Ryan K. Zinke, Secretary, United States Department of the Interior, Before the U.S. Senate Committee on Indian Affairs 1 (Mar. 8, 2017), <https://www.indian>

development and the importance of tribal self-determination, Secretary Zinke said,

[T]he Administration has an opportunity to foster a period of economic productivity through improved infrastructure and expanded access to an all-of-the-above energy development approach. I fully understand that not all nations have access to energy resources or choose to develop them and I respect their position. As I have mentioned earlier, sovereignty should mean something and the decision to develop resources is one that each tribe must make for itself.⁸⁶

During the hearing, tribal officials identified passage of the Tribal Labor Sovereignty Act as a priority. Keith Anderson, Vice Chairman of the Shakopee Mdewakanton Sioux Community, listed among his priorities that Mr. Zinke

take the lead within the Trump Administration to secure early enactment of the Tribal Labor Sovereignty Act of 2017 . . . [and] restore seven decades of legal precedent by treating tribal government employers the same as all other sovereign governmental employers. This bill is not about labor unions, it is about tribal sovereignty, about our tribal right to set our own laws for our own employees on our own lands.⁸⁷

Jefferson Keel, Lieutenant Governor of the Chickasaw Nation, concurred with Mr. Anderson's statement about the proposed legislation and the importance of "strengthening the federal law's provision of parity to tribal sovereigns."⁸⁸ When Secretary Zinke was asked by Senator Jerry Moran, sponsor of the Tribal Labor Sovereignty Act in the Senate, to commit to seeing that the administration supports and enacts it once it passes through

senate.gov/sites/default/files/upload/3.8.17%20Ryan%20Zinke%20Testimony.pdf.

86. *Id.* at 2.

87. Statement of the Honorable Keith B. Anderson, Vice Chairman, Shakopee Mdewakanton Sioux Community, Senate Committee on Indian Affairs 4 (Mar. 8, 2017), <https://www.indian.senate.gov/sites/default/files/upload/3.8.17%20Keith%20Anderson%20Testimony.pdf>

88. Testimony of Chickasaw Nation Lieutenant Governor Jefferson Keel Before the U.S. Senate Committee on Indian Affairs 2 (Mar. 8, 2017), <https://www.indian.senate.gov/sites/default/files/upload/3.8.17%20Jefferson%20Keel%20Testimony.pdf>.

both houses, he replied, “Absolutely, sir. I was glad to sponsor it. I look forward to progressing.”⁸⁹

Secretary Zinke is solidly on board with making the Tribal Labor Sovereignty Act law. Presumably he was appointed by President Trump for his expertise in matters affecting Indian Country and consequently President Trump will listen to his advice.

VI. Conclusion

President Trump has the opportunity to make a significant contribution to economic development and self-determination in Indian Country through passage of the Tribal Labor Sovereignty Act. A mere clarification of a definition would afford tribes assurance that their ability to enact and enforce their labor relations laws would not be interfered with by the federal government or outside parties. After ten years, Republicans control both houses and the presidency, and the legislation has Democratic allies as well. President Trump’s influence would be key, and he will be wisely advised by Secretary Zinke on this issue.

President Trump’s commitment to building infrastructure should not be limited to brick and mortar only. The strengthening of Indian tribes’ sovereign ability to make and enforce laws and exercise authority over their lands will necessarily strengthen tribal infrastructures and therefore self-sufficiency.

89. *Streaming Video: Oversight Hearing on “Identifying Indian Affairs Priorities for the Trump Administration,”* U.S. SENATE COMM. ON INDIAN AFFAIRS (Mar. 8, 2017), at 1:22:38, <https://www.indian.senate.gov/hearing/oversight-hearing-identifying-indian-affairs-priorities-trump-administration1>.