

Tribal Labor Sovereignty: Current Law and Proposed Legislation

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In the early 2000s, a legal conflict arose between *tribal sovereignty*—the precept that *federally recognized Tribes* (Tribes) maintain a pre-constitutional measure of self-governance—and certain *collective bargaining rights* codified in the [National Labor Relations Act](#) (NLRA). Among other things, the NLRA gives employees the right to collectively bargain with employers and requires employers to bargain with employees in good faith. The NLRA applies to *employers*, which it defines to exclude “the United States or any wholly owned government corporation or any state or political subdivision thereof,” but both the definition of employer and the Act as a whole are silent as to Tribes.

In May 2004, the National Labor Relations Board (NLRB), which is charged with enforcing the NLRA, held in *San Manuel Indian Bingo & Casino* that a tribally owned casino had engaged in an unfair labor practice in violation of the NLRA. The Tribe that owned the casino challenged the NLRB’s jurisdiction, asserting among other things that the NLRA did not cover tribally operated businesses on tribal reservations. The NLRB disagreed with the Tribe: in its view, the NLRA, as a statute of general applicability, applied to Tribes on the same basis as non-tribal entities and did not impermissibly impede tribal sovereignty. The Tribe petitioned the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) for review, and the NLRB cross-filed, asking the court to enforce the NLRB’s order. In 2007, the D.C. Circuit Court reviewed then-existing Supreme Court case law and [upheld](#) the NLRB’s jurisdiction.

Beginning in 2007, virtually identical legislation known as the Tribal Labor Sovereignty Act has been introduced in each Congress. These bills, including [H.R. 1723](#) and [S. 1301](#) in the 119th Congress, propose to adjust the NLRB’s jurisdiction by adding tribal governments and tribal enterprises on Indian lands to a list of entities that are not considered employers for purposes of the NLRA.

Legal Background

For nearly 30 years prior to 2004, the NLRB had determined on a case-by-case basis whether certain tribal enterprises were “governmental entities,” which the NLRB treated as analogous to the “political subdivisions” of states (a category exempt from the [statutory definition of “employer”](#) in Section 2(2) of the NLRA). In *Fort Apache Timber Co.* (1976), the NLRB considered the NLRA’s applicability to a tribally owned and operated mining company located on tribal land. The board found that a tribal

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government entity “acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe’s own reservation” was not an employer within the meaning of the NLRA. Similarly, in *Southern Indian Health Council, Inc.* (1988), the NLRB determined that a tribally operated nonprofit health clinic on tribal land involved governmental entities that were “implicitly exempt” from the NLRA’s definition of “employer.”

A few years later, the NLRB expressly limited the *Fort Apache* and *Southern Indian* reasoning to cases in which the tribal governmental enterprise operated on tribal land. In *Sac & Fox Industries* (1992), the NLRB determined that a tribally operated corporation located off-reservation was subject to the NLRA. The NLRB supported this distinction by citing two cases for the proposition that statutes of general applicability should apply to Tribes unless Congress has signaled otherwise: *Federal Power Commission v. Tuscarora Indian Nation* (a 1960 Supreme Court case) and *Donovan v. Coeur d’Alene Tribal Farm* (a 1985 U.S. Court of Appeals for the Ninth Circuit case (Ninth Circuit)).

Twelve years later, in 2004, the NLRB abandoned its *Fort Apache* and *Southern Indian* holdings entirely, announcing that both the location-based distinction and the idea that tribal governments were implicitly excluded from the NLRA’s definition of employer were “faulty.” In *San Manuel Indian Bingo & Casino* (2004), the NLRB said that *Sac & Fox* was correct to apply the NLRA to off-reservation tribal entities but had failed to recognize that *Tuscarora* required the same analysis regardless of location. The NLRB explained that Tribes did not fall within the statutory exemption for governmental entities or any of the other statutory NLRA exemptions and that Congress’s silence (when it had expressly excluded Tribes from other statutory schemes) led “to the inescapable conclusion that Congress purposely chose not to exclude Indian tribes from the Act’s jurisdiction.” Thus, the NLRB construed a general rule that, given congressional silence in a statute of general applicability, Tribes should be treated on the same basis as non-tribal entities. Based on the Ninth Circuit’s *Coeur d’Alene* opinion, the Board recognized three exceptions to that general rule:

1. the law “touches exclusive rights of self-government” in matters purely internal to the Tribe and its governance;
2. the application of the law would abrogate treaty rights; or
3. there is “proof” in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.

In its *San Manuel* decision, the NLRB deemed none of these exceptions relevant to the San Manuel casino’s situation. Because the casino employed a large percentage of non-Native employees and marketed its entertainment primarily to non-Native customers, the NLRB held it was not a governmental entity engaged in matters purely internal to the Tribe and no treaty or legislative history suggested entitlement to an exemption from the NLRA. Instead, the NLRB noted that the Supreme Court had “consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.”

Reviewing the *San Manuel* decision, the D.C. Circuit upheld the NLRB’s conclusions but analyzed the issues somewhat differently. Without adopting the Ninth Circuit’s *Coeur d’Alene* framework, the court analyzed Supreme Court precedent and concluded that the “Supreme Court’s concern for tribal sovereignty distinguishes among the different activities tribal governments pursue, focusing on acts of governance as the measure of tribal sovereignty.” When it came to the casino, the court reasoned that, although the profits funded tribal governance activities, any “impairment of tribal sovereignty” from applying the NLRA would be “negligible in this context, as the Tribe’s activity was primarily commercial.”

As a practical matter, the D.C. Circuit’s *San Manuel* decision cemented a rubric under which most tribal gaming operations would likely be treated as subject to the NLRA’s requirements regarding collective bargaining and labor organizing. In practice, this meant that Congress’s federal labor relations statute

generally supplanted (or preempted) tribal labor codes or agreements that might otherwise govern. Subsequent administrative decisions have continued to hold that the NLRA applies to tribal enterprises absent evidence that a specific Tribe or enterprise warrants an exception. For example, in *Chickasaw Nation d/b/a Winstar World Casino* (2015), the NLRB found that asserting jurisdiction over the Chickasaw Nation would abrogate the Nation’s 1830 and 1866 treaty rights, including a right to be “secure” “from and against all laws” except those enacted by Congress pursuant to its authority over Indian affairs. (No party argued that Congress enacted the NLRA pursuant to that authority.)

Tribal Labor Sovereignty Act Bills

To date, legislation introduced in Congress to address the NLRA’s applicability to tribal enterprises has focused on reversing the NLRB’s 2004 *San Manuel* formulation and the D.C. Circuit’s 2007 affirmation of that position. In the 110th Congress, the Tribal Labor Sovereignty Act of 2007, [H.R. 3413](#), would have amended the statutory definition of *employer* in the NLRA. Whereas the current statutory definition lists several exceptions—for example, it states that the term *employer* “shall not include the United States or any wholly owned Government corporation”—H.R. 3413 and its subsequent iterations would add another exception: “any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands.” In other words, Tribal Labor Sovereignty Act bills would make the NLRA’s employer provisions inapplicable to tribally owned enterprises on “Indian lands,” defined in the bill to include (1) reservations, (2) other lands held in trust by the United States for the benefit of Tribes or their members, and (3) certain lands in Oklahoma. The [same bill](#) was introduced in the 111th Congress, and other Members of the House have introduced bills with the [same name](#) in each subsequent Congress. Starting in the 113th Congress, a [companion bill](#) has been regularly introduced in the Senate. **Table 1** at the end of this section contains links to each introduced version of the Tribal Labor Sovereignty Act.

In the 112th Congress, the House Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing titled “[Examining Proposals to Strengthen the National Labor Relations Act](#),” which among other things reviewed relevant NLRB decisions and examined the Tribal Labor Sovereignty Act of 2011, [H.R. 2335](#). Individuals providing testimony before the subcommittee included a tribal leader, a staff attorney from the National Right to Work Legal Defense Foundation, a labor attorney, and an economist from the Hudson Institute.

In the 114th Congress, the House HELP Subcommittee held another [legislative hearing](#) on the Tribal Labor Sovereignty Act of 2015, [H.R. 511](#). Individuals providing testimony before the subcommittee included two tribal leaders, a staff attorney from the Native American Rights Fund, and a tribal casino employee and bargaining committee member. On November 17, 2015, the House of Representatives passed H.R. 511 by a vote of 249 to 177. The Senate Committee on Indian Affairs favorably reported a companion bill, [S. 248](#), but the full Senate did not take it up.

In the 115th Congress, the full House Committee on Education and the Workforce held a [hearing](#) on the Tribal Labor Sovereignty Act of 2017, H.R. 986, and, by a vote of 22 to 16, issued [House Report 115-324](#). That report stated that the bill’s purpose was to protect “tribal sovereignty and the right to tribal self-governance” by codifying “the standard of the National Labor Relations Board . . . prior to 2004,” which excluded tribally owned enterprises on tribal lands from the NLRA’s coverage.

Table 1. Tribal Labor Sovereignty Act Legislation Introduced in Congress

Congress	House Bill	Senate Bill
119 th	H.R. 1723	S. 1301
118 th	H.R. 937	S. 1328

Congress	House Bill	Senate Bill
117 th	H.R. 4839	S. 3454 ; S. 2867
116 th	H.R. 779	S. 226
115 th	H.R. 986	S. 63
114 th	H.R. 511	S. 248
113 th	H.R. 1226	S. 1477
112 th	H.R. 2335	
111 th	H.R. 1395	
110 th	H.R. 3413	

Source: CRS, based on information from [Congress.gov](#).

Considerations for Congress

If it chooses to act, Congress may resolve the question of to what extent workers in tribally owned or operated enterprises receive federal protections. Framed differently, congressional action could clarify whether the NLRA serves as a limit on tribal sovereignty, providing a floor below which Tribes may not offer fewer worker protections. Where the NLRA does not apply, Tribes may enact and enforce their own laws governing union organizing and other labor relations issues. Some commentators have noted [challenges that may emerge](#) if tribal labor codes vary widely or lack robust safeguards, or complicate the jurisdictional analysis. Others have noted that the issue commonly arises in the gaming context, and suggest amending the Indian Gaming Regulatory Act instead of the NLRA. The introduced Tribal Labor Sovereignty Act bills would extend a tribal enterprise exception only to entities operating on certain types of tribal lands, with the NLRA still applying to enterprises operated by Tribes without lands or on most off-reservation lands. Other legislative options could include distinguishing among the types of enterprises, with the NLRA applying to more commercial ventures but not to more inherently governmental ones.

The following considerations may also be relevant to potential legislation in this area:

- Definition of Indian lands.** As introduced, the Tribal Labor Sovereignty Act bills' definition of "Indian lands" refers to "former reservations" in Oklahoma. Following the Supreme Court's decision in [McGirt v. Oklahoma](#), 591 U.S. 894 (2020), and subsequent decisions applying that case, certain tribal reservations once considered disestablished are now understood as continuing to exist for certain purposes (such as federal criminal jurisdiction). Congress may consider whether or which tribal lands in Oklahoma would now fall under the "reservation" language elsewhere in the bill, and whether "former reservations," which may imply that such reservations no longer exist, accurately describes those lands.

- **Agency deference.** The D.C. Circuit’s decision in *San Manuel* relies in part on an instruction in *Chevron U.S.A. v. Natural Resources Defense Council* to defer to agency regulations that reasonably interpret silence or ambiguity in statutes administered by the agency. Specifically, the court deferred to the NLRB’s determination that Tribes and tribal enterprises were included in the NLRA’s definition of employer. In 2024, however, the Supreme Court, in *Loper Bright Enterprises v. Raimondo*, *overturned* the *Chevron* deference framework, ruling that courts are no longer to defer to agencies’ interpretations of statutes and instead must determine the “best meaning” of a statute in the first instance. *San Manuel* remains good law after *Loper*, which left undisturbed prior cases decided under *Chevron*. In certain circumstances, however—for example, if the NLRB were to change its interpretation of the NLRA, or if the U.S. Supreme Court or the D.C. Circuit sitting *en banc* were to take up the issue—a future court could potentially decide that tribal enterprises are not employers within the “best meaning” of the NLRA. Congress could watch how future courts rule on this question, or it could enact legislation to ensure that its preferred definition of employer—whether or not that includes all or some tribal entities, in some or all locations or instances—is in place.

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