AFL-CIO

LEGISLATIVE ALERT

February 7, 2017

The Honorable John Hoeven
Chair
Senate Indian Affairs Committee
838 Hart Senate Office Building
Washington, DC 20510

The Honorable Tom Udall
Vice Chair
Senate Indian Affairs Committee
838 Hart Senate Office Building
Washington, DC 20510

Dear Chair Hoeven and Vice Chair Udall:

The AFL-CIO urges you to oppose the Tribal Labor Sovereignty Act (S. 63), which would deny protection under the National Labor Relations Act to a large number of workers who are employed by tribal-owned and -operated enterprises located on Indian land. Among these workers are over 600,000 tribal casino workers, the vast majority of whom are not Native Americans. In recent years, there has been a substantial expansion of enterprises that would be impacted by this legislation—not only casinos, but mining operations, power plants, smoke shops, saw mills, construction companies, ski resorts, high-tech firms, hotels, and spas. These are commercial businesses competing with non-Indian enterprises. The Tribal Labor Sovereignty Act, as proposed, would strip all workers in these many commercial enterprises of their rights and protections under the NLRA.

The bill, introduced by Senator Moran, seeks to overturn a decision by the National Labor Relations Board (NLRB) in San Manuel Indian Bingo and Casino, 341 NLRB No. 138 (2004), which applied the National Labor Relations Act (NLRA) to a tribal casino enterprise.

In San Manuel, the NLRB looked to Supreme Court and circuit court precedent to articulate a test for whether the NLRB should assert jurisdiction over tribal enterprises, whether located on tribal lands or outside them. (Before San Manuel, NLRB jurisdiction was determined based solely on location: on tribal land, no jurisdiction, off tribal land, jurisdiction. Under the San Manuel test, the NLRA will not apply if its application would "touch exclusive rights of self-governance in purely intramural matters." Nor will the NLRA apply if it would "abrogate Indian treaty rights." The Board in San Manuel also considered other factors, including that the casino in question was a typical commercial enterprise, it employed non-Native Americans, and it catered to non-Native American customers.

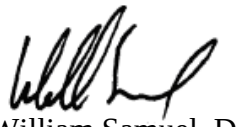
In San Manuel, the Board concluded that applying the NLRA would not interfere with the tribe's autonomy, and the effects of the NLRA would not "extend beyond the tribe's business enterprise and regulate intramural matters." However, the test articulated in San Manuel provides for a careful balancing of the tribal sovereignty interests with the Federal Labor law protections provided through the NLRA. In a companion case, the Board tipped the balance the other way, and the NLRB didn't assert jurisdiction. Yukon Kuskokwim Health Corporation, 341 NLRB No. 139 (2004).

The AFL-CIO does support the principle of sovereignty for tribal governments, but does not believe this principle should be used to deny workers their collective bargaining rights and freedom of association. While the AFL-CIO continues to support the concept of tribal sovereignty in truly internal, self-governance matters, it is in no position to repudiate fundamental human rights that belong to every worker in every nation. Workers cannot be left without any legally enforceable right to form unions and bargain collectively in instances where they are working for a tribal enterprise which is simply a commercial operation competing with non-tribal businesses.

Notwithstanding the importance of the principle of tribal sovereignty, the fundamental human rights of employees are not the exclusive concern of tribal enterprises or tribal governments. In fact, the vast majority of employees of these commercial enterprises, such as the casinos, are not Native Americans. They therefore have no voice in setting tribal policy, and no recourse to tribal governments for the protection of their rights.

The AFL-CIO must oppose any effort to exempt on an across-the-board basis all tribal enterprises from the NLRA, without regard to a specific review of all the circumstances, as is currently provided by current NLRB standards. Where the enterprise is mainly comprised of Native American employees, with mainly Native American customers, and involving self-governance or intramural affairs, that may be the appropriate result. However, where the business employs primarily non-Native American employees and caters to primarily non-Native American customers, there is no basis for depriving employees of their rights and protections under the National Labor Relations Act.

Sincerely,



William Samuel, Director
Government Affairs Department

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