**Calendar No. 9**

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# TO CLARIFY THE RIGHTS OF INDIANS AND INDIAN TRIBES ON INDIAN LANDS UNDER THE NATIONAL LABOR RELATIONS ACT

FEBRUARY 17, 2017.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs, submitted the following

## R E P O R T

[To accompany S. 63]

The Committee on Indian Affairs, to which was referred the bill (S. 63), to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

### PURPOSE

The purpose of S. 63 would amend and clarify the National Labor Relations Act (NLRA or the Act) so that federally-recognized Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises that are located on its Indian lands would be provided equity and parity under the law with respect to other governmental employers.

### NEED FOR LEGISLATION

The NLRA was enacted by Congress in 1935 to ensure fair labor practices and it explicitly excluded Federal and state governmental [1] employers from the federal labor law. Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises were never defined, mentioned, or excluded from the law. The National Labor Relations Board's (NLRB or the Board) decisions and orders, have varied in the applicability of the Act on Indian tribes, and their institutions or enterprises.

[1] Including any corporations wholly-owned by these governmental entities.

BACKGROUND

The NLRB is an independent Federal agency established by the Act. The Act recognizes the right of employees to engage in collective bargaining through representatives of their own choosing. However, certain employers are excluded from the Act such as those of the Federal and State governments, including wholly-owned government corporations, state lotteries and liquor stores. The NLRA never mentions Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises.

The primary responsibility of the NLRB is to administer the Act. The NLRB conducts elections, investigates charges, facilitates settlements, decides cases, and enforces orders. The NLRB is governed by a five-person board and a general counsel, appointed by the President and confirmed by the Senate.

*National Labor Relations Board decisions*

In two cases from 1935 to 2004, the Board declined to assert its jurisdiction over tribally-owned enterprises located on tribal lands in the *Fort Apache Timber Co.* (1976)[2] and *Southern Indian Health Council* (1988).[3] The NLRB held that tribally-owned businesses operating on their Indian lands were exempt from the NLRA's definition of employer. However, in *Sac & Fox Indus.* (1992),[4] the Board held that a tribally-owned and operated factory that was located off Indian lands was subject to the NLRA.

*The San Manuel Case*

In 2004, the NLRB ruled in the *San Manuel Indian Bingo & Casino*[5] (a casino located on its reservation, and owned and operated[6] by the San Manuel Band of Serrano Mission Indians) that the NLRA applies to tribal enterprises located on Indian lands. This was the first instance in which the Board applied the NLRA to a tribally-owned business on tribal lands. Furthermore, in this decision the Board determined future jurisdictional questions of the applicability of the NLRA will be decided on a case-by-case basis. In 2007, the U.S. Court of Appeals for the District of Columbia affirmed[7] the Board's 2004 *San Manuel* decision.

*The Chickasaw Nation Case*

After the U.S. Supreme Court's decision in *Noel Canning*,[8] which ruled the Board was invalidly appointed, the 10th Circuit case of *Chickasaw Nation* v. *NLRB* was remanded back to the Board. On June 4, 2015, the Board issued a decision on the application of the NLRA to the Chickasaw Nation, which operates a tribally-owned enterprise known as the WinStar Casino on tribal lands. In that ruling,[9] the Board decided not to assert jurisdiction over the Chickasaw Nation. Specifically, the Board cited the Chickasaw Nation's

[2] *Fort Apache Timber Co.*, 226 NLRB 503 (1976).
[3] *Southern Indian Health Council*, 290 NLRB 436 (1988).
[4] *Sac & Fox Indus.*, 307 NLRB 241 (1992).
[5] *San Manuel Indian Bingo & Casino*, 341 NLRB 138 (2004).
[6] The *Indian Gaming Regulatory Act*, Pub. L. No. 100 497 (Codified as 25 U.S.C. § 2701 et seq.) (1988), states that all gaming revenue must be used for tribal government purposes. Tribal government services could include, but is not limited to: health care, social services, housing, utilities, educational assistance, and emergency services.
[7] *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).
[8] *NLRB* v. *Noel Canning*, 573 U.S. ———, 134 S. Ct. 2250, 189 L. Ed. 2d 538 (2014).
[9] *Chickasaw Nation*, 362 NLRB 109 (2015).

treaty with the United States blocked the Board from asserting its jurisdiction over the tribe's casino. It is unknown what immediate effect the Chickasaw Nation decision will have on other tribal cases since the Board's decision was based on a treaty specific to the Chickasaw Nation.

*U.S. Court of Appeals*

Meanwhile, several Indian labor cases have appeared before the U.S. Court of Appeals for the 6th and 10th Circuits. In the *Little River Band of Ottawa Indians*,[10] the 6th Circuit held that the NLRB could enforce provisions of the Act against the Indian tribe. However, the 10th Circuit held in *Pueblo of San Juan*,[11] that the Pueblo's right to adopt a tribal labor ordinance preempts the NLRA and affirmed the decision of the district court. Thus, given the split 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 Indian lands.

*Tribal sovereignty*

In *Cherokee Nation* v. *Georgia*, 30 U.S. 1, (1831), the U.S. Supreme Court declared that Indian tribes are "domestic dependent nations." Reinforcing Tribes' status as nations, several court cases[12] have recognized and upheld that Indian tribes have the attributes of sovereignty including: sovereign immunity and authority over their members and territory. Additionally, the *Indian Self-Determination and Education Assistance Act of 1975* and the *Native American Housing and Self-Determination Act of 1996*, in particular, recognize the exercise of tribal authority by deferring to tribal personnel, wages, and labor laws in carrying out programs.

This bill is intended strengthen tribal sovereignty and addresses those instances where a Tribe is acting as an employer and conducting its business on tribal lands. This bill does not alter or affect in any way the applicability of the Act to a privately-owned business or enterprise, regardless of whether it conducts business on or off tribal lands or regardless of the number of Native Americans comprising its workforce.

*Bureau of Indian Affairs position*

On December 7, 2011, Deputy Solicitor of Indian Affairs, Patrice Kunesh, sent a letter[13] to the Acting General Counsel of the Board, Lafe Soloman, requesting the NLRB "re-evaluate its position on tribal issues and to help advance the Federal government's commitments to Indian Country, particularly with regard to respecting tribes as sovereign governments." The Deputy Solicitor of Indian Affairs then went on to state that "[t]ribal governments

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[10] *NLRB* v. *Little River Band of Ottawa Indian Tribal Gov't*, No. 14 2239 (6th Cir. June 9, 2015).

[11] *NLRB* v. *Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. N.M. 2000).

[12] *Montana* v. *United States*, 450 U.S. 544, 564 565 (1981); *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 854 855 (1985); *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997); *South Dakota* v. *Bourland*, 508 U.S. 679, 695 (1993); *Nevada* v. *Hicks*, 533 U.S. 353, 360 (2001).

[13] Letter from Patrice Kunesh, Deputy Solicitor of Indian Affairs, U.S. Department of the Interior, to Lafe Soloman, Acting General Counsel, NLRB (Dec. 7, 2011).

should be given at least the same exception as provided to state governments in the NLRA."

## LEGISLATIVE HISTORY

On January 9, 2017, Senator Jerry Moran (R–KS) introduced S. 63, along with Senators Mike Crapo (R–ID), Steve Daines (R–MT), Jeff Flake (R–AZ), Cory Gardner (R–CO), Ron Johnson (R–WI), James Lankford (R–OK), John McCain (R–AZ), John Thune (R–SD), Roger Wicker (R–MS), and James Risch (R–ID). The bill was referred to the Senate Committee on Indian Affairs. On February 8, 2017, the Committee met to consider the bill. The Committee then ordered the bill to be reported favorably to the Senate by voice vote. Senators Maria Cantwell (D–WA), Brian Schatz (D–HI), and Catherine Cortez Mastro (D–NV) requested to be recorded as voting against S. 63.

In the 114th Congress, Senator Jerry Moran (R–KS) introduced S. 248, along with Senators Mike Crapo (R–ID), Steve Daines (R–MT), Deb Fischer (R–NE), John Hoeven (R–ND), James Inhofe (R–OK), James Lankford (R–OK), and John Thune (R–SD). Senators James Risch (R–ID), Mike Rounds (R–SD), Cory Gardner (R–CO), and John McCain (R–AZ) were later added as co-sponsors. The bill was referred to the Senate Committee on Indian Affairs. On March 4, 2015, the Committee held a legislative hearing on the bill. On June 10, 2015, the Committee met to consider the bill. The Committee then ordered the bill to be reported favorably to the Senate by voice vote.

In the 113th Congress, Senator Moran introduced, S. 1477, the *Tribal Labor Sovereignty Act of 2013.*[14] It was referred to the Committee on Indian Affairs where no further action was taken. A similar bill, H.R. 1226, was introduced in the House of Representatives by Representative Kristi Noem and no further action was taken.

*Additional Senate Actions.* In the 111th Congress, Senator Inouye sent a letter[15] to Senator Kennedy, then-Chairman of the Committee on Health, Education, Labor, and Pensions (HELP), requesting that the legislation under consideration[16] include an amendment giving Indian tribes equal treatment that Federal and state governments receive under the NLRA. In the letter, it stated the Constitution of the United States "acknowledges Indian tribes as governments under the Commerce Clause and the Supremacy Clause." Furthermore, Senator Inouye's letter recommended the HELP Committee consider an amendment to S. 560, the *Employee Free Choice Act*, which would clarify the definition of employer to include Indian tribes.

## SECTION-BY-SECTION ANALYSIS OF BILL AS ORDERED REPORTED

### *Section 1—Short title*

Section 1 states S. 248 may be cited as the "Tribal Labor Sovereignty Act of 2017."

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[14] In the 114th Congress, S. 248, the *Tribal Labor Sovereignty Act of 2015* has identical language to the 113th Congress introduced bill, S. 1477, the *Tribal Labor Sovereignty Act of 2013.*

[15] Letter from Sen. Daniel Inouye, U.S. Senate, to Sen. Edward Kennedy, U.S. Senate (Jun. 1, 2009).

[16] The *Employer Free Choice Act*, S. 560, 111th Cong. (2009).

*Section 2—Definition of employer*

The bill amends Section 2(2) of the National Labor Relations Act (29 U.S.C. 152) by including in the list of employers that are excluded from the NLRA, "or any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands." The bill intends to provide parity, under the law alongside Federal and State governments, to federally-recognized Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises.

COST AND BUDGETARY CONSIDERATIONS

Summary: S. 63 would add tribes to the list of entities that are excluded from the definition of "employer" for purposes of the National Labor Relations Act. Through the National Labor Relations Board (NLRB), the National Labor Relations Act protects the rights of most private-sector employees to form a union and to bargain collectively. Adding tribes to the list of excluded employers would treat them similarly to state and local governments. Currently, the NLRB generally asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation. However, the NLRB does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions. Enacting S. 63 would not significantly affect the workload of the NLRB, so it would have no effect on the federal budget. Because enacting the bill would not affect direct spending or revenues, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 63 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028. H.R. 63 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

By excluding tribal enterprises located on tribal land from the definition of employer for purposes of the National Labor Relations Act, the bill would eliminate the right of employees of such enterprises to file a claim, individually or through a union, regarding certain labor practices. Currently, employees may file a claim against tribal employers over which the NLRB asserts jurisdiction alleging unfair labor practices under the act that prohibit or interfere with collective activities to improve wages and working conditions. By eliminating the right of employees to file such claims with the NLRB, the bill would impose a private-sector mandate.

The direct cost of the mandate would be the value of forgone monetary awards resulting from claims that would have been filed with the NLRB in the absence of the bill. According to the NLRB, it currently receives about 20,000 to 30,000 claims in total each year from employees, unions, or employers alleging unfair labor practices and more than half of all claims are withdrawn or dismissed. Other claims may be settled by the parties or adjudicated by the NLRB. Successful claims may result in remedies such as reinstatement of discharged employees and back pay for the period of unemployment, as well as payment of dues, fines or other costs. In fiscal year 2016, claims with the NLRB resulted in about 600 cases in which employees were reinstated and in awards of about $53 million in back pay and other costs. Case documents show that

the NLRB has asserted jurisdiction over only a small number of tribal enterprises since 2004 (fewer than 10). Based on those data, CBO estimates that the cost of the mandate would not be substantial and would fall below the annual threshold established in UMRA for private-sector mandates ($156 million in 2017, adjusted annually for inflation).

Successful claims filed with the NLRB also may result in a requirement on employers that would allow their employees to form a union and bargain collectively. Imposing such a requirement on employers may have a broader impact than that measured by the value of forgone monetary awards and settlements for claims brought before the NLRB. However, under UMRA that broader impact is not considered part of the direct cost of the mandate.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

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