

## Calendar No. 220

114TH CONGRESS }  
*1st Session* }

SENATE

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### TRIBAL LABOR SOVEREIGNTY ACT OF 2015

SEPTEMBER 10, 2015.—Ordered to be printed

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

### R E P O R T

[To accompany S. 248]

The Committee on Indian Affairs, to which was referred the bill (S. 248) 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. 248 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 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<sup>1</sup> 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.

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<sup>1</sup> 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)<sup>2</sup> and Southern Indian Health Council (1988).<sup>3</sup> 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),<sup>4</sup> 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*<sup>5</sup> (a casino located on its reservation, and owned and operated<sup>6</sup> 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<sup>7</sup> the Board's 2004 San Manuel decision.

*The Chickasaw Nation Case*

After the U.S. Supreme Court's decision in *Noel Canning*,<sup>8</sup> 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,<sup>9</sup> the Board decided not to assert jurisdiction over the Chick-

<sup>2</sup> *Fort Apache Timber Co.*, 226 NLRB 503 (1976).

<sup>3</sup> *Southern Indian Health Council*, 290 NLRB 436 (1988).

<sup>4</sup> *Sac & Fox Indus.*, 307 NLRB 241 (1992).

<sup>5</sup> *San Manuel Indian Bingo & Casino*, 341 NLRB 138 (2004).

<sup>6</sup> *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.

<sup>7</sup> *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

<sup>8</sup> *NLRB v. Noel Canning*, 573 U.S. , 134 S. Ct. 2250, 189 L. Ed. 2d 538 (2014).

<sup>9</sup> *Chickasaw Nation*, 362 NLRB 109 (2015).

asaw Nation. Specifically, the Board cited the Chickasaw Nation's 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*,<sup>10</sup> 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*,<sup>11</sup> 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.

#### 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<sup>12</sup> 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 to strengthen tribal sovereignty and addresses those instances where a Tribe is acting as an employer and conducting its business on tribal lands.

#### BUREAU OF INDIAN AFFAIRS POSITION

On December 7, 2011, Deputy Solicitor of Indian Affairs, Patrice Kunesh, sent a letter<sup>13</sup> 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 should be given at least the same exception as provided to state governments in the NLRA."

<sup>10</sup>*NLRB v. Little River Band of Ottawa Indian Tribal Gov't*, No. 14-2239 (6th Cir. June 9, 2015).

<sup>11</sup>*NLRB v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. N.M. 2000).

<sup>12</sup>*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).

<sup>13</sup>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)

## LEGISLATIVE HISTORY

On January 22, 2015, 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*.<sup>14</sup> 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<sup>15</sup> to Senator Kennedy, then-Chairman of the Committee on Health, Education, Labor, and Pensions (HELP), requesting that the legislation under consideration<sup>16</sup> 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 2015.”

*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, “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.

<sup>14</sup>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*.

<sup>15</sup>Letter from Sen. Daniel Inouye, U.S. Senate, to Sen. Edward Kennedy, U.S. Senate (Jun. 1, 2009).

<sup>16</sup>*The Employee Free Choice Act*, S. 560, 111th Cong. (2009).

## COST AND BUDGETARY CONSIDERATIONS

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, June 25, 2015.*

Hon. JOHN BARRASSO,  
*Chairman, Committee on Indian Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 248, the Tribal Labor Sovereignty Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

KEITH HALL.

Enclosure.

Summary: S. 248 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 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. 248 would not significantly affect the workload of the NLRB, so it would have no effect on the federal budget. The bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 248 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

S. 248 would impose a private-sector mandate, as defined in UMRA, on employees of tribal enterprises located on tribal land. The bill would eliminate the federal right of those employees to join together to improve their wages and working conditions, with or without a union. Furthermore, the bill would eliminate the right of those employees to file a claim, individually or through a union, with the NLRB regarding the labor practices by tribal employers that prohibit or interfere with activities to improve wages and working conditions in enterprises on tribal land. Under the bill, such practices would no longer be considered unfair labor practices by those employers under the National Labor Relations Act.

The cost of the mandate would be the value of forgone awards and compensation. Based on information from the NLRB, CBO expects that the mandate would apply to employees of a limited number of tribal enterprises. Consequently, CBO expects that the cost of the mandates would not be substantial and would fall below the annual threshold established in UMRA for private-sector mandates (\$154 million in 2015, adjusted annually for inflation).

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

