

## Calendar No. 65

116TH CONGRESS } <i>1st Session</i>	SENATE	{ REPORT 116-30
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### TO CLARIFY THE RIGHTS OF INDIANS AND INDIAN TRIBES ON INDIAN LANDS UNDER THE NATIONAL LABOR RELATIONS ACT

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APRIL 9, 2019.—Ordered to be printed

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

### R E P O R T

[To accompany S. 226]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 226) 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 bill, S. 226 would amend and clarify the National Labor Relations Act (NLRA or the Act) to support governmental parity for tribal governments and respect tribal sovereignty so that Federally-recognized Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises located on Indian lands are exempt from the Act.

#### NEED FOR LEGISLATION

The NLRA was enacted by Congress in 1935 to ensure fair labor practices by providing workers with the right to collectively bargain with employers. It explicitly exempts Federal and state governmental<sup>1</sup> employers from the definition of covered “employers.” The law is silent, however, on the treatment of tribes, tribal governments, and tribally-owned and operated institutions and enter-

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<sup>1</sup> Including any corporations wholly-owned by these governmental entities.

prises. This lack of clarity has led to an inconsistent application by the National Labor Relations Board’s (NLRB or the Board) relative to Indian tribes, their institutions, and enterprises, and creates the potential for shifts in NLRB policy. This legislation is intended to clarify that tribal entities operating on Indian lands are exempt from the NLRA, and removes the jurisdiction of the NLRB over them.

#### BACKGROUND

The NLRB is an independent Federal agency established by the Act, which recognizes the right of employees to engage in collective bargaining through representatives of their own choosing. However, certain employers are excluded from the requirements of the Act, such as the Federal and state governments, including wholly-owned government corporations, state lotteries and liquor stores. The NLRA is silent regarding Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises.

The primary responsibility of the NLRB is to administer the Act by conducting elections, investigating charges of unfair labor practices, facilitating settlements, deciding cases, and enforcing orders. The NLRB is governed by a five-person board and a general counsel, all of whom are appointed by the President and confirmed by the Senate.

#### *National Labor Relations Board decisions*

The NLRB has modified its interpretation of NLRA’s applicability to tribes several times over the course of its history, leading to confusion and continued litigation. In 1976, the NLRB concluded that tribal employers were “implicitly” exempted from the NLRA as governmental entities, but it later decided the exemption did not extend to tribal employers located off tribal land.<sup>2</sup> Then, in 2004, the Board concluded in *San Manuel Band of Mission Indians* that the NLRA applies to a tribal casino owned and operated by the San Manuel Band of Mission Indians located on its reservation.<sup>3</sup> It also determined that future jurisdictional questions on the applicability of the NLRA would be decided on a case-by-case basis. In 2007, the U.S. Court of Appeals for the District of Columbia affirmed the Board’s 2004 decision.<sup>4</sup>

#### *The Chickasaw Nation case*

After the 10th Circuit remanded the NLRB’s initial decision,<sup>5</sup> the NLRB in *Chickasaw Nation v. NLRB* held that the Chickasaw Nation’s treaty with the United States prevented it from asserting jurisdiction over the tribe’s WinStar Casino located on tribal lands.<sup>6</sup> It is unclear how the *Chickasaw Nation* decision will impact other tribal cases as the Board’s decision was based on a treaty specific to the Chickasaw Nation.

<sup>2</sup>Compare *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976), with *Sac & Fox Indus.*, 307 N.L.R.B. 241 (1992).

<sup>3</sup>*San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 138 (2004).

<sup>4</sup>*San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

<sup>5</sup>*NLRB v. Noel Canning*, 573 U.S. \_\_\_, 134 S. Ct. 2250, 189 L. Ed. 2d 538 (2014) (holding that the Board was invalidly appointed).

<sup>6</sup>*Chickasaw Nation*, 362 NLRB 109 (2015).

### *U.S. Court of Appeals*

The U.S. Courts of Appeals for the 6th and 10th Circuits have considered whether the NLRA applies to tribes and have ruled inconsistently. In *NLRB v. Little River Band of Ottawa Indians*,<sup>7</sup> the 6th Circuit considered whether the NLRA applied to a tribally-owned casino resort within the Tribe's reservation boundaries. It held *inter alia* that Tribes fit within the NLRA's definition of "employer" and were thus subject to NLRB's jurisdiction. However, in *NLRB v. Pueblo of San Juan*,<sup>8</sup> the 10th Circuit held that the NLRA did not abrogate the Pueblo's government ordinance prohibiting union agreements, concluding that the NLRA did not apply to the tribe's on-reservation casino. Given the differing interpretations of the NLRA by these Circuit Courts, and the inconsistent application of the law by the Board, legislation is needed to ensure clarity in the application of the NLRA to Indian tribes, tribal governments, and tribally-owned and operated institutions and enterprises that are located on Indian lands.

### *Tribal sovereignty*

The inequitable treatment of Indian tribes as exempt government employers is contrary to long established policy and precedent. 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>9</sup> have recognized and upheld that Indian tribes have the attributes of sovereignty.

Congress has specifically recognized in federal laws such as the *Indian Self-Determination and Education Assistance Act of 1975* and the *Native American Housing and Self-Determination Act of 1996*, the exercise of tribal governmental authority in essential government functions such as the establishment of benefits for tribal personnel benefits, wages, and codification of labor laws.

This bill is intended to strengthen tribal sovereignty and address instances where a tribe is 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 located either on or off tribal lands, 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<sup>10</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." Kunesh 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>7</sup>*NLRB v. Little River Band of Ottawa Indian Tribal Gov't*, No. 14-2239 (6th Cir. June 9, 2015).

<sup>8</sup>*NLRB v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. N.M. 2000).

<sup>9</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).

<sup>10</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 24, 2019, Senator Jerry Moran introduced S. 226, along with Senators Gardner, Risch, Thune, Lankford, Daines, and Rounds. Senators Cramer, Crapo, and McSally were later added as cosponsors. The bill was referred to the Committee on Indian Affairs. On January 29, 2019, the Committee met at a duly called business meeting to consider the bill. By voice vote, the Committee then ordered the bill to be reported favorably to the Senate.

*115th Congress.* On January 9, 2017, Senator Moran introduced S. 63, along with Senators Crapo, Daines, Flake, Gardner, Johnson, Lankford, McCain, Thune, Wicker, and Risch. The bill was referred to the Senate Committee on Indian Affairs. On February 8, 2017, the Committee met at a duly called business meeting to consider the bill. By voice vote, the Committee then ordered the bill to be reported favorably to the Senate. Senators Cantwell, Schatz, and Cortez Masto requested to be recorded as voting against S. 63. No further action was taken on this bill.

A companion bill, H.R. 986, was introduced in the House of Representatives by Representative Rokita with nine original cosponsors. The bill would later add twenty-three cosponsors for a total of thirty-two cosponsors. The bill was referred to the Subcommittee on Health, Employment, Labor, and Pensions of the Committee on Education and the Workforce of the House of Representatives. The Subcommittee held a legislative hearing on March 29, 2017. On June 29, 2017, the Committee on Education and the Workforce of the House of Representatives favorably reported H.R. 986. An amendment, in the nature of a substitute, was offered by Representative Rokita, which made technical changes to clarify the definition of "Indian lands." The amendment was adopted by voice vote and H.R. 986, as amended, was favorably reported to the House of Representatives by a vote of 22 to 16.

*Additional Actions.* On January 12, 2017, Senators Flake and McCain introduced S. 140, a bill amending the White Mountain Apache Tribe (WMAT) Water Rights Quantification Act of 2010 to clarify the use of amounts in the WMAT Settlement Fund. The bill was referred to the Committee on Indian Affairs. On February 8, 2017, the Committee met at a duly called business meeting to consider the bill and ordered the bill, without amendment, to be reported favorably to the Senate.

On May 8, 2017, the bill, S. 140, passed the Senate without amendment, by Unanimous Consent and was sent to the House of Representatives for consideration. The bill was referred to the Committee on Natural Resources of the House of Representatives. On November 2, 2017, the Subcommittee on Water, Power, and Oceans held a legislative hearing on the bill. On November 8, 2017, the Committee on Natural Resources met to consider the bill and by Unanimous Consent, ordered the bill to be passed, without amendment.

On January 9, 2018, the Committee on Rules of the House of Representatives met to consider the bill and ordered the bill to be adopted with an amendment in the nature of a substitute. That amendment included identical language of H.R. 986 which was the companion bill to S. 63. On January 10, 2018, the House of Rep-

representatives passed favorably, S. 140, as amended, by a vote of 239–173.

On January 11, 2018, the Senate received the privileged bill from the House of Representatives, S. 140, as amended. On February 18, 2018, the Senate, in a vote on cloture on the motion to concur in the House amendment to S. 140 was not invoked by a vote of 55–41.

*114th Congress.* Senator Moran introduced S. 248, along with Senators Crapo, Daines, Fischer, Hoeven, Inhofe, Lankford, and Thune. Senators Risch, Rounds, Gardner and McCain 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 at a duly called business meeting to consider the bill. By voice vote, the Committee then ordered the bill to be reported favorably to the Senate. No further action was taken on the bill.

*113th Congress.* Senator Moran introduced, S. 1477, the *Tribal Labor Sovereignty Act of 2013*.<sup>11</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 Noem, but no further action was taken.

*Additional Senate Actions.* In the 111th Congress, Senator Inouye sent a letter<sup>12</sup> to Senator Kennedy, then-Chairman of the Committee on Health, Education, Labor, and Pensions (HELP), requesting that the legislation under consideration<sup>13</sup> include an amendment giving Indian tribes equal treatment that Federal and state governments receive under the NLRA. The letter stated that the Constitution of the United States “acknowledges Indian tribes as governments under the Commerce Clause and the Supremacy Clause.” Furthermore, Senator Inouye 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 2019.”

##### *Sec. 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.

<sup>11</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>12</sup>Letter from Sen. Daniel Inouye, U.S. Senate, to Sen. Edward Kennedy, U.S. Senate (Jun. 1, 2009).

<sup>13</sup>*The Employee Free Choice Act*, S. 560, 111th Cong. (2009).

## COST AND BUDGETARY CONSIDERATIONS

U.S. CONGRESS,  
 CONGRESSIONAL BUDGET OFFICE,  
 Washington, DC, February 8, 2019.

Hon. JOHN HOEVEN,  
 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. 226, the Tribal Labor Sovereignty Act of 2019.

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

Sincerely,

KEITH HALL,  
 Director.

Enclosure.

*S. 226—Tribal Labor Sovereignty Act of 2019*

Summary: S. 226 would add Indian 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 tribes, even if they are located on a tribal reservation. However, the NLRB does not assert the jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

CBO estimates that implementing S. 226 would not significantly affect the workload of the NLRB and thus would have no effect on the federal budget.

S. 226 would impose a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) on employees of certain tribal enterprises. By excluding those 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. By eliminating that right 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 a total of about 20,000 to 30,000 claims each year from employees, unions, or employers alleging unfair labor practices. 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 2018, claims with the NLRB resulted in about 1,200 cases in which employees were reinstated and in awards of about \$54 million in back pay and other

costs. The mandate, however, applies only to a narrow group of employees of certain tribal enterprises, and historically, the NLRB has asserted jurisdiction over a small number of tribal enterprises. 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 (\$164 million in 2019, 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. Limiting such an outcome for employees may have a broader impact than that measured by the value of forgone monetary awards and settlements for claims brought before the NLRB. However, that broader impact is not considered part of the direct cost of the mandate under UMRA.

The CBO staff contacts for this estimate are Meredith Decker (for federal costs) and Andrew Laughlin (for private-sector mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### EXECUTIVE COMMUNICATIONS

The Committee has received no communication from the Executive Branch regarding S. 226.

#### REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 226 will have minimal impact on regulatory or paperwork requirements.

#### CHANGES IN EXISTING LAW

In compliance with the Standing Rules of the Senate and the Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.