Shakopee Mdewakanton Sioux Community

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STATEMENT OF THE HONORABLE KEITH B. ANDERSON
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SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

Legislative Hearing on
S. 248, the "Tribal Labor Sovereignty Act of 2015"

SENATE COMMITTEE ON INDIAN AFFAIRS
April 29, 2015

Introduction

Good afternoon, Mr. Chairman and Members of the Committee. My name is Keith Anderson. I am the duly-elected Vice-Chairman of the Shakopee Mdewakanton Sioux Community ("SMSC" or "Tribe"), a federally-recognized tribal government, located in Prior Lake, Minnesota.

My Tribe wholeheartedly supports S. 248 and asks that you secure its prompt enactment. S. 248 rests on a principle that has been amply demonstrated by Indian tribes across the country: when tribal sovereignty is respected and acknowledged, economic success follows.

The language of S. 248 would simply, and narrowly, clarify that tribal government employers should be treated exactly as state and local government employers are treated in the National Labor Relations Act of 1934 ("NLRA"). No more. No less.

S. 248 would return understandings of the federal law on tribal labor sovereignty to the position held by everyone until 2004. All S. 248 would do is restore the status quo of 2004, a status quo that held steady for the preceding seven decades.

The NLRA, 29 U.S.C. § 151 *et seq.*, is the primary law governing relations between unions and employers. It guarantees the right of employees to organize, or not to organize, a union and to bargain collectively with their employers. Its provisions apply to all "employers,"

except that Section 2(2) of the Act (29 U.S.C. § 152) explicitly says that the term "employer" does not include the United States government or any state government or political subdivision thereof.[1] And therein is the issue – for the first 70 years of its existence, everyone interpreted the NLRA definition of employer to exclude tribal government employers operating on tribal lands --- along with the exclusion of all other governmental employers.

The NLRA statute did not change in 2004. The only thing that changed in 2004 was the interpretation of that statute by the National Labor Relations Board ("NLRB"). The NLRB decided to change its position and declare that because tribal governments were not expressly listed among the excluded governmental employers in the statute, the NLRB in some situations would treat tribal governments as private employers subject to all the requirements of the NLRA.

Shakopee and other tribal governments were offended by the NLRB's analytical framework in its 2004 *San Manuel* decision – that the NLRA should be applied to tribal government employers when those tribes are engaged in "commercial" activities which the NLRB decides are "commercial." The NLRB has never applied this same analysis to the many similar "commercial" activities engaged in by federal, state and local government employers. If political considerations would never permit the NLRB to impose this interpretation on other governmental employers – how can this analysis be fairly imposed upon tribal government employers?

My Tribe, and many tribal governments, was alarmed that the NLRB thought it could roll back tribal sovereignty in this way, on its own, without any change in the statute by Congress. Ever since the NLRB decision in 2004, we have been asking for the technical relief embodied in S. 248, and are indebted to you, Mr. Chairman, and especially, to Senator Jerry Moran, for joining us in our efforts to fix this grievous error by the NLRB.

Background on the Shakopee Mdewakanton Sioux Community

Our Tribe has remained on our Reservation lands that were once part of the millions of acres upon which our ancestors lived before they were forced to relinquish them under a series of disastrous land treaties. What remains of our lands are approximately 1,844 acres held in trust and 2,279 acres in non-trust status for our Tribe, about half an hour from the outskirts of Minneapolis.

In recent decades, economic development has surrounded our Reservation. At the same time, our Tribe has played a significant role in the economic revitalization of our region. For years, our tribal government has been the largest employer in Scott County.

[1] "The term 'employer' … shall not include the United States or any wholly owned Government corporation … or any State or political subdivision thereof… ." Id. Most employees work for employers in the private sector who are covered under the NLRA. The law does not cover government employees, agricultural laborers, independent contractors, and supervisers (with limited exceptions). *See* FAQs on NLRB website -- http://www.nlrb.gov/resources/faq/nlrb#t38n3182 (accessed April 27, 2015).

Our tribal government provides a full range of governmental services to our Community residents. We administer social services for children and families, mental health and chemical dependency counseling, employee assistance, emergency assistance, public works, roads, water and sewer systems, health programs and a dental clinic, vehicle fleet and physical plant maintenance, membership enrollment, education assistance, regulatory commissions, economic planning and development, enterprise management and operations, cultural programs, an active judicial system, and many other governmental services. Our tribal government builds all Reservation infrastructure, including roads, water, and sewer systems, subdivision utilities, and tribal government facilities. About a dozen Reservation businesses are now owned by individual tribal members, including a smoke shop, gift shop, landscaping and excavating, construction services, and photography services.

Tribally-owned and controlled enterprises are an important source of governmental revenue for the Shakopee Tribe. Unlike state and local governments, we are unable to derive any governmental revenue from real estate taxes or sales taxes or income taxes. But like state and local governments, we are able to derive governmental revenue from the operation of governmental enterprises. For us, these include two casinos, a recreational vehicle campground, a hotel, events centers, a fitness and recreation facility, a children's entertainment and daycare facility, a waste treatment plant, a golf course, an organic and natural foods store, an organic farm, and convenience stores and car washes.

As the owner and operator of the largest casino hotel resort in Minnesota, Shakopee Mdewakanton Sioux Community provides an attractive workplace for our workforce. Our tribal government employees earn some of the most competitive salaries in our regional market. And our full-time and part-time employees receive well-regarded benefits and amenities, including –

- no-charge assessment and treatment of non-complicated illness and injury at a workplace health clinic for employees and their dependents on the medical plan;
- reduced co-pay for pharmaceuticals at a workplace pharmacy for employees and their dependents on the medical plan;
- no-charge diagnostic and preventive dental services, and reduced rates on basic and some major restorative services at a workplace dental clinic for employees on the dental plan;
- routine eye exams and discounted eyewear available at a workplace vision clinic for employees and their dependents on the medical plan;
- no-charge physical therapy and chiropractor evaluations and treatments available at a workplace "Wellness Center" for employees and their dependents on the medical plan;
- full-time employees may be reimbursed up to $2,000 for tuition after one year of service;
- cost-share (50%) of child care services at a workplace "Playworks" up to maximum annual benefit of $5,000 for employees;
- retirement contribution (50% match up to 5% of annual pay);
- sharply discounted membership fees at workplace "Dakotah! Sport and Fitness" facilities; and
- a broad array of other benefits, from financial services and employee assistance programs to employee discounts and reduced rate medical insurance plans.

The Shakopee tribal government employs more than 4,000 people, most of whom are in full-time positions. For each of the past five years, the Shakopee Tribe has been included among the "top work places" in Minnesota as part of the Minneapolis *Star Tribune* survey. We are very proud to be able to say that the Shakopee tribal government was the largest of the 155 employers on the 2014 list of "top work places" in Minnesota.

Our Tribal Government Enterprises Are Similar to State Government Enterprises

For the past four decades, federal policy makers in the White House and in the Congress have pursued a broadly bi-partisan policy of encouraging tribal government self-determination and self-sufficiency through the development, by the tribes themselves, of tribal economic enterprises.

At least three separate rationales have driven this federal-Indian policy. First, there is a desire to reverse the process that has led to considerable land loss and resource deprivation of tribal resources over the past centuries. Second, there is an effort to enable Indian tribes to help rid themselves of the plague of poverty and under-development in Indian communities that has forced Native Americans, as a group, to the bottom of every known measure of economic and social well-being in America. And third, there is support for an approach that respects the sovereign authority of governments to set their own course and resolve their own problems in their own way. For the Shakopee Mdewakanton Sioux Community that has meant we have actively pursued the development of appropriate economic development, including gaming, in order to boost the governmental revenues of our Tribe.

As do state and local governments throughout America, the Shakopee tribal government operates a hotel and convention center, event arenas, fitness center, child care center, golf course, emergency response and fire-fighting station, fuel stops, organic and natural food store and farms, recreational vehicle park, and a waste water treatment facility among many other activities.

In all fairness, my Tribe's economic enterprises cannot be distinguished from those owned and controlled by state and local governments throughout America. State and local government employees typically are engaged in a wide variety of commercial-like activities. State governments operate lotteries, liquor stores, resort spas and recreational parks, waste water treatment facilities, port authorities, transportation systems, event and entertainment venues, and convention centers, among many other enterprises that in competition with similar enterprises in the private sector. What makes all of these enterprises "governmental" is that they are under the exclusive ownership and control of state and local governments, and the revenues they raise are dedicated exclusively to governmental purposes. Our tribal government enterprises are no different.[2]

[2] In point of fact, the federal Indian Gaming Regulatory Act of 1988 requires that our gaming revenues must be applied to statutorily-prescribed governmental purposes.

Why S. 248 and Why Now?

My Tribe urgently needs the statutory language of the NLRA to be clarified so that there can be no doubt that it is treated in the same way as all other governmental employers are treated under the NLRA.

The NRLB respects the sovereignty of all other governmental employers that the NLRA statute protects. The NLRA has always protected the sovereign right of governmental employers to define their own collective bargaining rights and to avoid work stoppages and strikes in their governmental workforces. In all fairness, the NLRB should likewise respect tribal government sovereignty. The NLRB did so until 2004. But given the NLRB's new interpretation in 2004, and the deference given the NLRB by the courts, Congress must now step in and clarify, with enactment of S. 248, that tribal government sovereignty is to be protected no less than state government sovereignty is protected in the NLRA. Nothing short of a technical amendment like S. 248 will work.

None of the facts changed in 2004. There were no changed circumstances that would compel such a dramatic curtailment of tribal sovereignty. No "problems" arose in 2004 that had to be addressed by mandating NLRA's collective bargaining.

Indian gaming began on our Reservation in the early 1980s and enjoyed steady growth through the late 1980s and throughout the 1990s. Throughout much of Indian Country, much of the fastest economic growth occurred in the 1990s, including enterprise development ancillary to gaming. There was no "tipping point" in economic growth on Indian reservations that occurred in the years immediately preceding 2004.

Likewise the composition of our tribal government workforce, while it has grown in size, has always been predominately non-Indian or non-tribal. Just as state governments employ many workers who are citizens of other states, tribes like Shakopee have always employed many workers who are not members of the tribe. Similarities to state government employers abound: one need only look at the Maryland, Virginia and D.C. government workforces, or New York, New Jersey and Connecticut government workforces.

In short, opponents of S. 248 cannot point to anything unique that happened in the years immediately preceding 2004 to justify the NLRB's change in how it interpreted the statute.

It is Irrational and Discriminatory to Impose the NLRA on Tribal Government Employers But Not State Government Employers

The basic premise of sovereignty, for both state and tribal governments, is that each government sets its own policies in its own sphere of influence. Of course, that sovereignty is limited under the U.S. Constitution. What Shakopee and other tribes are seeking is to be treated the same as state governmental employers are treated under federal labor law, no more and no less.

Shakopee will insist that those who question the propriety of S. 248 be made to answer the following question: how do you justify treating tribal government employers differently than

you treat state government employers? Surely you do not mean to imply that tribal governments cannot be trusted as much as state governments can be trusted to deal with their governmental employees in a fair way?

Shakopee, like other tribal government employers, understands that it is in our self-interest to treat our employees fairly. After all, if our employees are not happy, our customers may not receive the high quality entertainment product we want for them. Maintaining above average or better workplace conditions than the marketplace surrounding our Reservation means tribal employers like Shakopee are better able to recruit and retain more productive workers. At Shakopee, we take great pride in the fact that many members of our tribal government workforce have worked for the Tribe for decades. Indeed, recently we noted the following worker anniversaries with a special honoring celebration that was widely appreciated to great acclaim (2 employees with 30 years, 6 employees with 25 years, 82 employees with 20 years, 126 employees with 15 years, 103 employees with 10 years).

Shakopee Asks that You Categorically Reject the Partisan Narratives on S. 248

The Shakopee Mdewakanton Sioux Community wishes to be very, very clear about this to both our allies and our opponents on S. 248 – S. 248 is not about labor policy.

S. 248 is about tribal sovereignty. Period.

We insist that supporters and opponents of S. 248 not turn this into a partisan political football they use for partisan political purposes.

Tribes need S. 248 to be enacted in order to restore tribal labor sovereignty as a matter of basic fair public policy.

Allies of Indian Country and tribal sovereignty, whether Republicans or Democrats, should not turn this issue into a partisan fight. Instead, we ask that our friends, both Republicans and Democrats, come together in a bi-partisan effort to enact S. 248 and restore tribal labor sovereignty to the parity position tribal government employers had as recently as 2004, and for the preceding seven decades under federal law.

Indeed, partisans on both sides of S. 248 have misconstrued the scope and meaning of S. 248. S. 248 addresses only an employer who is a federally-recognized tribal government operating on the Indian lands of that tribal government. Its provisions do not extend to other employers on those Indian lands, including Indian individuals, non-Indian individuals, and businesses not owned and operated by the tribal government. As in the 70 years prior to 2004, those employers would remain subject to the NLRA under S. 248.

While Shakopee would prefer to have S. 248 written much more expansively than it is, so that it would reflect Shakopee's understanding of its own territorial sovereignty and giving preemptive effect to Shakopee's tribal labor law as to all employers within the boundaries of its Reservation, Shakopee recognizes such an expansion of the scope of S. 248 might raise much more controversial issues akin to those that accompany the national debates over "right-to-work"

laws.[3] So Shakopee has decided to give its full-throated support to the much more narrow scope embodied in S. 248 – to restore tribal government employers to the position we had in 2004, treating us the same as the law treats state government employers.

Partisanship has no place on matters of federal-Indian issues involving tribal sovereignty. The members of this Committee have a remarkable and noteworthy history of straddling partisan divides when it comes to the defense of tribal sovereignty and the unique federal trust and treaty relationships with tribal governments. Each year budget hawks among the Committee's Republicans strike an agreement with Democrats on the Committee's federal program budget request recommendation letter. The same could be said of the budget hawks regarding the mandatory spending authority provisions on the Special Diabetes Programs for Indians measure that was re-enacted in recent weeks. In the reauthorization of the Violence Against Women Act (VAWA) last year, Republicans swallowed hard and accepted other unrelated provisions they opposed, and Democrats supported, in order to secure enactment of VAWA provisions that restored tribal territorial authority in law enforcement over violence against women. On the sovereignty principles that underlie tribal gaming authority, Republicans and Democrats on this Committee have, year after year, protected the Indian Gaming Regulatory Act against efforts mounted by powerful state government and private sector interests to amend and curtail the Act. And we should never forget that it was a bi-partisan group of members from this Committee who stopped an effort to impose a crippling, Unrelated Business Income Tax on tribal government revenue nearly two decades ago.

While tribes and tribal sovereignty sometimes stretch the political partisan philosophies of both the Democratic and Republican parties, Shakopee and other tribes are grateful that the allies of tribal sovereignty on Capitol Hill have found a way to embrace, on a bi-partisan basis, issues of importance to Indian Country like tribal labor sovereignty which may otherwise be misunderstood to be divisive. These Republican and Democratic leaders have earned our praise and support for engaging, like yoga masters, in bi-partisan stretching that results in a good and just result for Indian Country and tribal sovereignty. This is what we ask of each member of this Committee, that you give S. 248 your undivided and unequivocal <u>bi-partisan</u> support because it would treat tribes like states and restore the tribal labor sovereignty that existed up until 2004.

<u>Tribal Sovereignty Is the Issue</u>

By definition, sovereignty means different decisions may be made by different tribes. Just as with the 50 states, each tribe may exercise its sovereign authority over labor policies in a manner different from another tribe. Why should tribes be any given less latitude in this regard than is given Minnesota, or North Dakota, or New Mexico, or Kansas, or Wyoming?

Fundamentally, S. 248 poses the question – in what ways are tribal government employers different from state government employers so as to justify treating tribal government employers differently? And should the NLRB be permitted to precipitously break decades of precedence and changes the rules without a change in the statute? Especially when it comes to matters directly affecting tribal government sovereignty?

[3] As this Committee knows, half the 50 states have enacted right-to-work laws, which protect workers in so-called "open shops" who decline to join a union and pay union fees.

It is Imperative That a Clean Bill Be Enacted Free of All Conditions

Sovereignty at its core is a question of who decides? Whose governmental authority is recognized and respected? Shakopee asks, for its part, that Congress promptly enact S. 248 so that this question restores the status quo of 2004. Any special, pre-conditions applied to tribal governments must be rejected as unbearably paternalistic and discriminatory. What possible other rationale can be given for treating a tribal government employer different than the law treats a state governmental employer? Under S. 248 as introduced, would tribal government workers have any less protection than do state government workers under the NLRA today? The answer is no. And the next question is obvious – by what right would Congress burden tribal government employers with conditions precedent that they do not equally place upon state government employers?

Tribal sovereignty is premised on equity and parity. In 2009, the late Senator Daniel K. Inouye, a staunch defender of tribal sovereignty, supported simple and unconditional bill language like that in S. 248 because he said it would restore tribal sovereignty to federal labor law where it was for almost 70 years and treat tribal government employers like state government employers are treated.

All Shakopee asks is that S. 248 be maintained without conditions, a clean restoration of the legal position it and other tribal government employers had in 2004. We can accept nothing less. And we ask that this corrective legislation be enacted promptly this year with overwhelming bi-partisan support.

Mr. Chairman, thank you for the opportunity to present this testimony in support of prompt enactment of S. 248, the Tribal Labor Sovereignty Act of 2015.

Attachment: Redline of S. 248 amendments to National Labor Relations Act

NATIONAL LABOR RELATIONS ACT OF 1935 (redline incorporating language of S. 248)

29 U.S.C. §152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

. . .

(15) The term 'Indian tribe' means any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(16) The term 'Indian' means any individual who is a member of an Indian tribe.

(17) The term 'Indian lands' means—

(A) all lands within the limits of any Indian reservation;

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation; and

(C) any lands in the State of Oklahoma that are within the boundaries of a former reservation (as defined by the Secretary of the Interior) of a federally recognized Indian tribe.