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TESTIMONY OF ROBERT ODAWI PORTER
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before the

COMMITTEE ON EDUCATION AND THE WORKFORCE
UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON
HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

HEARING ON
EXAMINING PROPOSALS TO STRENGTHEN THE
NATIONAL LABOR RELATIONS ACT
JULY 25, 2012

INTRODUCTION

Nya-weh Ske-no.

Chairman Roe, Ranking Member Andrews, and members of the Subcommittee, I am thankful that you are well and I am pleased to appear before you today to testify on how you might strengthen the National Labor Relations Act (NLRA) while at the same time strengthening respect for tribal sovereignty by enacting H.R. 2335, the Tribal Labor Sovereignty Act of 2011.

I ask that my written testimony be placed in the record on behalf of the Seneca Nation of Indians, which I lead as its elected President.

BACKGROUND ON THE SENECA NATION OF INDIANS

The Seneca Nation of Indians ("Nation") is one of America's earliest allies, historically aligned with the other members of the historic Haudenosaunee (Six Nations Iroquois) Confederacy and living in peace with the American people since the signing of the Canandaigua Treaty over 217 years ago on November 11, 1794, 7 Stat. 44. Our Nation has entered into numerous treaties and agreements with the United States since that time. We have always sought to live up to our commitments, despite the fact that, repeatedly, the United States has not reciprocated in kind.

The United States made several key promises to the Seneca Nation in our Canandaigua Treaty. Of direct relevance to this hearing today, was a federal treaty recognition that the Seneca Nation is a sovereign nation and a federal treaty assurance that our property and activities on our Territory would not be interfered with. In particular, the United States expressly guaranteed that we would retain the "free use and enjoyment" of our lands. This promise has served as the basis for the unparalleled level of freedom possessed by the Seneca people today.

Because of our treaty-protected sovereign freedom, our Seneca Nation has been able to achieve some success in recovering from nearly 200 years of economic deprivation inflicted upon us by the United States due to devastating losses of our lands and resources. Both our Nation government and individual Seneca citizens have benefited from the opportunity to resume our trade relations with non-Indians during the last 40 years, focusing primarily on available business involving tobacco, gaming, hospitality, and ancillary ventures.

Key to our economic success has been our governmental sovereignty -- our right to govern, in our own way, what happens on our land.

FEDERAL LABOR LAW MUST BE CLARIFIED TO RESPECT TRIBAL SOVEREIGNTY

Many aspects of our treaty-recognized freedoms have been eroded over time. All three branches of the federal government -- judiciary, executive, and legislative -- have directly caused or allowed this erosion to occur, sometimes even by overturning decades of precedent.

A prime example of this legal regression can be found in recent tribal labor management decisions taken by the National Labor Relations Board (NLRB) and the federal courts in the *San Manuel Indian Bingo and Casino v. NLRB* case, 475 F.3d 1306 (D.C. Cir. 2007).

As you know full well, the National Labor Relations Act (NLRA), 29 U.S.C. § 160 *et seq.*, is the primary law governing relations between unions and employers and guarantees the right of employees to organize, or not to organize, a union and to bargain collectively with their employers. The NLRA applies to "employers," and Section 2(2) of the Act defines "employer" as "any person acting as an agent of an employer, directly or indirectly," but does not include the United States, State governments, or any political subdivision thereof.

In *San Manuel*, the NLRB asserted subject-matter jurisdiction over tribal government employers in a case brought against the San Manuel Band of Serrano Mission Indians, a federally recognized Indian tribal government, by a union competing with another union for the right to organize tribal government employees. The San Manuel Band appealed to the federal courts, which found against the San Manuel Band, holding that the NLRB may apply the NLRA to tribal government employees at a casino the San Manuel Band operates on its lands. Despite the fact that there had been no intervening change in the NLRA statute, the NLRB and the courts reversed 70 years of precedent to find that Indian tribal governments are not exempt from NLRA requirements because they concluded that the NLRA statutory language contains no express exemption as it does for the federal and state governments. We believe this holding was unfounded and violative of our Treaty rights.

The judicial rationale was in reality a political policy rationale -- the NLRB and the courts as a matter of policy concluded that because the San Manuel tribal government casino employs many non-Indians and caters primarily to non-Indian customers, it and all other similar tribal government enterprises should be treated like a commercial rather than governmental enterprise.

That rationale was wrong-headed, both as a matter of law, and of policy. For the Seneca Nation, as you can safely assume for all America Indian tribal governments, it is an affront to be told our own tribal labor management laws, enacted as an expression of our own tribal sovereignty, on our own tribal lands, are not sufficient to protect our tribal government employees.

The Seneca Nation is proud of our labor policies and practices. Seneca Nation employees are offered a compensation and benefits package that is more than competitive within our market, with best in class protections for employee rights and personnel procedures. We have also chosen to rely heavily on union labor, through project-labor agreements, in the construction of our gaming facilities. We cede ground to no one, including the NLRB and the federal government, in our demonstrated commitment to workplace fairness, security and benefits. Our exercise of our sovereign control of our labor management relations reflects the fact that good government labor policy is good for business. So you can imagine our displeasure and disappointment with the contrary judgment in the *San Manuel* case.

At issue in that case was whether the exclusions in the NLRA ("[t]he term 'employer' … shall not include the United States or any wholly owned Government corporation … or any State or political subdivision thereof… .") were intended to cover tribal government employers. The Court said the "Board could reasonably conclude that Congress's decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists." *Id.* at 1317.

When a regulatory body like the NLRB or a reviewing court conjures up a new interpretation of longstanding statutory law in violation of federal laws and treaties dealing with Indian nations, we believe it is the duty of the U.S. Congress to enact a clarifying amendment which makes the statute reflect the original congressional intent, consistent with the Constitution and treaties of the United States.

The Seneca Nation and other tribal governments have always sought to have key federal statutes consistently reflect and honor our treaty agreements and our governmental status. We have always insisted that federal law treat our tribal governments as it treats other governments. When court decisions or federal officials reinterpret longstanding statutory provisions to treat tribes as something other than governments, Congress should enact clarifying amendments to the law.

This is why we urge you to include in your labor reform legislation the provisions of H.R. 2335, the Tribal Labor Sovereignty Act of 2011, which would clarify the NLRA to once again be interpreted to expressly exempt tribal government employers from the reach of the NLRA and the NLRB. The Seneca Nation thanks the sponsor of H.R. 2335, Congresswoman Kristi Noem, and her 63 co-sponsors, including you, Chairman Roe, as well as the Chairman of the full Committee, Mr. Kline.

CONCLUSION

Tribal self-determination has long been the goal of federal Indian policy, dating back at least to July, 1970 when President Nixon issued his "Special Message to Congress on Indian Affairs." Since then much progress has been made toward restoring recognition and respect for tribal sovereignty and self-determination. But the NLRB's decision in the *San Manuel* case to override tribal authority and allow a federal takeover in this area of tribal governance is an outrage and must be corrected.

By acknowledging the governmental status of Indian tribes, the Noem bill, H.R. 2335, will respect Indian nation governments as other governments are respected for purposes of the application of the NLRA to tribal governmental activities on tribal lands.

The promise of labor law reform will positively impact Indian Country only if it advances the first principles that are at the foundation of federal Indian policy at its best -- ***tribal nations are governments whose exclusive authority to govern all economic activity on our territory is fully respected as a matter of federal law***. Resurrecting this ***tribal territorial sovereignty*** approach should be the urgent focus of any new labor law reform efforts. H.R. 2335 would do just that, and deserves your support through to enactment.

Thank you for this opportunity to provide testimony and I ask that it be made part of the record of this hearing. We also thank you for holding this hearing today. We hope it leads to prompt enactment of H.R. 2335.

Nya-weh.