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SENT VIA EMAIL

Mr. James West
Office of Indian Energy and Economic Development
Assistant Secretary—Indian Affairs
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Washington, D.C. 20240
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Re: ***Comments on Information Collection, 79 F.R. 8986 (February 14, 2014)***

Dear Mr. West:

We write to you in our capacity as legal counsel for the Aleutian Pribilof Islands Association, Maniilaq Association, the Jamestown S'Klallam Tribe, and the Metlakatla Indian Community ("Tribes"). The purpose of this letter is to provide the Tribes' comments pursuant to the Bureau of Indian Affairs' ("BIA") Notice for Revision of Agency Information Collection for Reporting Systems for Public Law 102-477 Demonstration Project, published February 14, 2014 in the Federal Register.[1]

Introduction

The BIA proposes changes to forms used for reporting the expenditure of funds in approved 477 Plans implemented by tribes and tribal organizations pursuant to the tribal employment and training program established by P.L. 102-477 ("477 Program" or "477

[1] *See* 79 Fed. Reg. 8985 (Feb. 14, 2014). The notice was republished on February 21, 2014, in order to correct a date in the notice. *See* 79 Fed. Reg. 9915 (Feb. 21, 2014). The notice announced the revision and publication of reporting forms for P.L. 102-477, and sought comments on or before April 15, 2014. The BIA held a tribal consultation session on the proposed revisions on March 13, 2014 in Washington, D.C. This letter provides the Tribes' comments pursuant to the Federal Register notice.

Act").[2] The 477 Program is administered by the Office of Indian Energy & Economic Development (OIEED) in the Department of the Interior ("DOI"). The 477 Act authorizes tribes and tribal organizations to combine employment and training-related federal funds from various agencies into a single 477 Plan approved by the Secretary of the Interior with a single budget and a single reporting system. Since its inception in 1992, 477 Program funds have been transferred to participating tribes and tribal organizations either through agreements authorized under Title I (self-determination contracts) or Title IV (self-governance compacts) of the Indian Self-Determination and Education Assistance Act ("ISDEAA").[3]

Although not stated directly in the Federal Register notice, the purported purpose of the proposed changes in reporting forms is in part to resolve differences between the 477 tribes and federal agencies regarding the interpretation of the 477 Act and the administration of the 477 Program. Transfer of funds and reporting of fund use under 477 Plans were the subject of consultations and negotiations in the P.L. 102-477 Administrative Flexibility Work Group ("477 Flexibility Work Group" or "AFWG"). The AFWG was organized in response to a directive from Congress that the federal agencies engage the 477 tribes and tribal organizations in government-to-government consultations to reach general consensus and "permanently resolve" issues related to the transfer and reporting of funds administered by tribes and tribal organizations through approved 477 Plans. In addition to the tribes and tribal organizations that administer approved 477 Plans, the AFWG included the federal agencies involved in the 477 Program, the Departments of the Interior, Health and Human Services ("DHHS"), and Labor ("DOL"), as well as the Office of Management and Budget ("OMB").[4]

The efforts of the AFWG did not result in measures that permanently resolve the fund transfer and reporting issues. The agencies and Tribes engaged in a comprehensive review of the 477 program, and developed a better understanding of the language and purpose of the 477 Act and the history of the 477 Act's implementation, as well as the process for the submission and approval of 477 plans. However, despite best efforts, the agencies and tribes were unable to reach the necessary consensus on the interpretation

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[2] *See* The Indian Employment, Training, and Related Services Demonstration Act, 25 U.S.C. §§ 3401-3417, as amended by Public Law 106-568, the Omnibus Indian Advancement Act of 2000.

[3] 25 U.S.C. § 450 *et. seq.*

[4] Eligible federal programs include, **from DOI**: General Assistance, Tribal Work Experience, BIA Employment Assistance - Adult Vocational Training, BIA Employment Assistance - Direct Employment, BIA Higher Education, BIA Adult Basic Education, and Johnson-O'Malley Programs; **from HHS**: Native Employment Works, Tribal Temporary Assistance to Needy Families (TANF), and Child Care and Development Fund Programs; and **from the Department of Labor (DOL)**: Workforce Investment Act, Section 166 Comprehensive Services, and Section 166 Supplemental Youth Services Programs.

and application of the 477 Act, and therefore did not reach final agreement on new mechanisms for the transfer and reporting of funds that would permanently resolve the outstanding issues.

The Tribes object to the form and manner in which the proposed revisions to reporting forms are being adopted and implemented. The agencies have repeatedly mischaracterized the implementation of new forms as a consensus measure agreed to and adopted by the agencies and the tribes and tribal organizations that participated in the AFWG. For example, federal agency representatives at the March 14, 2014 consultation on implementation of the proposed forms characterized the changes in reporting forms as having been agreed to and adopted as a result of the AFWG's extensive deliberations.[5] That is not correct. A basic element of the proposed reporting system, accounting for the major portion of changes to current forms, involves the requirement that tribes and tribal organizations report expenditures made under an approved 477 Plan by consolidating expenditures into "functional cost categories." This proposal was initiated by the federal agencies during the AFWG negotiations. Some tribal representatives to the AFWG opposed any change from current accounting to employ cost categories. Other tribal representatives that participated in the AFWG agreed to explore the cost category concept on condition that any new reporting system agreed to by the AFWG and implemented by the agencies would include other provisions and form part of an agreement to permanently resolve the practical and legal issues the agencies had raised regarding fund transfer and reporting.[6] The agency and tribal representatives that participated in the

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[5] This claim is repeated in other statements made by the agencies. *See* Statement of Lillian Sparks Robinson, Commissioner, Administration for Native Americans, Administration for Children and Families, U.S. Department of Health and Human Services, Before the Committee on Indian Affairs, United States Senate (April 2, 2014) ("Statement of Lillian Sparks Robinson") at 1(The FWG "agreed to submit new reporting forms and instructions" for formal review and implementation and this step "resolves many of the differences of opinion over operation of the 477 projects."). *See also* Report to the House and Senate Committees on Appropriations on Progress of P.L. 102-477 Administrative Flexibility Work Group, from Kevin Washburn, Assistant Secretary-Indian Affairs (April 1, 2014) ("Report on Progress of AFWG") at 2 (parties to the AFWG "agreed on" the financial reporting mechanism using functional categories and a revised narrative report). Copies of these documents are enclosed.

[6] Tribal representatives to the AFWG consistently stated that consideration of reporting by functional cost categories was tied to other principles consistent with longstanding administration of tribal 477 Plans: reporting in aggregate and not by funding source; recognition by the agencies of tribal authority to re-budget and reallocate program funds in an approved Plan; implementation of reporting in a manner that does not require tribes to create and maintain additional separate records or create additional administrative costs in the current implementation of an approved tribal program; and testing in a pilot program for 477 Tribes to determine its impact on efficiency and cost-effectiveness of 477 Plans, with corresponding continued funding through ISDEAA and suspension of the 2009 Circular A-133 until final review and implementation is completed. Tribal representatives also made clear that any agreements in principle reached in the AFWG

AFWG did not reach the agreement necessary to permanently resolve all relevant issues that the parties had identified regarding the interpretation of the 477 Act and administration of the 477 Program, including the legal basis for fund transfer and reporting requirements. Thus, there is no consensus between the agencies and 477 Tribes on use of the proposed reporting forms, and the agencies are proceeding unilaterally to implement the new reporting system as proposed in the Federal Register notice.

Furthermore, the proposed reporting requirements are not more "flexible" or "simplified," as the agencies claim.[7] While the proposed forms may not require direct reporting of expenditures "dollar-for-dollar" based on federal program source, the proposed forms do require tribes to break-out and categorize expenditures in more detail than in the current reporting system. This fundamentally alters the single budget and single reporting system used in the 477 Program for twenty years, and the manner in which tribes have accounted for all 477 expenditures through a single agency audit which reviews consolidated 477 expenditures. Moreover, the proposed reporting system has not been tested in application to the wide variation in structure of approved 477 Plans, and thus there is no basis for determining the potential burden placed on tribes in terms of additional recordkeeping requirements and administrative costs associated with recordkeeping and reporting, including the fact that tribal data systems may need to be restructured to provide the specific information in the form sought in the new reporting requirements.

In addition, the impact of the proposed changes in the various forms and instructions cannot be evaluated until OMB approves new accounting instructions to replace OMB Circular A-33.[8] Without the new instructions the Tribes are unable to evaluate the impact of the proposed changes to the forms on the Tribes' administration of the 477 Program. Finally, the information collection authorized in the amended reporting forms, if adopted, will expire January 31, 2017, and then be open and subject to revision once again.

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would have to be reviewed and approved by the broad body of 477 Tribes implementing the 477 Act, such detailed review necessary to ensure that any proposed revision of the reporting system is consistent with the wide variation in the structure and operation of individual tribal 477 Plans.

[7] *See* Statement of Lillian Sparks Robinson at 2 ("As a result of this agreement, tribes will benefit from consistency in the way in which 477 projects are reviewed and will be subject to more flexible reporting requirements."); Report on Progress of AFWG at 2 (use of proposed functional cost categories provides "a simplified financial reporting mechanism").

[8] The agencies propose to draft and implement the compliance instructions in a separate process to be initiated after the proposed forms are approved. *See* Report on Progress of AFWG at 3.

Thus, for several reasons, the reporting measures proposed for adoption by the February 14, 2014 notice fail to "permanently resolve" the outstanding issues regarding the interpretation and administration of the 477 Program, the purpose for which the AFWG was formed. The mere adoption and publication of forms does not provide a permanent resolution of the fund transfer and reporting issues, and the tribes and tribal organizations with approved 477 Plans remain vulnerable to the types of agency actions that have disrupted the 477 Program since 2008.[9] Without a permanent resolution of the legal and practical issues involved, the tribes are concerned that the agencies may raise the same or similar issues in other aspects of the plan review and approval process.

The Tribes recommend that that the BIA withdraw the Notice for Revision of Agency Information Collection for Reporting Systems for Public Law 102-477 Demonstration Project, and maintain the status quo pending continued consultations in the AFWG, and until the parties achieve a permanent resolution of the fund transfer and reporting issues.[10]

In order to provide a proper context for understanding the effect of the proposed action to implement the new forms, we provide background on the fund transfer and reporting issues and discuss the legal framework of the 477 Program before outlining the Tribes' specific comments on the form and content of the Federal Register notice and the proposed changes to the reporting forms. The background of the Act's administration and the Tribes' assessment of the agency actions that threaten to disrupt the 477 program are critical to understanding the effect of the proposed action to implement new reporting forms.

Background

The 477 Act provides a unique and vital program for tribal management and administration of employment and training funds.[11] Overall supervision and coordination among the affected federal departments has been provided by the OIEED. Currently

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[9] Fund transfer is not addressed in the Federal Register notice. The agencies have stated they will at this time continue to transfer funds through self-determination agreements, but have declined to commit to do so in writing or to recognize that the 477 Act authorizes transfer through ISDEAA mechanisms.

[10] The current reporting system is approved and in place with expiration date of January 31, 2017, OMB Control No. 1076-0135.

[11] The 477 tribes, collectively and individually, have provided background and legal analysis on several occasions since 2008. *See* July 19, 2013 letter from the Co-Chairs of the 477 Tribal Work Group to Assistant Secretary Washburn, copy enclosed. *See also* November 26, 2008 Letter to Dr. Middleton, copy enclosed. In fact, much information and analysis was submitted to the agencies in March 2011 when the agencies conducted formal consultations in Seattle and Anchorage. *See* March 2, 2011 Pre-Consultation Letter to DOI and HHS and March 24, 2011 Post-Consultation Letter to DOI and HHS, copies enclosed.

some 265 tribes participate in the 477 Program. Those tribes and tribal organizations have formed the 477 Tribal Work Group, which has in turn developed an extensive guide book describing the 477 Program and how to submit and gain approval of a 477 Plan. The 477 Tribal Work Group has also conducted periodic symposiums and workshops to keep participating and tribal organizations, as well as the federal agencies, fully informed about program requirements and operating procedures.

Since 1992, the 477 program has allowed tribes and tribal organizations to combine programmatic employment and training related funding from various federal agencies, while streamlining program approval, accounting and reporting mechanisms. Streamlined funding for 477 Plans through transfers under the provisions of the ISDEAA has been an essential element of the success of the 477 Program. 477 Program funds have been transferred to participating tribes either through agreements authorized under Title I (self-determination contracts) or Title IV (self-governance compacts) of the ISDEAA. In addition, the Act authorizes tribes and tribal organizations to develop programs that combine and re-budget the agency program funds to fit tribal priorities and needs. This flexibility facilitates the creation of culturally appropriate programs, adds no costs for the federal government, and frees up program funding for direct client services by eliminating duplicative administration. In short, it increases cooperation between agencies, reduces administrative burden and maximizes federal dollars where they are most needed. Congress has consistently supported the 477 Program, and in July 2013 Senate and House members urged the President and the Administration to continue implementation of the 477 Act consistent with the Tribes' position on transfer and reporting of program funds.[12]

Unitary funding and transfer through ISDEAA is consistent with the purpose of the 477 Act to allow Indian tribal governments to use funds from the various sources in order to integrate the employment, training and related services in one program. Single reporting under the 477 Act has allowed participating tribes to eliminate duplicative administrative costs while enhancing the quantity and quality of services to Native people nationwide.

The advantages of a 477 Plan include improved client services, better utilization of Program staff, use of a single intake system, more uniform treatment of clients, significant reduction in federal paperwork, regulatory and statutory waivers possible under all programs, use of a single budget, and improved cash flow. Having tribes in direct control of employment programs also ensures services are provided to clientele in a manner that is respectful and culturally sensitive. 477 tribes and tribal organizations provide services to a broad clientele. For example, in FY2012, DOI-OIEED reported a total participant base of 43,991 people served by 477 Program Plans administered by tribes and tribal organizations. Over 99% of these adults and youth achieved positive employment or education outcomes, earning an average $7.00 increase in hourly wages. More than one-third of the adults had been on a Cash Assistance Program such as TANF or BIA General Assistance when they entered their tribal 477 program. The success and importance of the 477 Program to participating tribes cannot be overstated.

[12] See July 26, 2013 letter from Members of Congress to the President, copy enclosed.

But the success of the 477 program has been jeopardized by two funding and reporting changes advanced by DOI and HHS: 1) the threat, raised in October 2008, to end the practice of transferring 477 Program funds to tribes through ISDEAA, and to require transfer through grants; and 2), the 2009 Circular A-133 compliance supplement issued by the Office of Management and Budget (OMB), which required 477 tribes to report 477 expenditures separately by funding source number for audit purposes (on top of existing audit requirements).

In 2011, in order to address the conflict, the House Interior, Environment, and Related Agencies Subcommittee included language in Section 430 of the FY 2012 appropriations bill that addressed the 477 tribes' primary concerns with the current administration of the 477 Act: continuation of funding through ISDEAA agreements, and relief from the additional reporting and audit obligations instituted through the 2009 compliance supplement. The agencies and the Administration opposed the legislative change, and instead offered to try to resolve the issue in a negotiation process.

House/Senate Appropriations conferees on the FY 2012 Interior appropriations bill agreed to defer consideration of section 430 based upon the Adminstration's agreement to suspend any changes and to engage the 477 tribes and tribal organizations in government-to-government consultations to reach "general consensus" and "permanently resolve" the transfer and reporting of funds administered by tribes through 477 program plans.

This conference committee directive led to the formation of the AFWG. The 477 consultation process included policy and program representatives from DOI, HHS, DOL, and OMB, as well as tribal representatives from 477 tribes and tribal organizations. In the meantime, the agencies agreed to continue the transfer funds through ISDEAA agreements and suspended the supplemental 2009 audit requirements. In short, the 477 program has continued with the same process and the same audits that have been successfully in place for over 20 years.

477 tribes welcomed the opportunity to try to resolve the agencies' issues without legislation. The AFWG met weekly by teleconference, and in occasional face-to-face meetings. The agencies and Tribes engaged in a comprehensive review of the 477 program, a review that helped educate the agencies regarding the language and purpose of the 477 Act and the history of the 477 Act's implementation. Although the agencies halted approval of new 477 Plans and approval of additions of new programs to existing plans during a portion of the negotiations, without any basis in the 477 Act for doing so, the parties did develop an informal checklist that should aid the agencies in handling the process for the submission and approval of 477 plans and changes to plans in the future. However, despite best efforts, the agencies and tribes did not reach consensus to permanently resolve differences regarding the transfer and reporting of funds.

Fund Transfer

In October 2008 DOI and HHS announced that they would end the practice of transferring 477 Program funds to participating tribes through agreements under

ISDEAA.[13] As a basis for the action the agencies cited the court's ruling in *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133 (9th Cir. 2003), a case that did not involve the administration of the 477 Program. In that case the court held that an Indian tribe could not administer TANF under a 638 contract. The court did not address the adminstration of TANF under 477. The court simply concluded that TANF is not a contractible program under the ISDEAA because it is (1) not a program or service "otherwise provided" to Indians under federal law, 25 U.S.C. § 450b(j), and (2) not a program "for the benefit of Indians because of their status as Indians," 25 U.S.C. § 450f(a)(1)(E).

There is an enormous difference between being compelled under the ISDEAA to contract the TANF program, and choosing to transfer TANF 477 funds through such contracts. For over 20 years HHS has transferred 477 funds in this manner--not because the ISDEAA mandated it but because doing so made sense and was not prohibited by law. The 477 Tribes have consistently argued that 477 plans can be funded through the ISDEAA, and that the *Navajo Nation* case in particular does not bar the fund transfers currently implemented for the Program. The relevant law is the 477 Act, administered by the BIA, not the numerous and varied agency programs (such as TANF) that can be integrated into a tribal 477 Plan. In fact, the Act provides for administration of the program through the Department of the Interior, including transfer of HHS and DOL agency program funds to the BIA, which then transfers the funds to the tribes.

The key to understanding the 477 Act is that the 477 Act is administered by the Department of the Interior under the Secretary of the Interior. The Secretary of the Interior has the authority to approve or disapprove a tribal plan, which must be done within 90 days of submittal. 25 U.S.C. § 3407. The Act provides for the Secretary of the Interior to "cooperate" with and "consult" with other affected agency Secretaries,[14] but it is the Secretary of the Interior who "shall, upon receipt of a plan acceptable to the Secretary of the Interior submitted by an Indian tribal government, authorize the tribal government to coordinate, in accordance with such plan, its federally funded employment, training, and related service programs in a manner that integrates the program services involved into a single, coordinated, comprehensive program and reduces administrative costs by consolidating administrative functions." 25 U.S.C. § 3403 (emphasis added).

Moreover, the 477 Program is an Interior "program, service, function or activity" that is available to tribes with consolidated funds from Interior and appropriations from other agencies. The federal programs that may be integrated into a tribal 477 Plan "include any program under which an Indian tribe is eligible for receipt of funds under a statutory or administrative formula for the purpose of assisting Indian youth and adults to succeed in the work force, encouraging self-sufficiency, familiarizing Indian youth and

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[13] This issue was discussed in detail in the November 25, 2008 letter to Dr. Middleton, and the July 19, 2013 letter from the Co-Chairs of the 477 Tribal Work Group to Assistant Secretary Washburn, both referenced in footnote 11, above.

[14] *See* 25 U.S.C. §§ 3403 (integration of services authorized) and 3406 (plan review).

adults with the world of work, facilitating the creation of job opportunities and any services related to these activities." 25 U.S.C. § 3404 (emphasis added).

The 477 Act thus fits the *Navajo Nation* Court's criteria that ISDEAA-eligible programs are those "specifically targeted to Indians." The 477 Program is one provided for tribes by virtue of their status as Indians because only tribes can take advantage of it. Its targeted purpose is to facilitate employment opportunities for Indian youth and adults, as well as to encourage tribal self-sufficiency consistent with self-determination principles.

In the AFWG discussions the agencies appeared to recognize this and stated they intend to continue transfer of funds through ISDEAA. However, the agencies have declined to provide 477 tribes with written assurance that ISDEAA transfer will continue without restriction and be available for new approved plans or new programs coming into the 477 program.[15] That issue is not addressed in the February 14, 2014 Federal Register notice, and is not resolved by the proposed changes to reporting forms and instructions describing the administration of the 477 Program.

Reporting

The 477 Act authorizes tribes and tribal organizations to develop 477 program plans to integrate services and combine and reallocate expenditures from various agency programs in a single, coordinated, comprehensive Tribal program plan with a single budget and a single annual report delivered to the Department of the Interior. The reporting system in use since 1992 includes OMB-approved statistical, narrative, and financial reporting forms. In the past few years, however, the federal agencies have sought to impose additional terms and conditions to restrict a tribe's ability to reallocate program funds to fit tribal needs and to require tribes and tribal organizations to report 477 expenditures separately by funding source. This is contrary to the fundamental purpose and intent of the 477 Act.

For twenty years the tribes have used a single budget and a single reporting system, and have accounted for all 477 expenditures through a single agency audit which reviews consolidated 477 expenditures. The agencies insist that more detailed information about expenditures is necessary, but have not identified any problem or shortcoming in the tribes' prior reporting. And while the agencies have not explained how the proposed report and audit changes are consistent with the 477 Act's single

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[15] The agencies continue to misrepresent the 477 tribes' position regarding fund transfer through ISDEAA mechanisms, claiming that the tribes assert that 477 Plans are subject to all provisions of the ISDEAA. *See* Report on Progress of AFWG at 3; Statement of Lillian Sparks Robinson at 2. Not true. The tribal representatives to the AFWG offered to clarify that the Contract Support Costs provisions of the ISDEAA do not apply to funds in a 477 program unless they qualify by virtue of their originating program status, while leaving the other provisions of ISDEAA intact. *See* July 19, 2013 letter from the Co-Chairs of the 477 Tribal Work Group to Assistant Secretary Washburn at 4.

reporting system, it appears their position is based on an interpretation of Section 14(a) of the 477 Act, which provides:

> Section 14(a) ADMINISTRATION OF FUNDS.--
>
> (1) IN GENERAL.--Program funds shall be administered in such a manner as to allow for a determination that funds from specific programs (or an amount equal to the amount attracted from each program) are spent on allowable activities authorized under such program.
>
> (2) SEPARATE RECORDS NOT REQUIRED.--Nothing in this section shall be construed as requiring the tribe to maintain separate records tracing any services or activities conducted under its approved plan to the individual programs under which funds were authorized, nor shall the tribe be required to allocate expenditures among such individual programs.

The agencies appear to rely on a legal argument that the language of section 14(a)(1), that "program funds" must be administered to allow for a determination that funds "are spent on allowable activities authorized under such program," means that funds must be accounted for on a dollar-by-dollar basis for each separate agency "program" included in a Plan. Essentially, the agencies appear to oppose the consolidation and reallocation of federal funds to meet tribal program needs as outlined in an approved Plan, and seek to use reporting requirements as the mechanism for restricting what tribes are able to do in developing Plans that meet the tribes' employment-related needs. This is a strained and illogical reading of the provision, at odds with both the purpose of the Act to authorize reallocation of funds, and the Act's consistent implementation for nearly two decades.

The 477 tribes understand that the term "program funds" refers to the combined program funds administered in an approved tribal Plan, and that "allowable activities" are those activities that are authorized in the approved tribal 477 program plan, not the separate federal programs from which funds are derived. In fact, since 1992 the Act has been administered so that tribes have accounted for expenditures as provided in the combined tribal program outlined in the approved tribal Plan for employment related services. Thus, 477 tribes and tribal organizations have been audited according to 477 plan program descriptions, which are federally approved and include specific spending parameters (by line-item), providing accountability by the terms of the tribal program outlined in the Plan. The statute supports the position that transfer of federal funds through and into a 477 plan not only allows but intends to constitute authority to utilize the funds in a consolidated program according to the approved program plan without individualized reporting of the expenditure of the underlying funds.

Moreover, section 14(a)(2) of the Act specifically provides that tribes are not required "to maintain separate records tracking any services or activities conducted under its approved plan to the individual programs under which funds were authorized, nor shall the tribe be required to allocate expenditures among such individual programs."

The agencies have not explained how this language can be squared with their interpretation of subsection (a)(1), or with the overall purpose of the 477 Act. The tribes' interpretation of the two sections is consistent, while the agencies' interpretation creates a conflict that cannot be reconciled.[16]

The AFWG was not able to resolve this difference. The agencies' insistence that tribes do supplemental reports on cost categories that match the agency programs is inconsistent with the purpose of the Act to allow tribes and tribal organizations to consolidate and re-budget and reallocate agency funds to fit the needs of the tribes as set out in the approved tribal program plan. In the past auditors have been able to review tribal plans and year-end reports and determine that funds have been spent as allocated in the approved plans. The agencies' new reporting system, while providing for reporting expenditures by functional cost categories, threatens to undermine the single reporting requirement of the 477 Act and disrupts the historic implementation of this important tribal program.

The Tribes' Comments on the Proposed Reporting System as Noticed in the Federal Register

For several reasons, the reporting measures proposed for adoption in the February 14, 2014 Notice for Revision of Agency Information Collection for Reporting Systems for Public Law 102-477 Demonstration Project are inadequate, incomplete and impose reporting requirements contrary to the provisions of the 477Act.[17] The proposed changes to the reporting system are not the product of consensus agreement between the agencies and the 477 tribes and fail to "permanently resolve" the outstanding issues regarding the interpretation and administration of the 477 Program, and should be withdrawn.

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[16] The term "program" is used to refer to the employment program developed in the tribal Plan, the federal programs from which funds are derived, and the administration of the Act as the 477 program. To the extent there may be any confusion in the Act by the use of the term "program" to describe both the terms of the Plan administered by a tribe and the source of federal funds that are combined in the tribe's plan, we believe the tribes' interpretation of section 14(a) conforms to the principle that all provisions of an act should be internally consistent. The agencies' interpretation renders subsection 14(a)(1) inconsistent with not only subsection 14(a)(b), as well as the rest of the statute. Moreover, the 477 Act, as a statute intended to benefit Indians, should be interpreted liberally in favor of Indians, with any ambiguous provisions interpreted to the tribes' benefit. *See, e.g., County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992)

[17] The narrative and financial report instructions do not acknowledge that the agencies will continue transfer of funds through ISDEAA as authorized by the 477 Act, and do not recognize that the Act authorizes tribes and tribal organizations to combine, re-budget and expend funds in accordance with approved 477 Plans.

Form and Content of the Federal Register Notice

The Tribes register a general objection to the Federal Register notice and the changes to the 477 reporting system proposed therein. The proposed forms are in conflict with the provisions of the 477 Act and do not permanently resolve the fund transfer and reporting issues, the purpose for which the AFWG was formed. Mere adoption and publication of the forms does not provide a permanent resolution. The Federal Register notice and the proposed changes in the various forms and instructions do not address the fund transfer issue, and the effect of the proposed reporting requirements will not be ascertainable until OMB approves new accounting instructions to replace OMB Circular A-33. Without the new instructions the Tribes are unable to evaluate the impact of the proposed changes to the forms on the Tribes' current reporting practices. Moreover, the information collection authorized in the amended reporting forms, if adopted, will expire January 31, 2017.

Without a permanent resolution of the legal and practical issues involved, the same or similar issues may be raised in other aspects of the plan review and approval process. For example, in February 2011 HHS and DOI circulated a "477 Funding Agreement Addendum" (proposed Addendum) for consultation and comment. The proposed Addendum was aimed at addressing fund transfer and reporting issues, but the 477 tribes objected that it was either duplicative of or inconsistent with the requirements of the 477 Act. [18]

The proposed Addendum contained terms and conditions that would have imposed additional "grant" conditions on HHS funds, and further restricted a tribe's use of HHS program funds included in a 477 Plan. The proposed Addendum provided that "Title I and Title IV of Pub. L. 93-638 do not apply to TANF, CCDF, or NEW funds, and thus any provisions of this Funding Agreement applicable to funding under either Title I or Title IV of Pub. L. 93-638 do not apply to HHS program funds." It also required that 477 tribes agree "not to reallocate HHS program funds nor redesign the grant program. The Tribe agrees to abide by HHS program guidelines, manuals, and policy directives. The Tribe agrees to make records of the grant program available to HHS for inspection and agrees to performance monitoring visits from HHS, in accordance with the terms of the grant." Finally, the proposed Addendum addressed reporting and auditing practices for HHS funds: "TANF, CCDF, and NEW funds must be audited under their own CFDA numbers and consistent with the Single Audit Act and OMB Circular A-133. The TANF and CCDF funds must be audited consistent with the applicable TANF or CCDF program compliance supplement in Part 4 of the OMB Circular A-133 Compliance Supplement. NEW funds must be audited consistent with Part 7 of the OMB Circular A-133 Compliance Supplement." These proposed requirements were plainly inconsistent with the 477 Act's purpose to allow tribes to administer the Program under a single approved 477 Plan with a single budget and a single reporting system.

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[18] The Tribes' legal and policy objections to the proposed Appendix were set forth in detail as part of formal consultations conducted by the agencies. *See* March 2, 2011 Pre-Consultation Letter to DOI and HHS and March 24, 2011 Post-Consultation Letter to DOI and HHS, referenced in footnote 7, above.

After consultation meetings and receiving critical comments from 477 tribes and tribal organizations, the agencies abandoned this attempt to alter the administration of the 477 Program through use of the proposed Addendum, but without agreeing to some mechanism to permanently resolve the fund transfer and reporting issues, as the agencies propose through adoption of the reporting forms as proposed in the Federal Register notice, the 477 tribes will be vulnerable to similar attempts by the agencies to unilaterally change the administrative process and requirements for approval of 477 Plans.

The Tribes recommend that that the agencies withdraw the publication notice and maintain the status quo pending continued negotiations in the 477 Administrative Flexibility Work Group, and until such time as the parties negotiate a permanent resolution of the fund transfer and reporting issues.

Evaluation of Proposed Changes

The forms that are proposed for use in future reporting include: Financial Expenditure Report Form & Instructions, Narrative Report, Statistical Report Form, Statistical Report Form Instructions, and Functional Cost Categories.[19] Although the Federal Register notice does not address this issue, the 477 tribes and tribal organizations have been advised that the onerous audit requirements imposed by Office of Management and Budget (OMB) A-133 Circular will be replaced. The narrative report and statistical report provide information on the results of program measures implemented by tribes in their approved 477 plans. The proposed new Financial Expenditure Report combines the former Financial Report and TANF Financial Report to allow tribes to report expenditures made under an approved plan by consolidating expenditures into "functional cost categories."

The terms of the "cost category" reporting system were discussed by the federal and Tribal representatives in the AFWG, but, as described above, the parties did not reach consensus on the terms and conditions of use of the reporting system that represents a permanent resolution of fund transfer and reporting issues. The Tribes' position is that the 477 Act allows tribes to consolidate federal funds and re-budget or reallocate them to match the program priorities outlined in a tribal plan; the agencies maintained that the tribes must expend funds as provided in the federal program, and through Circular A-133 sought dollar-for-dollar reporting by funding source. The AFWG developed the proposed Financial Expenditure Report as a compromise in order to allow tribes to report how funds are expended under a plan and still provide overall accounting for total federal dollars expended. The untested premise of this approach is that it provides flexibility for

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[19] Once adopted, these forms will remain in effect through January 31, 2017. The "functional categories" for reporting include cash assistance; child care services; education, employment, training and supportive services; program operations; and administrative costs. This allows 477 tribes to combine and report expenditures in these categories rather than break-out and report expenditures as to the sources of funds (i.e., TANF, child care, NEW, WIA).

tribes to report expenditures based on the elements in their individual plans, without having to create new recordkeeping practices and without reporting "dollar-for-dollar" how each federal program's funds are expended. However, tribal representatives to the AFWG were willing to discuss this approach on the basis of a *quid pro quo* that the agencies would agree to permanently resolve the fund transfer and reporting issues and that such resolution would be documented in a meaningful way in the record. That agreement was not reached by the parties and approved by the 477 tribes, and the agencies should not implement unilaterally what was intended as part of a compromise that was never reached. The Tribes recommend that that the agencies withdraw the publication notice and maintain the status quo pending continued negotiations in the AFWG to reach consensus measures which demonstrate a permanent resolution of the issues.

Agency Request for Comments

The February 14, 2014 notice solicits comments on the following specific areas: 1) whether the information collected is necessary for the agencies to perform their functions, including whether the information will have practical utility; 2) the accuracy of the agency's estimate of the burden (hours and cost) on tribes created by the collection of information, including the validity of the methodology and assumptions used; 3) ways the agencies could enhance the quality, utility, and clarity of the information to be collected; and 4) ways the agencies could minimize the burden of the collection of the information. *See* 79 Fed. Reg. at 8986. The Tribes' specific comments follow.

Necessity and utility of information collection

The Federal Register notice does not explain the reason for the collection of information required by the new reporting forms or the purpose served under the 477 Act by the change in information collection. Under the current reporting system, in place for two decades, auditors have been able to review tribal plans and year-end reports and determine that funds have been spent as allocated in the approved 477 Plans. The proposed change in the fundamental nature of current reporting practices is inconsistent with the purpose of the Act to allow tribes and tribal organizations to consolidate and re-budget and reallocate agency funds to fit the needs of the tribe as set out in the approved tribal program 477 Plan. Part of the problem has been the agencies' unwillingness to articulate clearly any perceived problems with current administration of the program, or to share any written analysis of their interpretations of the Act. The Federal Register notice does not explain how the current reporting system is inadequate or justify the proposed change on the basis of any legal requirement in the 477 Act. Thus, the Tribes have no basis for evaluating whether the additional information collection requirements imposed by the proposed reporting system are necessary for the agencies to perform their functions, or whether the information will have any practical utility for implementation of the 477 Program.

Burden on Tribes by implementing the reporting requirements

The proposed reporting system is to be implemented unilaterally by the agencies, without any testing in practical application. In practice the 477 Plans implemented by tribes vary in terms of the number and size of programs incorporated into a 477 Plan, the design of the tribal program implemented in the Plan, and the number of tribal members served by the Plan. In addition, the notice provides the agencies estimate that the "burden" on tribes in responding to the reporting requirements includes a range from 2 to 40 hours, and a dollar cost of $310.00. *See* 79 Fed. Reg. at 8986. That estimate does not provide any basis for meaningful analysis of the actual burden imposed by the new requirements, or allow a determination or accurate assessment of the cost of compliance with the new process. The notice does not describe the methodology and assumptions used in formulating the estimate of the burden of information collection, and therefore the Tribes have no basis for evaluating the same. As noted above, the effect of the proposed reporting requirements will not be ascertainable until OMB approves new accounting instructions to replace OMB Circular A-33. Without the new instructions the Tribes are unable to evaluate the burden or the cost of implementing the proposed reporting changes, including any new recordkeeping practices that tribes may have to develop to be able to comply with reporting requirements, or the cost to restructure data collection systems in order to provide the specific information in the form sought in the new reporting requirements. Such requirements are precluded by the express terms of Section 14(a)(1) of the Act: "Nothing in this section shall be construed as requiring the tribe to maintain separate records tracing any services or activities conducted under its approved plan to the individual programs under which funds were authorized, nor shall the tribe be required to allocate expenditures among such individual programs."

Quality, utility and clarity of information collected

The Tribes believe that the data and information collected in the current reporting system, in place for two decades, has been sufficient to allow the tribes and agencies to evaluate the efficiency of the Tribal 477 Plans and to describe the benefits accruing to tribal members served by the 477 Plans. The success and importance of the 477 initiative to tribes cannot be overstated and has been repeatedly recognized. In fact, in 2008 the Office of Management and Budget gave the 477 Program the highest rating of any program in the Department of the Interior. The current reporting system has also enabled auditors to review tribal plans and year-end reports and determine that funds have been spent as allocated in the approved 477 Plans. The Federal Register notice does not provide any information regarding the purpose for the proposed reporting changes or how these changes are expected to enhance the quality, utility, and clarity of the information that has been collected in the past. Given the past and lengthy record of the tribes' performance under the 477 Program and record of service to tribal members served by the 477 Plans, the burden is on the agencies to justify the additional requirements the agencies seek to impose with the new reporting system.

Minimizing the burden on 477 Tribes

If the agencies are serious in seeking recommendations on ways they can minimize the burden of the collection of the information, they should reconsider the proposed new reporting system, which imposes additional reporting burdens on tribes, adopted unilaterally by the agencies, without any explanation of the need for the additional reporting, without any justification for the requirements under existing law, and imposing such requirements after the tribes have successfully administered 477 Plans for more than twenty years without such requirements. Furthermore, the agencies seek to impose as a requirement, a system of cost category reporting that was developed as a draft proposal, in mutual discussions between the federal and tribal representatives, but which was envisioned by the tribes as an inextricable part of a compromise that would provide a permanent resolution of the differences that divided (and still divide) the parties regarding the proper interpretation and application of the 477 Act.

Recommended action

The Tribes recommend that the agencies minimize the burden on the tribes by withdrawing the notice and maintain the status quo until such time as the agencies and tribes reach agreement on a permanent resolution of fund transfer and reporting issues, which will enable the agencies and tribes to implement any changes to reporting requirements, if necessary, in a mutually satisfactory manner. As noted above, the current reporting system is approved by OMB through January 31, 2017, providing sufficient time for agreement and implementation of any revised reporting system. The current reporting system is adequate and consistent with the 477 Act, and should remain in place.

In any event, the Tribes recommend that the notice be withdrawn until such time as the agencies 1) provide an adequate explanation of the need for the new reporting system, consistent with the terms of the 477 Act; 2) describe the methodology and assumptions used to calculate the potential burden imposed on tribes by the new reporting requirements; 3) explain the purpose for the proposed reporting changes and describe how these changes are expected to enhance the quality, utility, and clarity of the information that has been collected in the past; and 4) conduct a meaningful test application of the proposed reporting system to the varied tribal 477 Plans that have been implemented under the 477 Act in order to evaluate whether it minimizes the collection burden on the tribes.

Technical Comments on Proposed Forms

In the event the BIA declines to withdraw the February 14, 2014 Notice for Revision of Agency Information Collection for Reporting Systems for Public Law 102-477 Demonstration Project, and proceeds with action to implement the new reporting system, the Tribes recommend the following changes to the proposed forms in order to clarify the scope and manner of use of the forms.

Financial Expenditure Report Form & Instructions

In the Financial Expenditure Report, column 8, make the following change:

Strike line 8(e)(i), "Child Care Quality Improvement (non-add)" and insert it as line 8(c)(i). The reason for this change is that only those tribes with a CCDF allotment of $500,000 or more are required to account for Child Care Quality Improvement expenditures.

In the financial Expenditure Report, line 9, add language as follows:

Certification: This is to certify that the information reported on all parts of this form is accurate and true to the best of my knowledge and belief and that the tribe has complied with all directly applicable statutory requirements and with those directly applicable regulatory requirements which have not been waived**, and that all funds have been expended in accordance with the Tribe's approved 477 Plan**.

Narrative Report

Page 2, item #1. Strike the first sentence because such a report is required only for tribes with a CCDF allotment of $500,000 or more:

Tribes with a CCDF allotment of $500,000 or more are required to spend a minimum of 4 percent of CCDF expenditures on activities to improve the quality of care; those Tribes are required to address this question in the narrative.

Statistical Report Form and Statistical Report Form Instructions

In the Statistical Report Form, Section II "Terminee Outcome," at Subsection B(1), insert a forward slash "/" between Degree and Certificate (Degree/Certificate) in order to distinguish the separate types of documents.

In the Statistical Report Form Instructions, at page 3, Section II(A)(4)., "Average Adult Earnings Gain," insert the phrase "To illustrate," at the beginning of the third sentence, to read "To illustrate, if at termination such a person entered unsubsidized employment earning $6.50 per hour, the gain would be $6.50 per hour." The reason for this change is to make clear that it is intended as an example of gain for purposes of determining average gain.

Functional Cost Categories

In the Category form for "Program Operations," strike the second sentence in the Definition section, which reads "Reporting for child care quality improvement . . . Tribes receiving less than $500,000 in CCDF" and insert it in the Definition section in the Category form for "Child Care Services." The reason for this change is that "child care"

is a specific type of activity and it would be less confusing to have the function match the expenditure.

Conclusion

The 477 Act has allowed tribes and tribal organizations to develop meaningful programs that have increased tribal members' direct access to employment programs and self-sufficiency. Tribes have been able to merge several separate programs into one program with a single budget, one annual report, and a single consolidated audit of the entire 477 program. The decrease in administrative costs has increased the provision of client services. The ability of Tribes to design tribal programs to fit their own specific needs and priorities has eliminated barriers to employment services that were dictated by restrictions in the separate funded programs. The Act has facilitated tribal self-determination by authorizing tribes to design services to fit each individual tribe's needs.

The confusion and disruption caused by agency actions since 2008 have threatened to undermine the efficiency and success of the 477 Program. The proposed implementation of a new reporting system, without any explanation of the need for the changes after twenty years, and over the objections of the 477 tribes, is unnecessary and counterproductive.

The 477 tribes and tribal organizations look to the Department of the Interior and the Bureau of Indian Affairs for leadership in saving the integrity of this program. The BIA is the designated "lead agency" for 477 program implementation, with the responsibility to develop the single plan and single report format, and to provide appropriate technical assistance and support for program goals.[20] For nearly two decades the 477 Program has been an unqualified success. The 477 Act has allowed participating tribes to eliminate duplicative administrative costs while enhancing the quantity and quality of services to Native people nationwide. The Department and the BIA have the trust duty to maintain the integrity of the 477 program consistent with the 477 Act and the past administration of the program that has proven so successful.

For the reasons outlined above, the BIA should withdraw the Notice for Revision of Agency Information Collection for Reporting Systems for Public Law 102-477 Demonstration Project, and maintain the status quo regarding fund transfer and reporting, until such time as the agencies and tribes reach agreement on a permanent resolution of issues and are in a position to implement a mutually acceptable replacement for the current reporting system.

For more information about the issues discussed above, please contact Geoff Strommer by email at gstrommer@hobbsstraus.com or by phone at (503) 242-1745, or Vernon Peterson by email at vpeterson@hobbsstraus.com or by phone at (503) 320-0145.

[20] *See, e.g.*, 25 U.S.C. §§ 3403 and 3410.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: Geoff Strommer (by TAE)
Geoff Strommer

Enclosures:
November 25, 2008 Letter to Dr. Middleton
July 19, 2013 Letter to Assistant Secretary Washburn
March 2, 2011 Pre-Consultation Letter to DOI and HHS
March 24, 2011 Post-Consultation Letter to DOI and HHS
July 26, 2013 letter from Members of Congress to the President
Robinson, DHHS Testimony Before SCIA, April 2, 2014
Washburn, Report to Committees re AFWG, April 1, 2014

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November 25, 2008

Sent Via Facsimile

Dr. Robert W. Middleton
Director, Office of Indian Energy
and Economic Development
Office of the Secretary
Department of the Interior
Washington, D.C. 20240

Re: Proposed Change in Funding for 477 Program

Dear Dr. Middleton:

We write to you in our capacity as legal counsel for the Jamestown S'Klallam Tribe, Kawerak, Inc., Maniilaq Association, and the Metlakatla Indian Community. The purpose of this letter is to register our tribal clients' legal objection to the proposed change in funding for the tribal employment and training program established by P.L. 102-477, ("477 Program" or "477 Act").[1] The 477 Program is administered by the Bureau of Indian Affairs ("BIA"). Currently 477 funds are transferred to participating Self-Governance tribes through approved Annual Funding Agreements ("AFA"), as authorized by the Indian Self-Determination and Education Assistance Act ("ISDEAA").[2] Your October 17, 2008 letter announced that beginning January 1, 2009, funds for 477 Plans will be transferred through a grant process under Department of the Interior ("DOI") regulations.[3] Our tribal clients strongly oppose this proposed change.

Interior officials attending the quarterly meeting of the 477 Tribal Work Group held November 19, 2008, in Omaha stated that the proposed change is based on a written opinion from the Solicitor's Office that federal law prohibits the inclusion of 477 Plans in Self-Governance agreements. While the Solicitor's Office has so far declined to release the opinion for review, and we have heard only its conclusion, our own analysis convinces us that tribal 477 Plans are eligible to be funded through ISDEAA, and that it would be unlawful for the BIA to now decline continued funding through Self-Governance agreements.

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[1] The Indian Employment, Training, and Related Services Demonstration Act, 25 U.S.C. §§ 3401-3417, as amended by Public Law 106-568, the Omnibus Indian Advancement Act of 2000.
[2] 25 U.S.C. § 450 *et. seq.*
[3] The BIA proposes to fund 477 Plans through 43 CFR Part 12, "Administrative and Audit Requirements and Cost Principles for Assistance Programs," and 25 CFR Part 276, "Uniform Administrative Requirements for Grants."

The tribal employment and training program established by the 477 Act allows tribes and tribal organizations to combine employment and training-related federal funds from various agencies into a single 477 Plan approved by the Secretary of the Interior with a single budget and a single reporting system. The 477 Act authorizes combined funding from programs in Interior, the Department of Labor ("DOL"), and the Department of Health and Human Services ("HHS"). The 477 Act is administered by the DOI's Office of Indian Energy & Economic Development in the BIA, and 477 Plans are approved under the authority of the Secretary.

Since the Program's inception, 477 funds have been transferred to participating tribes through Self-Governance agreements. As BIA officials described the Program on November 19, 2008, there are 167 Self-Governance tribes involved in operating 28 separate 477 Plans, some as single-tribe plans and others as tribal consortium plans. That means that 70% of the 236 Self-Governance tribes are involved in the implementation of the 477 Program. Currently some $68 million is funded to 477 Plans through the Self-Governance agreements. This amounts to nearly 20% of the total current funds obligated through Self-Governance. To make such a significant change, in a decision without any government-to-government consultation with Self-Governance tribes, makes no practical or legal sense.[4]

The success and importance of the 477 initiative to Self-Governance tribes cannot be overstated. The Office of Management and Budget gave the 477 Program the highest rating of any program in the Department of the Interior. Streamlined funding through the ISDEAA process is an essential element of that success. Moreover, tribes are concerned that this abrupt, unexplained change may have far-reaching implications for the Self-Governance program generally. For policy reasons alone, the Department of the Interior, as the tribes' principal trustee, should reconsider this ill-advised decision. However, it is also clear that the proposed change is illegal.

At the November 19 meeting, an attorney from Solicitor's Office, Sabrina McCarthy, stated Interior's position that there is no authority for fund transfer through Self-Governance agreements, but did not cite any specific provision of the 477 Act or the ISDEAA that would prohibit or preclude fund transfer through the current process. She also advised that she did not have authority to release the written opinion, but indicated that it relies in part on the court's ruling in Navajo Nation v. Department of Health and Human Services, 325 F.3d 1133 (9th Cir. 2003), a case that involved neither the administration of the 477 Program nor federal funding through the Self-Governance provisions of ISDEAA. In that case the court held that an Indian tribe could not administer Temporary Assistance for Needy Families (TANF), an HHS program, under a 638 contract. With regard to the 638 provisions of ISDEAA, the court concluded that TANF is not a contractible program because it is (1) not a program or service "otherwise provided" to Indians under federal law, 25 U.S.C. § 450b(j), and (2) not a program "for

[4] We note that the 477 Work Group, on behalf of its participating tribes, has requested a moratorium on the change, and has requested release of the Solicitor's opinion and a commitment from all federal agencies to enter full government-to-government consultations, as required by each agency's consultation policies.

the benefit of Indians because of their status as Indians," 25 U.S.C. § 450f(a)(1)(E). The court also analyzed TANF and concluded it is a general assistance program which allows tribes to apply to administer the program directly from HHS, but not under ISDEAA because it is not a program "specifically targeted to Indians."

We think that 477 Plans can be funded through Self-Governance agreements, and that the Navajo Nation case in particular does not bar the fund transfers currently implemented for the Program. The relevant law is the 477 Act, administered by the BIA, not the numerous and varied agency programs (such as TANF) that can be integrated into a tribal 477 Plan. At the November 19 meeting Interior officials acknowledged that the 477 Program is one "specifically targeted to Indians," and that a 477 Plan which did not include TANF as a program component could be funded through ISDEAA. That does not explain why 477 Plans with no TANF funds are also to be excluded from ISDEAA fund transfers beginning January 1. More importantly, however, we believe that the better reading of the 477 Act is that all 477 Plans, no matter what the source of program funds, are eligible to be funded through Self-Governance agreements, and that it would be unlawful for the BIA to decline continued funding through those agreements.

25 U.S.C. § 458cc(b)(1) provides that a Self-Governance funding agreement can authorize a tribe "to plan, conduct, consolidate and administer programs, services, functions, and activities" administered by the Department of the Interior, including any program, service, function, activity, or portion thereof, administered under authority of . . . (C) "programs, services, functions, and activities or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior." Thus, a program or service can be included in a Self-Governance agreement if it is one administered by Interior and otherwise available to Indian tribes or Indians with funds from Interior or appropriations made to other agencies. The 477 Act authorizes such a program:

- First, it is administered by the Department of the Interior under the Secretary of the Interior. The Secretary of the Interior has the authority to approve or disapprove a tribal plan, which must be done within 90 days of submittal. 25 U.S.C. § 3407. The Act provides for the Secretary of the Interior to "cooperate" with and "consult" with other affected agency Secretaries,[5] but it is the Secretary of the Interior who "shall, upon receipt of a plan acceptable to the Secretary of the Interior submitted by an Indian tribal government, authorize the tribal government to coordinate, in accordance with such plan, its federally funded employment, training, and related service programs in a manner that integrates the program services involved into a single, coordinated, comprehensive program and reduces administrative costs by consolidating administrative functions." 25 U.S.C. § 3403 (emphasis added).

[5] *See* 25 U.S.C. §§ 3403 (integration of services authorized) and 3406 (plan review).

- Second, the 477 Program is an Interior "program, service, function or activity" that is available to tribes with consolidated funds from Interior and appropriations from other agencies. The federal programs that may be integrated into a tribal 477 Plan "include any program under which an Indian tribe is eligible for receipt of funds under a statutory or administrative formula for the purpose of assisting Indian youth and adults to succeed in the work force, encouraging self-sufficiency, familiarizing Indian youth and adults with the world of work, facilitating the creation of job opportunities and any services related to these activities." 25 U.S.C. § 3404 (emphasis added).

The 477 Act thus fits the Navajo Nation court's criteria that ISDEAA-eligible programs are those "specifically targeted to Indians." The 477 Program is one provided for tribes by virtue of their status as Indians because only tribes can take advantage of it. Its targeted purpose is to facilitate employment opportunities for Indian youth and adults, as well as to encourage tribal self-sufficiency consistent with self-determination principles.

The Navajo Nation case cannot be read to preclude certain 477 components such as TANF from inclusion in Self-Governance agreements based on the conclusion that the component program would be directly subject to ISDEAA provisions. In that case, the tribe sought to contract TANF directly under ISDEAA in part to qualify for contract support costs authorized for 638 contracts, and the court held that programs such as TANF, which benefit Indians only "collaterally" the same as the general population, are not directly subject to the terms of ISDEAA. However, the 477 Act does not directly subject any component program to ISDEAA. There is a clear demarcation between the 477 Plan on its own terms and the component programs or services that are integrated into the Plan. The 477 Program is structured so that the 477 Plan, as authorized under the 477 Act and approved and administered by the BIA, can be included in a Self-Governance agreement and funded through ISDEAA, while each component program remains subject to the terms agreed to by the tribe and the agency in the development of the Plan.

The Program and service elements integrated into a 477 Plan are governed by the provisions of the originating statutes and the terms by which they are incorporated into the 477 Plan. As the first step in the process, the tribe develops a comprehensive strategy for tribal employment services, including identifying the federal programs to be combined, describing the way the services are to be integrated and delivered, identifying the tribal agencies to administer the integrated Program, preparing a single-budget projection of expenditures, and identifying the expected results by which the success of the Plan can be measured. 25 U.S.C. § 3405. Upon receipt of a proposed Plan, the Secretary of the Interior consults with each federal agency providing funds to be used to implement the integrated Plan to determine if the Plan can be approved. 25 U.S.C. § 3406. Affected agency programs are integrated in the tribe's Plan, subject to criteria that allow a single, coordinated and comprehensive employment Program, so long as the

Plan's elements are consistent with the requirements of the individual programs. Tribes can seek a waiver of an agency's "statutory requirement, regulation, policy or procedure promulgated by that agency" for a specific program, so long as the waiver is consistent with the provisions of the statute from which the program derives its authority. *Id.*[6]

Otherwise, an agency's requirements and funding levels for a program, as agreed to in an approved Plan, remain applicable even after the Plan is included in a Self-Governance agreement for purposes of fund transfer. This is demonstrated most clearly by the fact that the BIA's "Self-Governance Negotiation Guidance for BIA Programs" specifically requires that tribes including 477 Plans in funding agreements commit to follow the underlying program requirements.[7] Thus, for purposes of inclusion in a Self-Governance funding agreement, the issue is whether the 477 Act established administration of a 477 Plan as an eligible Program, not whether each separate program or service integrated into a Plan would be eligible for inclusion in ISDEAA as a stand-alone agreement. As demonstrated above, a 477 Plan is authorized to be included in a Self-Governance agreement because it is one administered by Interior and available to Indians—"specifically targeted to Indians"—with funds from Interior or appropriations made to other agencies. 25 U.S.C. § 458cc(b)(1)(C). The BIA's responsibilities and activities related to the 477 Program that are assumed by the tribes under Self-Governance include those related to fund distribution and reporting of expenditures and activities. *See* 25 U.S.C. § 3410. The 477 Program is somewhat unique in Self-Governance activities in that it provides for the integration and administration of other direct service programs, but it is fully consistent with ISDEAA's purpose to maximize tribal participation in directing federal services in a manner responsive to the needs and desires of tribal communities, and to further self-determination "to permit an orderly transition from Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b).

Other features of the 477 Act and the tribal 477 Plans approved under the Act support the view that the 477 Program is a distinct Interior-administered program eligible for inclusion in ISDEAA agreements and contracts. The federal agencies operate under an interagency MOU which designates the BIA as lead agency. 25 U.S.C. § 3410. The Program uses a single budget, a single-reporting format, and a single oversight system "implemented" by the BIA. *Id.* There is no separate funding associated with the 477 Program. All the funds involved are from separate agency programs dealing with

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[6] 25 U.S.C. § 3408 authorizes a Plan to provide for expenditure of funds for the creation of economic opportunities or development of economic resources "consistent with the purposes specifically applicable to Indian programs in the statute under which the funds are authorized."

[7] For example, the current Guidance document provides that Self-Governance agreements must include the following statement: "To the extent this agreement includes Indian Employment Training and Related Services Demonstration Project funds pursuant to P.L. 102-477, the Tribe agrees that such funds will be administered in accordance with the Tribe's approved plan, all statutory requirements including reporting, and applicable federal regulations that have been published in the Federal Register."

employment, training, or any related area that the tribe is otherwise eligible to receive. Under specific authority for interagency fund transfers, funds from all agencies are transferred to and consolidated in the Central Office BIA, through the Treasury Department, and then the combined funds are obligated to the tribe under the Interior financial systems process. *See* 25 U.S.C. § 3412. Tribes have responsibilities to the originating agencies for reporting and other requirements under the component programs, as those are defined in the Plan.

This interpretation of the 477 Act is consistent with BIA's administrative practice funding 477 Plans through ISDEAA, and certainly a permissible construction of the Act consistent with its purpose to further self-determination. 477 Plans have been funded in this manner for more than a dozen years. In fact, the current 2009 Self-Governance Negotiation Guidance for BIA Programs, dated June 1, 2008, continues to provide that "P.L. 102-477 funds are eligible to be included in Self-Governance funding agreements," and directs that tribes desiring to include such funds in the funding agreement must incorporate the appropriate language into a section of the funding agreement.

Unitary funding under ISDEAA is also consistent with the purpose of the 477 Act to allow Indian tribal governments to use funds from the various sources in order to "integrate the employment, training and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally-determined goals consistent with the policy of self-determination." The advantages of a 477 Plan include improved client services, better utilization of Program staff, use of a single intake system, more uniform treatment of clients, significant reduction in federal paperwork, regulatory and statutory waivers possible under all programs, use of a single budget, and improved cash flow. Having tribes in direct control of employment programs also ensures services are provided to clientele in a manner that is respectful and culturally sensitive. There is no policy reason or legal basis for stripping tribes of the advantages achieved through this Program by changing the funding mechanism.

The BIA should maintain its consistent, long-standing implementation of the 477 Program by funding approved plans through ISDEAA. In a time of otherwise dour economic forecasts, this last-minute change threatens to undermine the stability of a very successful tribal Program, with no apparent policy or legal reason for the change. As noted above, this proposed change will affect 70% of Self-Governance tribes and nearly 20% of funds currently distributed through Self-Governance. At the very least, Interior and the BIA are obligated to declare a moratorium on the funding change, and engage Self-Governance tribes in full government-to-government consultations involving all the federal agencies with programs and services subject to the 477 Act.

For more information about the issues discussed above, please contact Geoff Strommer by email at gstrommer@hobbsstraus.com or by phone at (503) 242-1745, or Vernon Peterson by email at vpeterson@hobbsstraus.com or by phone at (503) 281-1375.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: _____
Geoff Strommer

cc: Sharee Freeman, Director, Office of Self-Governance
Ron Allen, Chairman, Jamestown S'Klallam Tribe
Cyndi Ferguson, Self-Governance Coordinator, Jamestown S'Klallam Tribe
Loretta Bullard, President, Kawerak, Inc.
Ian Erlich, President, Maniilaq Association
Jackie Hill, Self-Governance Coordinator, Maniilaq Association
Karl Cook, Mayor, Metlakatla Indian Community
Paul T. Brendible, Jr., Contracts and Grants, Metlakatla Indian Community

July 19, 2013
SENT VIA EMAIL

Mr. Kevin Washburn
Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, NW
MS 4513-MIB
Washington, D.C. 20240

Re: *Action Necessary to Preserve and Strengthen the 477 Program*

Dear Mr. Washburn:

I write on behalf of the many Tribes and tribal organizations that have adopted 477 Plans implementing Public Law 102-477.[1] The tribal employment and training program established by the 477 Act authorizes Tribes and tribal organizations to combine employment and training-related federal funds from various agencies into a single 477 Plan approved by the Secretary of the Interior with a single budget and a single reporting system. We appreciate your attention to the 477 program. We are encouraged by your discussion of the current issues during the July 3 teleconference, and look forward to your involvement and leadership in finally resolving these issues.

You indicated that the federal agencies involved in the program, the Departments of the Interior (DOI), Health and Human Services (HHS), and Labor (DOL), as well as the Office of Management and Budget (OMB), are currently discussing legal issues involved in implementing the 477 Act. You welcomed comments from the Tribes. On behalf of the 477 Tribes, I take this opportunity to describe the background of the Act's administration and our assessment of the agency actions that threaten to disrupt the 477 program.[2]

Background

[1] The Indian Employment Training and Related Services Demonstration Act, Pub. L. 102-477, as amended, 25 U.S.C. §§ 3401-3417.

[2] On several prior occasions since 2008, the Tribes (collectively and individually) have provided the agencies with more detailed background and legal analysis than is contained here. This includes considerable information and analysis submitted in March 2011, when the agencies first conducted formal consultations in Seattle and Anchorage. That information supplements the summary provided here.

The 477 Program is unique among federal initiatives, and has succeeded for 21 years without any implementing regulations. Overall supervision and coordination among the impacted departments has been provided by the Bureau of Indian Affairs, while the 477 Program has been directly implemented through the initiative of hundreds of participating Tribes and tribal organizations situated throughout the Nation. Those Tribes and tribal organizations have organized the 477 Tribal Work Group, which has in turn developed an extensive guidebook describing the 477 Program and how to submit and gain approval of a 477 Plan. The Tribal Work Group has also conducted periodic symposiums and workshops to keep participating and interested Tribes and tribal organizations, as well as the federal agencies, fully informed about program requirements and operating procedures.

Since 1992, the 477 program has allowed Tribes and tribal organizations to combine programmatic employment related funding from various federal agencies, while streamlining program approval, accounting and reporting mechanisms. Streamlined funding for 477 Plans through transfers under the Indian Self-Determination and Education Assistance Act ("ISDEAA") has been an essential element to the success of the 477 Program. 477 Program funds have been transferred to participating Tribes either through self-determination contracts or self-governance compacts awarded under the ISDEAA. In carrying out a 477 Plan, the Act authorizes Tribes and tribal organizations to develop programs that re-budget and reallocate the agency program funds to best fit tribal priorities and local needs. This flexibility has facilitated the creation of culturally appropriate programs, has added no costs to the federal government, and has freed up program funding for direct client services by eliminating duplicative administrative requirements. In short, 477 has increased cooperation between agencies, reduced administrative burdens and maximized federal dollars where they are most needed.

Unitary funding under ISDEAA agreements is consistent with the purpose of the 477 Act, which is to allow Indian tribal governments to use funds from the various sources in order to integrate tribal employment, training and related services into a single program. Single reporting under the 477 Act has allowed participating Tribes to eliminate duplicative administrative costs while enhancing the quantity and quality of services to Native people nationwide.

The advantages of a 477 Plan include improved client services, better utilization of Program staff, use of a single intake system, more uniform treatment of clients, significant reduction in federal paperwork, regulatory and statutory waivers available under all programs, use of a single budget, and improved cash flow. Having Tribes in direct control of employment programs also ensures services are provided to clients in a manner that is respectful and culturally sensitive while addressing the unique circumstances of each individual Tribe. The success and importance of the 477 Program to participating Tribes cannot be overstated.

Unfortunately, the success of the 477 program has been jeopardized by two proposed funding and reporting changes advanced by DOI and HHS: (1) the threat, first raised in October 2008, to end the practice of transferring 477 Program funds to Tribes through ISDEAA agreements; and (2) issuance of the 2009 OMB Circular A-133 compliance supplement, which required 477 Tribes to report 477 expenditures for audit purposes separately by funding source number (on top of existing audit requirements already imposed upon these funds under the Single Audit Act.).

Unable to gain any headway in discussions with the agencies, the 477 Tribes turned to Congress. In response, last year the House Interior, Environment, and Related Agencies Subcommittee included Section 430 in the FY 2012 appropriations bill. That Section would have legislatively commanded that 477 funding continue being transferred to Tribes and tribal organizations through ISDEAA agreements, and would have barred the imposition of the new reporting requirements reflected in the 2009 OMB Circular A-133 compliance supplement. The agencies and the Administration opposed the legislative command, and requested time to resolve the issues through a negotiation process which would maintain the status quo.

The House and Senate conferees then agreed to defer consideration of Section 430 based upon the Administration's agreement to suspend all changes, and to engage the 477 Tribes and tribal organizations in government-to-government consultations designed to develop general consensus and "permanently resolve" the issues at hand. This conference committee directive led to the formation of the "P.L. 102-477 Administrative Flexibility Work Group."

The 477 program negotiation process has included policy and program representatives from DOI, HHS, DOL, and OMB, together with tribal representatives from numerous 477 Tribes and tribal organizations. The Work Group has been meeting weekly by teleconference, and in occasional face-to-face meetings since November 2011. In the meantime, the agencies have continued to transfer funds through ISDEAA agreements and have suspended the imposition of new reporting and auditing requirements. As a consequence, the 477 program has continued with the same process and the same audits that have been successfully in place for 21 years.

The 477 Tribes welcomed the opportunity to resolve the agencies' concerns without legislation. The agencies and Tribes have engaged in a comprehensive review of the 477 program, and they have developed a better understanding of the language and purpose of the 477 Act, the history of the 477 Act's implementation, the process for the submission and approval of 477 plans, and the consolidated reporting system in place for all integrated programs contained in a 477 plan. But despite these best efforts, the agencies and Tribes have been unable to reach the necessary consensus on new mechanisms for the transfer and reporting of funds. With your renewed leadership, we hope that these issues can finally be put to rest.

Fund Transfer

In October 2008, DOI and HHS announced their intent to cease transferring 477 Program funds to participating Tribes through ISDEAA agreements. As a basis for this abrupt announcement, the agencies cited a 5-year old court decision issued in *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133 (9th Cir. 2003). But that case did not involve the 477 Program at all. Rather, that case involved a Tribe's right to directly contract a TANF program under the ISDEAA. The court held that an Indian Tribe could not compel HHS to contract the TANF program under an ISDEAA contract. The court simply concluded that TANF is not a "contractible" program under the ISDEAA because it is (1) not a program or service "otherwise provided" to Indians under federal law, 25 U.S.C. § 450b(j), and (2) not a program "for the benefit of Indians because of their status as Indians," 25 U.S.C. § 450f(a)(1)(E).

There is an enormous difference between a tribe compelling HHS to contract the operation of a TANF program under an ISDEAA contract, and HHS electing to transfer TANF 477 funds through such contracts. For 21 years HHS has transferred 477 funds in this manner – not because the ISDEAA mandated it but because doing so made sense and was not prohibited by law. The 477 Tribes have consistently argued that 477 plans can be funded through the ISDEAA, and that the *Navajo Nation* case does not bar the fund transfers which have occurred for 21 years.. The relevant law for the transfer of 477 funds is the 477 Act, which is administered by the BIA, not by HHS. The Act plainly provides for administration of the 477 program through the Department of the Interior, including transfer of HHS and DOL agency program funds to the BIA, which then transfers the funds to the Tribes. It is not HHS which is transferring these funds under the ISDEAA; it is the BIA which is doing so.

The key point here is that the 477 Act is administered by the Interior Department. The Secretary of the Interior has the authority to approve or disapprove a tribal plan, which must be done within 90 days of submittal. 25 U.S.C. § 3407. The Secretary "cooperate[s]" with and "consult[s]" with other affected agency Secretaries,[3] but it is the Secretary of the Interior who "shall, upon receipt of a plan acceptable to the Secretary of the Interior submitted by an Indian tribal government, authorize the tribal government to coordinate, in accordance with such plan, its federally funded employment, training, and related service programs in a manner that integrates the program services involved into a single, coordinated, comprehensive program and reduces administrative costs by consolidating administrative functions." 25 U.S.C. § 3403 (emphasis added). Thus, transfer of the funds is plainly in the hands of the Secretary.

Moreover, the 477 Program is an Interior "program, service, function or activity" that is available to Tribes receiving consolidated funds from Interior and other agencies. The federal programs that may be integrated into a tribal 477 Plan "include any program under which an Indian tribe is eligible, under a statutory or administrative formula, for the purpose of assisting Indian youth and adults to succeed in the work force, encouraging self-sufficiency, familiarizing Indian youth and adults with the world of work, facilitating the creation of job opportunities and any services related to these activities." 25 U.S.C. § 3404 (emphasis added). Those are Certainly "Indian" programs. Once 477 program funds are collected by Interior, the 477 program easily fits the *Navajo Nation* court's criterion that ISDEAA-eligible programs are those "specifically targeted to Indians." Obviously, the 477 Program is specifically targeted to Indians, it exists by virtue of the Tribes' status as Indians, and only Indian Tribes and tribal organizations can take advantage of it.

In the Flexibility Work Group discussions the agencies appear to recognize this and have stated their intent to continue transferring funds through ISDEAA agreements. However, the agencies have declined to provide 477 Tribes with a written assurance to this effect, or to assure that 477 funds will be transferred on an identical basis for new approved plans or new programs coming into the 477 program. To meet one concern, the tribal representatives have offered to clarify that the "contract support costs" provisions of the ISDEAA would not apply to funds in a 477 program unless those funds (unlike TANF) independently qualify for such status by virtue of their originating "Indian" status, but to date this has not brought closure to this issue.

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[3] *See* 25 U.S.C. §§ 3403 (integration of services authorized) and 3406 (plan review).

Reporting

The 477 Act authorizes Tribes to develop 477 Plans which integrate services and combine and reallocate expenditures from diverse agency programs into a single, coordinated, comprehensive tribal program plan with a single budget and a single annual report delivered to the Department of the Interior. The reporting system in use since 1992 includes OMB-approved statistical, narrative, and financial reporting forms, and all recipients are bound by the auditing requirements of the Single Audit Act. But as noted earlier, in recent years HHS has sought to impose additional terms and conditions that would restrict a Tribe's ability to reallocate program funds to fit tribal needs, that would require Tribes and tribal organizations to report 477 expenditures separately by funding source, and that, as a result, would destroy the ability to consolidate and commingle 477 funds. We believe such a new requirement is directly contrary to the fundamental purpose and intent of the 477 Act.

Importantly, HHS has been vague about the perceived "problems" that are driving the proposed changes. For 21 years the Tribes used a single budget and a single reporting system and have accounted for all 477 expenditures through a single agency audit which reviews consolidated 477 expenditures. Although HHS, alone, now insists that more detailed information about expenditures of TANF and other HHS funds is necessary, HHS has failed to identify <u>any</u> historic problem or shortcoming in the Tribes' two decades of reporting. To be clear, at no time have the agencies responded to the Tribes' repeated requests for an identification of the problems this new approach is intended to solve, much less an explanation as to how the proposed report and audit changes are consistent with the 477 Act's single reporting system.

While the agencies failed to provide any legal analysis for the proposed change in program administration, we understand their position to be based on an interpretation of Section 14(a) of the 477 Act, which provides:

> ADMINISTRATION OF FUNDS.--
>
> (1) IN GENERAL.--Program funds shall be administered in such a manner as to allow for a determination that funds from specific programs (or an amount equal to the amount attracted from each program) are spent on allowable activities authorized under such program.
>
> (2) SEPARATE RECORDS NOT REQUIRED.--Nothing in this section shall be construed as requiring the tribe to maintain separate records tracing any services or activities conducted under its approved plan to the individual programs under which funds were authorized, nor shall the tribe be required to allocate expenditures among such individual programs.

The agencies apparently reason that under subsection 14(a)(1), "program funds" must be administered in such a manner as to allow for a determination that funds "are spent on allowable activities authorized under such program," and that this means that funds must be accounted for

on a dollar-by-dollar basis for each separate agency "program" included in a Plan. Essentially, the agencies oppose the consolidation and reallocation of federal funds to meet tribal program needs, and seek to use reporting requirements as the mechanism for restricting what Tribes are able to do in developing Plans that meet the local employment-related needs. This is a strained and illogical reading of the quoted provision. It is also at odds with both the purpose of the Act—which is to authorize the reallocation and consolidation of funds—and with the Act's consistent implementation for 21 years.

As we read the law, the term "program funds" in subsection (a)(1) refers to the combined program funds that are administered in an approved tribal Plan, so that "allowable activities" are those activities that are authorized in the approved tribal 477 Plan (and not the separate federal programs from which funds are derived). This is consistent with how the Act has been administered, with Tribes accounting for expenditures as set forth in the combined tribal program outlined in the Plan for the provision of employment related services. Thus, 477 Tribes and tribal organizations have been audited according to 477 program plan descriptions, which are federally approved and include specific spending parameters (by line-item). This has provided direct accountability by the terms of the tribal program outlined in the Plan. The statute supports the position that the transfer of federal funds through and into a 477 Plan constitutes the authority to utilize Plan funds according to the approved Plan without individualized reporting on the expenditure of each underlying fund.

This interpretation is compelled by subsection 14(a)(2), which specifically provides that Tribes are not required "to maintain separate records tracing any services or activities conducted under its approved plan to the individual programs under which funds were authorized, nor shall the tribe be required to allocate expenditures among such individual programs." The agencies have never explained how this language can be squared with their interpretation of subsection (a)(1), much less with the overall purpose of the 477 Act. The Tribes' interpretation of the two sections is consistent, while the agencies' interpretation creates a conflict that cannot be reconciled.[4]

The Flexibility Work Group has not been able to resolve this difference. The agencies' insistence that Tribes must do supplemental reports on cost categories that match the agency programs is contrary to the Act's purpose to allow Tribes and tribal organizations to consolidate, re-budget and reallocate agency funds to best meet local needs as set out in the approved tribal program Plan. For 21 years auditors have been able to review tribal plans and year-end reports and determine that funds have been spent as allocated in the approved plans. The agencies' new

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[4] The term "program" is used to refer to the employment program developed in the tribal Plan, the federal programs from which funds are derived, and the administration of the Act as the 477 program. To the extent there may be any confusion in the Act by the use of the term "program" to describe both the terms of the Plan administered by a tribe and the source of federal funds that are combined in the tribe's plan, the Tribes' interpretation of subsection 14(a) conforms to the principle that all provisions of an Act should be internally consistent. The agencies' interpretation renders subsection 14(a)(1) inconsistent with not only subsection 14(a)(2), but with the rest of the statute as well. Moreover, the 477 Act is a statute intended to benefit Indians, and it must therefore be interpreted liberally in favor of the Tribes, with any ambiguities resolved in their favor. *See, e.g., County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

reporting requirements would undermine the historic implementation of this important tribal program, and in significant ways destroy the 477 initiative.

Conclusion

The 477 Act has been a liberating law that has increased tribal members' direct access to employment programs and self sufficiency. This has occurred because Tribes have been able to merge up to thirteen separate programs into a single program with a single budget, single annual report, and single consolidated audit of the entire 477 program. The decrease in administrative costs has increased the provision of client services. The ability of tribal programs to design a process of holistic wrap-around services and activities has reduced barriers to employment services that were dictated by restrictions in the separately funded programs. The Act has facilitated tribal self-determination by authorizing Tribes to design services to fit each individual Tribe's needs.

The confusion and disruption caused by agency actions since 2008 threaten to undermine the efficiency and success of the 477 Program. Part of the problem has been the agencies inability to articulate any perceived problems with the current administration of the 477 program, or to share any written analysis of their interpretations of the Act.

The 477 Tribes and tribal organizations look to the Department of the Interior and the Bureau of Indian Affairs for leadership in saving the integrity of this program. The BIA is the designated "lead agency" for 477 program implementation. It shoulders the responsibility to develop the single plan and single report format, and to provide appropriate technical assistance and support for program goals.[5] For 21 years the 477 Program has been an unqualified success. The Department and the BIA now have the trust responsibility to maintain the integrity of the 477 program consistent with the Act and past administration of the program.. Indeed, it should not go unstated that the Act's goal of consolidation for efficiency is a key goal of this Administration, is reflected in other Administration initiatives, and as a practical matter is particularly necessary in an environment of decreasing discretionary appropriations .

We would be happy to meet with you to discuss these issues in detail, and we look forward to any assistance you can provide in resolving these issues in a manner that assures the continued success and viability of the 477 program.

Sincerely,

Margaret Zientek
Co-Chair
477 Tribal Work Group

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[5] *See, e.g.*, 25 U.S.C. §§ 3403 and 3410.

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March 2, 2011

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Re: Preliminary Comments on Draft Proposed 477 Addendum

Dear Mr. Johnson and Mr. Newland:

We write to you in our capacity as legal counsel for the Jamestown S'Klallam Tribe, the Metlakatla Indian Community, the Aleutian Pribilof Islands Association, and the Maniilaq Association (Tribes). The purpose of this letter is to provide preliminary comments on the draft proposed "477 Funding Agreement Addendum" (proposed Addendum) that was distributed for consultation and comment on February 4, 2011 by the U.S. Department of Health and Human Services (HHS) and the Department of the Interior (DOI). The agencies are hosting consultations on March 7, 2011, in Seattle, Washington, and March 9, 2011, in Anchorage, Alaska. We reserve the right to provide additional comments after the consultation meetings.

The proposed Addendum appears to be aimed at addressing two of the 477 tribes' primary concerns with current administration of the 477 Act by the federal agencies: 1) the threat, first raised in October 2008, to end the practice of transferring 477 Program funds to participating tribes through agreements under the Indian Self-Determination Education and Assistance Act (ISDEAA); and 2), the 2009 Office of Management and Budget (OMB) Circular A-133, which requires 477 tribes and tribal organizations to report their 477 expenditures separately by funding source number for audit purposes. We assume the proposed Addendum is intended as a supplement to be added to each participating tribe's current ISDEAA funding agreement. To that extent, the agencies' proposal to maintain fund transfer through the ISDEAA is a positive development. However, much if not all the additional language in the proposed Addendum is either duplicative of or inconsistent with the requirements of the tribal employment and training

program established by P.L. 102-477, ("477 Program" or "477 Act").[1] Currently 477 funds are transferred to participating tribes through approved Annual Funding Agreements (AFA), as authorized by the ISDEAA.[2] The tribal employment and training program established by the 477 Act allows tribes and tribal organizations to combine employment and training-related federal funds from various agencies into a single 477 Plan approved by the Secretary of the Interior with a single budget and a single reporting system.[3] The 477 Act authorizes combined funding from programs in DOI, HHS, and the Department of Labor (DOL). The 477 Program is administered by the Bureau of Indian Affairs (BIA).

The first paragraph of the proposed Addendum recites that it applies only to HHS program funds, specifically Temporary Assistance for Needy Families (TANF), Child Care and Development Fund (CCDF), and/or Native Employment Works (NEW) funds, but does acknowledge that use of the funds is governed by an approved 477 Plan. The proposed Addendum also includes language providing for lump sum advance payment of funds and retention of interest. These appear to be positive developments in terms of Plan implementation. Recognition that the 477 Act requires a single 477 Plan with a single budget and a single reporting system is critical to the success of the 477 Program. However, the proposed Addendum contains additional language incorporating terms and conditions that appear to be in addition to the elements that are part of a negotiated and approved 477 Plan. The agencies should be prepared to explain the purpose of these additional terms and conditions at the scheduled consultation meetings. If the proposed terms and conditions are not consistent with the purposes and objectives of the 477 Program, they will have to be altered or eliminated from the proposed Addendum. Questionable terms include the following:

- The proposed Addendum provides in the second paragraph that a tribe must "comply with the Terms and Conditions of the award for the HHS program or programs included in its Pub. L. 102-477 plan - Attachment A (TANF Terms and Conditions), Attachment B (CCDF Terms and Conditions), and Attachment C (NEW Terms and Conditions). Failure to comply with these Terms and Conditions may result in disallowed costs and/or the loss of Federal funds and may be considered grounds for the suspension or termination of these grants." These terms and conditions were not included in the consultation package. To the extent they are currently part of a tribe's Plan it is duplicative and unnecessary to reference them in the addendum, and to the extent they add additional

[1] The Indian Employment, Training, and Related Services Demonstration Act, 25 U.S.C. §§ 3401-3417, as amended by Public Law 106-568, the Omnibus Indian Advancement Act of 2000.

[2] 25 U.S.C. § 450 *et. seq.*

[3] The proposed Addendum is directly contrary to the purpose of the 477 Act to encourage tribes to exercise their governmental authority to "integrate the employment, training and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally-determined goals consistent with the policy of self-determination." 25 U.S.C. § 3401.

requirements they are inconsistent with the 477 Act's purpose to allow tribes to administer the program under a single Plan.

- The third paragraph contains additional terms and conditions restricting a tribe's use of HHS program funds included in a Plan: "The Tribe agrees not to reallocate HHS program funds nor redesign the grant program. The Tribe agrees to abide by HHS program guidelines, manuals, and policy directives. The Tribe agrees to make records of the grant program available to HHS for inspection and agrees to performance monitoring visits from HHS, in accordance with the terms of the grant." Again, if similar provisions are currently part of a tribe's Plan it is duplicative and unnecessary to reference them in the Addendum, but to the extent they add additional requirements they are inconsistent with the 477 Act's purpose to allow tribes to administer the Program under a single Plan.

- In the final paragraph, the proposed Addendum states: "The Department of Health and Human Services is responsible for interpreting program statutes, regulations, and policy and procedures for the HHS program funds included in this Funding Agreement." It is not clear what this means in the context of an approved 477 Plan. To the extent it contemplates review outside the terms of an approved Plan, it is inconsistent with the terms of the 477 Act.

- The proposed Addendum characterizes HHS funds as subject to the terms of a separate "grant": "The program funds provided pursuant to this Addendum are grant funds, not contract funds." There is no explanation in the Addendum or the cover letter how these particular 477 funds are subject to the terms of a "grant," while other 477 funds from HHS and other agencies in the 477 program are not. Simply, there is no authority in the 477 Act for HHS to impose additional "grant" conditions on the use of these funds under a tribe's approved 477 Plan.

- Finally, the proposed Addendum addresses reporting and auditing practices for HHS funds: "TANF, CCDF, and NEW funds must be audited under their own CFDA numbers and consistent with the Single Audit Act and OMB Circular A-133. The TANF and CCDF funds must be audited consistent with the applicable TANF or CCDF program compliance supplement in Part 4 of the OMB Circular A-133 Compliance Supplement. NEW funds must be audited consistent with Part 7 of the OMB Circular A-133 Compliance Supplement." This is plainly inconsistent with the 477 Act provision for a single approved 477 Plan with a single budget and a single reporting system. To the extent the OMB Circular requires 477 tribes to break out their 477 expenditures by CFDA number of the funding program (i.e. CCDF, TANF, NEW, etc), the Circular is contrary to law and frustrates the single reporting provision of the 477 Act. This is a critical provision for success of the 477 Program and additional reporting or auditing requirements cannot be added through addendum as contemplated by this language.

Much of the proposed Addendum would impose requirements for HHS funds that are in addition to the requirements in an approved Plan that apply to HHS funds, as well as DOI and DOL funds. Such terms and conditions are contrary to the terms of the 477 Act. Currently, tribal funding agreements contain language addressing the special status of 477 Program funds. Typically, the provision states that the funding agreement may include non-BIA funds for programs which are funded through or flow through BIA, including funds associated with a 477 Plan, and stipulates that: 1) such funds will be administered in accordance with the tribe's approved 477 Plan, including compliance with existing 477 reporting requirements for the subject funds; and 2) any reprogramming of 477 funds can only be done by modifying the 477 Plan and gaining approval of the change. The current language is fully adequate to comply with the purposes and requirements of the 477 Act, and the agencies will have to explain why the terms and conditions incorporated into the proposed Addendum cannot be addressed as part of a tribe's approved Plan.

There are other aspects of the proposed Addendum that address issues that are beyond the scope of an approved 477 Plan. For example, the proposed Addendum states: "Title I and Title IV of Pub. L. 93-638 do not apply to TANF, CCDF, or NEW funds, and thus any provisions of this Funding Agreement applicable to funding under either Title I or Title IV of Pub. L. 93-638 do not apply to HHS program funds." This attempts to enshrine the agencies' continuing misapplication the court's ruling in *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133 (9th Cir. 2003), a case that involved neither the administration of the 477 Program nor federal funding through the Self-Governance provisions of ISDEAA. In that case the court held that an Indian tribe could not administer TANF under a 638 contract.

Although the agencies have never explained their position, this appears to be the basis for the agencies' 2008 announcement that they would end the practice of transferring 477 Program funds to participating tribes through agreements under ISDEAA. The tribes have consistently argued that 477 plans can be funded through the ISDEAA, and that the *Navajo Nation* case in particular does not bar the fund transfers currently implemented for the Program. The relevant law is the 477 Act, administered by the BIA, not the numerous and varied agency programs (such as TANF) that can be integrated into a tribal 477 Plan. The 477 Act fits the *Navajo Nation* Court's criteria that ISDEAA-eligible programs are those "specifically targeted to Indians." The 477 Program is one provided for tribes by virtue of their status as Indians because only tribes can take advantage of it. Its targeted purpose is to facilitate employment opportunities for Indian youth and adults, as well as to encourage tribal self-sufficiency consistent with self-determination principles. The 477 Program is structured so that the 477 Plan, as authorized under the 477 Act and approved and administered by the BIA, can be funded through ISDEAA, while each component program remains subject to the terms agreed to

by the tribe and the agency in the development of the Plan.[4] Many of the terms and conditions included in the proposed Addendum appear to be contrary to proper Plan implementation under the 477 Act.

Finally, the Tribes look to the Department of the Interior and the Bureau of Indian Affairs for an explanation why Interior and Bureau officials endorse this attempt by HHS to distort the application of the 477 Act to a select group of HHS programs. The Bureau of Indian Affairs is the designated "lead agency" for 477 Program implementation, with the responsibility to develop the single Plan, single report format and to provide appropriate technical assistance and support for program goals.[5] For nearly two decades the 477 Program has been an unqualified success. The 477 Act has allowed participating tribes to eliminate duplicative administrative costs while enhancing the quantity and quality of services to Native people nationwide. The Department of the Interior and the Bureau of Indian Affairs have the trust duty to maintain the integrity of the 477 Program consistent with the 477 Act and the past administration of the Program that has proven so successful.

The Tribes look forward to the scheduled consultation meetings and are prepared to engage in constructive dialogue about the proposed Addendum and other alternatives to resolve the current issues regarding the Tribes' implementation of 477 Plans. If you have any questions please contact Geoff Strommer (gstrommer@hobbsstraus.com or 503-242-1745) or Vernon Peterson (vpeterson@hobbsstraus.com or 503-320-0145).

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: Geoff Strommer (by THE)
Geoff Strommer

Enclosure (November 25, 2008 letter to Dr. Middleton)

cc: Tribal Clients
Stacey Ecoffey, Principal Advisor for Tribal Affairs, HHS
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[4] This issue is addressed in detail in our November 25, 2008 letter to Dr. Middleton (copy enclosed). It is also irrelevant and inappropriate to include language in the proposed Addendum addressing ISDEAA issues such as support costs, declination criteria, and dispute resolution. See concluding sentence of the third paragraph of the proposed Addendum.

[5] *See, e.g.*, 25 U.S.C. §§ 3403 and 3410.

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Re: Post-Consultation Comments on Draft Proposed 477 Addendum

Dear Mr. Johnson and Mr. Newland:

We write to you in our capacity as legal counsel for the Jamestown S'Klallam Tribe, the Metlakatla Indian Community, the Aleutian Pribilof Islands Association, and the Maniilaq Association (Tribes). The purpose of this letter is to provide additional comments on the draft proposed "477 Funding Agreement Addendum" (proposed Addendum).[1] These comments supplement our March 2, 2011 letter, and reflect the results of the consultations conducted by representatives of the Department of Health and Human Services (HHS) and the Department of the Interior (DOI) on March 7, 2011, in Seattle, Washington, and on March 9, 2011, in Anchorage, Alaska. At the March 9 meeting, federal representatives extended the comment deadline until March 25, 2011.

Discussions at the consultation meetings focused on the 477 tribes' primary concerns with current administration of the 477 Act: transfer of 477 Program funds to participating tribes through agreements under the Indian Self-Determination Education

[1] As set out in the March 2, 2011 letter, the Tribes believe that the proposed Addendum is either duplicative of or inconsistent with the requirements of the tribal employment and training program established by P.L. 102-477, The Indian Employment, Training, and Related Services Demonstration Act, 25 U.S.C. §§ 3401-3417, as amended by Public Law 106-568, the Omnibus Indian Advancement Act of 2000 ("477 Program" or "477 Act").

and Assistance Act (ISDEAA),[2] and the question of applicability of reporting requirements in the 2009 Office of Management and Budget (OMB) Circular A-133, which appear to require 477 tribes and tribal organizations to report their 477 expenditures separately by funding source number for audit purposes. The federal and tribal representatives at the consultations engaged in open and frank exchanges on these issues. Federal representatives agreed to review the proposed Addendum in light of the oral and written comments submitted by the tribes and tribal organizations before deciding how to proceed. It is expected that the agencies will consult with the tribes again before implementing any action that would alter the current requirements for transfer of funds or reporting under the 477 Program.

In an important development, federal representatives confirmed that the proposed Addendum is intended as a supplement to be added to each participating tribe's current ISDEAA funding agreement. Thus, the agencies no longer take the legal position that no 477 Program funds can be transferred to participating tribes through the ISDEAA. This legal position formed the basis for the agencies' 2008 announcement that they would end the practice of transferring 477 Program funds through ISDEAA, and rely instead on a grant process under DOI regulations.[3] The agencies did not have legal representatives at the consultations, and therefore could not discuss the legal basis for the proposed Addendum, an issue the agencies still need to address if they decide to propose a revised Addendum.

At both consultations, tribal representatives were consistent in questioning the need for an Addendum that applies exclusively to HHS program funds, specifically Temporary Assistance for Needy Families (TANF), Child Care and Development Fund (CCDF), and/or Native Employment Works (NEW) funds. The tribal employment and training program established by the 477 Act allows tribes and tribal organizations to combine employment and training-related federal funds from various agencies into a single 477 Plan approved by the Secretary of the Interior with a single budget and a single reporting system. The 477 Act authorizes combined funding from programs in DOI, HHS, and the Department of Labor (DOL), and those agencies are involved in review and approval for each tribe or tribal organization's approved 477 Plan. Thus, the terms and conditions outlined in the proposed Addendum are either duplicative of or inconsistent with the requirements of the 477 Act and the existing 477 Plans approved pursuant to the Act. The agencies owe the tribes and tribal organizations a clear

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[2] 25 U.S.C. § 450 *et. seq.*

[3] Even though the agencies recognize funds may be transferred through ISEDAA, the proposed Addendum still characterizes HHS funds as "grant" funds, with no explanation how these particular 477 funds are subject to the terms of a "grant," while other 477 funds from HHS and other agencies in the 477 program are not. There is no authority in the 477 Act for HHS to impose additional "grant" conditions on the use of these funds under a tribe's approved 477 Plan.

explanation if there is a legal basis for special treatment of certain HHS funds, or if the proposed Addendum is intended to address other practical concerns.

In fact, tribal representatives invited HHS to identify specific concerns, particularly those related to audit and reporting requirements. This subject was identified by both tribal and federal representatives as needing more detailed discussion, beginning with HHS identifying specific reporting needs. HHS representatives stated generally that the agency strives to provide accountability and "transparency" with regard to the Secretary's obligation to report to Congress on the use of funds in the identified programs. The 477 Act specifically authorizes reporting of funds incorporated into a 477 Plan as part of single budget and a single reporting system, and thus the reporting of 477 Plan data may not correlate exactly with data reported by non-477 Program sources. The tribes and tribal organizations have expressed a willingness to discuss with HHS how the data in current 477 reporting can be structured to satisfy HHS concerns without altering the single budget, single reporting benefits of the 477 Act.

As drafted, the proposed Addendum is directly contrary to the purpose of the 477 Act to encourage tribes to exercise their governmental authority to "integrate the employment, training and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally-determined goals consistent with the policy of self-determination."[4] Tribal testimony and written comments have been consistent regarding the scope and effect of the proposed Addendum. Its implementation would undermine the flexibility embodied in the 477 Act, and frustrate the tribes' ability to structure the unique, culturally relevant innovations that have made each 477 Plan successful on its own terms. The additional reporting requirements would increase costs and administrative burdens and increase agency monitoring outside the scope of the approved 477 Plans. The agencies must take into account and respond to the tribes' cogent criticisms of the proposed Addendum before proceeding with any similar proposal.

By changing their legal position regarding the transfer of 477 funds, the agencies effectively recognize that the court's ruling in *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133 (9th Cir. 2003), is not an impediment to the practice of transferring 477 Program funds to participating tribes through the ISDEAA. The relevant law is the 477 Act, administered by the BIA, not the numerous and varied agency programs (such as TANF) that can be integrated into a tribal 477 Plan. The 477 Act fits the *Navajo Nation* Court's criteria that ISDEAA-eligible programs are those "specifically targeted to Indians." The 477 Program is structured so that the 477 Plan, as authorized under the 477 Act and approved and administered by the BIA, can be funded through ISDEAA, while each component program remains subject to the terms agreed to by the tribe and the agency in the development of the Plan. Many of the terms and

[4] 25 U.S.C. § 3401.

conditions included in the proposed Addendum appear to be contrary to proper Plan implementation under the 477 Act.

Current tribal funding agreements contain language adequate to address the special status of 477 Program funds. Typically, the provision states that the funding agreement may include non-BIA funds for programs which are funded through or flow through BIA, including funds associated with a 477 Plan, but stipulates that 477 funds will be administered in accordance with the tribe's approved 477 Plan. This language complies with the purposes and requirements of the 477 Act, and the agencies should address issues as part of the development of each tribe's approved plan rather than continuing to pursue the proposed Addendum.

The agencies have an obligation to maintain the integrity of the 477 Program consistent with the 477 Act and the past administration of the Program that has proven so successful. The Tribes look forward to the agencies' response to the testimony and comments provided during the consultation process. If you have any questions please contact Geoff Strommer (gstrommer@hobbsstraus.com or 503-242-1745) or Vernon Peterson (vpeterson@hobbsstraus.com or 503-320-0145).

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: Geoff Strommer (by TAE)
Geoff Strommer

cc: Tribal Clients
Stacey Ecoffey, Principal Advisor for Tribal Affairs, HHS
(Stacey.Ecoffey@hhs.gov)

Congress of the United States

Washington, DC 20510

July 26, 2013

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

We write to express our appreciation for the establishment of the White House Council on Native American Affairs. The promotion of economic and workforce development, addressing the historic health disparities among Native populations, and improving safety in tribal communities are essential policies that honor our Nation's unique legal relationship with federally recognized tribes as defined by the United States Constitution, treaties, federal laws and Supreme Court decisions.

Over the last 50 years, the United States has promoted a policy of tribal self determination based on the twin pillars of strong tribal governments and strong tribal economies. We must continue to work to ensure that our Nation's policies are more action than rhetoric. It is our hope the new Council will bring light to long standing issues to ensure justice to tribes.

We would like to direct your attention to the high unemployment rates in our Native communities and the need to fix a federal program that helps tribes improve education and employment among tribal members. While our Nation continues on the road to economic recovery, we cannot forget that economic opportunity to the level most Americans enjoy has yet to reach our tribal communities. Within American Indian and Alaska Native communities unemployment often exceeds 49 percent.

Our Native populations are often at the bottom of every socio-economic indicator as reflected by health, education, and public safety statistics. The historical trauma experienced by our Nation's tribal communities continues to manifest itself through the social ills of alcoholism, domestic violence and health disparities.

Over 20 years ago, Congress enacted the Indian Employment, Training, and Related Services Demonstration Act of 1992 (P.L. 102-477), allowing tribes to address the high rates of unemployment and poverty among tribal members. P.L. 102-477 authorizes tribes and tribal organizations to combine federal employment, training, child care and welfare assistance funding across federal agencies, including the Department of Health and Human Services, the Department of Interior and the Department of Labor, into an integrated tribal employment plan approved by the Secretary of Interior with a consolidated budget and a single, consolidated reporting system. Roughly half of our federally recognized tribes in the United States participate in the tribal 477 program. The 477 program enables tribes the flexibility to plan the programming to best fit the needs of the community and minimize administrative redundancy by merging reporting requirements, while adhering to the Government Performance Results Act's

accountability standards. Under tribal 477 plans, regional tribal organizations and tribes have created "one stop" training and employment offices with Indian Self Determination and Education Assistance Act contracts and compacts.

Despite the 20 year success of tribes implementing P.L. 102-477, federal agencies over the last several years have threatened to decouple the entire program. I am told the agencies disagree on the fundamental purpose of the 477 program – to allow tribes and tribal organizations to reallocate their funds in order to meet the needs of local communities. It is essential that the Administration follow the intent of the law as provided by P.L. 102-477 and allow tribes to re-allocate and re-budget funds within the parameters of an approved 477 plan, without imposing new fund-by-fund reporting requirements.

We cannot ignore the success that tribes have made in their implementation of the tribal 477 program to prepare tribal members for employment. The services provided by tribes to their tribal members help individuals build healthy lives. Whether it is a victim of domestic violence building a new life, a high school drop out that seeks to improve employment options or a prisoner that has just been released from jail, the tribal 477 employment program has enabled tribes to provide a "one stop" service to those tribal members who need assistance in building a self-sufficient life.

It is our fear that if actions continue to de-couple the tribal 477 employment program, in addition to the Administration's current treatment of Contract Support Costs in light of the *Ramah* decision, this Administration threatens the further success of tribal self-determination.

It is our hope that this Council will work to uphold the twin pillars of tribal self-determination -- strong tribal governments and strong tribal economies. The Administration must ensure that Tribes and tribal organizations carrying out consolidated programs under PL102-477 will continue to receive their funds through the Indian Self Determination and Education Assistance Act, and will continue to use and account for those funds pursuant to each Tribe's approved consolidated "477" plan. Tribes must be able to re-allocate and re-budget their programs to best meet local needs – the very notion of tribal self-determination.

Thank you for the consideration of this request.

Sincerely,

Lisa Murkowski
United States Senator

Mark Begich
United States Senator

Jeff Merkley
United States Senator

Patty Murray
United States Senator

Tim Johnson
United States Senator

Jon Tester
United States Senator

Jerry Moran
United States Senator

Don Young
United States Congressman

Statement of

Lillian Sparks Robinson
Commissioner
Administration for Native Americans
Administration for Children and Families
U.S. Department of Health and Human Services

Before the

Committee on Indian Affairs
United States Senate

April 2, 2014

Chairman Tester, Vice Chairman Barrasso, and members of the Committee, it is my honor to appear before this Committee on behalf of the Department of Health and Human Services (HHS) to provide testimony on bills that would affect American Indian and Alaska Native children and families. I am a member of the Rosebud Sioux Tribe which is located in South Dakota, and I serve as the Commissioner for the Administration for Native Americans (ANA), which is part of the Administration for Children and Families (ACF) at HHS.

My testimony will focus on two of the bills before the Committee today: S. 1574, the "Indian Employment, Training and Related Services Consolidation Act of 2013", and S. 2160, the "Native American Children's Safety Act." We continue to review S. 1570, "to amend the Indian Health Care Improvement Act to authorize advance appropriations for the Indian Health Service (IHS) by providing 2-fiscal-year budget authority. "

Public Law 102-477

HHS participates in the demonstration program established under Public Law (P.L.) 102-477, the Indian Employment, Training and Related Services Demonstration Act of 1992. This program allows tribes to establish demonstration projects to coordinate their Department of the Interior (DOI), HHS, Department of Labor (DOL), and Department of Education employment, training, and related services programs into a single, comprehensive program with consolidated administrative functions. The Department of Education does not currently participate. The law authorizes, but does not require, Federal agencies to allow grant-funded programs to be included in "477" projects.

In 2014, there are 62 grantees, representing 265 tribes, operating demonstration projects that include DOI, HHS, and DOL programs. HHS has three participating programs: the Temporary Assistance for Needy Families (TANF) program, the Child Care and Development Fund (CCDF) program, and the Native Employment Works (NEW) program. The great majority of funding in 477 projects comes from TANF and CCDF grant funds. While the specific amounts vary across projects, total funding in FY 2013 was $60 million with approximately 55 percent of those funds coming from TANF ($33 million), 40 percent coming from CCDF ($24 million), and five percent coming from NEW ($2.8 million).

Since November 2011, tribal representatives of 477 projects, along with officials of the Office of Management and Budget, DOI, HHS, and DOL have been meeting to address issues concerning the law, reporting requirements, and auditing requirements related to 477 projects. I am pleased to report that, in January, the 477 work group agreed to submit new reporting forms and instructions to the review process governed by the Paperwork Reduction Act, as well as to convene a concurrent tribal consultation. This represents a significant achievement for all parties and resolves many of the differences of opinion over operation of the 477 projects. As a result of this agreement, tribes will benefit from consistency in the way in which 477 projects are reviewed and will be subject to more flexible reporting requirements. The Federal agencies will benefit from strengthened relationships and greater assurance that public funds are being spent in the best interest of tribal members and the public.

The workgroup's accomplishments include: (1) identifying flexibilities within the law that allow tribes to consolidate a significant amount of their 477 funds for the purpose of supporting

economic development; (2) fostering a much-improved and a strengthened trust-based relationship between the tribes and participating Federal agencies; and (3) developing a financial reporting form with instructions that move away from dollar-for-dollar reporting and move to reporting based on functional categories, including child care, education, and employment and training services for example.

For a number of years, there has been disagreement between the tribes and some Federal agencies about auditing and reporting requirements governing P.L. 477 projects.
The disagreement stems from the fact that the Federal agencies, including HHS, have interpreted the program statute to mean that, when a program participates in a project, program funds must be used for the purposes for which they were authorized, and program statutory and regulatory requirements apply, unless waived.

In contrast, a number of tribes interpret the statute to mean that, when a program participates in a 477 project, its funds can be used for any allowable activity under an approved 477 plan.
A number of tribes also assert that 477 projects fall under at least some of the terms of P.L. 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), which could allow for redesign and reallocation of funds and could make the projects qualify for contract support costs, among many other benefits of the ISDEAA; but the ISDEAA does not apply in this context for HHS funding. The ISDEAA allows tribes to take over Federally-run programs, not to contract for grant programs that were never carried out directly by the Federal government.
The HHS programs, functions, services, and activities that tribes can contract for under the ISDEAA are those that certain Federal agencies administer for the benefit of Indians because of

their status as Indians. The application of the ISDEAA to the TANF program was litigated in Navajo Nation v. Department of Health and Human Services, in which the Ninth Circuit Court of Appeals found in favor of HHS and determined that the ISDEAA does not apply to TANF funds, primarily because tribes are not the exclusive beneficiaries of the funds and so TANF is not a program "for the benefit of Indians because of their status as Indians". The same would apply to CCDF funds. In fact, this applies to all ACF programs, including Head Start and foster care, with the possible exception of the ANA programs that I administer as Commissioner.

Tribal Early Learning Initiative (TELI)

ACF is pursuing additional ways, beyond the 477 demonstration program, to coordinate and simplify programs. Since the fall of 2012, ACF has been implementing the Tribal Early Learning Initiative (TELI). The TELI is a partnership between ACF and four American Indian tribes that have Head Start/Early Head Start, Child Care, and tribal Home Visiting grants. The four participating tribes are the Choctaw Nation of Oklahoma, the Confederated Salish and Kootenai Tribes in Montana, the Pueblo of San Felipe in New Mexico, and the White Earth Nation in Minnesota. The purposes of the TELI are to support tribes that wish to coordinate tribal early learning and development programs; create and support seamless, high-quality early-childhood systems; and raise the quality of services to children and families across the prenatal-to-age-five continuum.

Over the past year and a half, TELI grantees have made major strides in improving their early-childhood systems and services. Grantee activities have included jointly creating a community-based resource directory, convening joint professional-development opportunities and trainings

for staff, reviewing and agreeing on common assessment tools, creating a single tribal early-learning program-enrollment form, conducting joint dental services across programs, and investing in a data system to allow for better coordination and sharing of relevant data across programs. TELI tribes' fruitful partnerships across Home Visiting, Head Start, and Child Care have made them models for other tribes and Federal programs.

The Indian Employment, Training and Related Services Consolidation Act of 2013

S. 1574 would amend the Indian Employment, Training and Related Services Demonstration Act of 1992 to give the Secretary of the Interior the exclusive authority to approve or disapprove a plan submitted by an Indian tribe or tribal organization to integrate Federal employment, training, and related services, including services under programs that Interior does not administer, into a consolidated and comprehensive program. The provisions in legislation expand the 477 program well beyond the initial purpose of integrating employment and training programs. For example, it could permit the use of Head Start funding to support job training instead; and appears that it would allow for opting out of the important bipartisan reform of Head Start that requires low-performing programs to improve or face grants being put out for competition. We believe that this policy should be maintained as part of the Administration's effort to improve and expand early-learning programs for all children.

The bill would give tribes the authority to incorporate any provision of the Indian Self-Determination and Education Assistance Act (ISDEAA) into their 477 plans and, at the request of tribes, to disburse the funds through ISDEAA contracts (bill, §5; proposed §5(b) of the 1992 Act). Since its inception, the ISDEAA has not been applicable to the types of HHS grant funds

that are included in 477 demonstration projects. The Ninth Circuit Court of Appeals has already ruled that that the ISDEAA does not apply to grants like TANF grants because tribes are not the exclusive beneficiaries and so it is not a program "for the benefit of Indians because of their status as Indians", as the ISDEAA requires. The ISDEAA allows tribes to take over Federally-run programs (for example, when a tribe contracts to run a hospital that IHS had been operating), not to contract for grant programs never carried out directly by the Federal government. Under the ISDEAA, tribes receive Contract Support Cost funding because the Congress sought to avoid reductions in program resources when Federal programs are transferred to tribal operation. For HHS grant programs, the Federal government has never carried out the programs, and the grants are not designed to be all-inclusive of costs. States and tribes already have broad flexibility to carry out the TANF and CCDF programs. Providing contract support costs, along with program redesign authority and other benefits, to a tribe administering block grant funds to provide cash assistance and other support services to its program recipients would not be consistent with how these grants have been used historically or the current statutory purpose of contract support costs.

Third, S. 1574 would give agencies with programs involved in a 477 demonstration project broad waiver authority. That authority currently exists under P.L. 102-477 but S. 1574 would take it a step further by requiring an agency dispute-resolution process as well as potentially creating a right to appeal a waiver denial to Federal district court. The language is unclear but there is some suggestion that the same appeal right applies to the denial of a 477 plan itself. We would like to work with the Committee to better define how waiver disputes would be resolved and the flexibility necessary to create economic development projects under the 477 program.

Fourth, S. 1574 would allow tribes to operate approved consolidated programs without being required to submit any additional budget, report, audit, supplemental audit, or other documentation (§4 of bill; proposed §4(b) of the 1992 Act). We note that there is language in the bill that refers to the Department of the Interior creating a single report but it is difficult to reconcile that concept with the broad language providing that no report or audit is required. Prohibiting agencies from obtaining supplemental reports or audits could significantly limit our ability to be responsible stewards of public funds for important programs such as TANF, CCDF and NEW. The limitation on reporting requirements could prevent agencies from understanding the types of services being offered with the funds, what service gaps remain, and whether the programs have a positive impact in Indian country. Fundamentally, taxpayers deserve to know how their funds are being used and what outcomes they are getting for these investments.

As instructed by the Congress in the explanatory statement accompanying the Consolidated Appropriations Act, 2014, we have worked with our colleagues at DOI and other Federal agencies on a report, submitted to Congress on April 1, that outlines the many accomplishments we have made, an explanation for why we could not come to full agreement on several issues, and laying out a plan for regular discussions on 477 issues with tribes. HHS and our partner agencies would welcome input from the Committee on ways in which we can continue to improve the 477 program.

Children's Bureau Grants to Tribes

Today, many tribes operate some form of child-protection service programs and many have tribal codes, court systems, and child-welfare programs. Historically, tribes have obtained much of

their child-welfare funding through the states, or through grants from the Department of the Interior's Bureau of Indian Affairs. However, the Children's Bureau, within ACF, now offers more direct funding opportunities for tribes than ever before through several grant programs.

The Fostering Connections to Success and Increasing Adoptions Act of 2008 provided Federally-recognized Indian tribes, tribal organizations, and consortia of Indian tribes with the option to apply to operate a title IV-E program. Since passage of the law, we have approved the Port Gamble S'Klallam Tribe of Kingston, Washington; the Confederated Salish and Kootenai Tribes of Pablo, Montana; and the South Puget Intertribal Planning Agency of Shelton, Washington to operate a title IV-E program.

The Fostering Connections Act also authorized one-time grants of up to $300,000 to tribes to assist in the development of a tribally operated title IV-E plan. Twenty-two tribes or consortia of tribes have received those grants, totaling approximately $6.4 million, since 2009.

The Fostering Connections Act also provided both tribes that operate a title IV-E program and tribes that have a title IV-E cooperative agreement or contract with the state title IV-E agency, the option to apply to receive funds directly from HHS to operate a John H. Chafee Foster Care Independence (CFCIP) and/or Educational Training Voucher Program (ETV). The CFCIP and ETV programs provide funds to help older youth in foster care and youth who were formerly in foster care acquire training and independent living skills so they can become self-sufficient. In fiscal year (FY) 2014, four tribes will receive a total of $111,500 in funds through the CFCIP and ETV programs.

Additional funds, under the Stephanie Tubbs Jones Child Welfare Services Program, are available to tribes to improve their child-welfare services with the goal of keeping families together. In FY 2014, 189 tribes will receive a total of $6.3 million in funds through the program.

Funds are also available for eligible tribes under the Promoting Safe and Stable Families (PSSF) Program to assist with family support, family preservation and support, time-limited family reunification services, and services to support adoptions. In FY 2014, 135 tribes will receive $10.3 million in funding through the program.

S. 2160, the "Native American Children's Safety Act"

Tribes that receive funds through title IV-E and IV-B for child-welfare programs are required to license foster family homes and child-care institutions and conduct criminal and child-abuse background checks. The "Native American Children's Safety Act" would require tribes that operate programs under both title IV-E and Department of the Interior authorities to apply two separate sets of criteria for background checks for foster family homes. Having to implement two different laws and regulations for licensing and background checks for foster-care placements is likely to cause confusion for tribes that operate a title IV-E or IV-B program or have a IV-E agreement with the state. For example, title IV-E does not exempt emergency placements from the requirement that prospective foster family providers complete a fingerprint-based check of the National Crime Information Database. We would be happy to work with the

Committee to align these important requirements and to ensure the safety of children placed in out-of-home care.

I very much appreciate the Committee's interest in the issues raised by both bills. I look forward to working together on both bills and to continuing to find ways to improve services provided in our American Indian and Alaskan Native communities and to ensure the safety of their children. I would be happy to answer any questions.

REPORT TO HOUSE AND SENATE COMMITTEES ON APPROPRIATIONS
ON PROGRESS OF P.L. 102-477 ADMINISTRATIVE FLEXIBILITY
WORK GROUP
FROM KEVIN WASHBURN
ASSISTANT SECRETARY—INDIAN AFFAIRS
April 1, 2014

We are pleased to report on the progress of the Public Law 102-477 Administrative Flexibility Work Group (AFWG) in resolving 477 program administrative issues. This report provides background on the highly successful 477 demonstration project, the status of negotiations between Federal and Tribal AFWG representatives, the accomplishments of the AFWG in achieving administrative flexibility, and plans to move the process forward.

In 1992, Congress passed Public Law 102-477, the Indian Employment, Training, and Related Services Demonstration Act of 1992, as amended by Public Law 106-568, the Omnibus Indian Advancement Act of 2000 (477 Act). The 477 Act's purpose is to improve the delivery of employment, training, and related services to Tribal clients by removing unnecessary administrative burdens. The 477 Act authorizes eligible Tribes and Alaska Native organizations to consolidate up to ten employment-and-training-related, formula-funded Federal grant funds from the Departments of the Interior (DOI), Labor (DOL), and Health and Human Services (DHHS).

The ten eligible programs are: the DOI's Bureau of Indian Affairs' General Assistance program, Division of Workforce Development's (DWD) Job Placement and Training Program, Higher Education and Adult Basic Education programs, and the Johnson-O'Malley programs; the DOL's Workforce Investment Act Section 166 Comprehensive Services Program and Supplemental Youth Services Program; and DHHS's Native Employment Works (NEW), Tribal Temporary Assistance for Needy Families (TANF), and Child Care and Development Fund (CCDF) programs.

Instead of submitting individual program records, plans, and reports to access funding, participating Tribes save time and resources by submitting a single plan and consolidated budget to DOI for all funding under the Act—affording more support for job placements and case management. Approved plans are implemented on a three-year cycle, providing Tribes with budget and program planning stability. The very successful Public Law 102-477 allows Tribes to assert greater control over management of social welfare and workforce development funds received from multiple Federal agencies. In FY2013, 265 participating Tribes benefitted by approximately $87 million from these program grants, including over $33 million for TANF and over $24 million for CCDF.

In response to the February 28, 2011 Presidential Memorandum encouraging greater cross-government collaboration, improved outcomes, more administrative flexibility and removal of bureaucratic barriers, the Office of the Assistant Secretary-Indian Affairs organized the AFWG. The group is composed of representatives from DOI, DOL, DHHS, the Office of Management and Budget (OMB), and Tribes participating in the 477 program. This organizational composition ensured that the right Federal and Tribal resources were assembled to achieve the goals in the Presidential Memorandum.[1]

Between November 2011 and January 2014, the AFWG met by teleconference or in person approximately 30 times. During 2013 alone, the AFWG held teleconferences in March, April, and May; and my office conducted teleconferences in June, August, and November. My office hosted and conducted the most recent, face-to-face AFWG meeting involving both Federal and Tribal representatives on January 24, 2014.

The AFWG worked toward the flexibility called for in the Presidential Memorandum. As a result of these collaborative efforts with our Tribal and Federal partners, our office is pleased to report the following accomplishments:

- The AFWG improved and streamlined the P.L. 102-477 plan review process by creating a checklist for Tribes and Federal agencies to use when developing, renewing, and approving plans. The checklist is already in use.

- The AFWG agreed on a simplified financial reporting mechanism under which Tribes report on the use of funds through functional cost categories (i.e. cash assistance, child care services, education, employment and training services, program operations, and administrative costs) rather than burdensome reports on each funding source separately (i.e., TANF, CCDF, NEW, and WIA).

- The AFWG agreed on a revised narrative report under which Tribes highlight their program activities made possible with 477 funds. In addition, DHHS agreed to exercise waiver authority to allow Tribes to report certain TANF information in the narrative report rather than in a more burdensome separate report.

- The AFWG acknowledged that a Tribe with a 477 plan may use funds made available under the law for economic development, including providing private sector training placement. The allowable amount is the greater of ten percent, or the unemployment rate in the service area of the Tribe, not to exceed 25 percent.

[1] http://www.whitehouse.gov/the-press-office/2011/02/28/presidential-memorandum-administrative-flexibility

While many issues were resolved through the workgroup, several issues were not. First, some Tribes would prefer that DHHS and DOL programs included in a 477 plan be made subject to the terms of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93-638, as amended. Currently, DHHS and DOL programs are not subject to the provisions of the ISDEAA. Many Tribal leaders assert that the benefits that accrue to Tribes under the ISDEAA—mandatory contract support costs, application of the Federal Tort Claims Act to Tribes' program activities, and clear application of the Contract Disputes Act to Tribal agreements with Federal agencies, to name a few, would enhance the goal of Tribal self-determination. Second, when a Tribe includes a program in its 477 plan, that program remains subject to underlying statutory and regulatory requirements of the program unless those requirements are waived by the respective agency's Secretary. Some Tribes would prefer to have the independent authority to re-program funds received under 477 without obtaining a waiver because this would allow additional flexibility to address the changing needs of Tribal populations.

During the January 24, 2014 meeting, AFWG representatives acknowledged that there were unresolved issues but agreed to move on to consultation on the proposed reporting forms and to continue working on unresolved issues related to indirect and administrative costs/rates and the waiver process. On February 14, 2014, DOI published notice for consultation on the following draft forms: (1) Annual Financial Report Form and Instructions (which refers to agreed-on functional cost categories); (2) Statistical Report Form and Instructions; and (3) Narrative Report format.

DOI held a consultation on the forms on Thursday, March 13, 2014 at the National Congress of American Indians Executive Council Winter Session. AFWG Tribal representatives attended the consultation, recommended technical changes to the forms, and noted the many accomplishments of the AFWG. The comment period is open through April 15, 2014. After considering comments and making appropriate changes, we will submit the forms for Paperwork Reduction Act (PRA) review.

Once OMB provides PRA approval for the forms, the Federal partners will draft the compliance supplement language, which is used for auditing purposes, to coincide with the instructions and forms. The language will then be shared with the workgroup. At that point, implementation will begin. The Federal partners will coordinate to provide technical assistance to Tribes, including training.

Finally, we have fostered a much improved relationship between the Tribes and the Federal partners in the AFWG. We have not accomplished all that the Tribes wanted but we agreed to move forward to consultation and review for the materials developed. We look forward to

continuing to build on this relationship as we work through unresolved issues and the next steps in implementing the forms. We are very supportive of this successful project.