



Prairie Band Potawatomi Nation
Government Center

WRITTEN TESTIMONY

of Prairie Band Potawatomi Nation Chairwoman Liana Onnen

Senate Committee on Indian Affairs

**Oversight Hearing on Building Tribal Economies: Modernizing
Tax Policies that Work for Indian Country**

November 1, 2017

Introduction

On behalf of the Prairie Band Potawatomi Nation (PBPB), I thank you for the opportunity to testify at this important hearing. This Committee is charged with addressing a multitude of significant issues that affect tribes and our people, from public safety to health care to everything in between and beyond. Our Nation thanks you for your work on these matters and for scheduling this hearing today.

Tax issues in Indian Country go to the heart of our efforts to improve the quality of life for our members. We especially appreciate the timeliness of this hearing, given the overarching discussions on tax reform. Last month the Republican Leadership released its “United Framework” for fixing the Tax Code. It pointed out that “too many in our country are shut out of the dynamism of the US economy...” and proposes to establish a “fairer system that levels the playing field.” This Committee knows that Indian tribes and our communities are among those who have been shut out. We appreciate that Committee Members have introduced legislation to level the playing field. Specifically:

- Chairman Hoeven and Sen. McCain have introduced S.1116, the Indian Community Economic Enhancement Act of 2017. This bill responds to the challenges we face in Indian Country by identifying and removing obstacles to economic development.
- Senator Moran’s Tribal Tax Reform and Investment Act of 2017 (S. 1935) will spur much-needed economic development on Indian lands, promote tax fairness, strengthen tribal self-determination and recognize tribal sovereignty. The PBPB extends a special word of thanks to Senator Moran for introducing this important bill.
- Chairman Hoeven, along with Senator Murkowski and Senator Heitkamp, introduced S. 2012, the “Tribal Economic Assistance Act of 2017”.
- Senator Cantwell (along with Senate Finance Committee Chairman Hatch) introduced the Affordable Housing Credit Improvement Act of 2017 (S. 548).

We thank each of you and all Members of this Committee for your leadership in working with us to seek a fairer system. We count on you to ensure that tribal governments and our communities are the partners and the beneficiaries of this tax reform effort. As you know, our

tax priorities have been on hold for decades. We remain hopeful that the bills you have introduced demonstrate a true commitment to prevent Indian Country from being left behind in the current tax reform effort.

PBPN's experience shows that when tribal economies thrive, our members and the surrounding communities all benefit. PBPN has been an economic engine for our region in the State of Kansas. We employ more than 170 tribal members and 125 non-members in our tribal government. Our Entertainment Corporation employs more than 700 people, and nearly 600 of those are non-members. The majority of the non-tribal members we employ live off-reservation and their wages and taxes contribute directly to surrounding communities. Meanwhile, our casino and golf course attract more than 110,000 visitors per month to our Reservation.

Many of the programs the PBPN provides and funds through tribal government revenues are for both members and non-members, thereby enriching the cultural, social, recreational and educational opportunities available in our region. Countless organizations host events at our 18-hole golf course, our Elders Programs is available for all seniors, and our Boys and Girls Club provides exciting activities not only for our tribal member youth but also for those nearby our Reservation. The revenues we generate from our casino, our tribal sales tax and our tribal cigarette tax make these programs possible.

PBPN, however, could do far more if Congress eliminates barriers to tribal economic development and acts to modify tax incentives to attract private investment to tribal communities. The majority of projects the Nation has completed have been almost entirely financed through our own enterprises taxes and federal appropriations. With greater ability to attract private partners we could concurrently finance and operate a wider variety of projects, programs and enterprises. We believe the bills that the Committee Members have introduced are vital to accomplishing these objectives as described in greater detail below.

Tax Reform and Tax Parity

S.1116, the ICE Act, recognizes the fundamental problem for tribes in the tax arena: tribal governments are not treated in the same manner as states or local governments under the Federal tax code. This lack of parity and our limited access to tax incentives has impaired our economic development and restrained our ability to create jobs in our communities. As this Committee's report on S. 1116 points out, Indian Country faces "disproportionate barriers" to economic development. Unemployment, even in the best of times, is still more than twice the national average. S.1116, S. 1935 and S. 2012 provide tools that remove some of these barriers and improve opportunities to attract investment and create jobs.

Tax-exempt financing. This Committee's report on the ICE Act (S. 1116) points out that the "lack of parity in treatment of an Indian tribe as a governmental entity under Federal tax law ...impedes...the ability of Indian tribes to raise capital through issuance of tax exempt debt... and benefit from other investment incentives accorded to State and local governmental entities."

This is so true and the situation needs to be rectified. S. 1935 and S. 2012 both seek to level the playing field regarding tax-exempt financing. Under current tax law, Indian tribes may finance the construction of roads, schools and other governmental infrastructure projects with tax-exempt bonds. Yet, unlike state and local government bond issuances, the tax code limits tribal tax-exempt bonds to projects that meet the requirements of the essential governmental function test.

This distinction has limited our ability to utilize tax-exempt financing. Although state and local governments use tax-exempt bonds for projects that generate new revenues such as convention centers and public recreational facilities, we could not use tax-exempt bonds for our golf course. Such tax-exempt financing would enable us to accelerate the timeframe for development of business and commercial development opportunities. Moreover, we have long discussed plans to develop lands we own adjacent to US Highway 75. This location with its highway access offers tremendous commercial potential, but without the financing tools that are available to state governments, PBPN is at a disadvantage to access funding to move ahead with development. Clearly, the playing field is not level when states and local governments can issue tax-exempt bonds for these projects, but tribal governments cannot.

For this reason, we welcome S. 2012's repeal of the essential government functions test as an important step in promoting tax fairness between tribal and state governments. Indeed, the Treasury Department's 2011 Report to Congress found the tribal "essential governmental function" limitation unfair and difficult to administer. In that report, Treasury also recommended that tribes should have full parity with states with tax-exempt bond financing, including private activity bonds. Sec. 3 of S. 1935 contains terms that would repeal the essential government functions test *and* permit tribes to issue private activity bonds. We encourage the Committee to embrace the tax fairness provided by S. 1935.

Governmental Pension Plans. A similar disparity in the tax code creates unfair burdens for tribal governments with regard to our governmental pension plans. State government pension plans are exempt from ERISA requirements. However, the "essential governmental function/commercial activity" limitation for tribal plans in the tax code means that tribal government employees engaged in the Tribe's revenue generating activity may not be eligible for governmental plan status. As a result, PBPN, like other tribes that choose to establish governmental plans as permitted under the tax code, is still required to administer two separate benefits plans: an ERISA-exempt governmental plan for all employees performing essential governmental functions and a commercial ERISA-compliant plan for our employees who work in our gaming facility. As you know, our casino is not operated as a private business. It is a government operation that raises revenue pursuant to the Indian Gaming Regulatory Act and must spend its revenues only in accordance with federal law. Requiring tribes to meet standards that do not apply to any other government is unfair and fails to recognize the sovereign status of tribes. S. 1935 would correct this problem and establish fairness, simplicity and efficiency in the administration of government employee benefits plans.

Correcting other disparities. S. 1935 corrects several other disparities in the federal tax code to provide tribes the same benefits and tools available to states, including those with respect to the treatment of tribal foundations and charities, child support enforcement, and the adoption tax credit.¹

S.1935 would ensure that charitable organizations formed to support tribal governments would be treated the same as charitable organizations formed to support state and local governments. There is no basis for treating such organizations differently. Currently, it is difficult for tribes to raise funds for separate nonprofit organizations for charitable purposes. PBPN currently makes substantial contributions to charitable organizations in our surrounding region through the charitable giving program of the Nation. We have not created a public charity that seeks tax-exempt donations and private foundation support. However, the Nation might consider doing so should the law be changed. The changes proposed by S. 1935 would ensure parity of tribal governments with state and local governments in this respect and facilitate tribes' efforts to raise charitable contributions from foundations, corporations and individual donors.

S. 1935 would also allow tribes' child support enforcement agencies to access the Federal Parent Locator database that is available to state child support agencies and to offset tax refunds of individuals who owe past due child support. The PBPN government has had a child support enforcement office for five (5) years. We are fortunate to have an effective collaborative working relationship with the child support enforcement department of the State of Kansas. However, direct tribal access to the federal database, is urgently needed by many tribal governments not only as a matter of governmental parity but as a matter of smart government. It will enhance tribes' means to enforce the law in a manner that minimizes administrative burdens.

Section 7 of 1935 is another provision that properly acknowledges the governmental status of Indian tribes. This section would recognize tribal court determinations of a child having special needs for purposes of the adoption tax credit. Today, adoptive parents must receive such a determination from a state court before they can benefit from the tax credit. The PBPN tribal court has presided over twenty-two (22) adoptions in the past five (5) years with three currently pending. Despite the mandate of the Indian Child Welfare Act to give full faith and credit to the public acts, records, and judicial proceedings of Indian tribes, a special needs determination must be made by a state court in order for an adoptive parent to receive a federal adoption tax credit. To require tribal members to leave the jurisdiction of tribal court to venture to a state court for an adoptive proceeding, creates confusion over jurisdictions and seems to require proceedings that the ICWA was enacted to avoid. By acknowledging the validity of tribal court determinations, S. 1935 is consistent with 25 C.F.R. § 1911 by giving the same recognition to tribal court

¹ I want to note other legislation has been introduced in the Senate (S. 1309), which would provide tribal governments the same option that state and local governments have to enter into agreements with the Social Security Administration to provide Social Security and Medicare coverage to tribal government officials.

determinations as that afforded to state court. There likely has been a real disparity here where tribal member adoptive families may not have had the benefit of receiving this tax credit that has been available to other eligible families adopting through state court.

PBPN strongly supports S. 1935 because it helps to level the playing field so tribal governments have resources to encourage private investment in Indian Country while it reduces administrative burdens in the same manner as provided to states under the Tax Code. Treating all governments in the federal system the same way promotes fairness, uniformity, reduces bureaucracy, prevents inconsistent treatment and avoids unintended consequences. We also stand behind S. 1935 as it recognizes tribal sovereignty, self-determination and promoting strong tribal governments and economies. Through passage of S. 1935, tribes will be better positioned to contribute to and benefit from the dynamism of the US economy. We encourage this Committee to fully embrace S. 1935 and work with the Senate Finance Committee to advance it into law as part of the larger tax reform effort.

Tax Incentives and Economic Development

For years, Tribal Leaders have pointed out that tax code provisions to promote economic development do not address the needs and opportunities in Indian Country. As a result, Indian Country has been left behind by a system of incentives that sends capital, investment and jobs to others but leaves tribal governments without. By this hearing, this Committee is doing its part to engage with Tribes as the current tax reform process accelerates.

The bills introduced by Members of this Committee demonstrate that you understand that the existing tax incentives need to be improved to better secure investment in reservation infrastructure and commerce. While improvements are needed to protect Indian Country from being left further behind, I urge this Committee to be mindful that from our experience investing in Indian Country not only helps the tribes, but their surrounding communities as well.

I want to stress that in order to enhance prospects for economic development and job creation in Indian Country, this Committee's engagement with the tax-writing Committees is vital. The "United Framework" for fixing the Tax Code expressly preserves only the Research & Development Tax Credit and the Low-Income Housing Tax Credit. That Framework leaves it to the discretion of the tax-writing Committees whether to retain other tax credit programs. PBPN and other tribes are raising our voices to urge those Committees to retain and improve the effectiveness of the existing tax credits applicable to tribal communities. I would like to encourage your support for retaining several tax credit programs along with modifications that will make them more effective for Indian Country.

Low-Income Housing Tax Credit (LIHTC). PBPN welcomes the United Framework's retention of the LIHTC even though, as a practical matter, most tribal communities have been left behind with regard to the allocation of the LIHTC. As you know, American Indians face some of the worst housing and living conditions in the United States. Forty percent of housing

on Indian reservations is substandard (compared to 6 percent outside of Indian Country) and nearly one-third of homes on reservations are overcrowded. Yet, with the LIHTC allocated to state agencies based on population, as opposed to need, there is no incentive or regulation requiring state agencies to consider tribal projects in their IRS approved Qualified Allocation Plans. In our experience, even where the credit is available the private investor may still be unwilling or unable to put up the financing. Indian Country needs congressional action to amend the LIHTC so that a greater portion of the available federal tax credits are allocated specifically to tribal communities and that investors have incentives to partner to develop affordable housing in Indian Country. The Affordable Housing Credit Improvement Act of 2017 (S. 548) provides an incentive for states while reducing the burden on states when using their existing allocations for tribal housing.

New Market Tax Credit (NMTC). The design of the NMTC Program is intended to make more projects feasible and cost effective by making it easier for tribes to attract private investment. In practice, however, relatively few tribal communities have benefitted from this Program that has delivered some \$70 billion in tax credit authority nationwide. PBPN believes that now is the time to improve the NMTC, not abandon it. We support S. 2012 that directs the Secretary of Treasury to provide tribal projects with “Priority” status for the allocation of NMTCs. We welcome House bill H.R. 3129, the Aiding Development of Vital Assets in Native Communities and Environments (“ADVANCE”) Act, which creates additional incentives for allocating the NMTC to projects in tribal communities. We encourage you to press for improvements to the NMTC that will make it effective for delivering needed projects in Indian Country.

PBPN supports S. 2012 language that would make permanent the Accelerated Depreciation Business Property on an Indian Reservation Tax Credit and the Indian Employment Tax Credit. These two tax credit programs are underutilized in tribal communities due to their status as short-term temporary measures (that have been approved periodically along with the other tax provisions passed as part of a “tax extenders” package). If made permanent, accelerated depreciation would provide an outstanding mechanism to attract capital-intensive projects on reservations and can bring high-skilled jobs to Indian communities. Additionally, cash saved in taxes can be reinvested in the business or in employees.²

² We note that the “United Framework” proposes to repeal the depreciation schedules to allow immediate expensing of investment in capital equipment. The “United Framework” proposal does not change the depreciation rules on new structures. If accelerated depreciation in Indian Country is retained (permanently, or at least as long as the immediate expensing rule applies), we believe the accelerated depreciation incentive for investment in Indian Country could become quite useful. An investor could put in a new building/facility in Indian Country (and receive accelerated depreciation) and be able to immediately expense any investment in equipment that

Simplifying, expanding, and making permanent the Indian Employment Tax Credit would lead to greater use of the credit, thereby helping to increase employment rates and promote economic growth in Indian Country. S. 2012 would make the credit permanent, which is a vital step forward. PBPN also recommends the Committee consider modifying the tax credit formula as recommended by the National Congress of American Indians (NCAI) and the Native American Finance Officers Association (NAFOA).

Business Partners and Investor Face Multiple Layers of Taxation in Indian Country

Even when tribal governments succeed at obtaining investment and partnerships with the private sector to generate revenues to provide services in our communities, outside jurisdictions may seek legal loopholes to divert or tax these revenues. This Committee's report on the ICE Act (S. 1116) includes a discussion of the adverse impact of multiple layers of taxing jurisdiction over economic development on Indian lands. The uncertainty as to whether an outside tax applies or not in itself can prove to be a deal breaker for economic development in our communities. Moving forward with discussions and negotiations with business entities that desire to do business with the Prairie Band requires a level of certainty regarding the business entity taxing climate.

The Nation supports the Department the Interior's efforts to document the economic harm caused by multiple layers of taxation on tribal lands through its Indian Trader Act regulatory effort. We encourage this Committee to engage in exploring legislation that would eliminate this uncertainty and ensure that those revenues generated in tribal communities are reinvested there and are not subject to the jurisdiction of outside governments, who spend those revenues in off-reservation locations that do not benefit tribal communities.

Conclusion

Thank you for your consideration and support. I look forward to working with you to advance these vital efforts for investment and job creation in tribal communities.

is put into that building. We would certainly seek to tap into this combination of benefits as we explore possible developments on our lands adjacent to US Highway 75.