UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

November 6, 2019

Examining the 477 Program: Reducing Red Tape While Promoting Employment and Training Opportunities in Indian Country.

Testimony of Margaret Zientek
Co-Chair, 477 Tribal Work Group

My name is Margaret Zientek, and I appear today as Co-Chair of the 477 Tribal Work Group. I serve as the Assistant Director for the Citizen Potawatomi Nation Employment & Training Program, of which I am an enrolled citizen. I was also a tribal representative on the Pub. L. 102-477 Administrative Flexibility Workgroup (AFWG), leading up to Congress' passage of the Indian Employment, Training, and Related Services Consolidation Act, Pub. L. No. 115-93 ("amended 477"), which made the P.L 102-477 demonstration project permanent, expanded it to a total of 12 federal agencies, and strengthened tribal rights while streamlining the agency approval process.

Thank you for this opportunity to present written testimony concerning the flawed implementation of amended 477 since December 2017

As Co-Chair for the 477 Tribal Work Group, I speak today on behalf of over 69 477 programs representing and serving over 252 Tribes across the United States. For the Committee's information, the Work Group knows of an additional 10 new plans currently being written, and another 74 tribes and consortia representing over 120 tribes have sought technical assistance in exploring 477. The Citizen Potawatomi Nation has operated a 477 program for almost two decades, and I have served in my national capacity for almost two decades. I have seen how much good this program can, and does, do for Tribes across the Nation. I believe in its potential, and am dismayed that the Memorandum of Agreement entered into by the twelve federal agencies has allowed certain actors within some of those agencies to turn the work of this Committee and Congress as a whole on its head by codifying the same harmful behaviors amended 477 was intended to curtail.

The 477 Initiative established by Pub. L. 102-477 has been essential for the development of effective and efficient tribal services to increase employment and training in Indian country. The program, now permanent after decades as the model of a successful demonstration project, provides a critical foundation for maximizing the effectiveness of diverse tribal employment, training and related service programs that would otherwise be available to Tribes only by dealing with a panoply of federal agencies issuing multiple contracts or grants.

The law allows for the consolidation of funding streams from the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, Transportation, and Veterans Affairs.

Thanks to the 477 Initiative, these programs are consolidated into a single tribal plan. By this means, the 477 program provides critical flexibility for Tribes and tribal organizations to tailor the consolidated activities into a single new program that best meets the unique local needs of their respective communities.

At the same time, it eliminates administrative redundancy by merging program and financial reporting requirements, all while still adhering to the Government Performance Results Act's stringent accountability standards. Tribes, alone, decide which programs or combination of programs to combine into a 477 plan. This structure affords maximum local flexibility and full accountability, which accounts for the fact that the 477 Initiative has to date received the highest OMB PART rating of any program in Indian Country.

The Citizen Potawatomi Nation's 477 Program: The Citizen Potawatomi Nation (CPN) has participated in the 477 Initiative since 1996. We have been able to achieve enormous administrative savings and provide extended services to our participants as a direct result of the Act's provisions. In 2016, 2017, and 2018, CPN's 477 program has served over 5,000 people seeking employment, training, and social services, as well as more than 4,000 families that received child development services. We see the success in our community, and in tribal communities across the country.

For almost three decades, P.L. 102-477 has offered success to some of the areas with highest unemployment in the country. Because of 477, Tribes and tribal organizations have produced outcomes far beyond those of their neighboring States because they have been able to consolidate the resources of diverse programs in ways that make the most sense at the local level. They have moved tribal members from cash assistance to unsubsidized employment. And they have accounted for 477 program activities according to the plan approved by the Department of the Interior.

Amended 477 addressed specific tribal concerns, but the implementation of the law has undermined Congress' intent to address those concerns. In April 2014, I testified before this Committee and asked that Congress make specific changes to the proposed legislation that eventually became amended 477 to address Tribes' concerns. Tribes asked that the legislation include a mechanism to identify eligible employment, training and related social service programs from other federal agencies on which Tribes and tribal organizations might draw to supplement their efforts and to add to their plans. To do this, Tribes asked that the scope of the original demonstration program be expanded in two ways: (1) to cover a wider range of departmental and agency funds, including competitive funds, formula funds, block grants, and designated funds; and (2) by specifying a wider range of funding types, including funds for job training; welfare to work and tribal work experience; creating or enhancing employment opportunities; higher education; skill development; assisting Indian youth and adults to succeed in the workforce; encouraging self-sufficiency; familiarizing individual participants with the world of work; facilitating the creation of job opportunities; and any services related to these activities.

Tribes asked that the 477 Act also be amended to address timely approval of 477 plans, regulation waivers and dispute resolution, so that there are clear rules and clear forums for resolution of disagreements about the 477 Act. This Committee, and Congress as a whole, listened to those concerns and amended the legislation to address them. We sincerely thank you for those efforts.

However, as pointed out in the letter sent by amended 477's cosponsors in July of this year, the implementation of the amended law has done the exact opposite. Congress

> sought to stop agencies from introducing problems into the PL 477 program that reduced its effectiveness. Among other things, agencies had been requiring additional criteria for program eligibility not found in the law and additional reporting prohibited under the law. We made clear through the language of the bill that these things are unlawful—laying out clear program eligibility criteria, mandating that only the Department of the Interior has authority to determine program eligibility, and stating that a Tribe need only submit one annual report for a PL 477 plan.

And as the Cosponsors explained, amended 477 has thus far been implemented in such a way – through the Memorandum of Agreement entered into by all twelve agencies – that re-introduces the specific problems that reduced the program's effectiveness in the first place.

We share the Cosponsors Concern.

The MOA was written entirely without tribal input, and is simply inconsistent with the amended 477 law. Under amended 477, Congress required the 12 impacted agencies to enter into an interdepartmental memorandum of agreement ("MOA"), with the Secretary of the Interior serving as lead agency, by December 18, 2018.[1] On December 20, 2018, the Secretary of the Interior released the executed MOA with a Dear Tribal Leader Letter. This MOA, which was negotiated behind closed doors and without any meaningful tribal input, does not faithfully implement the law. The P.L. 102-477 Tribal Work Group has produced a detailed redline of the MOA explaining the legally-problematic sections and providing language that would bring the MOA into compliance with the law. That redline is attached as a supplement to this testimony. In brief though:

- **The MOA unlawfully allows other agencies that to make decisions that Congress specifically allocated to the Secretary of the Interior.** The law is clear that "The Secretary [of the Interior] shall have exclusive authority to approve or disapprove a plan submitted by an Indian tribe."[2] The law spells out the specific areas in which the other agencies have authority to provide input,[3] but the MOA unlawfully transfers critical decision-making authority from Interior, where expertise regarding the 477 program resides, to the other agencies. Interior then will rubber-stamp those decisions, and as we have seen with the

[1] 25 U.S.C. § 3410(a)(3).
[2] 25 U.S.C. § 3407(a) (emphasis added).
[3] *See* 25 U.S.C. § 3406(a)(1), (b)–(i).

denials already published, that is exactly what has happened. Ending this practice was one of the underlying reasons the new law was needed.

- **The MOA unlawfully restricts the purposes of the agency programs eligible for integration into a 477 plan:** the law is clear that tribes may consolidate federal programs implemented for a variety of purposes, such as "economic development" and "encouraging self-sufficiency."[4] The MOA unlawfully restricts eligible programs to those where "job training" or "employment" is the "primary" purpose of the program and where the federal statute authorizing the program clearly states employment and training is its purpose. This provision deeply undermines the amended law.

- **The MOA unlawfully limits eligibility for programs funded through competitive funding and block grants:** the law allows tribes to consolidate competitive funds into a plan so long as the funds are from a source that fits into one of the allowable categories of funding.[5] The MOA unlawfully restricts this eligibility to programs where Federally-recognized tribes and their members are the sole eligible recipients or the program's authorizing legislation has a PL 477 designation. This restriction is found nowhere in the law. Additionally, the MOA does not list block grant funds as an eligible type of funds.

- **The MOA unlawfully gives agencies the authority to delay 477 plan reviews through multiple extensions:** the law allows Interior to ask for written consent from a tribe for an extension of up to 90 days on its statutory time limit to review that tribe's submitted plan,[6] and it does not allow extensions for waiver requests.[7] The MOA provides for multiple extensions throughout the plan and waiver review process, allowing agencies to delay and extract additional concessions from tribes. Ending this type of behavior was an important consideration in the amendment process. And multiple extensions lessens the effects of amended PL 477's mandate that a PL 477 plan[8] or waiver request[9] is deemed approved if not acted on within the statutory timeframe for approval.

- **The MOA Allows Agencies to Deny Waiver Requests For Unlawful Reasons:** the law allows for tribes to request waivers of applicable statutory, regulatory, or administrative requirements.[10] Affected agencies may only deny waiver requests if they provide written notice that waiver is inconsistent with the purposes of PL 477 or "the provision of law from which the program included in the plan derives its authority that is specifically applicable to Indians."[11] The MOA directs an agency to deny a waiver request if a tribe refuses to approve a time extension – entirely the opposite of the statutory language.

The MOA includes numerous other issues which undermine the intent of Congress to provide for a smooth, efficient, and streamlined plan and waiver review process led by the Department of the Interior.

---

[4] 25 U.S.C. § 3404(a)(1)(A).
[5] 25 U.S.C. § 3404(a)(1)(B), (a)(2).
[6] 25 U.S.C. 3407(c).
[7] *See* 25 U.S.C. § 3406.
[8] 25 U.S.C. § 3407(b)(5).
[9] 25 U.S.C. § 3406(e)(3).
[10] 25 U.S.C. 3406(b)–(i).
[11] 25 U.S.C. § 3407(d), (e).

The MOA has already been used as the basis for unlawful denials of the inclusion of programs into Tribes' 477 plans. The work group is concerned that individual agencies may communicating denials or de-facto denials directly to Tribes, rather than through the Division of Workforce development in BIA, so there may be more than the following examples. However, what we do know is that affected agencies have denied the inclusion of at least four programs into 477 plans based on eligibility criteria unlawfully added though the MOA, rather than in statute, and that due to the restrictions placed on DOI in the MOA, BIA has had to rubber-stamp these denials rather than applying its own expertise as to the includability of the programs:

- **Vocational Rehabilitation Program:** The Department of Education took the position the program is not eligible because it receives competitive funding made available to entities other than federally recognized tribes, relying on the MOA's provision unlawfully creating this eligibility criterion.

- **Disability Employment Initiative:** The Department of Labor took the position the program is not eligible because it receives competitive funding made available to entities other than federally recognized tribes, relying on the MOA's provision unlawfully creating this eligibility criterion

- **Child and Family Service Title IV-B, Subparts 1 and 2:** The Department of Health and Human Services took the position the program is not eligible because it is not an employment or job training program, relying on the MOA's provision unlawfully creating the eligibility criterion that requires the primary purpose in the program's authorizing statute to be employment or training, despite amended 477's broader purpose requirement.

- **Low-Income Home Energy Assistance Program (LIHEAP):** The Department of Health and Human Services took the position the program is not eligible because it is not an employment or job training program, relying on the MOA's provision unlawfully creating the eligibility criterion that requires the primary purpose in the program's authorizing statute to be employment or training.

Summary and Conclusion. The Pub. L. 102-477 program has been one of the most successful Indian programs in the history of the government-to-government relationship, and is one of the purest examples of the potential implicit in the self-determination policy. The Tribal Work group has been honored to work closely with Congress to make improvements to the program and to help it reach that potential. We are deeply grateful for this Committee's unwavering bipartisan support for the Program.

Federal agency implementation of the amended 477 program has served to undermine both Congress' and Tribes' efforts, and I appreciate the opportunity to speak to those issues today.