

MEMORANDUM

April 30, 2010

TO: SELF-GOVERNANCE TRIBES

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP
Geoff Strommer & Vernon Peterson

RE: ***Report on Proposed Legislation to Amend the 477 Act***

On April 21, 2010, Senator Dorgan, Chairman of the Senate Committee on Indian Affairs, released and requested comments on the "Discussion Draft Indian Country Jobs Bill," composite legislation that would provide a variety of new tools to create jobs and develop reservation economies, including proposed amendments to "improve" the Indian Employment Training and Related Services Demonstration Act, Pub. L. 102-477, as amended, 25 U.S.C. §§ 3401-3417 (commonly known as the "477 Act").¹

The 477 Act authorizes tribes and tribal organizations to combine their diverse federal employment, training and related services programs of the Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), the Department of Health and Human Services (DHHS) and the Department of Labor (DOL), into a single, integrated Plan approved by the Secretary of the Interior, with a consolidated budget and a single, consolidated reporting system. The 477 Program was first enacted in 1992 and has over the course of nearly two decades proven to be an enormous success. During the past fiscal year, 265 tribes and tribal organizations operated 68 separate 477 Plans, as single-tribe and tribal organization plans. One of the strengths of 477 is that the tribes and tribal organizations have taken the initiative and ownership in organizing the 477 Tribal Work Group, which has prepared a guide book describing the 477 Program and conducts periodic symposiums and workshops to keep tribes and tribal organizations fully informed about requirements and operating procedures.

Recent actions by the federal agencies threaten this successful program. The two primary concerns are the 2008 decision by the DHHS and the BIA 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 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.

¹ The relevant portion of the bill that would amend the 477 Act is on pages 2-5 of the bill.

DHHS and BIA lawyers apparently justify their funding decision on the basis of a ruling in *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133 (9th Cir. 2003), a case decided seven years ago that involved neither the administration of the 477 Program nor federal funding through the contracting and compacting provisions of ISDEAA. The 477 Work Group and participating tribes have provided DOI and HHS with a legal analysis that explains in some detail why the *Navajo Nation* case does not legally bar 477 Program funds from being included in ISDEAA agreements. The agencies have declined to discuss their rationale in consultations, and they have not responded to the legal analysis provided by the tribes and tribal organizations.

More recently, the federal agencies have implemented a program reporting change through 2009 OMB Circular A-133, which amended the BIA Cross-Cutting Section to require 477 tribes and tribal organizations to report their 477 expenditures separately by funding source number for audit purposes. Most tribes and tribal organizations track funding by service type so they may not even have this information available. This change would undermine the single, consolidated reporting system authorized by the 477 Act, one of the clear advantages the Act provides to tribes and tribal organizations.

In response to these agency actions, the 477 Work Group met with staff members of the Senate Committee on Indian Affairs and Senate Finance Committee in January 2010 to discuss the Work Group's comprehensive draft bill, the proposed "*Indian Workforce Development Act of 2010*" (hereafter "draft IWDA"). Since the original 477 Act was a "demonstration" project, the purpose of the proposed draft IWDA is to make permanent, improve and expand the initiative of the legislation. Of course, the draft IWDA addresses the tribes' paramount concerns: (1) to ensure the continued flow of 477 funding through self-determination contracts and self-governance compacts, and (2) to ensure that recent new audit guidelines from OMB do not undo Congress' goal of authorizing consolidated reporting of all funds covered by a 477 Plan. Other provisions included in the draft IWDA address timely approval of plans and waivers, streamline reporting requirements, provide a means for dispute resolution, and would expand the program to include federal employment-related programs in the Departments of Commerce, Transportation, and Agriculture and other federal agencies, and the use of funds from federal workforce development programs.

The draft Senate bill, (in Section 4, Indian Employment, Training, and Related Services, at pages 2-5) proposes a series of discrete amendments to the 477 Act that address many of the concerns that prompted the 477 Work Group and participating tribes to develop the comprehensive draft IWDA. It resolves the fund transfer and audit issues and makes other improvements as well to require timely approval of plans and waivers, streamline reporting requirements, provide a means for dispute resolution, and authorize informal or formal administrative review and federal judicial review of a decision to disapprove a plan, under provisions incorporated from the ISDEAA. However, the Senate bill does not provide the comprehensive overhaul proposed in the draft IWDA.

The most critical change amends the language in section 4 of the original Act (25 U.S.C. § 3403) to address the concerns about transfer of funds and single audit. It provides that approved plans shall be fully integrated into a single, coordinated, comprehensive program and not require submission of additional budgets, reports, or supplemental audits. It also authorizes funds for programs and services covered by an approved plan to be transferred to the tribe or tribal organization pursuant to contracts, compacts or funding agreements under Titles I and IV of the ISDEAA. This provision effectively reverses the position of the agencies on both funding and reporting. These changes alone would return the 477 Program to the stability it enjoyed before the recent federal agency action to change the long-standing administration of the Act.

Another amendment provides a critical revision of the 477 Act by substituting a single section 7 “Plan Review and Approval” for separate sections 7 and 8 under the original 477 Act (25 U.S.C. §§ 3406 and 3407). The new language provides a more clear and definite requirement that the Secretary of the Interior approve or disapprove a proposed plan within 90 days and authorizes informal or formal administrative review and federal judicial review of a decision to disapprove a plan, under provisions incorporated from the ISDEAA. The provision authorizes extension of the review period only upon written agreement of the tribe or tribal organization, and also requires that “written notification of disapproval of the plan that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that, the plan does not meet the requirements of section 6.” This change addresses concerns voiced by tribes and tribal organizations that have experienced significant delays with the 477 Plan review and approval process. When plans are disapproved, or when no action is taken at all, tribes and tribal organizations have been forced to negotiate terms with separate agencies, and had no express recourse to federal court review.

Another important amendment provided by the Senate bill restructures section 11 of the 477 Act (25 U.S.C. § 3410) regarding “Federal Responsibilities” to incorporate some of the specific provisions of the draft IDWA, including the development and use of a model single report, technical assistance to tribes in developing plans, the distribution of funds to the tribe or tribal organization, granting agency waivers of regulations, and the establishment of an inter-agency dispute resolution process. Finally, the amendment requires an annual meeting of participating tribes and federal agencies, an annual review of performance under the Act, and a forum “to identify and resolve” conflicts in the administration of the Act.

These changes, if enacted, will reverse the federal agency actions that have threatened the 477 Program and improve the process for approval of plans and plan reporting. However, the draft Senate bill does not address the tribes’ long-range goals, developed in the draft IWDA, to expand the Program to provide tribes and tribal organizations with the opportunity to integrate other federal

employment-related programs into tribal plans, including the expansion of the 477 Program to the Departments of Commerce, Transportation and Agriculture and other federal agencies, the use of funds from various other federal workforce development programs, and the authority to recover indirect costs associated with any funds transferred under the Act.

The Senate Committee provided a very short turn around for comments on the draft bill. Comments are due May 3, 2010. Some of the language in the proposed amendment needs clarification, and we submitted appropriate comments and suggestions (copy attached). The 477 Work Group, NCAI and 477 participating tribes have urged tribes to contact their Senators and Representatives to recommend passage of the Senate bill.

Conclusion

If you have any questions or concerns about the information discussed above, please contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745) or Vernon Peterson (vpeterson@hobbsstrauss.com or 503-242-1745).