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Trial Court of the Osage Nation
FILED

AUG 26 2016

BY AJ

**OPINIONS OF THE ATTORNEY GENERAL
OF THE OSAGE NATION
ONAG-2016-03
(Slip Opinion)¹**

August 26, 2016

QUESTIONS SUBMITTED BY: The Honorable Geoffrey M. Standing Bear, Principal Chief of the Osage Nation.

This Office has received your request for an Official Attorney General Opinion regarding the constitutionality of the Capital Asset and Improvement Fund Act (ONCA 16-58).

To which you ask:

Does Section 4(D) and Section 4(F) of ONCA 16-58 violate the separation of powers provisions of the Osage Nation Constitution?

I. INTRODUCTION

Pursuant to the Osage Nation Office of Attorney General Act at 15 ONC § 3-109, you properly ask for an Attorney General Opinion on the constitutionality of Sections 4(D) and 4(F) of the Capital Asset and Improvement Fund Act (ONCA 16-58). As explained below, I am of the

¹ NOTICE: This opinion is subject to formal revision before official publication. Readers are requested to notify the Office of the Attorney General using the header information, or at AttorneyGeneralOffice@osagenation-nsn.gov, of any typographical or other formal errors, so that corrections may be made prior to official publication.

opinion that Section 4(D) is an unconstitutional violation of the separation of powers clause; however, Section 4(F) is constitutional and does not violate the separation of powers clause.²

II. DISCUSSION

Taking guidance from our Supreme Court's decision in *Standing Bear v. Whitehorn*, Case No. SCO-2015-01, I keep with their intention to make "a uniquely Osage jurisprudence" and decline to consider "the standards and values created by State and Federal governments in creating their constitutional jurisprudence."³ As such, I will refrain from using State and Federal principals and instead focus on Osage law and jurisprudence to answer your question.

Your question asks if Section 4(D) and 4(F) of the Capital Asset and Improvement Fund Act violates the "separation of powers provisions" of the Constitution. Separation of powers provisions are found in Article V, Section 2. This section states that the powers of the three branches are "separate and distinct" and that "no person or collection of persons, charged with official duties under one of those branches, shall exercise any power properly vested in either of the others except as expressly provided in the Osage Nation Constitution." The Supreme Court noted two very good reasons why constitutionally mandated separation of powers is essential to the vitality of this Nation: "The concept [of separation of powers] refers to the division of government responsibilities into distinct branches [1] to limit any one branch from exercising the core functions of another and [2] to prevent the concentration of power in any one branch." *Standing Bear* at 6.

I will discuss Section 4(D) and 4(F) within this framework.

A. Section 4(D)

² ONCA 16-58 contains a severability clause at Section 7 which allows unenforceable sections of the Act to be removed while keeping the remainder of the Act in full force and effect.

³ *Standing Bear v. Whitehorn*, SCO-2015-01 at 3 (2016). Known throughout this opinion as "*Standing Bear*".

It is well decided that no monies can be spent without a Congressional appropriation. Article VI, Section 23 defines Congress' appropriation authority by saying: "The Osage Nation Congress shall enact, *by law*, an annual expenditure of funds which shall include an appropriation of operating funds for each branch of the government for each fiscal year (emphasis added)." However, the Congress' appropriation responsibility is not unfettered. The Supreme Court stated, "[t]he Constitution limits this authority in several ways, including requiring appropriations to be enacted by law, prohibiting Congress from usurping another branch's responsibilities via legislation in violation of Article V, section 2 (Separation of Powers) ..." *Standing Bear*, p.11. It is this Constitutional prohibition against usurpation of another branch's responsibilities which led you to question Section 4(D) of the Capital Asset and Improvement Fund Act.

In order to examine the Constitutionality of Section 4(D), it is necessary to determine the Section's intent within the law as a whole. The intent is derived from the language itself. The Capital Asset and Improvement Act at Section 1(A) states "[t]he purpose of this Act is to establish a revolving fund that *holds appropriation monies* to be used for capital construction and improvements (emphasis mine)." Section 4 is the "Limitations" section of the Act and part (D) states: "No funds for any capital construction project *may be expended out* of the Capital Asset and Improvement Fund until a Capital Asset Budget is prepared and approved by *Congressional Resolution* (emphasis mine)." When the Act's purpose in Section 1(A) is read with the limitations in Section 4, the Act prohibits the expenditure of appropriated monies out of the Capital Asset and Improvement Fund without a separate Congressional Resolution. Essentially, the budget approval process by Congressional Resolution required in Section 4(D) is a condition before the authorized personnel can expend appropriated funds out of the Capital Asset and Improvement Fund.

In looking at the Constitutionality of other appropriation bills, the Supreme Court stated: “The Constitution does not expressly authorize Congress to condition its appropriation on certain actions taking place.” *Standing Bear* at 10. Further, “[w]e similarly reject the argument that Congress possesses the inherent authority to impose conditions, restrictions, or limitations in its appropriation laws when such conditions violate the Constitution.” *Id.* at 11. By conditioning the Executive Branch’s expenditure of capital asset funds previously appropriated by law upon a Congressional Resolution, Section 4(D) does precisely what the Supreme Court ruled to be unconstitutional. The Congressional act of requiring a resolution overrides the Principal Chief’s authority to direct expenditures from previously appropriated funds and “usurp[s] another branch’s responsibilities via legislation in violation of Article V, Section 2.” *Standing Bear* at 11. Therefore, Section 4(D) of the Capital Asset and Improvement Fund violates the separation of powers provisions of the Osage Nation Constitution.

B. Section 4(F)

Per your request, I will next examine the Constitutionality of Section 4(F).

Section 4(F) of the Capital Asset and Improvement Fund Act states: “Unused funds appropriated and authorized for a specific project shall revert back to the general fund in the Treasury upon completion of the original project.” This reversion clause mandates any appropriated funds remaining in the capital asset and improvement fund lapse back to the general fund when that specific project is completed. The clause is similar to the lapse provision found in all division appropriation bills, which require unencumbered or unspent funds at the end of the fiscal year to be returned to the general fund for further appropriation.⁴

⁴ See, e.g., ONCA 16-59, ONCA 15-41, and ONCA 15-78.

The difference between the lapsing clause in the Capital Asset and Improvement Fund Act and those found in the division appropriation bills is the Capital Asset and Improvement Fund lapsing clause is contingent on the completion of a specific project, like the building of an arbor, and not the completion of a set amount of time, like a fiscal year. The project lapsing clause reflects the purposes of the Act, which is: (i) to create is a revolving fund to hold appropriations for capital improvement projects; (ii) that is not subject to fiscal year limitations for capital asset projects anticipated to take longer than a year to complete.⁵

To be an unconstitutional violation of the separation of powers provisions, the capital asset and improvement fund lapsing clause must be an unconstitutional condition to the appropriation, or a Congressional usurpation of the power of another branch of government, both of which are factors the Supreme Court stated makes an appropriation bill unconstitutional. *Standing Bear*, p. 10, 11. I can see no evidence from the plain reading of the lapsing clause that it is either a condition to the appropriation or an exercise of authority granted to another branch of government. Therefore, the lapsing, or reversion, back to the general fund of unspent or unencumbered funds appropriated for a specific project upon completion of that project is a valid exercise of Congress' appropriation authority found in Article VI, Section 23.

The automatic lapsing of appropriated funds, and their reversion to the general fund, may appear to be in conflict with one of the holdings in *Standing Bear*, which stated: "Congressional appropriation laws cannot delegate to Congress a power exercised by another branch and cannot delegate a congressional power to another branch." *Standing Bear* at 14. Wherein, the Supreme Court deemed that a Congressional mandate to the Treasurer, an Executive Branch employee, to calculate the difference in specific line item values and return the difference to be the same as

⁵ ONCA 16-58, Section 1(A) and (B).

asking the Treasurer to modify an appropriation, which is a Legislative Branch power and therefore an unconstitutional delegation of congressional power to another branch.

Similarly, the Supreme Court in *Standing Bear* held: “Congressional appropriation laws can only be amended by legislation and not by executive action.” *Id.* at 15. The Supreme Court reasoned that appropriations are enacted by law and “any changes to that law would require another act of Congress.” *Id.* However, the Supreme Court was specifically discussing the amount of a current appropriation. “When an appropriation amount changed (or needed to be changed), Congress enacted a new law to modify the appropriation amount.” *Id.*

The appropriations, and more specifically the return of appropriated funds, held unconstitutional in *Standing Bear* are distinguishable from the lapsing, and reversion of funds, referred to in Section 4(F) of the Capital Asset and Improvement Fund Act. Unlike the unconstitutional appropriations in *Standing Bear*, Section 4(F) of the Capital Asset and Improvement Fund Act is not seeking to modify a current appropriation amount, or conferring congressional powers onto another branch. Section 4(F) requires funds to automatically revert back to the Treasury upon the lapsing of the appropriation, which is the completion of the specific project. The bill requires the Executive Branch to specifically account for the project, but this duty is already placed on the Executive Branch by other powers, such as Generally Accepted Accounting Practices. The lapsing clause in Section 4(F) is not an amendment to an existing appropriation, nor does it confer congressional power onto the executive; and Section 4(F) is therefore factually distinguishable from the appropriation amendments deemed to be unconstitutional in *Standing Bear*.

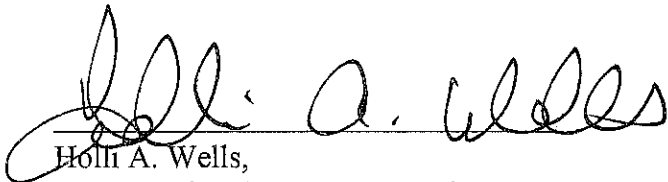
III. CONCLUSION

It is, therefore, the official opinion of the Attorney General, that:

Section 4(D) of the Capital Asset and Improvement Fund Act (ONCA 16-58) violates the separation of powers clause of Constitution of the Osage Nation.

Section 4(F) of the Capital Asset and Improvement Fund Act (ONCA 16-58) does not violate the separation of powers clause of the Constitution of the Osage Nation and is a valid exercise of Congressional appropriation authority.

Respectfully submitted,



Hollis A. Wells,
Osage Nation Attorney General