1071 Grandview Lane
Pawhuska, Ok 74056

OSAGE NATION
OFFICE OF THE ATTORNEY GENERAL

T: 918-287-5514
F: 918-287-5468

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OPINIONS OF THE ATTORNEY GENERAL
OF THE OSAGE NATION
ONAG-2017-03
(Slip Opinion)[1]

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

This Office has received your request for an Official Attorney General Opinion regarding the Budget Parameter and Limitation Act, 15 ONC § 1A-102 et seq., and specifically the exception in 15 ONC § 1A-104(E) for Congressional appropriation of non-tribal funds.

To which you ask:

When do non-tribal funds need to be submitted to Congress for appropriation?

I. INTRODUCTION

Pursuant to the Osage Nation Office of Attorney General Act, 15 ONC § 3-109, this question was properly summited for an Attorney General Opinion to determine when non-tribal funds need to be submitted to Congress for appropriation. As explained below, I am of the opinion that the Budget Parameter and Limitation Act at 15 ONC § 1A-104(E) effectively exempts non-tribal funds from Congressional appropriation, but not from the Legislative budget process.

[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.

II. DISCUSSION

Although the Osage Nation is comparatively an infant in its jurisprudence, the Budget Parameters and Limitation Act is long in the litigation tooth. Hardly four years since its enactment, the Budget Parameters and Limitations Act ("BPLA"), ONCA 13-67, codified at 15 ONC 1A-102 et seq., is the primary subject of two Supreme Court decisions and a previous Official Attorney General Opinion.[2] Once again, we are asked examine a section of the BPLA to determine what role it plays in the budget, appropriation and execution process. Specifically, we will look at 15 ONC § 1A-104(E) and offer an opinion on when non-tribal funds must be submitted to Congress for appropriation.

A. What 15 ONC § 1A-104(E) Says

First, we must examine the section to determine its meaning. The teachings of the Supreme Court require us to review the section in question as a whole and give each word its plain meaning and interpret the section in a way that avoids an absurd or inconsistent result.[3] 15 ONC § 1A-104(E) reads:

> To the extent an appropriation is made to an entity which is funded throughout the fiscal year from non-tribal funding or additionally funded for previous fiscal years from non-tribal funding, this act shall be deemed to authorize the additional expenditure of those non-tribal funds as they are received in all categories set out in that entity's appropriation or in any new category allowed by the funding source, [4] without further appropriation from the Osage Nation Congress. These funds shall be:
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> 1. Consistent with the award letter, modified budget and program plans submitted to the Osage Congress; and
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> 2. In accordance with Osage law and all federal laws, regulations and grant restrictions.

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[2] *See, Standing Bear v. Whitehorn,* SCO-2015-01 (2016), *Standing Bear v. Pratt,* SCO-2016-01 (2017), and ONAG-16-01 (filed March 24, 2016).

[3] *Pratt* at 5 (quoting *Redcorn v. Red Eagle*, SPC-2013-01 at 3-4 (2013).

[4] The section included the phrase "... subject to the 1/26th salary restriction referenced in subsection (D) of this section..." which the Supreme Court struck down as unconstitutional in *Standing Bear v. Pratt*, SCO-2016-01 at 28.

Section 1A-104(E) provides an exception to the Appropriation Law (discussed below) for Osage Nation entities funded with non-tribal funds to expend non-tribal funds without further appropriation from Congress, when the non-tribal funds are received on an indeterminate date. Section 1A-104(E) goes on to say that; not only may the additional non-tribal funds be spent on any category in the entity's appropriation, but they may also be expended in *any new category* allowed by the funding source. The only restrictions contained in Section 1A-104(E) on the expenditure of non-tribal funds without appropriation are: (1) the expenditures must be allowed by the funding source; (2) the expenditures must be consistent with the entity's budget and program plan; and (3) the expenditures must be legal.

B. Definition of Non-Tribal Funds

Next, we must look at what constitutes non-tribal funds in order to apply the 1A-104(E) appropriation exception. Osage law contains no specific definition of "non-tribal funds." However, 15 ONC § 1A-101(Q)(1) defines "tribal funds" as "[a]ll revenue derived from tribal operations, gaming distributions, tax distributions and interest income on tribal funds." By logical deduction, non-tribal funds must be all other funds not derived from tribal operations. Non-tribal funds include all monies received from the federal government and the State of Oklahoma.

C. Exception to the Appropriation Law for Non-Tribal Funds

The Appropriation Law gives deference to other Osage Nation laws as to when an appropriation is required. The Appropriation Law at 15 ONC § 2-202(A) says "no money shall be drawn down from the Treasury of the Osage Nation, except by appropriation in accordance with the Constitution *and Osage Nation Law* (emphasis added)." And, 15 ONC § Section 2-202(B) states "all expenditures of funds of the Osage Nation must be in strict accordance *with the*

appropriation laws of the Osage Nation (emphasis added)." This deference to other Osage Nation laws allows the BAPL to apply its appropriation exception to non-tribal funds.

When the BAPL is read as a whole, it is clear non-tribal funds were not meant to be included with the Congress' appropriation restrictions. The BAPL consistently exempts non-tribal funds from its requirements.[5] In addition, the definitions preceding the BAPL define "state funds" as revenue derived from grants and contracts with the State of Oklahoma and goes on to declare "Osage Nation Congress shall review, *but not appropriate state funds*." 15 ONC 1A-101(Q)(2) (emphasis added). While there is no similar statement regarding federal funds in its definition, it stands to reason since Congress has admitted there is no need to appropriate state funds, then the same is true for federal funds as they are both in the same classification as non-tribal funds.

D. Reasoning Behind the Non-Tribal Funds Appropriation Exception

In keeping with the dictates of the Supreme Court, reading Section 1A-104(E) as allowing non-tribal funds to be spent without Congressional appropriation avoids an absurd or inconsistent result. The Constitution requires an annual appropriation by law of operating funds for each branch of government every fiscal year.[6] 15 ONC 1A-101(Z) defines "operating funds" as the "funds appropriated to the Osage Nation entities for the day-to-day operation of the Osage Nation government." The definition further states, "*Tribally funded* operating budgets are for a period of one (1) year and expire at the end of each fiscal year (emphasis added)." Conversely, operating budgets funded with non-tribal funds do not expire at the end of each fiscal year and, therefore, unspent non-tribal funds do not lapse back to the Department of the Treasury for further appropriation. In fact, according to the Constitution, the Treasurer is only responsible for managing tribal funds. Article VII, § 13 says, "The Treasurer shall accept, receipt for, keep and safeguard *all*

[5] *See*, 15 ONC § 1A-104(A), (B), (C), and § 1A-105, which all begin with the phrase "Except for non-tribal funds..."
[6] *Osage Const.*, Art.VI, Sec.24.

tribal funds as directed by the Congress and shall maintain and provide an accurate record *of such tribal funds* (emphasis added)."

This distinction is necessary to avoid an illogical result because Congress, and more significantly the Osage Nation entity, cannot control when and in what amount the non-tribal funds are received. The non-tribal funds may be received at any time in the fiscal year and vary in amount from what is expected. If the Osage Nation entity had to wait until Congress convened and appropriated the non-tribal funds, the program may not have enough funds to run the program, which could be considered a hindrance or obstruction of the proper administration of the Osage Nation government.[7] Also, reason necessitates the exception, as Congress cannot appropriate funds in a sum certain that are not yet received into the Treasury. With thoughtful foresight, Congress legislated a fix for this problem by excepting the receipt of additional non-tribal funds from appropriation before program expenditure.

E. When Do Non-Tribal Funds Need to be Submitted to Congress?

Under Section 1A-104(E) of the BPLA, Congress does retain some oversight over non-tribal funds. The provision in Section 104(E)(1) says non-tribal funds can be spent without further appropriation if they are "[c]onsistent with the award letter, modified budget and program plans *submitted to the Osage Congress* (emphasis added)." The Supreme Court held in *Pratt* that Congress may "legislate the form that appropriation requests may take" and "each requesting entity is responsible for providing Congress with a complete, relevant, and accurate picture of its appropriation request" by being legislatively required to provide "support documentation."[8] The current required Congressional budget request form contains a line item for non-tribal revenue.

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[7] *Pratt* at 28.
[8] *Ibid.* at 32.

Applying the Congressional budget parameters allowed in *Pratt*, an entity must provide Congress an amount, if known, of non-tribal funds expected to be received during the fiscal year in order to provide Congress an accurate picture of its appropriation request. In the same vein, an Osage Nation entity is required by Section 104(E)(1) to submit to Congress a "modified budget" when it receives non-tribal funds that are inconsistent with the amount presented to Congress in the entity's original non-tribal revenue line item appropriation request.

In summary, by Congress enacting a law which allows non-tribal funds to be spent when received, without further Congressional appropriation, and in categories not contained in the entity's original Congressional appropriation, for all intents and purposes eliminates the need for non-tribal funds to be appropriated by Congress. However, the limitations to the appropriation exception in 1A-104(E)(1) requires the non-tribal funds, if known, to be included in the Osage Nation entity's program plan and budget submitted to Congress. If the non-tribal funds are not known at the time the Osage Nation entity submits its program plan and budget to Congress, then the Osage Nation entity must submit a modified budget to Congress upon receipt of the non-tribal funds.

III. CONCLUSION

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

Section 1A-104(E) of the Budget Parameters and Limitations Act allows an entity to expend non-tribal funds without appropriation by Congress, but requires the entity to include the non-tribal funds in their budget or program plan as part of their appropriation request, or submit a modified budget to Congress when the non-tribal funds are inconsistent with the amount originally included in the entity's appropriation request.

Respectfully submitted,

Clint Patterson,
1st Asst. Attorney General