



OSAGE NATION ATTORNEY GENERAL OFFICE

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Trial Court of the Osage Nation
FILED

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By K. Bunde

OPINIONS OF THE ATTORNEY GENERAL OF THE OSAGE NATION ONAG-2015-13

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 ONCA 15-90, which amends the Capital Asset and Improvement Fund Act. You state that the terms “enactment” and “effective date” are the focus of the problem. To which you ask:

1. There is no Alternate Effective Date; therefore, this law will not become effective for sixty (60) days from October 7, 2015. Also note that Section 2 says the amendments in this law will not apply to contracts and encumbrances in existence as of the date of enactment. **Our interpretation is that the Executive Branch may continue to use funds from previously approved completed projects which are remaining, provided the funds are used exclusively for further capital improvements and/or purchase of land [emphasis yours].** We need to know if you agree with this interpretation.
2. A more difficult question is: What do we (the Executive Branch) do with funds on those projects which are ongoing and have funds remaining from the total appropriation amount which are awaiting encumbrance but cannot be encumbered because the amount needed is not known? Because of issues such as engineering estimates, cost of goods or services, or other matters which are variable and can only be known with relatively short periods of time, we do not know how anyone could determine a realistic amount for the encumbrance on those remaining funds. An example of this situation is the Pawhuska Arbor project which is not yet complete. Items such as, the shade trees which are described in the project proposals have not yet been selected, priced, or ordered and the cost of installation has yet to be determined. That work will not have a price to it until after the sixty (60) days from the date of the passage of the Act. Our interpretation is the

entire appropriated funding (\$2.4 million) may be retained for this project until we in the Executive Branch determine the project is indeed complete. We would like to know if you agree with our interpretation on this matter.

3. The other issue is what to do with funds remaining from encumbrances or contracts from projects which will be completed in the future are (sic) encumbrances or contracts in existence as of October 7, 2015, and when those projects are finally completed there will be funds remaining unspent. Our interpretation is that because ONCA 15-90 states: “The amendments set forth in this Act **shall not apply to contracts and encumbrances in existences as of the date of enactment**”[emphasis yours], this means ONCA 15-90 is not applicable to contracts and encumbrances on projects that were in existence on or before October 7, 2015. Therefore any leftover monies from those contracts and encumbrances will also be available for expenditure by the Executive Branch for further capital improvements and/or purchase of land **regardless of date of completion** [emphasis yours].

I. SHORT ANSWER

1. The effective date of ONCA 15-90 is December 7, 2015. ONCA 15-90 does not apply to contracts or encumbrances which are in existence as of December 7, 2015. The Executive Branch may continue to use remaining funds from previously approved completed projects on other projects in accordance with the Capital Asset and Improvement Act, so long as those monies are under contract or encumbered as of December 7, 2015.
2. The Executive Branch must return any unencumbered monies back to the Treasury general fund upon the completion of the project for which the money was specifically appropriated by Congress.
3. The Executive Branch may use monies remaining from any project completed before December 7, 2015 on other projects in accordance with the Capital Asset and Improvement Act, so long as those monies are under contract or encumbered as of December 7, 2015. Any remaining balance of a project completed after December 7, 2015 must revert back to the Treasury general fund.

II. DISCUSSION

As you correctly state, the terms “enactment” and “effective date” are the crux of this issue. ONCA 15-90 states in Section 2 “Scope” that it “shall not apply to contracts and encumbrances in existence as of the date of enactment.” The general applicable rule says that a

bill is enacted on the date when the last step necessary for the bill to become law occurs.¹ The Principal Chief signed ONCA 15-90 on October 7, 2015, which is the last step necessary for the bill's *enactment*.

However, ONCA 15-90 is not *effective* until December 7, 2015. According to the Article VI, Section 13 of the Constitution, "(l)aws passed by the legislature become effective sixty (60) days after enactment. The Osage Nation Congress may, by concurrence of two-thirds (2/3) of the membership, provide for another effective date." The bill does not contain an alternate effective date. Therefore, ONCA 15-90 was enacted on October 7, 2015 and becomes effective December 7, 2015.

Using the term enactment in the bill's scope muddles the Constitutional waters as the bill is not effective until sixty days after its enactment; which means the bill applies retroactively to contracts and encumbrances occurring after the enactment date but before the effective date. Rather than wade into the deep ocean of the constitutionality of ex post facto civil legislation and retro law-making, this issue can be resolved by looking at Congressional intent.

Fortunately, it is clear from the record that Congress intends ONCA 15-90 to apply to contracts and encumbrances in existence on the "effective" date, rather than the "enacted" date. Congress discussed and voted on an alternate effective date for ONCA 15-90.² In the Congressional discussion of the bill and the alternate effective date, the bill's sponsor urged Congress to give the Executive Branch "leeway" and a "cushion of time, say sixty days" for the Executive to plan for the bill to go into effect and "reset going forward".³ As such, the bill's sponsor recommended a "no" vote on the alternate effective date to allow for the completion of

¹ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

² 4th Osage Cong. *Tzi-Sho Session*, Day 22, Part 4, October 2, 2015 (statements of Congressman Dr. Ron Shaw) (<https://www.youtube.com/watch?v=ZanqHg3QtG0&feature=youtu.be>).

³ *Id.*

ongoing projects. Subsequently, Congress did vote down the alternate effective date by a seven to five vote,⁴ two votes short of the constitutionally mandated two-thirds concurrence. Therefore, looking at Congressional intent, it is clear that they intended ONCA 15-90 to apply to contracts and encumbrances in existence at the effective date, and not the enacted date.

To answer your first question regarding remaining funds from previously completed projects, applying the Congressional intent of ONCA 15-90, the Executive Branch may continue to use remaining funds from previously approved completed projects, provided the funds are used exclusively for further capital improvements and/or purchase of land, and further provided that said funds are under contract or encumbered as of December 7, 2015.

Next, you ask about uncompleted projects which have funds that are not under contract or encumbered on the effective date of ONCA 15-90. The bill amends Section 2(D) of the Capital Asset and Improvement Fund Act to read in pertinent part, "The Executive Branch Tribal Development and Land Acquisition Department, shall submit to the Osage Nation Congress an accounting of all monies expended and any unencumbered remaining balance revert back to the general fund of the Treasury *upon completion of the project* [emphasis mine]." Under the plain reading of the bill, monies are not subject to reversion until the project is deemed complete. The reversion provision only applies to remaining unencumbered project funds. The Executive Branch may continue to use funds appropriated for a specific project until that project is *completed*, regardless of whether these funds are under contract or encumbered as of the effective date of ONCA 15-90.

As I read your third scenario, it appears you are asking if ONCA 15-90 applies to monies that are remaining from a completed project which will be under contract or encumbered as of the effective date of ONCA 15-90, but remain unspent even after they are reallocated to another

⁴ Id.

capital improvement project and/or purchase of land. As stated in the analysis above, ONCA 15-90 reverts remaining funds from completed capital asset projects which are not under contract or encumbered as of December 7, 2015 back to the general fund of the Treasury. Remaining funds from completed projects may be reallocated at the discretion of the Executive Branch to another capital improvements project and/or purchase of land, so long as these remaining funds are under contract or encumbered as of December 7, 2015. Reallocated funds that are under contract or encumbered for another project, but remain after completion of the reassigned project are no longer outside the application of ONCA 15-90 as they are not under contract or encumbered before December 7, 2015 and the project to which they were reallocated is a "completed project" within the meaning of Capital Asset and Improvement Fund Act, as amended. Therefore, the Executive Branch may not use any leftover monies from contracts and encumbrances for further capital improvements and/or purchase of land from any project completed after December 7, 2015, and further an accounting must be done of those monies and any remaining balance shall revert back to the general fund of the Treasury.

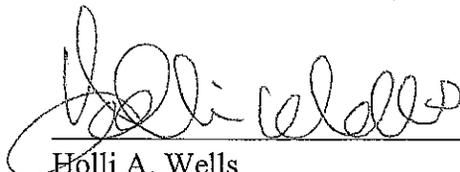
For example, if Congress appropriated \$1,000,000.00 to build an arbor. The arbor is completed on October 1, 2015 for \$900,000.00. On November 30, 2015, the Executive Branch encumbers the remaining \$100,000.00 on a contract to remodel the museum. The remodel is completed January 31, 2016 for \$85,000.00. The Tribal Development and Land Acquisition Department submits an accounting to Congress for the \$85,000.00 and the remaining \$15,000.00 reverts back to the general fund of the Treasury, as it is now unencumbered funds on a project completed after December 7, 2015; and therefore subject to ONCA 15-90.

III. CONCLUSION

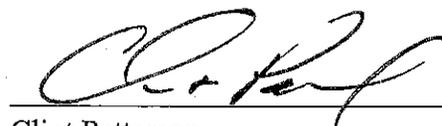
It is, therefore, the official opinion of the Attorney General, that:

The effective date of ONCA 15-90 is December 7, 2015. ONCA 15-90 does not apply to contracts or encumbrances which are in existence as of December 7, 2015. The Executive Branch may continue to use remaining funds from previously approved completed projects on other projects in accordance with the Capital Asset and Improvement Act, so long as those monies are under contract or encumbered as of December 7, 2015. The Executive Branch must return any unencumbered monies back to the Treasury general fund upon the completion of the project for which the money was specifically appropriated. And, the Executive Branch may use monies remaining from any project completed before December 7, 2015 on other projects in accordance with the Capital Asset and Improvement Act, so long as those monies are under contract or encumbered as of December 7, 2015. Any remaining balance of a project completed after December 7, 2015 must revert back to the Treasury general fund.

Respectfully submitted,



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Clint Patterson
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