

Memorandum

To: Commerce & Economic Development Committee
From: Barber & Bartz, P.C.
Date: November 10, 2011
Re: Osage Nation
Our File No. 9522-01
Analysis of Constitutional Provision Regarding Annual Budget

➤ **QUESTION PRESENTED:**

The Osage Nation Congress, pursuant to its constitutional authority, appropriates funds for specific purposes during particular fiscal periods. Some of the appropriated funds are not in fact spent, and remain in the treasury. The question has arisen whether such funds are available to be appropriated for other purposes during subsequent fiscal years. In this connection, the corollary question has arisen as to whether Article VI, Section 23 of the Osage Constitution limits Congressional appropriations to current year's revenue, and thus prohibits Congress from accessing unspent appropriations from previous fiscal years.

➤ **SHORT ANSWER:**

At least where the appropriations bill specifically so provides, if appropriated funds are not spent by the end of the fiscal year, the appropriation lapses and the funds become unencumbered. Thus, they can be re-appropriated by Congress for other purposes. Section 23 does not restrict Congressional ability to do this, because it should not be construed as limiting Congressional spending to current year's revenues only. Congress is the only body with the constitutional ability to appropriate funds from the Treasury, and if it cannot access unspent

funds, they must of necessity remain in the Treasury *ad infinitum*, which cannot have been the intent of the framers of the Constitution.

➤ **DETAILED ANALYSIS:**

**I. Congressional Ability To Access Funds
Appropriated In Previous Years But Never Spent**

With regard to funds in the Treasury that are appropriated during a fiscal year but are unspent during that year, it is important to note that appropriations bills in the Osage Congress typically (though not universally) contain a provision that if any of the appropriated funds remain unspent at the end of the year, their appropriated status will “lapse” and the unspent funds will be available for future appropriations. To enact a law providing for such a lapse is well within the legislative power. *See, e.g., McDougall v. Frohmiller*, 150 P.2d 89, 92-93 (Ariz.1944); *State ex rel. Browning v. Brandjord*, 81 P.2d 677, 680-681 (Mont.1938); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 385-386 (Alaska 2001); *Riley v. Johnson*, 219 Cal. 513, 519, 27 P.2d 760,762 (1933).¹ Indeed, it is likely to be held that unspent appropriated funds at the end of an appropriation period lapse automatically, even if not so specifically provided in the appropriations bill or otherwise. *See, Dadisman v. Moore*, 384 S.E.2d 816, 823 note 9 (W.Va.1988), although for clarity’s sake we would recommend that a specific lapse provision continue to be included in each appropriation.

To “lapse” in this context means to lapse back into the government’s general fund, which makes the funds subject to the control of the legislature, useable for any legal purpose. *See,*

¹ Generally speaking, the legislative appropriation power includes the authority to attach conditions and contingencies to such appropriations. *Graham v. Haridopolous*, ___ So.3d ___, 2011 WL 4818046, at *2 (Fla.App., Oct. 12, 2011); *In re Deborah Heart & Lung Center SFY 2009 Charity Care Subsidy Allocation*, 8 A.3d 250, 254 (N.J.Super.2010). It also includes the power to amend previous appropriation bills. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 378 (Alaska 2001). There is no reason why such power would not include the ability to enact either a general or specific provision for the lapse of unspent or unencumbered funds at the end of the appropriations period.

Dadisman v. Moore, 384 S.E.2d 816, 823 note 9 (W.Va.1988); *State ex rel. Meyer v. Duxbury*, 160 N.W.2d 88, 92 (Neb.1968). This logically includes the ability of the Congress to re-appropriate unspent surplus which remains in the Treasury due to lapse of a prior appropriation. The question has been posed, however, whether the Osage Constitution, Art. VI, Section 23, precludes Congress from appropriating Treasury funds that remain from previous years unspent revenues. This question will be addressed next.

II. Effect of Article VI, Section 23 On Congress' Ability To appropriate Surplus Revenue Remaining In Treasury From Previous Years

A. Introduction: Principles of Constitutional Interpretation

Since this question involves the interpretation of a constitutional provision, it is appropriate at the outset to summarize some well-settled principles of constitutional interpretation. It is generally stated that the same principles used in construing statutes apply also to the construction of constitutional provisions. *City of Guymon v. Butler*, 2004 OK 37, 72 P.3d 80, 84; *Inquiry Concerning Complaint of Judicial Standards Commission v. Not Afraid*, 245 P.3d 1116 (Mont.2010); *RECALLND v. Jaeger*, 792 N.W.2d 511, 513 (N.D.2010). This means that a court will be guided by looking to the intent of the drafters or framers, and the purpose or object sought to be achieved through the provision in question. *Finch v. Commonwealth Health Insurance Connector Authority*, 946 N.E.2d 1262, 1271 (Mass.2011); *Stephens v. State*, 18 A.3d 168, 173 (Mo.App.2011). Normally, this intent is defined by the language of the provision, if it is plain and unambiguous. *EOG Resources Marketing, Inc. v. Oklahoma State Board of Equalization*, 2008 OK 95, 196 P.3d 511, 521. In evaluating the language, some courts state that the construction of constitutional language should be "broad and liberal" instead of technical, *School District of Kansas City v. State*, 317 S.W.3d 599, 605 (Mo.2010) (en banc). See, however, *Movants to Quash Multicounty Grand Jury Subpoena v.*

Daxon, 2008 OK 95, 184 P.3d 546, 551 (court should adopt a construction of the constitution that is a *middle path* between being “strict” and “liberal”).

All courts, however, recognize that a literal or strict reading of the constitution will not be adopted where it defeats the evident purpose of the provision in question. *City of Guymon v. Butler*, 2004 OK 37, 92 P.3d 80, 84; *Calvey v. Daxon*, 2000 OK 17, 997 P.2d 164, 170; *Lepak v. McClain*, 1992 OK 166, 844 P.2d 852, 854. That intent and purpose is sometimes referred to as the “spirit” (as opposed to the “letter”) of the provision. *Browning v. Florida Hometown Democracy, Inc. PAC*, 29 So.3d 1053, 1067 note 13 (Fla.2010). The meaning that is ultimately attached to the language of a constitutional provision must not violate its spirit. *Lueck v. Teuton*, 219 P.3d 895, 899 (Nev.2009); *State v. Trujillo*, 42 P.3d 814, 820 (N.M.2002).

What these principles mean as a practical matter is that an interpretation of a constitutional provision that produces a result that is *unreasonable, illogical, or inconsistent with common sense* should be avoided whenever possible consistent with the provision’s language, and that in such cases the framers’ real intention must prevail over the literal meaning of the language. *Bernstein v. State*, ___ A.3d ____, 2011 WL 4389138, at *5 (Md. App., Sept. 22, 2011); *Patterson Recall Committee, Inc. v. Patterson*, 209 P.3d 1210, 1215 (Colo.App.2009); *Acreman v. Sharp*, 282 S.W.3d 251, 255 (Tex.App.2009); *Gray v. Mitchell*, 285 S.W.3d 222, 229 (Ark.2008).

Guided by these principles, we can proceed to the evaluation of Section 23, Art. VI of the Osage Constitution.

B. Context of the Constitutional Budgeting and Appropriations Scheme

The Osage Constitution makes the Congress the sole budgeting authority for the National government. Section 23 of Article VI provides for an “annual budget” (which appears synonymous with “annual expenditure of funds”) to be enacted by Congress. No other branch or

office of government has this power; the Principal Chief has a line-item veto power, but this can be overridden by Congress. Thus, Congress is the sole budgeting and appropriating power.

It is, of course, recognized that budgets involve estimates. *Protest of Downing*, 1933 OK 387, 23 P.2d 173, 179; *State ex rel. Cole v. Keller*, 176 So.176 (Fla.1937); *Korn v. Gulotta*, 72 N.Y.2d 363, 372, 534 N.Y.S.2d 108, 112 (1988). This fact caused the court in *Appalachian Electric Power Co. v. City of Huntington*, 177 S.E. 431, 433 (W.Va.1934) to say that a “budget” does not control what funds may legally be spent by the governmental entity. However, this does not appear to be the majority view. In *Kistler v. Carbon County*, 35 A.2d 733, 735 (Pa.Super.1944) it was said that a “budget” is more than a “mere” estimate of probable revenues and expenditures—it is a method of *controlling and limiting expenditures* during a fixed period by designating amounts of money legally at the disposal of the governmental entity, and the purposes for which they may be expended. And in *Graves v. Purcell*, 85 S.W.2d 543, 583 (Mo.1935) (en banc) the court said:

The word “budget” has a well-recognized general meaning, and as applied to governments or governmental units, it is a plan or method by means of which the expenditures and revenues are so controlled for a definite period, by some budgetary authority, as to effect a balance between income and expenditures.

See also, Black’s Law Dictionary, 5th Ed. (West,1979), definition “budget”, p. 176:

A balance sheet or statement of estimated receipts and expenditures. A plan for the coordination of resources and expenditures. The amount of money that is available for, required for, or assigned to a particular purpose.

In sum, it appears that the Osage Congress is the sole entity with the constitutional authority to determine the spending of the Osage government, and it is to be accomplished, at least initially, through the annual budgeting process. This seems to have been recognized by

Congress itself in its enactment of ONCA 07-05 which expressly prohibits money from being drawn from the Treasury except through due appropriation by Congress.

C. **Construction of The Term “Projected Revenues” in Section 23**

This Congressional budget power is not entirely without restraint, however. First, Section 23 of Article VI requires that each annual budget must include appropriations for each branch of the government. This obviously keeps the government running as a whole, and also preserves the separation of powers by preventing Congress to use the “power of the purse” to coerce the executive or the judiciary. Second, Section 23 also provides, “The annual budget shall not exceed projected revenues.” Thus, the amount of “projected revenues” for the budget period acts as a mandatory cap upon government spending. These eight words are the phrase that is the subject of the current question.

Since the cap on the budget is equal to projected “revenues”, that term needs to be defined. The term “revenue” or “revenues”, taken alone, is a quite broad term. *Opinion of the Justices*, 134 N.E.2d 892, 897 (Mass.1956) (“revenue” is a word of “comprehensive significance”). It is defined in *Black’s Law Dictionary*, 5th Ed. (West,1979), definition “revenue”, p. 1185, thus:

As applied to the income of a government, a broad and general term, including all public moneys which the state collects and receives, from whatever source and in whatever manner.

An examination of the term as used in various court opinions construing statutory or constitutional provisions reveals that the precise scope of the term “revenue” or “revenues” tends to vary according to the language, purpose, and context of the provision. For instance, in Missouri’s so-called “Hancock Amendment” (a limitation on taxes based on previous years’ revenues), “total state revenues” does not include revenues left over from the previous year because it was not so defined in the governor’s “budget message” of 1980-1981. *Missouri*

Merchants and Manufacturers' Assoc. v. State, 42 S.W.3d 628 (Mo.2001) (en banc). Subject to this exception, though, the term includes all funds received into the treasury and subject to appropriation. *Missouri Assoc. of Counties v. Wilson*, 3 S.W.3d 772, 774 (Mo.1999) (en banc).

Other courts have defined “revenues” in various statutes for different purposes as not including unspent revenues (sometimes called “surplus”) from previous years. *Miller v. Watts*, 214 S.E.2d 165 (Va.1974); *City of Phoenix v. Arizona Sash, Door & Glass Co.*, 293 P.2d 438, 440 (Ariz.1956) (“revenues” means the annual or periodical yield of taxes and other public income which is collected and received into the treasury for public use).

Some state statutory provisions eliminate the question by using the term “current revenues”. *Guerra v. McClellan*, 250 S.W.2d 241, 245 (Tex.App.1952); *Greenhalgh v. Woolworth*, 64 A.2d 659, 553 (Pa.1949). The framers of the Osage Constitution did not choose to include such a limiting term on the definition of “revenues”, however, which may have some significance to its interpretation. The framers could have used a term such as “projected current revenues” or “projected annual revenues” or “projected revenues received during the year in question”, but they did not.

Finally, some courts have ruled that “revenues” include all monies received and subject to appropriation, including unspent or surplus revenues from previous periods. *Swinburne v. City of Newport*, 181 S.W.2d 421 (Ky.App.1944) (terms “current revenue” and “current expenditures” were not confined to only the present year).

Since, then, the term “projected revenues” in Section 23 is a broad and malleable term, not subject to a rigid definition as to whether or not it covers unspent past revenue, its meaning must be ascertained by reference to the purpose and context of the constitutional provision in question. As to its purpose, Section 23 reflects an obvious intent to prevent deficit spending or government borrowing by tying planned spending to the anticipated (or “projected”) amount of

“revenue”. As the Massachusetts Supreme Court said in *Opinion of the Justices*, 134 N.E.2d 892, 897 (Mass.1956):

It is manifest that art. 63 was designed to place the fiscal operations of the Commonwealth as far as possible on a strict budget plan by which all money received on account of the Commonwealth from any source should be paid into its treasury and all proposed expenditures of the Commonwealth should be included in some appropriation bill.

Deficit spending can be avoided by limiting the annual budget to the total amount of revenues anticipated to become available during the year, no matter when received. That purpose does not mandate that “projected revenues” be limited to exclude past years’ revenues that remain in the treasury.

More to the point, however, to exclude past years’ revenues from the budgeting process, revenues that have lapsed from being previously appropriated, or remain unspent for some other reason and therefore remain in the Treasury, would lead to an illogical result. An interesting case in this context is *Woods v. State Board of Equalization*, 1973 OK 155, 517 P.2d 430. That case involved an Oklahoma constitutional provision (Article X, Section 23) requiring the Board of Equalization, prior to each regular legislative session, to submit an estimate of “revenues” to be received by the State. No funds could be appropriated until and unless this estimate was first submitted. The question presented was whether the estimate should include estimated funds anticipated to be received from the Federal government under the “Revenue Sharing Act of 1972”. The petitioner argued that “revenues” under the Oklahoma provision was limited to State-generated revenues, not monies received from the Federal government. In rejecting this argument, the Oklahoma Supreme Court noted that the Oklahoma constitution prohibited the expenditure of these Federal funds except by legislative appropriation, just as it did with State-generated funds. Since the Board’s estimate was a prerequisite for legislative appropriations, to

omit the Federal funds from the estimate would leave open the question of when the Federal funds could be appropriated, and what if any restrictions would be placed upon the Legislature in doing so. The Court therefore held that the Federal funds were to be included as “revenues” under the Oklahoma Constitution.

The logic of the *Woods* Court is applicable to our situation, since it involved a construction of the word “revenues” that was designed to avoid an illogical or absurd result. In our case, we have already seen that Congressional spending is limited by its budget, which in turn is capped in amount by “projected revenues”. Thus, the omission of funds from the Section 23 definition of “projected revenues” has the effect of omitting it from the budgeting process. Therefore, if the term “projected revenues” does not include *past years’* revenues which currently remain—lapsed, unappropriated, unencumbered, and unspent—in the Treasury, then Congress could never appropriate those revenues, because they could never be accounted for in the budget. And since Congress is the *only constitutional appropriating entity* within the Osage government, and since Treasury funds can only be withdrawn pursuant to appropriation, this means that these funds could never be accessed for any purpose.² Such an intent cannot logically be imputed to the framers of the Osage Constitution. Common sense, therefore, requires that the term “projected revenues” in Section 23 be construed to mean *the projected amount of revenues available for appropriation during the coming year, which would be the total of (1) current revenues to be received during the year and (2) past years’ surplus revenues already contained within the Treasury and available to be appropriated.*

9522-01
00185097

² As a practical matter, this would force Congress to appropriate, and the government to spend, all of the revenue received in a fiscal year, in order to avoid losing access to such funds by the lapse of their appropriation. This is not part of the purpose of a “balanced budget” provision.