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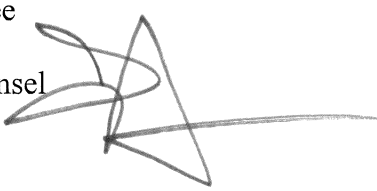
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MEMORANDUM

TO: Oneida Business Committee

FROM: Jo Anne House, Chief Counsel 

DATE: January 5, 2016

SUBJECT: Petition – Metivier - \$2000 Per Capita for FY2017 to FY 2021

You have requested a legal review regarding a petition submitted by Yvonne Metivier. The petition contains a single paragraph. The Enrollment Department has verified a sufficient number of signatures on the petition. The petition contains the following request.

“GTC directs OBC to pay \$2000.00 per capita beginning budget year 2017 and 2018, 2019, 2020, and 2021.”

To draft this opinion, I have reviewed prior actions of the General Tribal Council, Tribal law, policies and procedures, and various other resources. This opinion is broken into sections to address the issues raised in the petition – basic membership information, Indian Gaming Regulatory Act and Per Capita law.

This opinion does not address the tax consequences of acceptance or rejection of a per capita payment on the individual. Tax questions are unique to each individual and cannot be addressed in this type of an opinion. This opinion also does not address the consequences of acceptance or rejection of a per capita payment on the individual in regards to receiving program services at the federal, state, local or tribal level. The impact on program services is unique to the program service and the individual and cannot be addressed in this type of an opinion.

Much of the background information in this opinion is taken directly from the January 5, 2016, legal opinion regarding a petition presented by John Powless, Jr.

Background

Basic Membership Information¹ and Cost

As of December 31, 2014, there were 16,995 members of the Oneida Tribe of Indians of Wisconsin. Looking at membership trends, 55% of the members are between ages 21 and 54 which represent the largest age group of members. Although members age 55 and older represent about 22.5% of the membership, 9.5% of the members are between the ages of 55 and 61; close to one-half of all members age 55 and older. This age group of 55-61 will increase the number of

¹ The calculations and information regarding enrollments in this opinion are based on an Enrollments Report dated December 31, 2014.

members receiving the elderly per capita payments by 1628 members over a five year period, or up to \$3.27 million each year based on the \$2000 elderly per capita payment.

From 2001 to 2014, new enrollments have decreased each year from 300 new enrollments in 2001 to 124 new enrollments in 2014. Further, the enrolled population has remained stable with slight increases for the past five years between 16,600 to 16,900 members. This is accounted for through the combination of deceased members and disenrollment requests.

The petition is a request for a per capita payment of \$2000. Based on the December 2014 enrollment information, there are about 16,995 members. This equals about \$34 million in per capita payments over a five year period totaling about \$170 million.

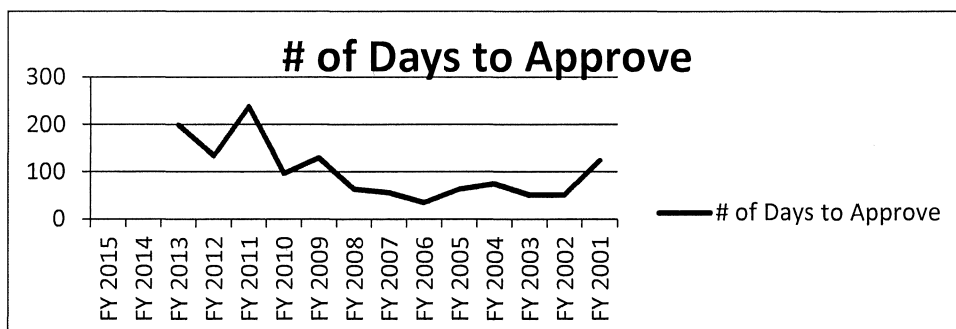
Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act identifies the authorized uses for “net revenues from any tribal gaming” in 25 U.S.C. section 2710(b)(2)(B), subsections (i) through (v).

- (i) to fund tribal government operations and programs;
- (ii) to provide for the general welfare of the Indian tribe and its members;
- (iii) to promote tribal economic development;
- (iv) to donate to charitable organizations; or
- (v) to help fund operations of local government agencies.

Revenue Allocation Plan Approval Process

The Bureau of Indian Affairs has published regulations regarding per capita payments in 25 C.F.R. Part 290. A per capita payment from gaming revenues cannot be made if a Revenue Allocation Plan is not approved in accordance with these regulations. *24 C.F.R. 290.10 and .11.* The Secretary, or designated official, has 60 days to conduct the review and approve or disapprove the Revenue Allocation Plan. Failure to act within the 60 day time period does not mean the Revenue Allocation Plan is approved by default. *25 C.F.R. 290.19.* The chart below shows the number of days from submission to approval for the Revenue Allocation Plans submitted between 2001 and 2013.²



Information in the Revenue Allocation Plan

There are two primary directives in the regulations – identifying specific information which must be included in the Revenue Allocation Plan and identifying who may receive the per capita

² We have been unable to locate the approval letter for the FY2014 plan, and the FY2015 plan took 80 days between submission and approval.

payment, including who is excluded from receiving the per capita payment. A Revenue Allocation Plan must contain the elements outlined in 24 C.F.R. 290.12, and be accompanied by the documents listed in 25 C.F.R. 290.17.

- Allocation, by percentages, of the use of net gaming revenues which equal to 100%.
- There must be adequate net revenues reserved for those governmental functions listed in 25 U.S.C. 2710(b)(2)(B) subsections (i) through (v).
- The allocation for each governmental function must “contain detailed information” to determine compliance with the Indian Gaming Regulatory Act.
- Protection and preservation of the interests of minors and incompetent adults.
- Notification to the member of tax liability.
- Specific eligibility requirements for those who will receive the per capita payment.

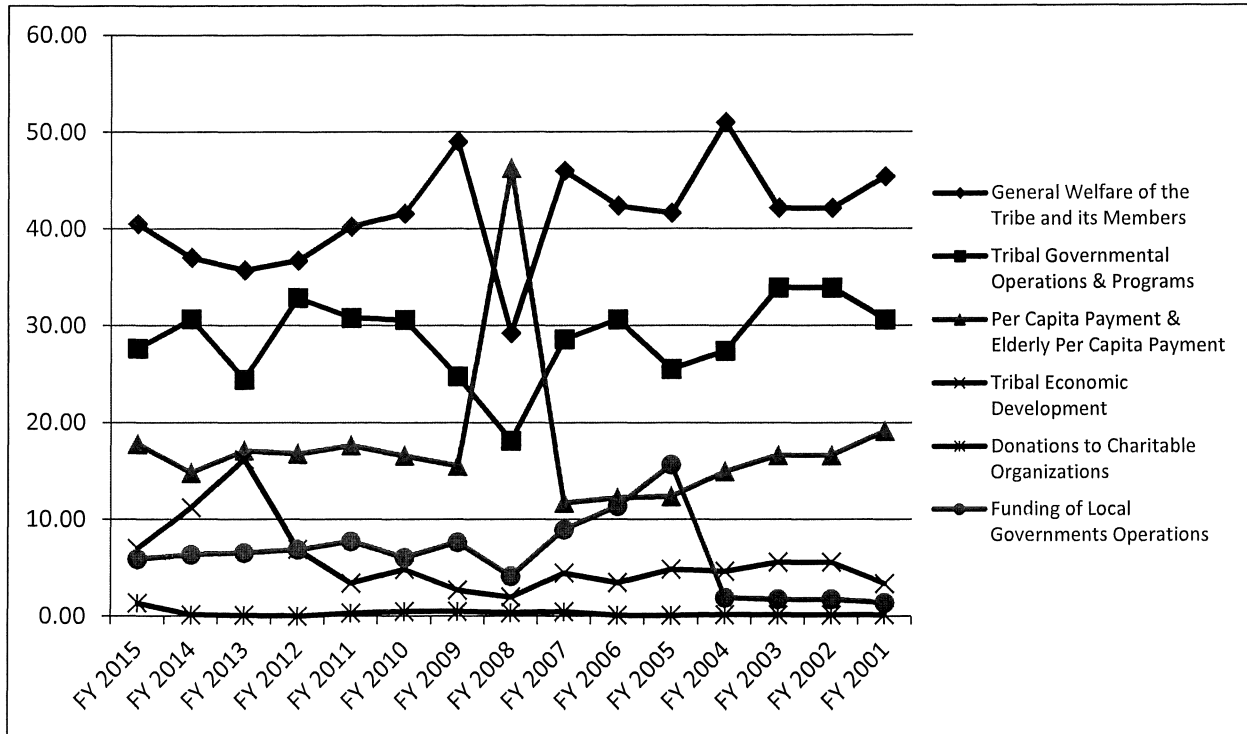
In addition, a Revenue Allocation Plan must be submitted with a cover letter requesting approval of the plan and the Tribal resolution adopting the plan.

The approved Revenue Allocation Plan for 2015 contains the following allocations.

- 27.62% - Tribal governmental programs defined as: Tribal administration, capital improvements to tribal offices, tribal public works program, tribal planning program, tribal enrollment program, tribal community health representative, tribal health services, Indian Health Services clinic, Indian school food service programs, tribal parenting program, summer youth workers’ program, tribal library, tribal recreation program, tribal elderly program, veterans symposium, tribal arts and crafts program, and tribal cultural programs.
- 40.47% - General welfare of the Tribe and its members defined as: utility assistance program, funeral assistance program, tribal housing assistance program, higher education program, elderly services, social services programs, health services and the food distribution program.
- 6.96% - Tribal economic development defined as: investment and proposed tribal economic development projects.
- 1.32% - Donations to charitable organizations.
- 5.87% - Funding of local government operations that affect the Tribe and its members.
- 17.76% - Per capita payments.

The percentage allocations for the required elements of the Revenue Allocation Plan between 2001 and 2015 are set forth in the following chart. The description of each category has been consistent from year to year. It should be noted that the per capita payments are stable from 2001 to 2008 with a general per capita of \$750 to \$800, with an increase to the \$1200 general per capita from 2009 to 2015.

The large change in the following charts in 2008 is the impact of the \$5000/\$10,000 per capita. Members should review the financial analysis to identify how funds were re-allocated and moved to make this payment. In addition, the legal and financial opinions regarding the 2008 per capita presented in the General Tribal Council meeting materials are available from the Records Management Office. The General Tribal Council meeting minutes of August 11, 2007, which approved the 2008 per capita payment are available on-line.



The Revenue Allocation Plan allocation percentages are identified based the adopted budget of the Tribe. A Revenue Allocation Plan identifies allocation of net gaming revenues; or gaming revenues less gaming related expenses. Further, the plan presents grouped financial information based on the requirements of the Indian Gaming Regulatory Act and related regulations. As a result, members will notice a difference between the adopted budget and the Revenue Allocation plan financial information. The chart below identifies the financial information related to the percentage allocations from a selection of Revenue Allocation Plans.

	2015	2012	2011	2008	2001
General Welfare of the Tribe and its Members	\$51,029,713	\$55,772,624	\$57,240,470	\$67,135,528	\$36,433,435
Tribal Governmental Operations & Programs	\$34,818,709	\$49,926,847	\$43,869,803	\$41,674,683	\$29,358,672
Per Capita Payment & Elderly Per Capita Payment	\$22,392,000	\$25,452,800	\$25,090,000	\$106,296,200	\$14,390,000
Tribal Economic Development	\$8,786,698	\$10,434,595	\$4,835,191	\$4,509,738	\$4,835,191
Donations to Charitable Organizations	\$1,670,000	\$0	\$425,000	\$835,000	\$110,000
Funding of Local Government Operations	\$7,398,578	\$10,368,363	\$10,988,681	\$9,405,827	\$1,489,200
Totals	\$126,095,698	\$151,955,229	\$142,449,145	\$229,856,976	\$86,589,668

As has been identified in prior legal opinions as well as by the Treasurer, past and present, gaming revenues have begun to stabilize while the cost of conducting gaming continues to rise. As a result, the available revenue for allocation for activities identified in a Revenue Allocation Plan is reduced over time. Further, neither retail nor grant related income has increased to cover the gap created by increasing expenses. Although utilities, building maintenance costs, and programing costs continue to rise, the largest impact on the budget remains the employment base. As employee longevity with the Tribe increases, the salary and benefits continue to

increase, including accruals and use of personal and vacation time. Therefore, even if all other expenses in the budget remained the same, the cost of conducting business and programming would continue to increase. Members are also encouraged to review the March 3, 2015, legal opinion “Petition – Genskow – Budget Development” for further information regarding the budgeting processes.

Financial Constraints

The Oneida Tribe budgets each year for activities based on estimated revenues from Tribal enterprises. In addition to revenues, the Tribe has borrowed funds to construct various facilities – Oneida Health Center, Anna John nursing facility, and various utilities for example – as well as to invest in economic opportunities. The Oneida Business Committee has approved the Treasurer’s goal regarding paying down debt in an aggressive manner. This will reduce the overall cost of borrowing funds by reducing interest charged on the debt as well as keeping the rate of interest low during the borrowing period as the Federal Reserve Board begins increasing interest rates over the next year.

The bank loans and bonding require the Tribe to maintain certain financial conditions during the borrowing period. For example, the Tribe must have an adopted budget by a deadline or fines are assessed by the lenders. Further, there may be requirements to maintain certain debt ratios, develop levels of reserve funding, and maintain existing assets which are functioning as collateral for the bank loans and/or bonds. Members are encouraged to read the financial analysis to determine the impact of the proposed petition on these loans and bonds.

Finally, revenue streams from both gaming operations and retail operations have been utilized as collateral to obtain funding. For example, the retail revenues are collateral for a bond issuance which, in part, paid to construct the Anna John facility. It is not possible to disrupt the operations of these enterprises without unduly impacting the loan and/or bond agreements. Again, members are encouraged to review the financial analysis for this petition as well as the analysis submitted for the John Powless, Jr. petition, to obtain a clearer picture of the impact of the proposed petition.

Finally, nearly every Treasurer has identified that in creating a balanced budget some programming needs must go unfulfilled. Further, the Chief Financial Officer has spoken of a “structural deficit” defined as operational needs exceeding revenues prior to beginning the budget process requiring the organization to begin budgeting by reducing overall expenses; in the FY2015 budget, this was up to 12%, the FY2016 budget the reduction was similar. In the past, the Oneida Business Committee has worked to finalize balancing the budget prior to presentation to the General Tribal Council. The FY2016 budget was primarily balanced by the direct reports and members of boards, committees and commissions. In both circumstances, the budget was balanced by reducing funding to building maintenance and repair that is beginning to have a long term impact on the functionality of buildings and increasing the overall costs of repairs when they are eventually able to be budgeted. The budget has also been balanced by pushing back capital improvement processes intended to create improved facilities for conducting programs.

Per Capita Ordinance

After many years of per capita payments the Oneida Business Committee adopted the Per Capita law in 2000 in response to reoccurring questions arising during the adoption of per capita payments by the General Tribal Council.³ The goal was to, “have a consistent methodology for issuance of per capita payments[.]” *Sec. 9.1-2*. The ordinance standardizes such issues as eligibility to receive a payment (when enrolled, what age, if deceased), when the payments are made, and provides limited reasons to attach a per capita payment. In addition, to comply with the requirements for approval of a Revenue Allocation Plan, the ordinance addresses how the interests of minors and incompetent adults are protected. The Per Capita law was adopted in conformance with the delegated authority in the Administrative Procedures Act.⁴

The Per Capita law identifies that per capita payments will be made on or before September 30th. *Sec. 9.5-3(d)*. The purpose of setting a payment date is to allow appropriate budgeting and cash management practices. This allows the per capita payment funds to be accrued over the entire year, to ensure cash availability for operational costs (i.e. payroll, program services, taxes, etc.), and to reduce losses in early or untimely withdrawals from various investments.

The Per Capita law also identifies when an individual is eligible to receive a per capita.

- If enrolled and file a payment request form⁵ by July 1st. *Sec. 9.5-3(b)*.
- If not enrolled, then -
 - Must file an application for enrollment prior to January 31st; and
 - Enrollment must be approved by Oneida Business Committee prior to March 31st; and
 - New member must file a payment request form filed by July 1st. *Sec. 9.5-3(a)*.
- If deceased, must have filed a payment request form by July 1st. *Sec. 9.5-4*.

In addition, minors and incompetent adult payments are addressed in section 9.6 regarding deposits, early withdrawals, and when dispersed.

The Oneida Business Committee received a request to consider authorizing attachments to per capita payments regarding child support arrears. In addition, the Tribe receives tax levies from the federal government from time to time. Finally, there are members who owe a debt to the Tribe regarding a program payment, retail purchase, theft from the Tribe, and on occasion, fines. The Oneida Business Committee considered each of these issues and the public hearing comments as presented by the Legislative Operating Committee. The Oneida Business Committee adopted amendments to the Per Capita law which authorized these three exceptions and prohibited all other attachments. *Sec. 9.4-6*. The law requires attachment requests to be filed with the Judiciary prior to July 1st and the Judiciary to issue attachment orders on or before August 1st. The attachment orders are made in priority order of child support arrears, debt owed to the Tribe, and federal tax levies. If the attachment request is not made by July 1st, there are no exceptions to late filing.

³ See, for example, April 9, 1999, Special General Tribal Council minutes regarding minor’s trust funds and pooled accounts.

⁴ The Administrative Procedures Act was superseded by the Legislative Procedures Act adopted by the General Tribal Council by resolution # GTC-01-07-13-A. Both laws delegated authority to the Oneida Business Committee to adopt legislation in conformance with those procedures.

⁵ The payment request form verifies the correct mailing address for the member and identifies whether the member wishes the Tribe to withhold federal taxes from the payment.

Finally, section 9.4-3 of the law requires per capita payments to be made only pursuant to the direction of the General Tribal Council “through adoption of a resolution.” There have been payments made since adoption of the law by motion of the General Tribal Council. In those circumstances, to comply with the Per Capita law, the Oneida Business Committee has adopted a resolution setting forth the per capita payment directive of the General Tribal Council.

Analysis

The petition proposes consideration of a per capita payment. It is within the authority of the General Tribal Council to approve such payments. However, it is not clear the ongoing financial impact regarding this per capita payment request. This is especially critical regarding the inability of the Tribe to provide the normal maintenance and repair of existing facilities of the Tribe. As a result, while such a per capita payment can be directed, and in the past the Oneida Business Committee has presented budgets which met those per capita directives, the result has been an ongoing cycle of deterioration of facility management in order to avoid reduction in services or employee lay-offs.

The Per Capita law was generated to provide answers to common questions regarding per capita payments in a consistent manner. Further, the law was intended to set forth elements required under federal laws and regulations such as the protection of interests of minors and incompetent adults as well as how a per capita is allocated. To the extent that the petition does not contain a resolution in compliance with the Per Capita law, the Oneida Business Committee has been able to provide corrective actions to adopt a resolution.

Conclusion

Adoption of a per capita payment is reserved to the General Tribal Council under the Per Capita law. The petition presents a request that is within the authority of the General Tribal Council to take up.

If the action is properly presented for adoption by the General Tribal Council, it will require a simple majority vote if included in the FY2017 budget prior to its adoption.

Members are encouraged to review the financial analysis regarding the impact on the Tribe in conjunction with this opinion. It is possible that the financial analysis may identify that it is not financially possible to make the requested per capita payment which would result in a motion to adopt the per capita payment out of order.

If you have further questions, please contact me.