

PRIVILEGED AND CONFIDENTIAL
UNTIL DISSEMINATED

M E M O R A N D U M

To: Business Committee
Cc: Constitution Committee
From: Austin R. Vance and J. Renley Dennis, Whitten Burrage
Date: December 31, 2022
Re: Legal Impact Analysis: Removal of Business Committee Members from governing boards

I. BRIEF SUMMARY

At the October 22, 2022, Special Session of the Quapaw Nation Indian Council, a proposed amendment was introduced as follows (the “Removal Amendment”):

81	6. By majority vote, shall the Quapaw Indian Council amend the Governing Resolution
82	Section 4 to add Subsection 4 (d) to provide:
83	
84	(d) Unless changed by vote of the Quapaw Indian Council, the Business
85	Committee shall oversee all Quapaw Nation commissions, agencies,
86	instrumentalities, and entities and each Quapaw Nation entity charter or organic
87	document is hereby amended to include the provision that no Business Committee
88	member may be a member of those entities’ governing boards. This section and
89	section 4(b) shall be effective six (6) months from the day of passage of this
90	provision.

To better inform the Indian Council of the implications of the Removal Amendment, our office completed a legal analysis of this proposed change to Section 4 of the Governing Resolution.

II. QUESTION PRESENTED

Assuming the Removal Amendment passes, are there legal impediments to removing the Business Committee members from governing boards of the following entities:

- A. Gaming Entities:
 - 1. Downstream Development Authority (“DDA”);
 - 2. Saracen Development LLC (“Saracen”); and,
 - 3. Quapaw Casino Authority.

- B. Non-Gaming Entities: Quapaw Tribe Tax Commission and Quapaw Cattle Company.

PRIVILEGED AND CONFIDENTIAL
UNTIL DISSEMINATED

- C. Non-Quapaw Entities:
1. Intertribal Council/Boards;
 2. Gaming Associations; and,
 3. Highway 166 Development Corporation.

III. BRIEF ANSWER

Although certain Quapaw Nation laws will need to be amended, there is no legal impediment that prevent removing Business Committee members as board members of subsidiary entities of the Quapaw Nation. Because the Removal Amendment modifies the Governing Resolution, there is no risk of a conflict of law with any Business Committee resolution previously passed. More precisely, any Business Committee resolution that conflicts with the Governing Resolution or a resolution passed by the Indian Council is “unconstitutional” and invalid. As long as the Nation fulfills the legal obligations under federal law and binding agreements, the Indian Council can change its internal entities’ structures in a manner consistent with the Removal Amendment. However, there may be issues not addressed within this Memo that may make the a six (6) month transition term difficult to meet,¹ and we would encourage additional language that permits the Business Committee members to remain on any entities of the Nation for as long as legally required due to any prior obligation or duty.

IV. ANALYSIS

A. GAMING ENTITIES:

Gaming enterprises are the most heavily regulated ventures subject to the Removal Amendment as gaming is the subject to the Indian Gaming Regulatory Act (“IGRA”), the National

¹ The language of the Removal Amendment is vague. The statement that the Removal Amendment shall be effective “six (6) months from the day of passage of this provision” literally reads as though the Business Committee members will only be prohibited from serving on the board of another Quapaw entity for an initial six-month period. We believe this is antithetical to the intent, which was to give the Business Committee a six (6) month grace period to reorganize the entities if the Removal Amendment was adopted.

PRIVILEGED AND CONFIDENTIAL
UNTIL DISSEMINATED

Indian Gaming Commission (“NIGC”), and the Gaming Compact between the State of Oklahoma and the Quapaw Nation. Nonetheless, there is no conflict with removing the Business Committee members from the gaming enterprises but there are areas of legal concern.

The NIGC has released a series of bulletins on the regulation and governance of gaming enterprises by tribes. These bulletins indicate two primary areas of concern for restructuring gaming enterprises.² First, when tribes alter their organizational structures, it is common practice for a third-party contractor to assist with the process until the new committee is in place—this is to prevent a “gap” in the fulfillment of fiduciary duties and obligations. The NIGC is particular concerned with the structure of such agreements to comply with IGRA’s standards for profit sharing or they will be treated as unauthorized managerial contracts. This concern, however, is not directly related to the Nation’s decision to remove the Business Committee from governing enterprises but is a legal hurdle that may increase the cost of such a transition. Second, the NIGC is concerned with the separation of the gaming enterprises from the regulatory authority but the Removal Amendment would not affect Title 17 of the Quapaw Nation Code, Gaming and Amusement, (“Title 17”) in such a manner. Likewise, the Gaming Compact with the State of Oklahoma reflects the same concerns on separation of regulation enforcement authority, but again, those are not legal barriers. We found no existing legal duty or obligation that prevents removing the Business Committee members from Gaming Entities per the Removal Amendment.

1. **DOWNSTREAM DEVELOPMENT AUTHORITY.** Two instruments were reviewed for the DDA’s specific legal analysis, which included (1) the Charter of the Downstream Development

² By gaming enterprise, this Memo refers to the tribally operating gaming facility operations and is not in reference to the regulatory arm of the Nation, which operates independently from the Business Committee pursuant to federal law.

PRIVILEGED AND CONFIDENTIAL
UNTIL DISSEMINATED

Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah) and all documents incorporated therein (collectively, the “Charter”) and (2) and the First Amendment to Loan Agreement (the “Loan”).

The Charter itself *will need to be amended* to comply with the Removal Amendment. In summation, the Removal Amendment could be effectuated by amending Sections 14 and 15 of the Charter. Likewise, Resolution No. 100520-A, which instituted the current DDA structure, would be functionally invalidity by the Removal Amendment.³

Regarding the Loan, there are no particular provisions related to the DDA composition. Although we completed an independent review of the Loan, we ultimately agreed with the prior legal opinion that the only required notice for a change at DDA concerns the director positions rather than board composition. As long as the DDA can fulfill its financial obligations under the Loan to make the lenders whole, then the Removal Amendment does not interfere with the Loan. We found no existing legal duty or obligation that prevents removing the Business Committee members from the DDA under the Removal Amendment.

2. SARACEN DEVELOPMENT LLC. Saracen is structured as a subsidiary LLC of the Downstream, with the Nation being the real member of interest. Further, the Loan references to Saracen almost exclusively focus on the proper claim of ownership of property between the DDA and Saracen for collateral purposes. Taken together, we found no existing legal duty or obligation that prevents removing the Business Committee members from Saracen.

3. QUAPAW CASINO AUTHORITY. We found no existing legal duty or obligation that prevents removing the Business Committee members from the Quapaw Casino Authority.

³ Title 17 follows the natural structure of gaming under IGRA, which already ensures the Business Committee was already not directly involved in gaming regulation enforcement.

PRIVILEGED AND CONFIDENTIAL
UNTIL DISSEMINATED

B. NON-GAMING ENTITIES:

In its current form, the Removal Amendment would remove the Business Committee members from various non-gaming entities as well. It is unclear if that is the intent of the Removal Amendment or if it is meant to remove the Business Committee members from gaming business venture boards only, which may require the largest time commitment—*we recommend clarification on the Indian Counsel's intent on this point.* Regardless, there are no law that prevents removing the Business Committee from non-gaming businesses and commissions as long as the entities are maintain their proper operation once the Removal Amendment is effective. We found no existing legal duty or obligation that prevents removing the Business Committee members from the Quapaw Tax Commission, Quapaw Cattle Company, or any other non-gamin enterprise of the Nation per the Removal Amendment.

C. NON-QUAPAW ENTITIES.

In addition to entities we interpret to be covered by the Removal Amendment, we were also asked about several entities that we believe are not be covered by the Removal Amendment. More specifically, the Highway 166 Development Corporation, Intertribal Councils/Boards, Gaming Associations are not Quapaw entities for purposes of the Removal Amendment.

This interpretation is based on reading the Removal Amendment as a whole to derive its meaning per rules of legal construction. The fact that the Removal Amendment is addressing entities the Business Committee members “oversee,” where the Nation drafts and amends the governing documents, indicate these covered Quapaw entities are those the Nation maintains unilateral control over. Inversely, these Quapaw entities would not include ventures the Nations enters into with the United States, the State of Oklahoma, other federally recognized tribes, or

PRIVILEGED AND CONFIDENTIAL
UNTIL DISSEMINATED

private individuals/entities as a peer-to-peer venture, such as a through a partnership, joint venture, compact, or other consensual commercial relationship.

1. **HIGHWAY 166 DEVELOPMENT CORPORATION.** The information available on Highway 166 Development Corporation needs to be reconciled with official records of the Nation. Our current understanding is this entity is a project with other sovereigns organized within a corporate structure. If so, and unless this paragraph is updated before January 13, 2023, then we found the Highway 166 Development Corporation is analogous to a joint venture and not a Quapaw Nation entity; therefore, the Removal Amendment would have no effect.

2. **INTERTRIBAL COUNCILS/BOARDS.** Intertribal entities and councils, like Intertribal Buffalo Council and Northeastern Tribal Health Board, are voluntary associations and not Quapaw Nation entities; therefore, the Removal Amendment would have no effect.

3. **GAMING ASSOCIATIONS.** Gaming associations, like the Oklahoma Indian Gaming Association and the National Indian Gaming Associations, are voluntary associations and not Quapaw Nation entities; therefore, the Removal Amendment would have no effect.

V. CONCLUSION

Based on Quapaw law, the Removal Amendment can be effectuated without causing a legal concern for the governance or obligations of Quapaw Nation entities.⁴ While the Removal Amendment is vague as written and could accompany logistical problems with the six-month transition term from all Quapaw Nation entities, there is a presumption that laws passed directly by the people should be interpreted as valid if possible and this law can be interpreted as valid.

⁴ The analysis provided in this Memo involved only the review of the Removal Amendment, IGRA, NIGC Rules and Regulations, and available Quapaw resolutions and codes. With the exception of the Highway 166 Development Corporation, we have no reason to believe additional documentation exists that would change these opinions. Nonetheless, if we are provided more information or documents, we are happy to supplement or amend this opinion if warranted.