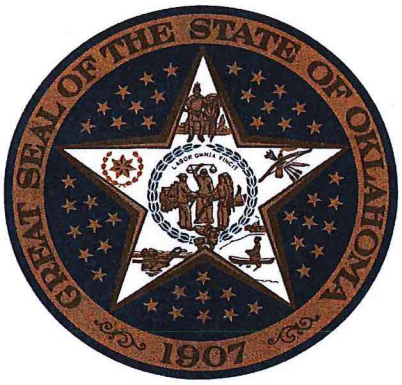

Oklahoma Attorney General Comments to the Bureau of Indian Affairs

on the

Leasing of Osage Reservation Lands for Oil and Gas Mining

Docket No. BIA-2013-0003

October 28, 2013

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Oklahoma Attorney General Comments to the Bureau of Indian Affairs
Docket No. BIA-2013-0003-Leasing of Osage Reservation Lands for Oil and Gas Mining

Submitted via: Federal e-Rulemaking Portal: regulations.gov
and email: osageregneg@bia.goc

Re: 1076-AF17

On October 14, 2011, the United States and the Osage Nation (formerly known as the Osage Tribe) signed a Settlement Agreement to resolve litigation regarding alleged mismanagement of the Osage Nation's oil and gas mineral estate, among other claims. In the Settlement Agreement, the parties agreed that it would be mutually beneficial "to address means of improving the trust management of the Osage Mineral Estate, the Osage Tribal Trust Account, and Other Osage Accounts." The parties agreed that a review and revision of the existing regulations is warranted to better assist the Bureau of Indian Affairs (BIA) in managing the Osage Mineral Estate. The parties agreed to engage in a negotiated rulemaking for this purpose. However, there also appears to be another, less clearly established purpose of the proposed rule related to environmental regulation of oil and gas exploration and production activities in Osage County.

On August 28, 2013 the Department of the Interior-Bureau of Indian Affairs issued in the Federal Register its proposed revisions to the regulations addressing oil and gas mining on reservation land of the Osage Nation. The proposed rule would update the leasing procedures and rental, production, and royalties requirements for oil and gas in Osage Mineral lands and is the result of a negotiated rulemaking. The Oklahoma Office of the Attorney General objects to the proposed rule in its current state, and strongly urges you to amend the rule and the regulations so that they properly recognize the State of Oklahoma's primary and exclusive role in environmental regulation of oil and gas exploration and production activities in Osage County as well as the States right to regulate the waters within its borders.

The State of Oklahoma and not the federal government, is best equipped to design, administer and enforce laws and regulations related to oil and gas development. State regulatory programs have been carefully designed to address state-specific issues and needs and are applied consistently, regularly reviewed, and continuously subjected to thoughtful administrative oversight. Importantly, the state has greater flexibility to respond to new information and modify or update its rules, as demonstrated in recent years.

Currently, state regulators employ highly trained staff that efficiently oversees operations on state, federal and fee lands within our borders and issues permits in a timely manner. This stands

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in stark contrast to a federal program that is notorious for frequent and prolonged delays and persistent staffing challenges. These problems will likely intensify once budget cuts are combined with onerous and unnecessary new federal rules and requirements.

Section § 226.48 A lessee's use of water

The Oklahoma Water Resources Board ("OWRB") is the State agency that administers and regulates rights to the use of stream water and groundwater in Oklahoma pursuant to the laws of the State. Those laws require, among other things, that those who wish to use stream water or groundwater for non-domestic purposes (including use in oil and gas exploration, production and other operations) must acquire a permit from the OWRB authorizing such a use.

In its current form, 25 C.F.R. § 226.48 authorizes the un-permitted use of surface water in Osage County. In effect, the federal regulation purports to preempt the State of Oklahoma's regulatory authority, and does so with no basis in law. If BIA chooses not to modify the language as suggested by the State, at the very least, in the preamble to the proposed rule, BIA should include the following language, "Although 25 C.F.R. §226.48 remains unchanged, the Department of Interior and BIA do not intend for the language in that section to create or assert any claim to water rights on behalf of the Osage tribe."

The proposed rules refer to "reservation lands" in Osage County, however, the Osage reservation was disestablished over a century ago, when the Osage reservation was incorporated into the new State of Oklahoma as Osage County. *See Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). In fact, in concluding that the Osage Reservation had been disestablished by Congress in the 1906 Osage Allotment Act, the Tenth Circuit noted that "federal officials responsible for the Osage lands repeatedly referred to the area as a 'former reservation' ***under state jurisdiction***." *Id.* at 1126 (emphasis added). As you know, the Act severed the mineral estate from the surface estate of the reservation and placed it in trust for the tribe. *Id. At 1120.*

Today, with approximately 99.96% of Osage County being lands other than those held in trust by the federal government for the benefit of the Osage Nation, *id.* at 1127, it is hard to fathom how federal officials now justify exercising regulatory authority over water throughout the *entirety* of Osage County. The federal government has no basis in law for assertion of jurisdiction over the waters of the State of Oklahoma either on its own behalf or on behalf of the Osage Nation. Even if the Osage Nation had some basis for a yet-to-be determined federal water right, the State of Oklahoma would remain the regulator of the County's waters. *See id.* at 1127-28 ("[W]e note that the Nation concedes that Oklahoma has had a "long-standing practice of asserting jurisdiction" in Osage County. '[T]he longstanding assumption of jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations' that 'merit heavy weight.'" [citations omitted]).

Indeed, consistent with the regulation and administration of all the waters within the borders of Oklahoma, the State has always held and asserted jurisdiction over the waters of Osage County, and has issued nearly 100 permits to Oklahomans seeking to use stream water and groundwater in the County. The federal government's purported authorization of un-permitted use of water unlawfully usurps the State's jurisdiction and seriously impairs the State's ability to exercise this jurisdiction, by: (1) making it difficult if not impossible for the OWRB to accurately determine the amount of water available for future permitting; (2) injecting uncertainty into the State's prior appropriation doctrine—the doctrine on which all existing stream water permits are based; and (3) creating jurisdictional confusion that is certain to confuse and detrimentally affect water users within the County.

The Supreme Court has long recognized that regulation of land and water use "is a quintessential state and local power." Thus, "[if] Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." Importantly, Congress has not enacted any statute that gives BLM authority to pre-empt state water regulations.

On the contrary, federal statutes establishing limited federal regulation of water resources expressly preserve state primacy. For example, the Clean Water Act (CWA) reflects the Congressional policy "to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution, [and] to plan the development and use...of land and water resources[.] The statute further states that "[e]xcept as expressly provided in this chapter, nothing...shall...be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states." Nowhere does the CWA express a desire to adjust the federal-state balance. Similarly, the Safe Drinking Water Act (SDWA) also emphasizes state primacy over drinking water regulation and enforcement.

Recognizing state jurisdiction over water resources, the CWA and SDWA carve out a narrow role for the federal government and vest federal regulatory authority in the U.S. Environmental Protection Agency (EPA). Thus, EPA shares, to a limited extent, state responsibility for protecting water resources. But nothing in these statutes confers regulatory authority over water resources to BIA. In a 2011 resolution, the Western States Water Council underscored this point by stating that "any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states."

These problems can be easily corrected by amending 25 C.F.R. § 226.48 as follows:

§ 226.48 Lessee's use of water.

Lessee or his contractor's use of water shall be in accordance with the laws of the State of Oklahoma.

The water use provision is not the only issue the State has with the proposed regulations. The regulations throughout are replete with provisions that contradict existing State laws, add unnecessary burdens to producers and do not extend sufficient protection to landowners. The proposed BIA regulations themselves recognize that the State should be involved in the regulatory process:

- Section 226.2 of the proposed rule indicates that oil and gas activities conducted in Osage County are subject to "all other applicable laws, regulations, and authorities." 78 Fed. Reg. 53089

- Section 226.33 of the proposed rule provides that the "lessee shall comply with applicable laws and regulations", including a requirement to conduct "all operations in a manner that . . . protects other natural resources and environmental quality [and] . . . protect life and property . . . " 78 Fed. Reg. 53095

- Section 226.45 of the proposed rule provides that "The lessee shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality. The lessee shall comply with the pertinent orders of the Superintendent and other standards and procedures as set forth in the applicable laws, [and] regulations . . . All produced water must be disposed of by injection into the subsurface, in approved pits, or by other methods which have been approved by the Superintendent. . . . A lessee's compliance with the requirements of the regulations in this part shall not relieve the lessee of the obligation to comply with other applicable laws and regulations." 78 Fed. Reg. 53098

- Section 226.46 of the proposed rule provides that "The lessee shall perform operations and maintain equipment in a safe and workmanlike manner. The lessee shall take all precautions necessary to provide adequate protection for the health and safety of life and the protection of property. Such precautions shall not relieve the lessee of the responsibility for compliance with other pertinent health and safety requirements under applicable laws or regulations. 78 Fed. Reg. 53098

All the sections of the propos ed rule referenced above implicate state (and federal) jurisdiction pursuant to environmental laws and regulations on the non-trust/non-restricted land in Osage County. It appears, however, that at least some state (and federal) regulatory agencies have acquiesced in the mistaken notion that BIA and the Superintendent of the Osage Nation have environmental jurisdiction and authority throughout the entire County to regulate the oil and gas industry, including on non-trust/non-restricted surface lands. The proposed BIA rules and regulations should recognize the regulatory authority of the Oklahoma Department of Environmental Quality, Oklahoma Corporation Commission and Oklahoma Water Resource Board. Each of these State regulatory agencies have expertise in environmental regulation as well as in regulating the exploration and production of oil and gas in the State, and the use of water in that process.

Comments of the Oklahoma Department of Wildlife

The Oklahoma Department of Wildlife compiled the following comments to be submitted in the rulemaking docket along with the Attorney General's comments:

The Oklahoma Department of Wildlife Conservation (ODWC) is a significant landowner in Osage county, with ownership of 26,918 surface acres. ODWC's main purpose in owning and managing real property in Osage County is the management, protection, and enhancement of wildlife resources and habitat for the scientific, educational, recreational, aesthetic, and economic benefits to present and future generations of citizens of and visitors to Oklahoma. ODWC understands that a certain amount of oil and gas exploration and operational activities are going to occur in State owned areas in Osage County, therefore in order to meet the constitutional duties of ODWC, the provisions of the Oklahoma Administrative Code, Title 800:30-3-1 through 8 for mineral exploration and production on State owned land in Osage County must be adhered to by oil and gas developers/operators.

226.9 Bonding requirements

Recognize that a surety performance bond from oil and gas developers/operators is generally required by the surface owner prior to conducting oil and gas activities.

226.36 Notice and information required to be given to surface owners prior to commencement of drilling operations?

ODWC is in support of the oil and gas lessee's notifying the surface owner in one general written notification sent by certified mail, with a copy to the BIA Superintendent before conducting archeological or biological surveys or staking of wells. The notice requirement should also require that no operations of any kind shall commence until the lessee can meet and negotiate in good faith with the surface owners. This will allow ODWC, as a landowner, to have an open line of communication with the lessee regarding the oil and gas activities to be conducted on a wildlife management area. This communication is critical to help insure the health and safety of the lessee and the health and safety of others using the wildlife management area. There are many health, safety and wildlife conservation factors to be considered prior to and in connection with oil and gas activities, including prescribed burning, hunting seasons, impact on habitat, such as the Greater Prairie Chicken booming grounds and wildlife in general.

ODWC does take issue that if the parties fail to agree on a route of ingress and egress, said route shall be set by the Superintendent. ODWC would like to see unbiased alternatives to resolve the routing issue rather than through a decision made solely by the BIA Superintendent. The assigned route must take into consideration the protection of the State's natural resources and environmental quality.

226.45 What are a lessee's other environmental responsibilities?

ODWC is not sure how successful this will be if a large portion of the surface is privately or non-tribal owned. These regulations have little enforcement power and do not have fines associated with environmental damage. The liability for damages to third parties should be governed by applicable State law. The Oklahoma Corporation Commission and the Oklahoma Department of Environmental Quality would be better suited to handle the enforcement of environmental rules.

The BIA should adopt the recommendations set forth below and work out an arrangement with the State of Oklahoma to have the State function as the regulatory body with oversight from the BIA and the DOI.

In the alternative, if BIA does not transfer regulatory control to the State, then the ODWC would like the land protection function in Osage County moved from the BIA to BLM. The BLM has strict procedures and protocols that have been successfully implemented in other geographical areas. All sections dealing with non-tribal surface owner rights (pollution, surface damages, etc.) should be the same in Osage County as they are for the rest of the State.

Recommendations

The Oklahoma Attorney General strongly urges the BIA to adopt the following recommendations found in the July 2013 white paper report titled: *The Effectiveness of Oil and Gas Regulatory Oversight on Oil and Gas Operations Osage County, Oklahoma by The Environmentally Friendly Drilling Program* regarding the regulation of oil and gas in Osage County:

Recommendation No. 1: Start over with the rulemaking process.

1. The Department of Interior should assemble a new rulemaking committee comprised of qualified individuals who are representative of all stakeholders. They need to be provided competent, independent legal counsel.

2. The regulatory office must be staffed with qualified and properly trained personnel in order to conduct the functions of managing the resources, enforcing the rules and to properly serve the Osage mineral owners and the citizens of Osage County.

3. Ethical regulatory practices and assurance that there will be no conflicts of interest and accountability must be required and incorporated in the regulatory office and applied to all employees.

4. There must be a system of accountability and transparency in the regulatory process.

Recommendation No. 2: **Develop process for accountability.**

If any organization is to be effective and responsive and if the regulatory process is to be transparent to the public, there must be oversight and regular review of personnel and their performance. This should extend to personnel in all functions within the regulatory body involved in the permitting process, regulators, administration, accounting and management. It was recommended by the landowners to the BIA in the rulemaking committee hearings to utilize a not-for-profit organization called STRONGER, "The State Review of Oil and Natural Gas Environmental Regulations." They have indicated a willingness to help in Osage County and have members on the committee from Federal agencies. The state review process is a collaborative process by which review teams composed of stakeholders from the oil and gas industry, state environmental regulatory programs, and members of the environmental/public interest communities review state oil and gas waste management programs against a set of guidelines developed and agreed to by all the participating parties. There are other options for review and oversight, like the IOGCC and GWPC States First program, but unless there is an accountability process, the credibility of the Department of Interior and the performance of the regulatory body will rightfully be questioned.

Recommendation No. 3: **Ensure that well records and subsurface data are accessible and accurate.**

It is almost impossible to properly protect groundwater without having accurate records that are continuously updated and without taking proper precautions to case and cement the hydrocarbon and salt water zones in order to isolate them from fresh water zones. Proper protection practices of groundwater are defined by the Ground Water Protection Council (www.GWPC.org) which is located in Oklahoma City.

The State of Oklahoma Geological Survey has developed excellent well and subsurface records that are maintained by the geological survey at the University of Oklahoma in all counties in Oklahoma except Osage County. They have done some work in the past in Osage County but the data is out of date and should be updated. The records can then be used by the regulators when permitting wells. All new wells should be logged and the electronic logs should be required in digital format and incorporated into the database. All existing files should be digitized. This is done in all states. The U.S. Geological Survey (USGS) has also done some work in Osage County and should be consulted to assist the BIA in this critical effort. The recently announced four year electromagnetic study by the USGS to map ground water needs to be coordinated with the BIA and the State.

Recommendation No. 4: **Both the BIA and the Osage Mineral Council should develop a cooperative agreement with the State of Oklahoma.**

The BIA on behalf of the Osage Nation is required to make sure the oil and gas operations

are properly regulated and the mineral estate is properly managed. This is a statutory requirement. BIA has proven they cannot and will not adequately manage the mineral estate or regulate oil and gas operations independently. We conducted an assessment of the alternatives to improve the regulatory process. One option discussed was to have the BIA use and delegate the BLM for regulatory inspection and enforcement. The BLM has offered inspector training to the BIA inspectors which is a good outcome of the rulemaking process. We have reviewed the performance of the BLM, their rules, regulations and processes and we firmly believe that the BLM is not capable of properly managing and regulating oil and gas operations in Osage County the best interest of the Osage Nation. Replacing the outdated Osage rules with the BLM's own CFR regulations would be an improvement but they are not adequate. The BLM process is slow, as documented in this report; many of their rules have not kept pace with advances in new oil and gas activity; (a most recent example has been the recent long and drawn out rulemaking on hydraulic fracturing and reporting). In contrast, the states, through progressive regulations, the FracFocus web based system, and their own regulatory process have done a superior job. As new challenges on environmental protection and better ways to produce oil and gas have developed and a growing need to protect the environment has emerged, the states like Oklahoma are much better equipped.

While the BLM has made some improvements in their regulatory process by passing their Oil and Gas Onshore Orders (Orders) and adopted a set of Best Management Practices, it would not adequately serve the needs of all stakeholders in Osage County; particularly in a timely manner. The permitting approval time on BLM managed lands would cost Osage Nation production and may lay the ground work for another lawsuit against the Federal government. In particular, it would be very difficult for the small operators to comply with a complex and slow BLM bureaucracy. The BLM has also had recent budget cuts that have stretch their resources. There is little reason to believe the BLM can do an adequate job.

The Constitution grants Congress the power to regulate commerce with Indian tribes (Article I § 8). This power has been delegated by statute to the BIA's Commissioner of Indian Affairs (25 USC § 2). The BIA has promulgated regulation that allows application of state rules to Indian land where the BIA determines the application "to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property" (25 CFR 1.4(b). Based on this sequence, the BIA has the authority to choose to apply state regulation here.

Legal review has determined the Supreme Court has taken a very functional approach towards agencies and delegation. In litigation following the New Deal, the Supreme Court established what is known as the "intelligible principle test" - where so long as Congress provides its delegee (here the BIA) with an intelligible principle to conform to (here carrying out the US trust to the Indian tribes) the Court has simply avoided the issue (488 U.S. 361).

Two examples are: 1) the Office of Surface Mining where the States are allowed to apply and given primacy to enforce the Surface Mining Control Act; and 2) the EPA allowing States to enforce the UIC program. The state could be required to hire and train qualified Osage Native

Americans in the regulatory process. They could be required to provide assurances to BIA and the Osage Nation that they comply with Federal NEPA rules. The majority of operators in Osage county operate profitably in the counties surrounding Osage County.

U.S. Energy Secretary Ernest Moniz, in his first interview since taking office in June 2103, as reported in Platts Gas Daily on July 9, 2013: "the Secretary expressed firm support for the domestic natural gas industry, both in stressing his desire to quickly approve liquefied natural gas exports and backing the role of states in regulating hydraulic fracturing. I think in the end there has to be a very, very strong state role there" for states, Moniz said in an interview set to air Sunday July 17th on "Platts Energy Week." "The situations are different in different states, the geologies are different," he said…

The article goes on to report that Secretary Moniz isn't alone in his opinion. Former EPA administrator Lisa Jackson has strongly defended state regulation of oil and gas development – including hydraulic fracturing – stating in 2011: "We have no data right now that lead us to believe one way or the other that there needs to be specific federal regulation of the fracking process." Jackson continued in her interview by observing, "States are stepping up and doing a good job. It doesn't have to be EPA that regulates the 10,000 wells that might go in." EPA's Drinking Water Division Director Steve Heare has also said states are doing a "good job" regulating hydraulic fracturing.

Moniz also emphasized the manageability of environmental concerns related to hydraulic fracturing, notably in regard to methane leakage. As Moniz told Platts: "I think the issues in terms of the environmental footprint of hydraulic fracturing are manageable," he said. "They're challenging, but manageable."

This statement is consistent with this report recommending the state of Oklahoma would do a much better job of regulating oil and gas in Osage County.

Solution

Both the BIA and the Osage Mineral Council should develop a cooperative agreement with the State of Oklahoma. A suitable alternative to the current ineffective situation is to have the BIA and the Osage Mineral Council work out an arrangement with the State of Oklahoma to have them function as the regulatory body with oversight from the BIA and the DOI. Good and consistent rules are necessary for proper regulation and this cooperation to be successful. These types of arrangements are done in other Federal agencies where the State is given primacy, with proper accountability and oversight to assure they are complying with Federal laws and rules.

Recommendation No. 5: **<u>Enforce the rules</u>.**

The bad players need to be made to comply with the rules. People who cut corners or cheat

on the environment, and the safety of their workers will also cheat the Osage out of royalties due. The legitimate operators will produce more oil and gas, pay their royalties fairly, and protect the environment.

The Oklahoma Congressional Delegation has also requested the BIA to restart the rulemaking process. *See letter dated September 30, 2013.* As stated in that letter "the proposed regulations do nothing to effectively protect the rights of surface owners" and noted that "Any action by BIA that reduces oil and gas development on the Nation would be an action in direct contradiction to the tribe's best interest....." This current proposed regulation will likely lead to future litigation against the BIA from the tribe, the State of Oklahoma, affected landowners and oil and gas producers in the region.

It is in BIA's best interest and in the best interest of all stakeholders, that BIA withdraw this proposed regulation and restart the rulemaking process with input from all interested stakeholders. Beyond the fundamental question of who is better equipped to provide the best regulations, in light of the fiscal realities facing both the Federal Government and the State, and in view of current and future budget constraints, the BIA should partner with the State of Oklahoma to the greatest extent possible to leverage the existing state programs, resources and infrastructure.