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Geoffrey M. Standing Bear
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R. J. Walker
Assistant Principal Chief

April 3, 2023

U.S. Department of the Interior
Bureau of Indian Affairs, Eastern Oklahoma Region
Attn: Regional Director
P.O. Box 8002
Muskogee, OK 74402

Re: RIN 1076-AF59

Dear Director Streater,

The Osage Nation (Nation) appreciates the opportunity to comment on the Proposed Rule that would bring extensive changes to the regulations governing mining of the Osage Mineral Estate for oil and gas. As you are aware, the Osage Minerals Council (OMC) is the Nation's agency whose jurisdiction and constitutional responsibilities are most affected by any revisions to 25 C.F.R. Part 226. Therefore, the Bureau of Indian Affairs must also engage with the OMC to understand how such changes might impact the management, leasing, and operations of the Osage Mineral Estate. The comments below address the concerns of the Nation and should not be interpreted to limit or conflict with those of the OMC.

I. The Osage Nation and the Osage Mineral Estate have unique histories and challenges that may not be properly addressed in the Proposed Rule.

Last year marked the 150th anniversary of the establishment of the Osage Reservation. Unlike other Tribes, the Nation purchased this reservation using funds from the earlier sale of its reservation lands in Kansas. That decision ultimately helped the Nation resist traditional allotment policies and insist that the United States include certain provisions in the Act of June 28, 1906 (1906 Act).[1] The Osage Mineral Estate is a product of this unique history.

[1] Pub. L. No. 59-321, 34 Stat. 539.

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Oil and gas leasing within the Osage Reservation is governed by the 1906 Act, not the general Indian Mineral Leasing Act of 1938.[2] The Indian Mineral Leasing Act and its implementing regulations at 25 C.F.R. Part 211 recognize this distinction and reflect congressional intent for the Secretary of the Interior to administer the Osage Mineral Estate differently from other Indian lands.[3] Any changes to the regulations at Part 226 must be consistent with this separate statutory authority.

Unlike many other Tribes with active oil and gas mineral operations, the Nation is the beneficial owner of extremely mature fields with over 15,000 producing wells. According to the BIA's own analysis, over 40 percent of Osage Mineral Estate lessees produce fewer than three barrels of oil daily, with similar results for natural gas production.[4] These shallow, low-production wells are not suited to directional drilling and often require producers to rely on secondary and tertiary recovery methods. And while the Nation defers to the OMC's expertise on this matter, the BIA's attempt to impose an extensive array of American Petroleum Institute, GPA Midstream Association, and American Gas Association standards and practices ("Industry Standards and Practices") onto the Osage Mineral Estate seems inappropriate. In effect, the Proposed Rule would convert thousands of pages of Industry Standards and Practices into enforceable federal law specifically applicable to the Osage Mineral Estate. That prospect requires much more thought and analysis than the Nation and the OMC have been able to provide, given the short period for public comment on the Proposed Rule. Further, the BIA's effort to conform the regulations at 25 C.F.R. Part 226 with those "governing oil and gas leasing and development throughout the rest of Indian country" appears inconsistent with Congress's clear statement regarding the unique history of the Osage Mineral Estate.[5]

II. The Proposed Rule's length and complexity may discourage the development of the Osage Mineral Estate.

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[2] Act of May 11, 1938, Pub. L. No. 75-506, 52 Stat. 437.

[3] *Id.*, sec. 6 ("Sections 1, 2, 3, and 4 of this Act shall not apply to . . . the Osage Reservation in Oklahoma"); 25 C.F.R. § 211.1(e) ("The regulations in this part do not apply to leasing and development governed by regulations in [25 C.F.R. Part 226]").

[4] Mining of the Osage Mineral Estate for Oil and Gas, 88 Fed. Reg. 2430, 2442 (Jan. 13, 2023) (calculated based on finding that approximately 100 of 223 lessees produced less than 1,000 barrels of oil annually).

[5] 88 Fed. Reg. at 2430.

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The permitting process under the current regulations at 25 C.F.R. Part 226 is cumbersome and imperfect, but is at least familiar to Osage Mineral Estate lessees. In contrast, the Proposed Rule appears to be substantially more onerous, with few clearly identified corresponding benefits. The Nation is concerned that these changes may negatively affect oil and gas development within the Osage Reservation and consequently reduce royalty payments to Osage headright holders.

As described in the preamble to the Proposed Rule ("Preamble"), the new regulations will "likely impact a substantial number of small entities within the Osage Mineral Estate."[6] Specifically, the BIA estimates that the average lessee's costs will increase by $18,000 to $26,000 per year, which "could represent between 15 to 65 percent of annual profits depending on the lessee."[7] For small producers, these added expenses are not insignificant and may force them to halt production or pursue opportunities elsewhere in Oklahoma. The Nation wonders how many producers will be able to afford to give up 20 percent, 50 percent, or even 65 percent of their annual profits. If the Proposed Rule provides the final push that forces these producers out of business or off the Reservation, the effects on Osage headright holders, the Nation, and Osage County will be significant.

The Nation is aware that implementing 25 C.F.R. Part 226 has suffered from bureaucratic inefficiency. However, the Proposed Rule seemingly does little to solve this very real problem. In fact, it adds over 100 sections to the existing regulations and incorporates by reference nearly 2,500 pages of Industry Standards and Practices.[8] The Regulatory Impact Analysis prepared in connection with the Proposed Rule fails to satisfactorily address the potential impact of these changes. In fact, it acknowledges that the "behavioral response of the oil and gas industry . . . in Osage County is somewhat uncertain."[9] Distressingly, it then concludes that any tendency that the Proposed Rule would drive producers off the Reservation will supposedly be mitigated by the difficulties of abandoning a well under BIA regulations and unwillingness to walk away from existing well investments, rather than through the creation of positive future regulatory conditions.[10]

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[6] *Id.* at 2442.

[7] *Id.* at 2443.

[8] *Id.* at 2432-2435.

[9] Industrial Economics, Incorporated, Regulatory Impact Analysis for Proposed Revised Code of Federal Regulations (CFR) 25 Part 226, Mining of the Osage Mineral Estate for Oil and Gas, Oct. 5, 2022, 4-21.

[10] *Ibid.*

The Nation believes the Regulatory Impact Analysis does not adequately consider the indirect costs of the Proposed Rule. The Osage Mineral Estate experienced investment uncertainty in recent years during the litigation over the BIA's reliance on the 1979 programmatic environmental assessment to satisfy the requirements of the National Environmental Policy Act.[11] As a result of this litigation, permitting activity substantially declined. It is reasonable to assume that the extensive and complex Proposed Rule will provide an additional disincentive for oil and gas development on the Osage Mineral Estate.

III. Any regulatory proposal affecting the Osage Nation and the Osage Mineral Estate should be guided by meaningful government-to-government consultation.

The Nation is in receipt of Assistant Secretary Newland's request for government-to-government consultation dated February 27, 2023. We welcome the opportunity to discuss the concerns identified herein and have communicated our response to Assistant Secretary Newland's letter under separate cover. However, it is unfortunate that the Proposed Rule was published without first consulting with the Nation and the OMC.

As described in the Preamble, the only "consultation" on this issue occurred on October 25, 2016 ("2016 Consultation").[12] There, the Nation and the OMC agreed that certain revisions to 25 C.F.R. Part 226 were appropriate. The Nation assumes that it was this meeting that prompted the BIA to prepare new regulations and not—as the Preamble incorrectly implies—the need to "resolve certain recommendations made by the Office of the Inspector General."[13] This clarification is important, because the advice "to correct program deficiencies by modifying 25 C.F.R. Part 226 to mirror other Indian Country oil and gas regulations" was actually rejected by the BIA in 2014.[14] And in response to this formal non-concurrence, the Office of the Inspector General then

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[11] *Hayes v. Osage Minerals Council*, No. 16-5060 (10th Cir. 2017).

[12] 88 Fed. Reg. at 2443.

[13] *Id*. at 2430.

[14] Office of the Inspector General, *BIA Needs Sweeping Changes to Manage the Osage Nation's Energy Resources*, October 14, 2014, pg. 32, www.doioig.gov/sites/default/files/2021-migration/CR-EV-BIA-0002-2013Public1.pdf ("BIA did not concur with this recommendation. As a result of the tribal trust settlement, BIA and other interested parties discussed mirroring other Indian Country oil and gas regulations to improve managing the minerals estate. The [OMC] and other interested parties voiced concerns . . . and the Negotiated Rule Making Committee tried to balance these concerns with the need to improve the current regulations.").

concluded that the "recommendation [was] resolved but not implemented."[15] To the Nation's knowledge, neither the BIA nor the Office of the Inspector General reversed their determinations. The Preamble lacks this important factual and regulatory context, which seems to undermine the Department's justification for many substantive provisions of the Proposed Rule. In fact, the Proposed Rule was developed through the BIA's own initiative and is an endeavor that can be altered in scope or reevaluated in its entirety through appropriate consultation with the Nation and the OMC.[16]

Approximately four years after the 2016 Consultation, the BIA distributed a draft of possible regulatory changes to 25 C.F.R. Part 226, which was followed by a letter advising the Nation and the OMC of a deadline for comments and consultation requests.[17] On February 22, 2022, the OMC formally asked the BIA not to move forward with the earlier-circulated discussion draft, and instead work collaboratively with the OMC on rulemaking.[18] For reasons unknown, the BIA did not consent to this request or agree to hold government-to-government consultation. The Proposed Rule was ultimately published on January 13, 2023, meaning that there was a period of eleven months during which the BIA could have meaningfully engaged with the Nation and the OMC.

As you are aware, consultation on policies that have tribal implications is required by Executive Order 13175.[19] This Administration has affirmed the importance of such government-to-government consultation[20] and has directed agencies to "strive for consensus with Tribes or a mutually desired outcome."[21] The U.S. Department of the Interior's consultation policy further specifies that actions that impact on-reservation land and trust assets "necessitate increasingly

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[15] *Ibid*.

[16] Attempts to revise 25 C.F.R. Part 226 began in 2012, following settlement with the United States of trust mismanagement claims in 2011. *See* 88 Fed. Reg. at 2431.

[17] 88 Fed. Reg. at 2430.

[18] *Ibid*.

[19] E.O. 13175, *Consultation and Coordination With Indian Tribal Governments*, Nov. 6, 2000, www.govinfo.gov/content/pkg/CFR-2001-title3-vol1/pdf/CFR-2001-title3-vol1-eo13175.pdf.

[20] *Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, Jan. 26, 2021, www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships.

[21] *Presidential Memorandum on Uniform Standards for Tribal Consultation*, Nov. 30, 2022, www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation.

dedicated efforts by Department officials to achieve consensus and should, where possible, defer to Tribes to establish standards."[22]

The Osage Mineral Estate clearly falls within the scope of the Department's heightened consultation requirements. Here, the BIA's failure to engage on this matter prior to the publication of the Proposed Rule is wholly inconsistent with the Department's own consultation policy and fails to live up to the Administration's commitment to giving Tribes a larger voice in shaping federal policies.[23]

The Nation firmly supports the Department's goal of "consensus seeking" and its requirement to "encourage Tribes to develop their own policies to achieve program objectives."[24] Going forward, the Nation expects the BIA to engage in robust consultation on the management, leasing, and operations of the Osage Mineral Estate and to work collaboratively with the Nation and the OMC to replace or substantially rewrite the Proposed Rule.

IV. The Proposed Rule should promote Tribal sovereignty.

The Nation anticipates that the OMC will raise specific concerns regarding the Proposed Rule's potential effects, both in its public comment submission and during government-to-government consultation. One issue that is likely of shared concern, however, is the Osage Agency's inefficiency in processing permits and acting on other requests.

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[22] 512 DM 5, § 5.4(G), www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-5_2.pdf (referencing 512 DM 4, Figure 1, www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf).

[23] Remarks by President Biden at the White House Tribal Nations Summit, Nov. 30, 2022, www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/30/remarks-by-president-biden-at-the-white-house-tribal-nations-summit. ("Today, I signed a new presidential memorandum that improves consultation between the federal government and Tribal nations based on key principles…. Federal agencies should strive to reach consensus among the Tribes. And there should be adequate time for ample communications. The federal agencies should prepare a public record for what's transpired during those consultations. And Tribal nations should know how their contributions influenced the decision-making.").

[24] 512 DM 5, § 4.6.

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In 2005, Congress provided Tribes with the ability to exercise increased administrative and regulatory control over energy resource development on Indian lands.[25] Recent amendments to this important statute now allow Tribes the options of entering into a Tribal Energy Resource Agreement ("TERA") with the Department or seeking Department certification for a Tribal Energy Development Organization ("TEDO").[26] Under either of these two vehicles, interested Tribes may enter into and manage energy-related leases, rights-of-way, and business agreements without first obtaining approval of the Secretary of the Interior.[27] Consistent with congressional intent to promote sovereignty, the Nation believes that the Proposed Rule should include language clearly stating that these options are available to the Nation. Such authority is not only an exercise in self-determination but is also an initiative that will likely lead to more efficient and effective management of the Osage Mineral Estate. We look forward to discussing the TERA and TEDO options with the BIA as part of future government-to-government consultation.

Thank you again for the invitation to submit written comments on the Proposed Rule. If you have any questions or require any additional information, please let me know.

Sincerely,

Geoffrey M. Standing Bear
Principal Chief, Osage Nation

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[25] Indian Tribal Energy Development and Self-Determination Act of 2005, Pub. L. 109-58, 119 Stat. 595, Title V.

[26] Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. 115-325, 132 Stat. 4445 (2018).

[27] The Nation notes that regulatory revisions in 2019 further removed barriers that had prevented many Tribes from seeking TERAs and/or TEDOs. *See* Tribal Energy Resource Agreements, 84 Fed. Reg. 69602 (Dec. 18, 2019) (amending 25 C.F.R. Part 224).

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