IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1.	OSAGE PRODUCERS' ASSOCIATION, an Oklahoma not-for-profit corporation,	)
	Petitioner,	)
	vs.	)
1.	SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior;	) JURY TRIAL DEMANDED
2.	MICHAEL BLACK, in his official capacity as Bureau Director of the Bureau of Indian Affairs;	)
3.	UNITED STATES DEPARTMENT OF THE INTERIOR; and	)
4.	UNITED STATES BUREAU OF INDIAN AFFAIRS,	)
	Respondents.	)

PETITION FOR REVIEW OF FINAL AGENCY ACTION

COMES NOW the Petitioner, OSAGE PRODUCERS' ASSOCIATION, and respectfully submits this Petition for Review of Final Agency Action under the Negotiated Rulemaking Procedure Act, 5 U.S.C. § 570 ("NRPA") and the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"). +

JURISDICTION

1. Petitioner Osage Producers' Association is an Oklahoma not-for-profit association made up of oil and gas producers that have oil and gas leases in Osage County, Oklahoma.

2. Respondent Sally Jewell is the Secretary of the Department of the Interior.

3. Respondent Bureau of Indian Affairs is charged with managing the Osage Nation mineral estate.

4. This Court has jurisdiction over this matter under 28 U.S.C. § 1331.

5. Respondent Sally Jewell is an officer of the United States and Respondent BIA is an entity of the United States Government.

6. The United States has waived its sovereign immunity and acquiesces to this court's jurisdiction under § 704 of the Act.

BACKGROUND

7. On October 14, 2011, the United States and the Osage Nation entered into a Settlement Agreement, which provided that the parties would review and revise the existing regulations governing oil and gas development in Osage County.

8. Further, the parties agreed that negotiated rulemaking was proper for this purpose.

9. In July, 2012, Respondent Department of Interior established a Negotiated Rulemaking Committee ("Committee").

10. The Committee submitted its Report to Respondent Bureau of Indian Affairs ("BIA") on April 25, 2013.

11. On August 28, 2013, the BIA published its proposed rule. *see* 78 Fed. Reg. 53,083 (August 28, 2013).

12. On May 11, 2015, the BIA published its final rule. *see* 80 Fed. Reg. 26,994 (May 11, 2015) (to be codified at 25 C.F.R. pt 226).

13. The BIA, on the basis of its own review without Department of Interior oversight, issued its final rules on May 11, 2015.

14. The May 11, 2015 final rules incorporated substantive changes to existing rules and regulations governing Osage County.

15. Certain substantive provisions are in violation of the law, are unconstitutional, arbitrary, capricious, ambiguous, and are not tailored to meet a legitimate governmental objective.

UNLAWFUL AND UNCONSTITUTIONAL FINAL RULES

16. Plaintiff hereby incorporates paragraphs 1 through 15 of this Petition.

17. Under § 226.18, the settlement value of a barrel of oil is the "NYMEX daily price of oil at Cushing, Oklahoma, for the month in which the produced oil was sold, adjusted for gravity . . . ." 80 Fed. Reg., at 27,023 (§ 226.18).

18. Among other factors, this final rule does not allow for deductions for transportation of the oil and gas from the lease to Cushing, Oklahoma, where the NYMEX price is established. 80 Fed. Reg., at 27,023. (§ 226.18).

19. Few members of the Osage Producers' Association in Osage County, Oklahoma receive the "NYMEX daily price of oil at Cushing, Oklahoma" for the sale of a barrel of oil. Rather, they receive the "highest posted price," which is the highest fair market price as established in the field where the Lessee produces.

20. Historically, the settlement value of a barrel of oil was based on the "actual selling price or the highest posted or offered price by a major purchaser in the Kansas Oklahoma area whichever is higher on the day of sale or removal."

21. On June 17, 2015, the "highest posted price" in Osage County was $56.50. *see* Minerals Council, The Osage Nation, https://www.osagenation-nsn.gov/who-we-are/minerals-council (last visited on June 17, 2015).

22. Therefore, and based on the current rules, Osage Producers' Association members paid royalty based on the $56.50 price, the "highest posted price," or the actual selling price, if a higher price was actually received.

23. The NYMEX price at Cushing is, on average, $3 to $5 per barrel higher than the actual selling price or highest posted price for oil in Osage County.

24. The members would therefore pay a royalty on oil that was $3 and $5 dollars more per barrel than the price actually received or the highest posted price by the members for each barrel of oil sold.

25. This NYMEX pricing is a violation of the rate of royalty provisions within the Oil and Gas Leases already in existence in Osage County and which were freely and fairly negotiated between the members and the Osage Nation, and which have been employed since the inception of the production of oil and gas in Osage County for the proper payment of a royalty to the Osage Nation.

26. Under 25 C.F.R. § 226.5, "Leases issued pursuant to this part are subject to the current regulations of the Secretary, all of which are made a part of such leases . . . [and] no amendment or change of such regulations made after the approval of any leases operates to affect the term of the lease, rate of royalty, ..."

27. This exact language is carried forward into the final rules at 25 C.F.R. §226.8.

28. Nevertheless, § 226.18 prescribes a new minimum royalty rate of 20% for oil, in addition to the NYMEX dialing pricing as explained above.

29. Further, under 25 C.F.R. § 226.20, the BIA prescribes a new minimum royalty of 20% for gas in violation of 25 C.F.R. §226.5, re-codified at § 226.8, as well as "taking" vested private property without just compensation.

30. §226.20 interferes with private contract rights in violation of the United States Constitution. *see* Const. art. I, s. 10, cl. 1.

31. Under § 226.52(B), when the Superintendent makes unilateral decisions that an oil and gas lease is terminated for cause, with no requirement of support or evidence supporting a claim

of termination, the Osage Nation is allowed to "take immediate possession of the lease premises and all permanent improvements and all other equipment necessary for the operation of the lease." 80 Fed. Reg., at 27,030 (§ 226.53(B)).

32. This, along with § 226.18, constitutes an unlawful taking without just compensation.

33. The BIA cannot retroactively attempt to change lease terms "affect[ing] the term of the lease, rate or royalty, rental, or acreage unless agreed by both parties and approved by the Superintendant." 25 C.F.R. §226.5

34. This retroactive change of lease terms amounts to an unconstitutional taking, and this unconstitutional taking will cause irreparable harm to the members of the Osage Producers' Association and is arbitrary and capricious and would cause the early termination of a substantial number of leases in Osage County.

35. Under § 226.31(d), and in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C., § 4321 *et seq.,* the BIA's final rule attempts to compel producer to create and submit a draft environmental assessment. 80 Fed. Reg., at 27,026.

36. Under NEPA, the agency cannot compel an applicant to prepare an environmental assessment. *see* 40 C.F.R. § 1506.5(b) (2013).

37. Rather, an agency can require production of environmental information only, and not a formal environmental assessment. *see* 40 C.F.R. § 1506.5(a) (2013).

38. The BIA may only permit an applicant to prepare a formal environmental assessment, but only if the applicant so chooses. 40 C.F.R. § 1506.5(b) (2013).

39. Nowhere in NEPA is an agency authorized to compel production of a formal environmental assessment by a private party.

40. Rather, "the agency . . . shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment." 40 C.F.R. § 1506.5(b).

41. Any attempt to require a producer to create a formal environmental assessment, in addition to being unlawful, creates a substantial financial burden upon the Lessees and illustrates just one more in a myriad of unlawful and unconstitutional, burdens upon the Lessees imposed by the final rules. *see, e.g.* Performance EA, http://www.bia.gov/WhoWeAre/RegionalOffices/EasternOklahoma/WeAre/Osage/ (click on "Performance EA" under "Documents" heading).

42. Further, the BIA has not undertaken any economic analysis of the impact of these additional costs upon lessees, in violation of its duty to undertake rational decision-making, considering all important aspects of the final rules, thereby rendering the entire negotiated rulemaking process unlawful.

ARBITRARY AND CAPRICIOUS FINAL RULES

43. Petitioner hereby incorporates paragraphs 1 through 42 of this Petition.

44. Proposed changes in the final rules include identifying and enumerating the various highly technical and expert responsibilities delegated to the Superintendent of the Osage Agency. 80 Fed. Reg., at 27,020 (§ 226.4).

45. Nowhere in §226.4 does it require the Superintendant to have oilfield experience or to have other expertise or experience which is absolutely necessary for the orderly and proper administration of the Osage Nation mineral estate. 80 Fed. Reg., at 27,020 (§ 226.4).

46. These actions are arbitrary, capricious, ambiguous, and are detrimental to the oil producers as well as the Osage mineral estate.

47. Under § 226.14 of the final rules, the Superintendent may order further development of an oil and gas lease "in his/her discretion." 80 Fed. Reg., at 27,022 (§ 226.14(c)).

48. The Superintendent may make the decision to order further development if, in his/her opinion, a "prudent Lessee w[ould] diligently develop the minerals." 80 Fed. Reg., at 27,022 (§ 226.14(c)).

49. Allowing the Superintendant discretion to force a hypothetical "prudent Lessee" to further develop a lease by requiring the drilling of additional wells by the Lessee is arbitrary and capricious.

50. Further, it creates an ambiguity as to what a "prudent Lessee" is, without definition or clarification.

51. If a Lessee fails to abide by the Superintendant's determination that a "prudent Lessee" would further drill and develop the Lease, the Lease "will be terminated . . . ." 80 C.F.R., at 27,022 (§226.14(d)).

52. Under § 226.15 and § 226.16, the Superintendant is granted broad discretion to determine if and when drainage of an Osage County oil and gas lease is occurring by an offset operator. 80 Fed. Reg., at 27,023 (§§ 226.15 and 226.16).

53. There is no requirement that the Superintendent gather scientific, technical, or engineering information, opinion, or reports prior to determining that drainage is occurring by offset operators.

54. The Superintendent, without sufficient geologic or engineering support, may order the Lessee to compensate Osage Nation for the purported drainage from offset operations.

55. Allowing the Superintendent such broad discretion is arbitrary, capricious, ambiguous, unjust, and results in an over-concentration of power delegated to the Superintendent.

56. Under § 226.15(b), if the Superintendant claims a lease is being drained by offset operators, the burden then shifts to the Lessee to establish, to the Superintendent's satisfaction alone, that the Lessee could not drill an offsetting well and produce oil and gas for a "reasonable profit," a term not defined in § 226.1 and a term left to the sole discretion of the Superintendent. 80 Fed. Reg., at 27,023.

57. Unless and until a Lessee can convince the Superintendent that a protective, off-setting well will not produce a "reasonable profit," in addition to "the cost of drilling, completing and operating the protective well," the Lessee must either (a) drill a well or (b) may be required to pay royalty compensating for the drainage. *Id.*

58. Such discretion to determine "reasonable profit," without definition or clarification, is the hallmark of arbitrary and capricious.

59. Further, a "reasonable profit" standard can be used to terminate Leases for non-production.

60. This "reasonable profit" standard cannot lawfully be used as there will be no certainty as to the continuity and continuation of a Lease.

61. A "reasonable profit" standard is unlawful, arbitrary, capricious, and creates even further ambiguity in the final rules.

62. Under § 226.29, a Lessee who assigns an oil and gas lease "will continue to be responsible, jointly and severally with the assignee, for lease obligations that accrued before the approval date . . . ." 80 Fed. Reg., at 27025 (§ 226.29(a)(1)).

63. Requiring a former operator to remain liable for, among other things, compensating for future plugging and abandonment of wells, is arbitrary and capricious, and deters the right to own Osage County oil and gas leases by obligating producers to retain such liability.

64. Further, no company is going to issue Bonds which are required to operate when such Bonds can have no defined expiration date.

65. Also regarding forced shutdown or abandonment of wells, the Superintendant will not consider the existence of overriding royalties or other payments when determining profitability of wells and whether or not such wells must be shut down or abandoned, the costs of such shut down or abandonment born solely by the producer.

66. By not taking into account all contractual obligations when determining whether or not a well must be shut down or abandonment for failure to produce a reasonable profit, § 226.30(a) is arbitrary, capricious, and unjust.

67. Lessees invest substantial capital into the drilling, completion, and production of these leases in order to produce oil and gas.

68. To then allow the Osage Nation, upon a flimsy and unsupported determination by the Superintendent that the lease is terminated "for cause," to take the lease equipment without compensation is unlawful, particularly when, as earlier stated, the Superintendent can use the standard of a "reasonable profit" as a basis for termination.

69. The final rule also imposes unreasonable costs on Lessees in Osage County to retrofit and refurbish tank batteries with overly technical and unnecessary valves and seals as well as comply with the National Electric Code, without any BIA consideration of the costs associated with such refurbishment and retrofitting. 80 Fed. Reg., at 27,029 (§226.46), 27,032 (§§226.62, 226.65).

PROCEDURALLY DEFICIENT FINAL RULES

70. Petitioner hereby incorporates paragraph 1 through 69 of this Petition.

71. In spite of the BIA's unsupported statement to the contrary, Respondent Department of Interior's unilateral determination, without support or evidence, that these rules "will not have a significant economic effect on a substantial number of small entities" in Osage

County is wrong, and in violation of the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. *see* 80 Fed. Reg., at 27,016 (V)(B, C).

72. Further, pursuant to Exec. Order 13,211, the BIA failed to undertake an analysis of the effects of the final rules on the energy supply.

73. In addition, pursuant to Exec. Order 12,866, the BIA failed to consider the costs of not only implementation of the final rules, but also costs associated with alternatives to the final rules. Rather, the final rules will have a substantial impact on every Lessee in Osage County that is involved in the production of oil and gas.

74. Further, and in spite of the BIA's unsupported statement to the contrary, the final rules constitute an unlawful taking of individual property rights without just compensation. *see* 80 Fed. Reg., at 27,016 (V)(E).

75. The above-referenced deficiencies in the BIA's final rules are not exhaustive, but rather are for illustrative purposes only.

REQUEST FOR JUDICIAL REVIEW OF NEGOTIATED RULEMAKING

76. Petitioner hereby incorporates paragraphs 1 through 75 of this Petition.

77. Various final rules are unconstitutional and unlawful.

78. Further, the regulatory conditions imposed by the final rule upon the members of the Osage Producers' Association are arbitrary, capricious, and create unnecessary financial burdens upon the Lessees.

79. Also, Respondents' rulemaking procedure and corresponding administrative record lacks factual, scientific, and engineering evidence necessary to sustain the BIA's final rule.

80. Also, the final rules are not properly tailored to achieve the BIA's legitimate government purpose in Osage County, which is to manage the Osage mineral estate for the benefit of the

Osage Nation, taking into account the right of the Lessees to produce oil and gas in an economic and efficient manner.

81. Rather, the final rules do precisely the opposite; they deter not only the Lessees that produce oil and gas, but also cause substantial harm to the Osage Nation by causing a substantial loss of the production of oil and gas.

82. Without proper and fair regulations, the Lessees will take their expertise and capital and will drill and operate wells elsewhere, and the Osage Nation mineral estate will suffer.

83. The Court must find the final rules that will become effective July 10, 2015 are unlawful, unconstitutional arbitrary, capricious, or are not properly tailored to meet governmental objections.

WHEREFORE, Petitioner Osage Producers' Association requests that this Court review the illegalities as well as the procedural and substantive deficiencies of Respondents' Negotiated Rulemaking, culminating in the issuance of the final rules on May 11, 2015. Further, Petitioner requests that the Court find that substantive changes to the current regulations in effect in Osage County are arbitrary and capricious, needlessly burdensome, and not properly tailored to achieve the BIA's legitimate governmental purpose. Further, Petitioner requests this Court grant it all reasonable attorney fees and costs the Court deems just and equitable.

Respectfully submitted,

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