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

(1) OSAGE MINERALS COUNCIL,

Plaintiff,

v.

(2) UNITED STATES DEPARTMENT OF THE INTERIOR,
(3) UNITED STATES BUREAU OF INDIAN AFFAIRS,
(4) SECRETARY OF THE INTERIOR SALLY JEWELL
(5) DIRECTOR OF INDIAN AFFAIRS MICHAEL BLACK,

Defendants.

Civil Case No. 15-CV-371-CVE-PJC

COMPLAINT FOR REVIEW OF FINAL AGENCY ACTION

NATURE OF THE ACTION

1. Osage Minerals Council hereby petitions the Court to prevent implementation of the final agency action of the United States Department of the Interior, Interior Secretary Sally Jewell, Bureau of Indian Affairs (BIA), and BIA Director Michael Black in promulgating the May 11, 2015, the Bureau of Indian Affairs issued *Leasing of Osage Reservation Lands for Oil and Gas Mining; Final Rule*, 80 Fed. Reg. 26994 ("Final Rule"). The Final Rule is attached hereto as **Exhibit 1**. The Final Rule is contrary to law, imposes requirements that are arbitrary, unsubstantiated, lack justification and are unnecessary; it is impossible for lessees to comply; and is destroying development of the mineral estate. Lessees are shutting down and preparing to abandon their wells and leases because it is not possible for them to comply with the requirements by July 10, 2015, and not financially profitable for them to continue operations there, thereby causing irreparable harm to the Osage Mineral Estate.

PARTIES

2. Petitioner **OSAGE MINERALS COUNCIL** ("Petitioner") was established pursuant to Article XV of the Osage Nation Constitution and is an independent agency within the Osage Nation, and is the governing body of the Osage Mineral Estate. Const. of the Osage Nation art. XV, § 4. It is responsible for governing and administering on behalf of and in the interest of the welfare and benefit of the Osage Mineral Estate. *Id.* In this capacity, Petitioner is vested with the powers to administer and develop the Osage Mineral Estate in accordance with the Osage Allotment Act of June 28, 1906, ch. 3572, 34 Stat. 539 ("1906 Act"), and has the authority to act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Minerals Estate, including the initiation and prosecution of claims related to the Osage Mineral Estate. *Id.*

3. Defendant **UNITED STATES DEPARTMENT OF THE INTERIOR** is an agency within the United States, intended to protect and manage the Nation's natural resources and cultural heritage; provide scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities.

4. Defendant **SALLY JEWELL** is the Secretary of the United States Department of the Interior and is responsible for 700 million acres of public subsurface estate and offshore outer continental shelf resources. It is also her responsibility to oversee a significant portion of American energy production, including oil and natural gas, and renewable resources, and in that official capacity, is responsible for implementing and complying with federal law, including the federal laws implicated by this action.

5. Defendant **UNITED STATES BUREAU OF INDIAN AFFAIRS** is an agency within the United States Department of the Interior and is responsible for the administration and

management of 57 million acres of subsurface minerals held in trust by the United States for American Indians, Indian tribes and Alaska natives. In this capacity, BIA is responsible for implementing and complying with federal law, including the federal laws implicated by this action.

6. Defendant **MICHAEL BLACK** is the Director of the Bureau of Indian Affairs, an agency within the United States Department of the Interior, and is responsible for managing the Bureau's day-to-day operations through the Office of Indian Services, the Office of Justice Services, and the Office of Trust Services, which administer or fund infrastructure, law enforcement, social services, tribal governance, natural and energy resources and trust management programs, and, in that official capacity, is responsible for implementing and complying with federal law, including the federal laws implicated by this action.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1331 (2013) (federal question); 28 U.S.C. 1367 (2013) (supplemental jurisdiction); and 5 U.S.C. §§ 551-706 (2013) ("APA").

8. Venue is proper under 28 U.S.C. § 1391(e) (2013) because the United States Department of the Interior and the BIA are agencies of the United States government and the claims arise from actions and events occurring within this district, and the property at issue located in this district.

9. The United States has waived its sovereign immunity under the APA, 5 U.S.C. § 704.

FACTS

10. The Osage Allotment Act of June 28, 1906 ("1906 Act"), reserved to the Tribe and the Osage Tribe of Indians oil, gas, coal, and other minerals of the reservation and

recognized that it had authority to assign leases for these minerals with the approval of the Secretary of the Interior and "under such rules and regulations as [the Secretary] may prescribe." ch. 3572 § 3, 34 Stat. 539, 543. The 1906 Act created a specific set of trust responsibilities:

> The 1906 Act clearly creates a trust relationship – and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case. Though the language of the Act is both arcane and antiquated, after laboring through it there's no question about this much. The Act requires the government to collect royalties, place them "to the credit of" each individual headright owner, and then disburse them to each individual headright owner on a quarterly basis, with interest. *See* 1906 Act §4(1)-(2), 34 Stat. at 544. A small slice of royalty income may be diverted to tribal operations, *id*. §4(3), (4), but all else is "placed… to the credit" of headright owners and distributed to them personally. In short, the 1906 Act imposes an obligation on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner. Over the years both Congress and this court have repeatedly recognized that, in this way, the 1906 Act created a trust relationship between the government and individual headright owners.

Fletcher v. United States, 730 F.3d 1206, 1209 (10th Cir. 2013) (*See, e.g.*, 1906 Act § 4(2), 34 Stat. at 544 (mandating that royalty payments be made the same way as *"other moneys held in trust"* (emphasis added)); Act of Apr. 18, 1912, Pub. L. No. 62-125, § 5, 37 Stat. 86, 87 (referring to Osage funds in the U.S. Treasury as "individual trust funds"); Act of Mar. 3, 1921, Pub. L. No. 66-360, *§* 4, 41 Stat. 1249, 1250 (also describing such funds as "trust funds"); *Globe Indem. Co. v. Bruce*, 81 F.2d 143, 150 (10th Cir. 1935) ("[T]he United States took the legal title to [Osage] funds and moneys in trust, but ... the beneficial title to the funds and moneys vested in the individual members of the tribe."); *Chouteau v. Commissioner*, 38 F.2d 976, 978 (10th Cir. 1930) ("The mineral reserves under the lands are held in trust by the United States for the tribe and its members ....").

> [The 1906] Act created so-called "headrights" which are each tribal member's individual share of the income derived from the minerals located on the land. The minerals and this income were to be placed in trust for the individual tribal

> members, subject to periodic distribution from income, until 1984, when legal title to the minerals together with the accumulated income would vest in the individual Indians.

*United States v. Mason, Admin 'r,*412 U.S. 391, 393 (1973).

11. An Act Relating to the Tribal and Individual Affairs of the Osage Indians of Oklahoma, amended the 1906 Act to further clarify the Secretary's responsibilities in managing and administering the Osage Mineral Estate. An Act Relating to the Tribal and Individual Affairs of the Osage Indians of Oklahoma, ch. 493, 45 Stat. 1478 (1929) ("1929 Act"). In the 1929 Act, Congress further required "[t]he Secretary of the Interior and the Osage tribal council are hereby authorized and directed to offer for lease for oil, gas, and other mining purposes any unleased portion of said land in such quantities and at such times as may be deemed for the *best interest of the Osage Tribe of Indians*," *Id*. at 1479 (emphasis added). The 1929 Act went on to provide further that "as to all lands hereafter leased, the regulations governing same…shall contain appropriate provisions for the conservation of the natural gas for its economic use, to the end that the highest percentage of ultimate recovery of both oil and gas may be secured." *Id*. These provisions of the 1929 Act were reiterated in, *An Act Relating to the Tribal and Individual Affairs of the Osage Indians of Oklahoma*, ch. 645, 52 Stat. 1034, 1035 (1938).

12. The Act of June 15, 1950, Pub. L. No. 81-548, 64 Stat. 215, amended the 1906 Act to provide that the Osage Tribal Council shall determine the royalty, not the President.

13. In 1978, Congress extended the tribal trust forever, i.e. "in perpetuity," and severely limited future succession to headrights by non-Indians. See Pub. L. No. 95-496, §§ 2(a), 5(c), and 7, 92 Stat. 1660 (1978).

14. 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. The Settlement Agreement is attached hereto as **Exhibit 2**.

15. The Settlement Agreement mandated the agency to engage in negotiated rulemaking:

> to improve the management of the Osage Mineral Estate, the Department of the Interior agrees to engage at the earliest date practicable after the Effective Date in a negotiated rulemaking with the Osage Tribe pursuant to 5 U.S.C. §§ 561-570a, in accordance with the terms of that Act and in accordance with the Determination of Need under 5 U.S.C. § 563 attached hereto as Exhibit 8. The scope of the negotiated rule-making should include, but need not be limited to, the following:

i. Identifying the appropriate information needed from all operators, purchasers and payers who are associated with the Osage Mineral Estate and developing and implementing standardized reporting to manage diligently production and accounting;

ii. Identifying the source, manner, and format of transmission whereby the information required by Subsection 9(a) will be provided to the Osage Minerals Council;

iii. Identifying appropriate revisions to the methods for calculating royalties and rentals for oil and gas, including but not limited to royalty rates, royalty value (pricing), and rental rates;

iv. Identifying the best feasible practices for developing and conducting onsite inspection programs;

v. Identifying the feasibility of implementing technological enhancements for generating run tickets and other production data for reporting that information to the Osage Tribe and the United States;

vi. Identifying the best feasible practices for gauging oil and gas production and the resources needed to implement the strategy selected;

vii. Identifying and implementing the best feasible practices for tank battery gauging; and,

> viii. Determining and documenting the formal communication needed to manage diligently the Osage Mineral Estate between the Osage Tribe, the Osage Minerals Council and the United States.

Settlement Agreement, § 9(b)-(c)(2011) (emphasis added).

16. On June 18, 2012, BIA announced its intent to establish an Osage Negotiated Rulemaking Committee. Notice of Intent to Establish an Osage Negotiated Rulemaking Committee, 77 Fed. Reg. 36,226. That announcement set forth the committee and its process. *Id*. at 36,226. Decisions were to be made by consensus. *Id*. at 36,226-27 (emphasis added). The Committee would act solely in an advisory capacity to BIA. *Id*. at 36,227. The head of BIA would determine whether the use of a negotiated rulemaking procedure was in the "public interest." *Id*. (emphasis added). Seven (7) factors would be applied in determining "public interest":

> 1. A rule is needed. BIA has determined that in order to avoid future litigation and to better assisted it in managing and administering the Osage Mineral Estate, a rule is necessary.
> 2. A limited number of identifiable interests will be significantly affected by the rule. The regulations governing the Osage Mineral Estate apply only to the Osage Mineral Estate and the Osage Agency, and do not have broader applicability. For this reason, a limited number of readily identifiable interests will be significantly affected by the rule.
> 3. Due to the limited applicability of the current regulations and the limited number of interest holders, there is a reasonable likelihood that BIA can convene a Committee with a balanced representation of persons who:
> * can adequately represent the interest defined in item 2, above; and
> * are willing to negotiate in good faith to attempt to reach a consensus on provisions of a proposed rule.
> 4. There is a reasonable likelihood that the Committee will reach consensus on a proposed rule within a fixed period of time. This is due to the settlement of the litigation and the desire of the Osage Nation and the Bureau of Indian Affairs to avoid further litigation by addressing and improving management and administration of the Osage Mineral Estate as soon as possible.
> 5. The use of negotiated rulemaking will not unreasonably delay development of a proposed rule and the issuance of a final rule. We anticipate that negotiation will expedite a proposed rule and ultimately the acceptance of a final rule.
> 6. BIA is committed to ensuring that the Committee has sufficient resources to commit its work in a timely fashion.

> 7. BIA, to the maximum extent possible and consistent with its legal obligations, will use the consensus report of the Committee as the basis for a proposed rule for public notice and comment.

Id. (emphasis added).

> 17. Procedures were also prescribed:
>
> A. Committee Formation. The committee will be formed and operate in full compliance with the requirements of FACA and NRA and under the guidelines of the Committee's charter.
> B. Interests Involved. BIA intends to ensure full and adequate representation of those interests that are expected to be significantly affected by the proposed rule. Under 5 U.S.C. § 562(5), "'interest' means with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner." The regulations governing the Osage Mineral Estate apply only to the Osage Mineral Estate and the Osage Agency. For this reason, BIA believes the membership described below fully and adequately represents those interests expected be significantly affected by the proposed rule.
> C. Members. The Committee cannot exceed 25 members, and BIA prefers nine members. The Secretary of the Interior will provide four members (two from BIA, one from the Bureau of Land Management, and one from the Office of Natural Resources Revenue), plus a facilitator. Five members have been chosen by the Osage Minerals Council. The facilitator will not count against the membership and will not be a voting member.
> ***
> D. Tentative Schedule. BIA will publish the first meeting date in a Federal Register notice. The Committee will determine the dates of future meetings, notice of which will then be published in the Federal Register…. The Committee will meet bi-monthly with the first meeting tentatively planned for August 2012. BIA plans to terminate the Committee if it does not reach consensus on a report within 24 months of the first meeting. The Committee may end earlier upon the promulgation of the final rule, or if either BIA, after consulting with the Committee, or the Committee itself, specifies an earlier termination date.
> E. Technical Assistance. BIA will ensure that the Committee has sufficient administrative and technical resources to complete its work in a timely fashion. BIA, with the help of a facilitator, will prepare all agendas, provide meeting notes, and provide a final report of any issues on which the Committee reaches consensus. BIA will also obtain space for all meetings.

77 Fed. Reg. at 36,227-28 (emphases added).

18. On July 26, 2012, former Secretary Salazar issued a document in the Federal Register establishing the Osage Negotiated Rulemaking Committee. Establishment of the Osage

Negotiated Rulemaking Committee, 77 Fed. Reg. 45,301. That document provided information on the membership of the Committee:

> The Department understands that the Osage Minerals Council, which is the governing body of the Osage Mineral Estate, voted on the members who would sit on the Committee in order of preference; therefore, the interests of all Council members will be represented by the members voted to serve on the Committee by the Osage Minerals Council.

Id. (emphasis added). The notice of establishment also provided the interests of individual headright holders would be adequately represented by the Minerals Council members because "each of whom is an elected member of the Osage Minerals Council and empowered to make decisions regarding the Osage Minerals Estate." *Id*.

19. On July 31, 2012, the Secretary established the Osage Negotiated Rulemaking Committee ("Committee") to revise the then current Leasing of Osage Reservation Lands for Oil and Gas Mining, 25 C.F.R. 226, rule. *Establishment of the Osage Negotiated Rulemaking Committee*, 77 Fed. Reg. 45,301. The Committee consisted of nine (9) individuals: five (5) chosen by the Osage Tribe/Osage Mineral Council and four (4) federal employees two (2) from BIA, one (1) from the Bureau of Land Management, and one (1) from the Office of Natural Resources Revenue. *Id*. at 45,302 (The BIA explained that the Committee members were the same as listed in the Federal Register on June 18, 2012, 77 Fed. Reg. at 36,227).

20. On August 22, 2012, the Committee approved formal Operating Procedures of the Committee. Osage Negotiated Rulemaking Committee, *Operating Procedures* (Aug. 22, 2012).

21. On March 20, 2013, Petitioner passed Resolution No. 2-155 requesting the Department of the Interior to extend the Negotiated Rulemaking process because the rules were problematic and Petitioner needed to understand the effects on the Osage Mineral Estate.

Resolution of the Osage Minerals Council No. 2-155, *available at* http://www.bia.gov/cs/groups/xregeasternok /documents/text/idc1-021504.pdf.

In April 2013, BIA dismissed Petitioner's resolution:

> The Osage representatives to this Reg-Neg Committee are representing themselves as individuals and not as members of, or representatives from, the Osage Mineral Council. As such, the resolution passed by the Osage Mineral Council is not an official articulation of the position of the Osage representatives to the Reg-Neg Committee but rather has been accepted by the Committee as a public comment. The timeframe that the Committee has been operating on is to seek a consensus opinion at the end of today's meeting [the April 2 meeting] and that is the schedule on which the Committee is moving forward today.

Osage Negotiated Rulemaking, Meeting 8 Meeting Summary (Apr. 2, 2013), *available at* http://www.bia.gov/cs/groups/xregeasternok/documents/text/idc1-021758.pdf.

22. On April 25, 2013, the Rulemaking Committee voted to approve and transmit a package of proposed regulations to BIA for consideration. *Osage Tribe Negotiated Rulemaking*, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/osageregneg/ (last visited June 25, 2015).

23. On April 25, 2013, the Rulemaking Committee provided a report to BIA with its proposed regulations approved by the Rulemaking Committee Proposed Rule: Leasing of Osage Reservation Lands for Oil and Gas Mining, 78 Fed. Reg. 53,083, 53,083 (Aug. 28, 2013). BIA reviewed the proposed revised regulations and made changes to meet formatting, statutory and other legal requirements.

24. On August 28, 2013, the Department of the Interior published a proposed rule in the Federal Register that was based on the report submitted by the Rulemaking Committee. 78 Fed. Reg. at 53,083.

25. The comment period was set to end on October 28, 2013, however, on November 1, 2013, BIA extended the comment period to November 18, 2013. 80 Fed. Reg. at 26,994.

26. On March 9 and again later on March 19, 2015, Petitioner demanded Informal Dispute Resolution pursuant to the Settlement Agreement Paragraph 11(j). Letter from Osage Minerals Council, to Sally Jewell, Secretary of the Interior and John Cruden, Assistant Attorney General, Environmental and Natural Resources Division (Mar. 9, 2015); Letter from Osage Minerals Council, to Sally Jewell, Secretary of the Interior and John Cruden, Assistant Attorney General, Environmental and Natural Resources Division (Mar. 19, 2015).

27. On April 9, 2015, Petitioner met with Department of the Interior staff Vanessa Ray Hodge (Senior Counselor to the Solicitor), Ken Dalton (Director of the Indian Trust Litigation Section), Robin Phillips (Superintendent of BIA-Pawhuska Agency), and Eddie Streater (BIA-Eastern Oklahoma Acting Regional Director). There, the Department of the Interior argued that the informal dispute process set forth in the Settlement Agreement did not apply to any aspect of the negotiated rulemaking after the negotiated rulemaking began. DOI argued the provisions of Paragraphs 11(j) and (i) only would apply to the initiation of the negotiated rulemaking, i.e. if the United States had never initiated the rulemaking process, then Petitioner could seek informal dispute resolution to enforce Section 9. It went on to state that, any and all procedural issues related to the negotiated rulemaking would have to be appealed under the Administrative Procedures Act, rather than the process described in the Settlement Agreement. DOI would not discuss the matter further, telling Petitioner that the process was governed by the Federal Advisory Committee Act ("FACA") and the Negotiated Rulemaking Act ("NRA"), and that it could attack the procedure only after the final rule was issued.

28. On April 16, 2015, Petitioner wrote to Secretary of the Interior Sally Jewell again requesting meaningful participation in the development of the Final Rule. Petitioner pointed out that Mr. Godfrey and Mr. Reineke introduced all the regulations, basically templated from

regulations applicable to other tribes and Federal lands. Petitioner went on to state that input from oil producers and landowners fell on deaf ears, and the end result was higher royalty pricing would be imposed on all producers, thereby negatively impacting the returns to Osage shareholders.

29. On May 11, 2015, BIA issued the Final Rule which stated that it "update[d] the leasing procedures and the rental, operations, safety and royalty requirements for oil and gas production on Osage mineral lands." 80 Fed. Reg. at 26,994.

TRIBAL MINERAL LEASING STATUTES

30. The statutory authorities cited and relied upon by Respondents in promulgating the Final Rule include:

> Osage Allotment Act of June 28, 1906, ch. 3572, § 3, 34 Stat. 539, 543;
> An Act Relating to the Tribal and Individual Affairs of the Osage Indians of Oklahoma, ch. 493, §§ 1-2, 45 Stat. 1478, 1478-80 (1929);
> An Act Relating to the Tribal and Individual Affairs of the Osage Indians of Oklahoma, ch. 645, § 3, 52 Stat. 1034, 1035-36 (1938); and
> Pub. L. No. 95-496, § 2(a), 92 Stat. 1660, 1660 (1978).

80 Fed. Reg. at 27019 (May 11, 2015); 78 Fed. Reg. 53088 (Aug. 28, 2013).

The statutory authorities cited and relied upon by Respondents when announcing its notice of intent to establish an Osage Negotiated Rulemaking Committee include:

> Federal Advisory Committee Act, 5 U.S.C. Appendix 2, § 1;
> Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447; (codified in scattered sections of 30 U.S.C.);
> Negotiated Rule Making Act of 1996, 5 U.S.C. §§ 561-570a;
> Osage Allotment Act of June 28, 1906, ch. 3572, § 3, 34 Stat. 539, 543; and
> *Leasing of Osage Reservation Lands for Oil and Gas Mining*, 25 C.F.R. Part 226.

77 Fed. Reg. at 36226 (June 18, 2012).

CLAIMS FOR RELIEF

31. Respondents' issuance of the Final Rule constitutes a final agency action subject to review by this Court. 5 U.S.C. §§ 551(13), 704.

32. The agency's actions and inactions in adopting the Final Rule are reviewable under the APA and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; in excess of statutory jurisdiction, authority, or limitation; and without observance of procedure required by law, all in violation of the APA, 5 U.S.C. § 706(2); and represents agency action unlawfully withheld, in violation of APA, 5 U.S.C. § 706(1). The Court should set aside these actions.

Respectfully submitted this 30th day of June, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2015, I filed a true and correct copy of **PETITION FOR REVIEW OF FINAL AGENCY ACTION** via the court's ECF system, with notification sent to those listed below.

/s/ Martha L. King
Martha L. King