

August 3, 2018

**OPINIONS OF THE ATTORNEY GENERAL
OF THE OSAGE NATION
ONAG-2018-05
(Slip Opinion)¹**

QUESTIONS SUBMITTED BY: The Honorable Geoffrey M. Standing Bear, Principal Chief of the Osage Nation, on behalf of Marsha Harlan, Osage Minerals Council, Chair.

This Office has received your request for an Official Attorney General Opinion regarding conflicts of interest within Osage Nation laws, specifically the Code of Ethics, OSAGE CONST., Art. X (2006) and the Osage Nation Ethics Law, 15 ONC § 6-101, *et seq.*

To which you ask:

Whether a duly elected Osage Minerals Council member who is an oil producer with ownership in a company which does business with the Osage Nation presents a conflict of interest within the laws of the Osage Nation?

Further, if a conflict of interest exists, how can same be remedied absent sale of the company?

I. SHORT ANSWER

A potential conflict of interest is created under Osage law when an Osage Minerals Council member owns and operates a business as an oil producer within the Osage Nation, and the potential conflict must be remedied using the provisions in the Osage Nation Ethics Law at 15 ONC § 6-202(C) before any official action is taken.

II. DISCUSSION

A. OSAGE MINERALS COUNCIL

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The Osage Mineral Estate consists of the “oil, gas, coal, and/or other minerals within the boundaries of the Osage Reservation.” OSAGE CONST., Art. XV, § 2 (2006). In order to discharge the Osage Nation’s perpetual obligation to protect and preserve the Osage Mineral Estate, the Constitution of the Osage Nation created the Osage Minerals Council. *Id.* at § 4. The Osage Minerals Council is established as an independent mineral management agency within the Osage Nation government responsible for managing and administering the Osage Minerals Estate. *Id.* The Constitution gives the Osage Minerals Council the power to: consider and approve leases, propose other forms of development of the Osage Minerals Estate, and promulgate its own rules and regulations. *Id.* Additionally, according to the Code of Federal Regulations, the Minerals Council has the authority to accept bids for lease sales, enter into contracts with lessees, set the primary term of leases, revise the royalty rate, change the payment date of royalty payments, waive late charges, utilize or merge two or more leases, consent to the assignment of leases, decide disputes between homesteaders and operators, and grant easements for wells. 25 CFR § 226.

B. APPLICABILITY OF OSAGE NATION LAWS

The Constitution created a Code of Ethics for *all tribal officials* and employees of the Osage Nation. OSAGE CONST., Art. X (2006). (Emphasis added). Art. X, § 9 expressly states the Code of Ethics applies “to all political subdivisions of the Osage Nation, including members of the boards, commissions and other bodies.” The Constitution sets the Minerals Council as an “independent agency within the Osage Nation...” *Id.* at § 4. The Osage Minerals Council consists of members of the Osage Nation and are elected by Osage mineral royalty interest holders. *Id.* at § 3.

Pursuant to the Constitution at Art. X, § 10, the Osage Congress enacted the Osage Nation Ethics Law to “establish clear parameters of acceptable standards of conduct by government officials [] and to require accountability of elected, appointed, and assigned Osage Nation officials...” 15 ONC § 6-102. The Ethics Law defines tribal official as “any person holding an elected or appointed office of any governmental body of the Osage Nation as defined herein.” 15 ONC § 6-103(Y). A governmental body is defined in the Ethics Law as “any branch, entity, enterprise, authority, division, department, office, commission, council, board, bureau, committee, legislative body, agency, and task force of the Executive Branch, *including the Osage Nation Minerals Council*, Legislative Branch, or Judicial Branch of the Osage Nation.” *Id.* at (O). (Emphasis added). Thus, the Osage Minerals Council and its members are tribal officials and, therefore, expressly subject to the Constitutional Code of Ethics and the Osage Nation Ethics Law.

C. POTENTIAL CONFLICT OF INTEREST

The question presented specifically relates to an Osage Minerals Council duly elected member who is an oil producer and does business within the Osage Nation. As stated above, oil is part of the Osage Minerals Estate, which is reserved to the Osage Nation. The Osage Minerals Council is charged with managing and administering the Osage Minerals Estate, of which *one* duty is approving leases. If a person is producing oil within the Osage Nation, then they must have a lease with the Osage Nation approved by the Osage Minerals Council. This means the Osage Minerals Council member, who is also an oil producer, is potentially put in a position of both lessor and lessee.

The Ethics Law prohibits tribal officials and employees from engaging "in other employment or economic activity which involves inherent substantial conflict with their responsibilities and duties as Osage Nation Officials or employees of the Osage Nation." 15 ONC § 6-202(E)(1)(a). "Conflict of interest" is defined as "the reasonable foreseeability that any personal or economic interest of the Osage Nation official or employee will be affected in any different manner from the interest of the general public, by any decision, enactment, agreement, award or other official action of function of any governmental body or political subdivision of the Osage Nation." 15 ONC § 6-103(H).

A reasonable man could foresee that the personal economic interest of an Osage Minerals Council member, who is an oil producer, would be affected in a different manner than the general public if that member is also responsible for approving leases to other oil producers. Thus, a conflict of interest exists with that Osage Minerals Council member approving leases in the same business with which the member is associated.

Approval of leases is only one official action of the Osage Minerals Council. The management and administration of the Osage Minerals Estate goes beyond lease approval. The Constitution, CFR's, and past business practices of the Osage Minerals Council dictate additional duties and responsibilities. The other official actions and functions of the Osage Minerals Council do not necessarily create an inherent substantial conflict of interest between a Minerals Council member who is also an oil producer. This must be determined on a case-by-case basis, as is done with every board member before every official action.

D. REMEDY

The Ethics Law makes an important distinction between the existence of a conflict of interest and an Ethics Law violation. A conflict of interest can exist without an ethics violation. An ethics violation occurs when the official or employee takes official action for personal gain. *See*, 15 ONC § 6-202(B)(e.g., using public office to influence for private gain, giving preferential treatment, garnering special favor, and disclosing proprietary information). The Ethics Law provides a remedy when an Osage official is required to take action on a matter in which such official has a personal or economic interest. The Ethics Law, at 15 ONC § 6-202(C), states, upon discovery of a conflict of interest, the official shall:

1. Prepare and sign a written statement describing the matter requiring action and the nature of the potential conflict;
2. Disseminate copies of that statement to his or her immediate supervisor, the presiding officer of and/or any decision maker concerning the action to be taken, and the responsible party for inclusion in the official record of any vote or other decision;
3. Abstain from sponsoring, influencing or in any manner attempting to influence any vote, official decision or

determination which would favor or advance such person's personal economic interest in such matter; and

4. Abstain from voting or otherwise participating in the official decision or determination of such matter, unless otherwise legally required by the Osage Constitution or by law.

III. CONCLUSION

It is, therefore, the official opinion of the Attorney General, that:

A Minerals Council member's ownership and operation as a producer within the Osage Nation Reservation presents a potential conflict of interest within the laws of the Osage Nation in performance of some of the member's official duties, and any conflict must be remedied using the appropriate procedures listed in the Ethics Law, which include disclosure and abstention.

Respectfully submitted,

Clint Patterson,
1st Asst. Attorney General