

**TESTIMONY OF
OSAGE MINERALS COUNCIL CHAIRMAN EVERETT WALLER**

**TRIBAL CONSULTATION ON THE PROPOSED RULE ON TRIBAL ENERGY
RESOURCE AGREEMENTS**

July 11, 2019

Good morning. I am Nekapahxe, or Everett Waller. I have the honor of serving as the Chairman of the Osage Minerals Council, an independent agency within the Osage Nation government that is constitutionally empowered to administer and develop the Osage Mineral Estate. Before serving in this capacity, I worked for over thirty years in the Osage oil fields, including as a Field Supervisor for the BIA Osage Agency Branch of Minerals. On behalf of the Osage Minerals Council, I provide this testimony on the proposed rule on Tribal Energy Resource Agreements, or TERA.

The Osage Mineral Trust System

I would first like to provide some background on the Osage Nation Reservation, the Osage Mineral Estate, the role of the Osage Minerals Council, and the hybrid Osage Mineral Trust System that has been in place for over a century. All of this is relevant to the proposed rule.

The Osage Reservation spans an area of approximately 1.47 million acres and is contiguous with Osage County, Oklahoma. Pawhuska, Oklahoma, is the seat of Osage government and has been since the Osages purchased these lands from the Cherokee Nation in 1871 and moved from our last reservation in Kansas to the Indian Territory. Our Osage people agreed to move to our current homeland only after our spiritual leaders, led by Wah-Tian-Ka, advised that our new home would provide for our children and elders.

In 1906, the Congress enacted the Osage Allotment Act for the primary purpose of allotting parcels of land to individual Osages. The 1906 Act included provisions in the law related to Osage minerals production that are unlike any of the other allotment acts that apply to the lands of other tribal nations in the United States, and those provisions still govern Osage minerals production today.

The 1906 Act directed the Secretary to create a roll of Osages and their children for two purposes: one, to have the right to receive surface land allotments of the Osage Reservation, and two, to receive a "headright," or the right to receive proceeds from Osage Mineral Estate, the Reservation subsurface. The 1906 Act also provided that the United States, as trustee, would hold the Osage Mineral Estate in beneficial trust for the Osage government. Oil and other minerals production companies could enter into leases with the Osage government, with approval of the Secretary through the Superintendent of the BIA Osage Agency. After the Superintendent approved a lease, the lessees would make payments to the BIA (now Office of Special Trustee) to be deposited, invested, and paid out to the headright owners every three months. The Osage Nation government, under the 1906 Act, does not accept payments, invest, distribute, or ever control Osage minerals proceeds.

Through a 1921 amendment to the 1906 Act, Congress mandated that the Osage government offer minerals production companies at least 25,000 acres of the Reservation for exploration each year. The Osage Nation is the only tribe in America with such a federal mandate.

This Osage mineral trust system is still in place over a century later. Although Congress, in 2004, clarified that the Osage government has authority to determine its own membership and form of government, and although Congress made clear that the Osages have created a constitutional form of government, the operation of *federal* control over Osage mineral leasing, mineral management, investment of proceeds from minerals, and payments to headright holders continues to the present. The day-to-day operations of Osage minerals and trust funds management are handled by federal agencies.

Over the last century, the Osage Reservation has produced significant quantities of oil. In fact, one of our experts has testified that only one other county in the United States has produced more oil than Osage County. In 2014, the Osage Agency estimated that in Fiscal Years 2012 through 2027, the Osage Mineral Reservation would generate \$13.6 billion in royalties for our Osage headright holders.

In recent years, Osage minerals production has dramatically slowed. This lack of production results in a human cost to our Osage headright holders, including elders who rely on income from Osage minerals. This decline in revenue is, in part, the result of systems and decisions related to administration of the Osage Mineral Estate.

As a result, the Osage Minerals Council is exploring whether a TERA would be beneficial for the Minerals Council and the Osage headright holders. We are working with the Osage Chiefs and Congress in this work. My testimony today is intended to ensure that the rules provide a useful and meaningful pathway for more efficient Osage minerals production and increased quarterly payments to our Osage headright holders.

Suggested Changes to the TERA Proposed Rule

Amending the proposed TERA rule to ensure that it applies to the Osage Nation has the potential to remedy to what the Department of Interior's Inspector General characterized as the BIA's "fundamentally flawed" and "[in]effective manag[ement] [of] the [Osage] mineral estate."¹ Accordingly, the final rule should address the Osage Minerals Council's concerns, which include the applicability of the TERA regulations to the Osage Nation.

Definition of "Tribal Lands"

The Osage Mineral Council would like to ensure that the Osage Nation and Minerals Council would qualify for a TERA. In the current regulations, which are referenced in the proposed rule, "Tribal lands" is defined as:

¹ Office of the Inspector Gen, U.S. Dep't of the Interior, *BIA Needs Sweeping Changes to Manage the Osage Nation's Energy Resources* 1 (October 2014).

[A]ny land or interests in land owned by a Tribe or Tribes, title to which is held in trust by the United States or is subject to a restriction against alienation under the laws of the United States. For the purposes of this part, tribal land includes lands taken into trust or subject to restrictions on alienation under the laws of the United States after the effective date of the agreement.

While we believe the Osage Minerals Estate falls within the “interest in land” clause of the definition, the explanation of the new rule should specifically clarify that the Osage Mineral Estate fits within “Tribal lands” definition.

Funding Formula

The 2018 TERA amendments include a provision for funding a tribe’s activities in carrying out an approved TERA. This provision requires the Secretary to make available to a TERA tribe any amounts of money that the Department would otherwise expend, but now does not have to expend, because the tribe is carrying out a TERA. In short, if the tribe performs a function or activity under a TERA that the Secretary once performed, the amount the Department saves because the Tribe is performing the function are to be made available to the Tribe.

The 2018 amendments also require the Secretary to adopt regulations by December 2019, including detailed provisions for implementing the tribal funding requirements. Therefore, the provisions of the regulations addressing tribal funding for carrying out a TERA will be especially important to the Osage Minerals Council.

Unlike other tribes, federal law limits the budget the Minerals Council can draw down from the Osage tribal trust account for minerals matters to \$1 million annually. Other tribes that own both the minerals and the proceeds can reinvest the proceeds back into minerals management. The Department needs to adopt an expansive rule on federal dollars the Osages can access.

Pre-Application Consultation and the Form of Application

The proposed rule requires a tribe interested in entering into a TERA to request a pre-application consultation with the Secretary. While the pre-application consultation would likely be beneficial, there are no timelines provided in the proposed rule in which the consultation must occur. Lack of guidance as to a timeline may serve as a barrier to a tribe submitting its TERA for consideration by the Secretary. In furtherance of accomplishing Congress’ goal in creating a more efficient TERA process, the Department should adopt a timeline in which a pre-application consultation must occur so as not to delay a tribe’s submission of their TERA for approval.

Inherent Federal Functions

In the proposed rule, there are two references to “inherently federal functions.” The first reference states that a tribe’s TERA “[m]ay include assumption by the Tribe of certain activities normally carried out by the Department, except for inherently Federal functions,” while the second reference states that any administrative responsibilities a tribe assumes through its TERA “may not include the responsibilities of the Federal Government under the Endangered Species

Act or other inherently Federal functions.”

Failure to define “inherently Federal functions” could lead to a number of unintended consequences, including decisions related to funding agreements and the scope of administration a tribe is authorized to oversee. For these reasons, the Department should clarify what constitutes “inherently Federal functions” as it concerns TERAs.

Extensions of the TERA Review Period

The TERA amendments provide definitive timelines in which a TERA must be approved or disapproved. The proposed rule authorizes the Secretary to extend the 270-day review period, with the consent of the tribe, when the tribe submits a final proposed TERA that “differs significantly or materially from the original TERA contained in the complete application.” Absent the Secretary’s disapproval of a TERA, in which case a tribe is given time to revise its TERA, the TERA amendments do not provide discretion to the Secretary to extend the 270-day review period. Any extension past the 270-day review period would be contingent upon the Secretary disapproving the TERA submitted by the tribe.

Reducing the Scope of a TERA or Rescinding a TERA

In the case of the Osage Nation, there is not a single tribal governing body that can unilaterally decide to reduce the scope of a TERA or rescind a TERA related to the Osage Minerals Estate. Rather, any decision related to the reducing the scope of an Osage Nation TERA or rescinding an Osage Nation TERA affecting the Osage Minerals Estate would require agreement from both the Osage Minerals Council and the Osage Nation Congress and Chief.

Public Comments on TERA Application

The proposed rule states that notice will be provided in the Federal Register containing information that advises “the public how to comment on a final proposed TERA.” The proposed rule then states that “The Secretary will review and consider public comments in deciding to approve or disapprove the final proposed TERA.” The Department should clarify this provision of the proposed rule to make clear that public comment alone is not a basis for approving or disapproving a TERA, but rather, an element considered when the Secretary makes a determination as to whether any of the four reasons for disapproving the TERA apply, including: (1) the tribe’s failure to demonstrate capacity; (2) a provision of the TERA would violate applicable Federal law; (3) the TERA does not include the required periodic review and evaluation provisions; and (4) the TERA does not include any of the required enumerated provisions.

Conclusion

This testimony offers some general comments about the proposed rule that we believe the Department should address. We will provide more specific comments by the September 3, 2019 comments deadline.