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Osage County Oil and Gas EIS
Bureau of Indian Affairs, Osage Agency
Attn: Superintendent
P.O. Box 1539
Pawhuska, Oklahoma 74056

Via email osagecountyoilandgaseis@bia.gov

Re: Comments concerning Draft Osage County Oil and Gas Environmental Impact Statement

Dear Superintendent:

This law firm represents Drummond Ranch, LLC ("Drummond Ranch"). Please accept the following comments on behalf of our client regarding the Draft Environmental Impact Statement ("DEIS") to be considered by the Bureau Indian Affairs' ("BIA"). Drummond Ranch owns real property within Osage County subject to oil and gas leases between various operators and the Osage Nation. The approval of the DEIS will have a direct impact on the interests of Drummond Ranch.

As you know, the BIA is required to consider these comments in its decision-making process for approving this DEIS in order to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. *See Forest Guardians v. U.S. Fish and Wildlife Service*, 611 F.3d 692, 717 (10th Cir. 2010) ("The purpose behind NEPA is to ensure that the agency will only reach a decision on a proposed action after carefully considering the environmental impacts of several alternative courses of action and *after taking public comment into account*.").

COMMENTS REGARDING EIS IN GENERAL

At the outset, we note that the DEIS does not require site-specific environmental assessments for approval of leases. This is in direct violation of Tenth Circuit's mandate requiring the federal agencies to analyze site-specific impacts prior to leasing. *See New Mexico ex rel.*

Richardson v. Bureau of Land Management, 565 F.3d 683, 717-18 (10th Cir. 2009) ("assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point."). This shell-game approach—lease first and analyze later—fails to satisfy the BIA's mandate under NEPA and its implementing regulations.[1] The Tenth Circuit has made clear that site-specific analysis must be conducted at the "earliest practicable point." *Id.* at 718. That point is at the leasing stage, not after "bureaucratic momentum" has taken over and drilling is virtually assured. *See Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1220–21 (D. Colo. 2007).

In addition to Tenth Circuit case law on NEPA, the Osage regulations themselves provide that site-specific analysis shall occur **prior** to approval of leases. *See* 25 C.F.R. § 226.2(c) ("Each oil and/or gas lease and activities and installations associated therewith subject to these regulations **shall** be assessed and evaluated for its environmental impact **prior** to its approval by the Superintendent.") (emphasis added). Standard Osage oil and gas leases provide that the lessee "shall have the right to use so much of the surface land within the Osage Mineral Estate as may be reasonable for operations and marketing." The Osage leases further grant the right to "lay and maintain pipelines, electric lines, pull rods, and other appliances necessary for operations ... the right of way for ingress and egress ... and the right to use water for lease operations." Thus, the approval of a lease by the Superintendent virtually guarantees that there will be surface disturbance before any environmental analysis has been conducted. The BIA is urged to revise the DEIS to show that NEPA analysis will be conducted prior to approval of leases, as required by the Tenth Circuit and the Osage regulations.

COMMENTS AS TO PROPOSED ALTERNATIVES

Alternative 1

This No Action Alternative is unrealistic. It is common knowledge that the oil and gas activity has caused significant environmental issues in Osage County. *See The Effectiveness of Oil and Gas Regulatory Oversight on Oil and Gas Operations, Osage County, Oklahoma*, The Environmentally Friendly Drilling Program, July 2013 found at http://efdsystems.org/pdf/OSAGE_Report_8_5_13.pdf (last accessed February 21, 2020). Alternative 1 should be disregarded.

Alternative 2

While Alternative 2 is more realistic than the No Action Alternative, it simply does not provide enough protections against further environmental harm. In *Description of Landscape Features, Summary of Existing Hydrologic Data, and Identification of Data Gaps for the Osage Nation, Northeastern Oklahoma, 1980-2012*, authored by the U.S. Geologic Survey, the USGS identified significant gaps in data collected to truly analyze the effect of historic oil exploration on groundwater in Osage County. *Id.* at 44-45. The Report also identified elevated dissolved chloride in secondary drinking

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[1] *See* Council on Environmental Quality, National Environmental Policy Act Task Force Report: *Modernizing NEPA Implementation*, p. 39 (Sept. 24, 2003) (finding that reliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a "shell game" of when and where deferred issues will be addressed, undermining agency credibility and public trust.)

water standards established by the EPA. *Id.* at 34-36. It is obvious that there has been historic damage to the environment in Osage County, including but not limited to natural resources such as the land and groundwater, not to mention wildlife. The BIA itself has admitted that "[b]rine infiltration from water flood injection used in oil recovery has contaminated the water-bearing strata and is a water quality problem in Osage County." *See* 2014 Osage Leasing Programmatic Environmental Assessment, Section 4.3. Simply stated, the environmental issues in Osage County require strong and effective measures to mitigate the impact of oil and gas activity. Alternative 2 should also be disregarded.

Alternative 3

This Alternative, while not perfect, is an improvement over the status quo and the proposed Alternative 2. It is appreciated that this Alternative avoids the one-size-fits-all approach. Osage County is so vast that cookie cutter environmental protections are futile. It is important that the BIA be permitted to utilize a patchwork of differing constraints and rules based upon the differing conditions in the county. We would also propose that the BIA consider differing types of leases, as opposed to the standard Osage Oil and Gas Lease. An example of additional types of leases that should be considered include No Surface Occupancy ("NSO") leases, (2) Controlled Surface Use ("CSU") leases and (3) Timing Limitation ("TL") leases. An NSO lease prohibits occupation of the surface and requires directional drilling. A CSU lease imposes restrictions beyond that in traditional leases in order to address site-specific issues for the property subject to the lease. A TL lease prohibits drilling activity for a certain period of time. This Alternative should be strongly considered by the BIA.

Alternative 4

This Alternative should also be strongly considered by the BIA. The Tallgrass Prairie Reserve, as well as our state parks in Osage County, are state treasures. As such, it is important to protect their natural beauty.

Drummond Ranch, LLC, appreciates your consideration of the concerns addressed in this letter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Donald A. Lepp