January 23, 2020

Comments directed to the Bureau of Indian Affairs on the Revised Draft Osage Oil and Gas Environmental Impact Statement (Draft EIS)

Submitted via email to: osagecountyoilgaseis@bia.gov and mosby.halterman@bia.gov

Please consider these comments:

Alternatives 3 and 4 –

The Draft EIA in Paragraph 4.1.2, page 4-3, Analytical Assumptions:

> "Implementing actions from any of the alternatives would be in compliance with all valid existing rights, laws, federal regulations, BIA policies, and other requirements."

Alternatives 3 and 4 are not in compliance with the 1906 Osage Allotment Act and existing oil and gas leases. Therefore, Alternatives 3 and 4 must be eliminated from consideration.

Compliance with NEPA –

The sister document, OKT-BLM/BIA EIS, November 2019, Volume 1, page ES-2, Bureau of Indian Affairs:

> "Compliance with the National Environmental Policy Act of 1969 (NEPA) is an inherently Federal responsibility, ... "

And NEPA, the law:

> "Sec. 102 [42 USC § 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and all agencies of the Federal Government shall -- .....
>
> > (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
> >
> > > (i) the environmental impact of the proposed action,
> > >
> > > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, ...”

What is the proposed action? It is the administration of the Osage mineral estate by the “... Secretary of the Interior, and under such rules and regulations as he may prescribe ... “(Osage Allotment Act of 1906 and the current prescription of the Secretary, 25 CFR 226.) The administration of the mineral estate is a nondiscretionary responsibility. Only the discretionary responsibilities of the Superintendent described in 25 CFR 226 are subject to NEPA. This is being clarified (a consequence of court findings) in the proposed revisions to the CEQ rules, (40 CFR 1509.1(q), January 10, 2020), “... NEPA is inapplicable where an agency is carrying out a nondiscretionary duty or obligation ...”.

CEQ’s discussion of proposed changes (Federal Register / Vol. 85, No. 7 / Friday, January 10, 2020 / Proposed Rules 1695):

> *“Since the enactment of NEPA, courts have examined the applicability of NEPA based on a variety of considerations. For example, courts have found that NEPA is inapplicable where an agency is carrying out a nondiscretionary duty or obligation.... “*

Section 102(1)(C) does not prohibit environmental effects, it requires a detailed statement on “adverse environmental effects which cannot be avoided”.

The Draft EIS fails to make even a superficial statement of the “adverse environmental effects which cannot be avoided” even though that information is readily available. One hundred plus (my guess, I wrote eighteen) Environmental Assessments have been published by the Osage Agency since the “Performance EA of March 2015” to support drilling permit applications. An inspection of a representative random sample of those drilling sites would provide the basis for making a “detailed statement” of “adverse environmental effects which cannot be avoided”, if any.

Permit processing efficiency

This is also an opportunity to correct an error made by the BIA Osage Agency on July 15, 2014, and perpetrated since, when the Superintendent issued a letter to lessees stating that they are responsible for preparing draft EA’s for all future actions requiring BIA approval. The Superintendent’s instructions included: “As allowed by 40 CFR 1506.5(b), it shall be the responsibility of the applicant to prepare a draft environmental assessment for all future proposed actions requiring BIA approval.”

40 CFR part 1500 are the regulations of the Council on Environmental Quality (CEQ) which implement NEPA. 1506.5(b) says: “**If an agency permits an applicant** to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.”

Not requires an applicant, permits an applicant.

In the July 15, 2014 letter the Superintendent attempted to apply 25 CFR 226.30, "Lessee shall comply with all orders issued by the Superintendent" to modify the CEQ's regulations. This was an inappropriate use of the authority expressed in 226.30.

Preceding 1506(b) is 1506(a):

> 1506.5 **Agency responsibility**.
>
> "(a) Information. **If an agency requires an applicant to submit environmental information for possible use by the agency** in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. ..."

Therefore, it is appropriate for the Agency to require environmental information but not a draft of an Environmental Assessment. Why is this important? This is important because the 200 plus page draft Environmental Assessments still required by the Agency are the primary and unnecessary burden on lessees which has extended the permit approval process resulting in fewer wells drilled.

The Draft EIS has the potential to lift this burden by incorporating redundant information which can be tiered to in the Agency's future Environmental Assessments. Future Environmental Assessments should look like this:

United States Department of the Interior
Bureau of Indian Affairs - Osage Agency

Draft ENVIRONMENTAL ASSESSMENT
Drilling Permit

Acme Oil Company

Erma Doe #4 NE/4 Section 19 T29N R11E
Erma Doe #5 NE/4 Section 19 T29N R11E

Proposed Oil and Gas Development on the Osage Minerals Reservation
Osage County, Oklahoma:

EXAMPLE

This draft EA represents a fictitious project.

December 25, 2020

For information contact: Erma Pate, Environmental Protection Specialist

Bureau of Indian Affairs, Osage Agency
Office of the Superintendent
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(918) 287-5700

Abbreviations and Acronyms

ABB	American Burying Beetle
BIA	Bureau of Indian Affairs
CFR	Code of Federal Regulations
EA	Environmental Assessment
EPA	U.S. Environmental Protection Agency
NHPA	National Historic Preservation Act of 1966
ODEQ	Oklahoma Department of Environmental Quality
OWRB	Oklahoma Water Resources Board
SPCC	Spill Prevention, Control, and Countermeasures Plan
Superintendent	Superintendent of the Osage Agency

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1.0 Incorporation by Reference

This EA is tiered to and incorporates by reference the Osage Oil and Gas Environmental Impact Statement of 2020. Incorporated by reference are consultations, alternatives, environmental issues related to the entire Osage mineral estate, and reference materials. Only environmental issues which require site specific consideration are included in this EA.

2.0 Need for Proposal

The Lessee holds an oil and gas lease for the referenced quarter section which obligates the lessee to develop the oil and gas minerals. The Lessee has filed an ADP, Osage Form 139, which requires the Superintendent's approval.

3.0 Project Description

This project pertains to an Oil and Gas Mining (Less Coal Bed Methane) lease, Contract number XYY-YYYYY, NE/4 S19 T29N R11E, held by Acme Oil Company, State Bank Building, Chautauqua, KS 67334

3.1 Well Locations in NE/4 S19 T29N R11E

Well Name	Feet from N/S Line	Feet from E/W Line	Latitude	Longitude	Cord. System
Erma Doe #4	330 FNL	330 FEL	36.984291	-96.147223	WGS 84
Erma Doe #5	330 FNL	300 FWL	36.984360	-96.154450	WGS 84

3.2 Proposed Facilities

EXAMPLE

Well	Facility	Area-Long term (Acres)	Area-To Be Reclaimed (Acres)	Length (Miles)
Erma Doe #4	Drill Pad	0.9		
Erma Doe #4	Road	0.37		0.19
Erma Doe #4	Power/Flowline		0.51	0.35
Erma Doe #4	Mud Pit		0.2	
Erma Doe #5	Drill Pad	0.9		
Erma Doe #5	Road	0.19		0.1
Erma Doe #5	Power/Flowline		0.23	0.16
Erma Doe #5	Mud Pit		0.2	
	Tank Battery	Existing		
Total		**2.36**	**1.14**	**0.8**

The well(s) will be served by and existing tank battery as shown in Appendix 1.

4.0 Surface Ownership – Land Use

4.1 Owner

Erma Doe Living Trust, 9999 Grandview Ave., Pawhuska, OK 74056

4.2 Land Use

The quarter section is used for cattle pasture, current practice is use for stocker cattle grazing commencing about April 15 and ending 90 days later at a stocking rate of 2.5 acres per head. There are no buildings used as a dwelling, granary, or barn. There are three existing oil wells, one produced water disposal well, and one existing tank battery (Appendix 1).

4.3 Use of Surface and Surface Owner Agreement

Per 25 CFR 226.19(a) the Lessee has the right to use so much of the surface of the land within the Osage Mineral Estate as may be reasonable for operations and marketing. The location of roads, flow lines, power, etc. per 25 CFR 226.18(b), is subject to agreement between the lessee and the surface owner. In this case, the surface owner has agreed to the proposed location of the new roads.

4.4 Damages

The surface owner will experience long term loss of not more than 2.36 acres. Settlement of damages for this loss and any other damages per 25 CFR 226.20 occurs after drilling operations are complete.

EXAMPLE

5.0 Superintendent's Discretionary Actions

Environmentally related discretionary decisions/actions by the Superintendent are provided for in 25 CFR 226:

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."*

This EA reflects the Superintendent's assessment and evaluation of the proposal.

226.18(b) *"Arrange for route of ingress and egress. Upon failure to agree on route ingress and egress, said route shall be set by the Superintendent."*

The surface owner and the lessee have agreed on the route.

226.19(a) *"If Lessee and surface owner are unable to agree as to the routing of pipelines, electric lines, etc., said routing shall be set by the Superintendent."*

The surface owner and the lessee have agreed on the routes.

226.19(b) *"A drilling site shall be held to the minimum area essential for operations and shall not exceed one and one-half acres in area unless authorized by the Superintendent."*

The lessee has not requested a drilling site greater than one and one-half acres.

226.22(b) *"Pits for drilling mud or deleterious substance used in the drilling, completion, recompletion, or workover of any well shall be constructed and maintained to prevent pollution of surface and subsurface fresh water. These pits shall be enclosed with a fence of at least four strands of barbed wire, or an approved substitute, stretched taut to adequately braced corner posts, unless the surface owner, user, or the Superintendent gives consent to the contrary."*

The lessee has not requested consent.

226.22(d) *"No earthen pit, except those used in the drilling, completion, recompletion or workover of a well, shall be constructed, enlarged, reconstructed or used without approval of the Superintendent."*

The lessee has not requested approval of such a pit.

226.23 *"The Superintendent, with the consent of the Osage Tribal Council, may grant commercial and noncommercial easements for wells off the leased premises to be used for purposes associated with oil and gas production."*

The lessee has not requested an easement off the leased premises.

226.24 *"Lessee or his contractor may, with the approval of the Superintendent, use water from streams and natural water courses to the extent that same does not diminish the supply below the requirements of the surface owner from whose land the water is taken."*

EXAMPLE

The lessee has not made a water use request.

226.33 *"Lessee shall not drill within 300 feet of boundary line of leased lands, nor locate any well or tank within 200 feet of any public highway, any established watering place, or any building used as a dwelling, granary, or barn, except with the written permission of the Superintendent. Failure to obtain advance written permission from the Superintendent shall subject lessee to cancellation of his/her lease and/or plugging of the well."*

Lessee has not requested permission.

226.37 *"Lessee shall conduct all operations in a manner that will prevent waste of oil and gas and shall not wastefully utilize oil or gas. The Superintendent shall have the authority to impose such requirements as he deems necessary to prevent waste of oil and gas and to promote the greatest ultimate recovery of oil and gas. Waste as applied herein includes, but is not limited to, the inefficient excessive or improper use or dissipation of reservoir energy which would reasonably reduce or diminish the quantity of oil or gas that might ultimately be produced, or the unnecessary or excessive surface loss or destruction, without beneficial use, of oil and/or gas."*

The Superintendent has suggested that flaring of gas requires the Superintendent's approval. The Lessee has not requested approval for flaring of gas.

6.0 Site Specific Issues

6.1 Cultural Resources / National Historic Preservation Act

The following Archeological Surveys are relevant to the project:

Bowring Archeological Services, LLC, July 25, 2017, Report on the Archeological Survey of the NE/4 S19 T29N R11E for Acme Oil Company, Osage County, Oklahoma

This study has been filed with the BIA Osage Agency Archeologist for review and approval. In accordance with 36 CFR Part 800.3 and 800.4 the survey report was provided to the Osage Nation Tribal Historic Preservation Office, the State of Oklahoma Historic Preservation Office and the Oklahoma Archeological Survey for further review.

6.2 Groundwater

Fresh Water Aquifers - The proposed well(s) are over the Vamoosa – Ada Bedrock Aquifer.

Drinking Water Wells - The nearest water well reported by OWRB is for domestic use approximately 3 miles southwest.
(http://owrb.maps.arcgis.com/apps/webappviewer/index.html?id=ed61209c40ec4f53bc51d2ffd18aa39b)
Accessed 12/25/2019

EXAMPLE

Wellhead Protection Area- The proposed well(s) are not near an ODEQ Wellhead Protection Area.

Produced Water Disposal- Produced water will be sent to an existing EPA/Osage Nation Licensed Class II disposal well, location as shown in Appendix 1.

6.3 Surface Waters

Streams, Wetlands, and Watering Places - On site observations and USFWS National Wetlands Inventory (surface waters and wetlands) show no waters or wetlands within 200 feet of the well(s). (Appendix 1 and 2).

Surface Water Flow Paths –

Erma Doe #4 - Surface flow from the Erma Doe #4 is northwest to a tributary of Turkey Creek.

Erma Doe #5 - Surface flow from the Erma Doe #5 is east to a tributary of Turkey Creek.

Tank Battery and field – All surface flows join Turkey Creek which then flows 3.5 crow miles to Hula Lake.

Spill Prevention, Control, and Countermeasure Plan - A copy of the SPCC Plan for this tank battery and field is maintained at:

Acme Oil Company, State Bank Building, Chautauqua, KS 67334
Phone: 620-555-5555 email: acmeoil@Chautauquawireless.net

6.4 Air Quality

There are no unique air quality issues with this project.

6.5 American Burying Beetle

Stocker cattle feeding results in grass height less than 8 inches during the ABB active season, the site is not ABB habitat.

7.0 Mitigation Measures

Mitigation measures described in the Osage Oil and Gas Environmental Impact Statement of 2020 are applicable to this project.

8.0 Preparers (40 CFR 1502.17)

Erma Page, Environmental Protection Specialist, Osage Agency, BIA

- Knowledgeable in the responsibilities of the Osage Agency
- Attended US EPA training in SPCC requirements and UIC Inspector Training
- Registered Environmental Professional
- 11 years professional experience
- B.S. Environmental Science, Oklahoma State University

EXAMPLE

Supporting Information supplied by:

- Cleon Coffey, Manager, Acme Oil Company
- Sammy Goode, Bowring Land and Cattle Company (surface lessee of Erma Doe Living Trust)

9.0 Public Notice

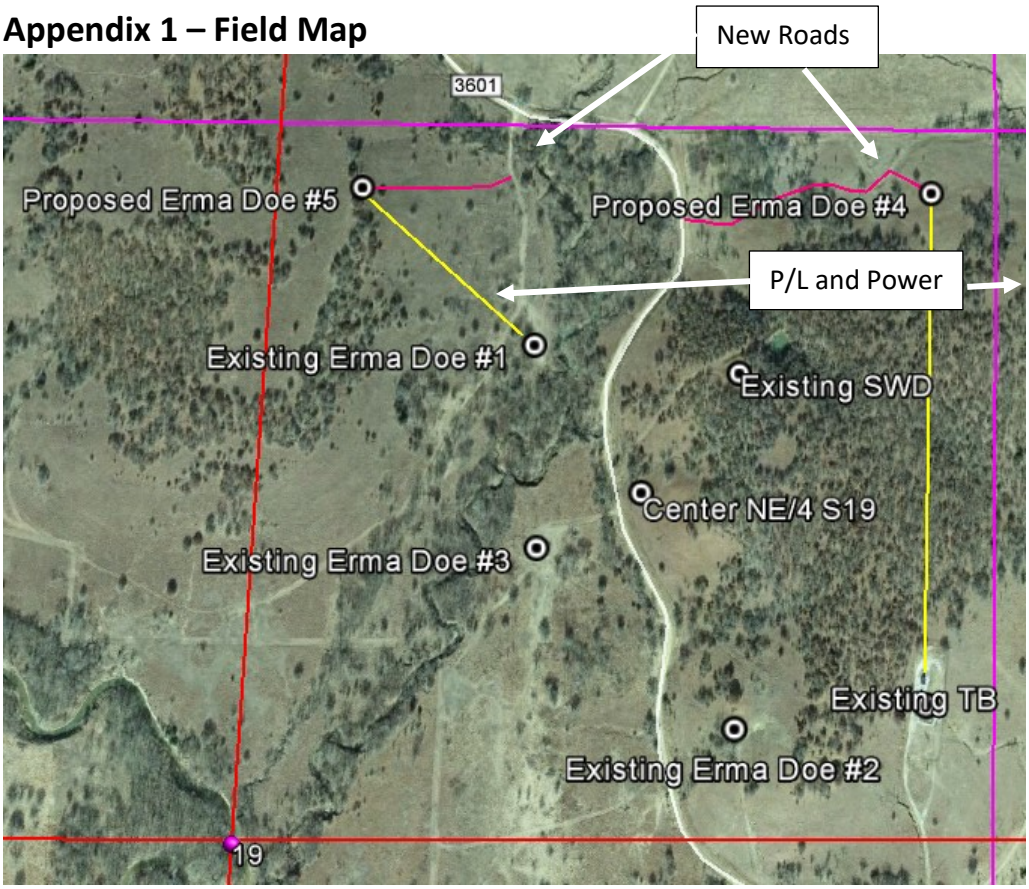
Public Notice of this Environmental Assessment was made in Osage News, http://www.osagenews.org/en/, December 31, 2020 and posted on the Osage Agency's website on December 30, 2020.

11.0 Appendices

Appendix 1 – Field Map

Appendix 2 – Wetlands Map

Appendix 1 – Field Map



Appendix 2 Wetlands Map https://www.fws.gov/wetlands/data/mapper.html Accessed 12/25/2019

End of Environmental Assessment for hypothetical wells.

The applicant's responsibilities can be reduced to completing a questionnaire that the Agency would use to fill in the blanks and create their EA.

Attempting to use NEPA for making regulations

The Performance EA of March 2015 introduced Best Management Practices (BMP). The BMP concept was borrowed from the BLM:

"BMPs have been developed and utilized by numerous energy companies and State and Federal Agencies throughout the Nation. BLM and other agencies are continually gathering and developing BMP ideas and sharing them through this and other websites. BMPs are not one-size-fits-all solutions." https://www.blm.gov/basic/programs-energy-and-minerals-oil-and-gas-best-management-practices-frequently-asked-questions Accessed 1/10/2020

The Osage Agency has assumed that if incorporated in an EIS or EA a BMP becomes a requirement, essentially a regulation. After incorporating in an EA, the Agency restates BMPs as conditions attached to drilling permits. This has worked because applicants have, sometimes begrudgingly, accepted them.

The November 15, 2015 version of the Osage Oil and Gas Draft EIS was largely the work product of EMPSi, an environmental consulting firm that has done a lot of work for the BLM:

> "For over two decades, EMPSi has partnered with the BLM to revise and amend its resource management plans to reflect the ongoing and emerging issues affecting our Nation's public lands, and to provide NEPA compliance and associated permitting." EMPSi's website, https://www.empsi.com/clients-blm Accessed 1/10/2020

EMPSi was also the principal preparer for OKT-BLM/BIA EIS as well as the current Draft EIS. EMPSi applied its BLM experience to the current Draft EIS and created or borrowed BMPs as it contemplated environmental issues. EMPSi inappropriately stretched the BLM (agent for the property owner) BMP concept to the BIA (manager of the Osage mineral estate according to the rules of the Secretary).

BMPs, Conditions of Approval, notices to lessees, etc. should not be incorporated in the EIS. However, the BIA could and should identify environmental issues it wishes to address through a proposed change in 25 CFR 226.

American Burying Beetle –

The Draft EIS incorporates the July 27, 2018 Biological Opinion of the FWS. There are conflicts between the Biological Opinion and the May 3, 2019 proposal of FWS (and FWS supporting documentation) to reclassify the ABB from Endangered to Threatened which render the Biological Opinion inappropriate for inclusion in the EIS.

The Biological Opinion was preceded by a July 3, 2017 BIA Biological Assessment which followed a year of consultations and written communications between the FWS and the BIA. On

November 26, 2018 Mosby Halterman, BIA, responded to my request for a copy of the Biological Assessment: "After conferring with the Solicitor's office they have advised that the BA is a deliberative internal document that should not be released."

The deliberations were therefore continuing after the Biological Assessment and Biological Opinion were complete.

Now we see that the drafters of the Draft EIS were cooking the books. The Biological Assessment included in the Draft EIS is not the actual July 3, 2017 Biological Assessment which should have a signed transmittal letter like the FWS Biological Opinion. The Biological Assessment included in the Draft EIS appears to be revisionary history drafted with hindsight to support the Biological Opinion.

There is acknowledgement that the Biological Opinion needs attention on page 2-6, Table 2-1: Alternatives Summary, ESA.

Appendix B, Osage County Oil and Gas Biological Opinion and Biological Assessment, should be deleted. It now appears the ABB reclassification will be complete before the final version of the EIS is complete, providing an opportunity to sort things out.

In the meantime, the BIA needs to provide practical ABB advise to permit applicants.

Other issues

Other issues include:

- The need to acknowledge that the most common and important environmental issue in Osage County, produced water handling and disposal, are managed by the EPA
- The ABB's biggest problem is wild horse facilities and grazing stocker cattle
- The Osage Wind Farm; visual intrusion, eagle take permit, unresolved litigation
- Useless information such as the number of beds in the Fairfax hospital
- Reliance on secondary sources for relevant information i.e. 2030 Osage County Comprehensive Plan for seismicity
- Inconsequential errors that reveal the proofreader lacks local knowledge. Where is Keystone State Park? It is not in Osage County, but why include it?
- The Draft EIS is padded with (paid by the page?) statements which can be eliminated, my favorite: "The color of construction equipment and vehicles would not resemble the muted tans and greens of the terrain and vegetation." (page 4-81)

Conclusion

The Draft EIS needs to be rewritten, eliminating Alternatives 3 and 4, eliminating BMPs, and including the environmental impact of the proposed action.

Sincerely,

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