

**Osage Negotiated Rulemaking Committee
Operating Procedures Draft
August 22, 2012**

I. Introduction

On October 14, 2011, after 11 years of litigation, the United States reached a settlement with the Osage Nation, Oklahoma (formerly known as the Osage Tribe) for alleged mismanagement of its oil and gas mineral estate, among other claims. The parties agreed that it would be mutually beneficial to “address means of improving the trust management of the Osage Mineral Estate, the Osage Tribal Trust Account, and the Other Osage Account.” (Settlement Agreement, Para. 1.i.). The parties agreed that a review and revision of the existing regulations is necessary in order to better assist the Bureau of Indian Affairs (BIA) in managing the Osage Mineral Estate. The regulations governing the Osage Mineral Estate (25 CFR Part 226) currently apply only to the Osage Mineral Estate and the Osage Agency and do not have broader applicability. The parties agreed to engage in negotiated rulemaking for this purpose. On July 31, 2012, the Department of the Interior published in the Federal Register the notice establishing the Osage Negotiated Rulemaking Committee (“the Committee”).

II. Authorities and Statutory and Regulatory Context

Authority for creation and operation of the Committee includes:

- Federal Advisory Committee Act (5 U.S.C. Appendix 2)
- Negotiated Rulemaking Act of 1996 (5 U.S.C. 561 et. Seq.)
- Act of June 28, 1906, ch. 3572 Stat. 539, as amended

Additional references include:

- Leasing of Osage Reservation Lands for Oil and Gas mining (25 CFR Part 226)
- U.S. Department of Interior, Bureau of Indian Affairs, Osage Negotiated Rulemaking Committee Charter

III. Objective and Scope

The Committee will advise the Secretary of the Department of the Interior (the “Secretary”) through the Bureau of Indian Affairs (BIA) on a rulemaking to revise 25 C.F.R. Part 226 regarding the management and administration of oil and gas mining leases for Osage Reservation lands. The Committee will act solely in the advisory capacity to BIA. The Committee will meet over a period not exceeding two years, to carry on negotiations in pursuit of its objective. The Committee will take into consideration comments submitted to the Committee by Osage head right holders, tribal members, the public or by any subcommittees established by the Designated Federal Officer (DFO).

Based on the Settlement Agreement signed by the Department and the Osage Tribe, the following areas are intended to be the focus of the negotiated rulemaking. The areas include, but are not limited to:

1. 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;
2. Identifying the source, manner, and format of transmission whereby the information required by Subsection 9(a) will be provided to the Osage Minerals Council;
3. 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;
4. Identifying the best feasible practices for developing and conducting onsite inspection programs;
5. 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;
6. Identifying the best feasible practices for gauging oil and gas production and the resources needed to implement the strategy selected;
7. Identifying and implementing the best feasible practices for tank battery gauging;
8. Determining and documenting the formal communication needed to manage diligently the Osage Mineral Estate between the Osage Nation, the Osage Minerals Council and the United States.

IV. Membership

A. Members: The Secretary of Interior has appointed nine (9) members and alternates to the Committee to serve a 2-year term concurrent with the duration of the Committee. The members and alternates are appointed as individuals. Any changes in membership will require a new appointment and the appropriate appointment process to arrive at that appointment. The members include:

- *Non-Federal Members:* To ensure fair and balanced representation of viewpoints, the Secretary appointed five (5) members chosen by the Osage Tribe or Osage Mineral Council.
- *Federal Members:* The Secretary appointed four (4) federal employees (two from the Bureau of Indian Affairs, one from the Bureau of Land Management, and one from the Office of Natural Resource Revenue).

B. Alternates: Alternates have an important and valuable role in the process. Alternates should attend as many Committee meetings as possible to assure that they are informed and up to speed on issues that have been discussed, ongoing deliberations and agreements reached on recommendations. Alternates should also confer with their Committee Member so that they know and understand the former's thinking and views on issues under discussion and decisions to be made on recommendations. A Committee Member may, as appropriate, give their proxy to their alternate to participate in: a) the Committee's, discussions and deliberations "at the table" in lieu of that member's participating from that seat, and b) decisionmaking on recommendations to the Secretary.

C. Designated Federal Official (DFO): The Secretary has also appointed a Designated Federal Official and an alternate DFO. The DFO is a full time Federal employee appointed in accordance with Agency procedures. The DFO will approve all Committee and subcommittee meetings, prepare and approve all meeting agendas, attend all Committee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the Secretary.

D. Co-Chairs. The Committee will appoint co-chairs, one from the federal caucus and one from the tribal caucus. The responsibility of co-chairs will be to assist with agenda development, help the Committee keep on track with its work plan, help move discussions forward in meetings, and work with the facilitator to problem solve around impasses, tensions, and conflicts.

V. Decisionmaking

A. Consensus: The Committee will strive to operate by consensus.

1. Consensus is defined as *unanimous* concurrence of the members, or in the absence of a primary member, his alternate after Committee discussion. Members may choose to "abstain." Abstention is a non-vote, and therefore does not count against consensus.
2. If a representative disagrees with a proposal, he or she should make every effort to offer an alternative satisfactory to all members. Members should not block or withhold consensus unless they have serious objections to the proposal. Consent means that members can *accept*, even if reluctantly, the agreement that emerges. The goal of the Committee is to reach consensus, recognizing that not all members will be equally satisfied with the outcome.
3. If both the primary and the alternate are absent from a meeting in which consensus will be deliberated or decided, or if a primary without an alternate is absent, the absences will be equivalent to not dissenting.

4. All agreements reached during negotiations are understood to be tentative until the Committee reaches formal consensus (“tentative consensus” or “provisional consensus”). Once final consensus is achieved, Committee members may not thereafter withdraw their consensus (“final consensus”).
5. On matters of process (agenda setting, changing the agenda, sequencing issues, and other process decisions), should the Committee reach an impasse, the DFO after consultation with the Co-Chairs and the facilitator will render a decision to move the proceedings forward.
6. Changes or modifications to these Operating Procedures may be made by an affirmative vote of seven of the nine Committee members. All changes or modifications will be reflected in writing.

B. Addressing Impasse.

1. If the Committee is unable to reach a provisional consensus as noted above and is unable to move the issue or issues forward, the Committee shall appoint at least one member from each caucus, or the Co-Chairs, to seek to deliberate on the issue between meetings, develop a recommendation or options for resolution, and bring such recommendations back to the Committee at the following meeting.
2. If the Committee is unable to reach a final consensus and unable to move the issue or issues forward, the federal and tribal caucuses shall each seek to reach a single position. Thereafter, concurrence between the federal caucus and the tribal caucus on a package of recommendations after discussion at a Committee meeting will constitute final consensus of the Committee.
3. If the Committee is unable to reach a final consensus, the Committee may report out areas of agreement and disagreement as noted in the “Agreement” section just below.

C. Agreement. Agreement shall constitute and be described as follows.

1. The goal of the Committee is to develop a Consensus Agreement Report that reflects a final consensus by the Committee.
2. If the Committee reaches consensus it will transmit its report(s) to the Secretary through AS-IA. The report(s) will contain the Committee's recommendations to be used by the AS-IA when developing regulations, policies, standards, and/or guidelines and/or more specifically, when possible, the regulations in appropriate regulatory language, in draft.

3. On issues where consensus is reached, Committee members will refrain from opposing or commenting negatively on the consensus-based language and will encourage their constituents to do the same.
4. If the Committee does not reach consensus, Committee members will determine what to report to AS-IA about the Committee's efforts. As envisioned by the Negotiated Rulemaking Act, the Committee, through the facilitators, will transmit to AS-IA a report specifying any areas in which the Committee reached agreement, as well as the explanation for the disagreements, a description of the interests that must be satisfied to reach an agreement, and if possible, ways to address the differences. If a non-consensus report is submitted to AS-IA, as permitted by the Negotiated Rulemaking Act, any Committee member may include as an addendum to the report additional information, recommendations, or materials.
5. If the Committee reaches final consensus on some but not all of the issues, AS-IA will, to the extent possible, duly consider the dialogue and proceedings generated by the negotiated rulemaking process. Tribal and Mineral Council Committee members may oppose or comment negatively on those aspects of action that are not based on a final consensus.

VI. Committee Meetings

The negotiations will be conducted in accordance with the Federal Advisory Committee Act (FACA).

- A. **Notification and Public Attendance:** All meetings of the full Committee will be announced in the Federal Register, Osage Mineral Council website, and other local Osage County outlets, prior to the meeting and will be open to the public. All members of the public are welcome to attend Committee meetings and may sign in on the day of a meeting. Members of the public also are encouraged to pre-register for logistics purposes.
- B. **Public Comment:** Opportunities for oral public comment will be provided at least twice per day during each Committee meeting divided appropriately depending on agenda topics being considered by the Committee. The Co-Chairs shall determine the time and manner of these comments. The Committee is not expected to respond to these comments during the oral public comment period. Members of the public will be permitted to file written comments to the Committee through the DFO, before or after meetings. Written comments will be reviewed and discussed by Committee members as appropriate. Comments provided to the Committee will become part of the public record.

- C. **Agenda:** The Co-Chairs with support from the facilitator are responsible for developing an agenda for all meetings of the Committee that will be distributed ahead of time. This agenda will be developed in accordance with FACA and posted prior to each meeting for the public. The meeting agendas will lay out clear times for beginning and start times each day and major agenda items. All members are expected to be present for the full meeting times and to be active and engaged. Cell phones, emails, conference calls, and other unrelated Committee activities should take place at breaks, at lunch, and in the evenings.
- D. **Caucuses:** Members may request caucuses by and among subgroups of Committee members at any time. The facilitators and Co-Chairs also may request caucuses. No decisions, however, can be reached outside of full and public Committee deliberations.
- E. **Subcommittees:**
- i. The Committee, in consultation with the Co-Chairs, may form subcommittees or work groups to advance discussion, generate options, and develop preliminary proposals. Subcommittees or work groups must be created by the full Committee and have a clear charge. A subcommittee or work group is not a decision-making body. Alternates may participate actively in subcommittees and workgroups. Others may be invited to participate on subcommittees by agreement of the co-leads.
 - ii. At least one Committee member from the federal caucus and the tribal caucus must participate in a subcommittee and workgroup. A Committee member from each caucus will be designated as co-leads to guide the work of a subcommittee or workgroup. Subcommittees and workgroups are not subject to the meeting notice or records requirements of the Committee.
- F. **Technical Assistance:** Upon agreement of the DFO and Co-Chairs, the Committee may accept technical assistance from its members' own organizations or may also seek technical assistance from representatives of other organizations. Technical advisors have no authority to make decisions on behalf of the Committee, nor can they report directly to the Department of the Interior (DOI). The Committee may invite technical advisors to make presentations at Committee meetings.
- G. **Minutes:** The detailed minutes of each of Committee meeting as mandated by FACA will be prepared by the facilitators and, after review and approval by the Committee, will be made available to the public on the BIA Osage Negotiated Rulemaking website. The minutes will generally be written without attribution. Draft minutes will be prepared by the Facilitators and distributed to the Committee within two weeks of a Committee meeting. The Committee will provide comments generally within one week of receiving the draft and finalize the minutes at the next Committee meeting.

VII. Committee Member Responsibilities

- A. All members must act in good faith in all aspects of these negotiations. Members agree that proposals made and ideas discussed in open meetings and candid problem solving conversations will not be used against any other member in future litigation or public relations. Good faith requires that individuals not represent their own personal or Tribe's or agency's views as views of the entire Committee, and that the views and opinions they express in the Committee deliberations are consistent with the views they express in other forums.
- B. Participating organizations and their representatives commit to making the negotiated rulemaking process the primary and central focus of their efforts to address issues related to the charter and to voluntarily curtail using other means to influence AS-IA on Committee issues during the negotiated rulemaking process. This does not mean participating organizations are relinquishing or waiving any legal rights.
- C. Members commit to the principles of decency, civility, and tolerance. Committee representatives must exercise leadership within their respective constituencies to foster a climate of joint problem solving on the Committee and publicly, engage with their constituencies to keep them informed, and to ensure their constituents support rather than undermine the process.
- D. Committee members will not attribute statements to others involved in this negotiated rulemaking, seek to present or represent the views or position of other members or alternates, nor attempt to speak on behalf of the Committee as a whole in or to the media.
- E. Media requests will be directed to and addressed by the Committee's Co-Chairs, or other single point of contact designated by the Committee, using the Committee's agreed upon process. Copies of all prepared media releases by the Co-Chairs, Osage Minerals Council, or the Department of the Interior pertaining to the Negotiated Rulemaking will be provided to Committee members in advance for review and comment. "Media" for these purposes includes: print, television and radio; websites; social media sites (Facebook, Twitter, etc.); and any other public information distribution mechanism. Committee members will abide by these operating procedures in all communications during the negotiated rulemaking process in and out of Committee meetings.
- F. The Co-Chairs will periodically review and assess the Committee's progress to determine if the process is meeting their needs and the interests of the participants.

- G. The Co-Chairs and facilitator will ensure compliance with these operating procedures.
- H. Orderly conduct of meetings.
 - i. Personal attacks, name calling, inappropriate gesturing, and other such negative behaviors will be addressed immediately, either privately or publicly, by Committee members and the facilitators.
 - ii. The Committee may recommend to the DFO or Co-Chairs sanctions for violations of these operating procedures.
 - iii. Poor attendance, lack of participation, not participating in good faith, or other significant violations of these operating procedures are grounds for the DFO to recommend to the Secretary that a member be removed from the Committee. If the primary member is removed, that seat will be filled by the alternate. In the case that no alternate exists or that both the primary and alternate have been removed, the Secretary will make every effort to fill the seat to represent that interest within the FACA approval process for membership.
- I. Any member of the Committee may withdraw from the negotiations at any time by notifying the DFO and Co-Chairs in writing, as long as the member has made every effort to address the concerns or issues he or she has raised to the Committee.

VIII. Facilitator Responsibilities

The facilitators serve at the discretion of the full Committee. The DFO, Co-Chairs, and facilitators are responsible for helping to ensure that the process runs smoothly, developing meeting agendas, preparing and distributing draft and final summaries, generating draft agreements, and helping the parties resolve their differences and achieve consensus on the issues to be addressed by the Committee.

- A. The facilitators have no decisionmaking authority and cannot impose any solution, settlement, or agreement among any or all of the parties.
- B. The facilitators will abide by the Ethical Standards of the Association of Conflict Resolution. In part, these standards require that: “The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action and a commitment to serve all parties as opposed to a single party.”
- C. The facilitators may use any number of techniques to help ensure that everyone has the opportunity to speak, that comments are kept to a reasonable length of time,

and that subjects under discussion are provided sufficient time and focus for progress.

- D. The facilitators will be available, to the extent schedule and budget allow, to facilitate Committee sessions, caucus deliberations, subcommittee meetings, and work groups.
- E. The facilitators will be available to consult confidentially with Committee participants during or between meetings. Facilitators, if asked, are required to hold confidences even if that means withholding information that the facilitators would prefer to be made available to the full group. Confidentiality protections do not extend to threats or reports of criminal action.
- F. The facilitators may engage in shuttle diplomacy among various parties during the negotiation. Within the bounds of the Negotiated Rulemaking Act and the FACA, these deliberations may be conducted in confidence.
- G. Parties will express any concerns about the facilitators' role or action: first, to the facilitators directly; or, as needed to the DFO or Co-Chairs.

IX. Committee Duration and Termination

These operating procedures may be amended by the Committee and are subject to biennial review and will terminate two years from the date the Committee's Charter is filed unless, prior to that date, the Charter is renewed under the provisions of Section 14(a)(2) of FACA. The Committee's charter is currently scheduled to end on August 14, 2014.

X. Consistency

These operating procedures are intended to be consistent with the Committee Charter and all applicable laws and regulations. In the event of any inconsistency or conflict, the statute, regulation, or the Committee's Charter shall govern.