



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

March 13, 2013

VIA FIRST CLASS MAIL AND EMAIL

Mr. Eddie Streater
Acting Deputy Regional Director - Trust Services
Eastern Oklahoma Region, Bureau of Indian Affairs
3100 W. Peak Blvd.
Muskogee, Oklahoma 74401

Subject: Osage Negotiated Rulemaking

Dear Mr. Streater:

Thank you for this opportunity to provide comments in the negotiated rulemaking involving 25 C.F.R. § 226.24. The Oklahoma Office of the Attorney General objects to § 226.24 in its current state, and strongly urges you to amend the rule so that it properly recognizes the State of Oklahoma's primary and exclusive role in regulating the waters within its borders.

The Oklahoma Water Resources Board ("OWRB") is the State agency that administers and regulates rights to the use of stream water and groundwater in Oklahoma pursuant to the laws of the State. Those laws require, among other things, that those who wish to use stream water or groundwater for non-domestic purposes (including use in oil and gas exploration, production and other operations) must acquire a permit from the OWRB authorizing such a use.

In its current form, 25 C.F.R. § 226.24 authorizes the unpermitted use of surface water in Osage County. In effect, the federal regulation purports to preempt the State of Oklahoma's regulatory authority, and does so with no basis in law.

As you well know, the Osage reservation was disestablished over a century ago, when the Osage reservation was incorporated into the new State of Oklahoma as Osage County. *See Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010). In fact, in concluding that the Osage Reservation had been disestablished, the Tenth Circuit noted that "federal officials responsible for the Osage lands repeatedly referred to the area as a 'former reservation' *under state jurisdiction*." *Id.* at 1126 (emphasis added).

Today, with approximately 99.96% of Osage County being lands other than those held in trust by the federal government for the benefit of the Osage Nation, *id.* at 1127, it is hard to fathom how federal officials now justify exercising regulatory authority over water throughout

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the *entirety* of Osage County. The federal government has no basis in law for assertion of jurisdiction over the waters of the State of Oklahoma either on its own behalf or on behalf of the Osage Nation. Even if the Osage Nation had some basis for a yet-to-be determined federal water right, the State of Oklahoma would remain the regulator of the County's waters. *See id.* at 1127-28 (“[W]e note that the Nation concedes that Oklahoma has had a “long-standing practice of asserting jurisdiction” in Osage County. “[T]he longstanding assumption of jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations’ that ‘merit heavy weight.’” [citations omitted]).

Indeed, consistent with the regulation and administration of all the waters within the borders of Oklahoma, the State has always held and asserted jurisdiction over the waters of Osage County, and has issued nearly 100 permits to Oklahomans seeking to use stream water and groundwater in the County. The federal government's purported authorization of unpermitted use of water unlawfully usurps the State's jurisdiction and seriously impairs the State's ability to exercise this jurisdiction, by: (1) making it difficult if not impossible for the OWRB to accurately determine the amount of water available for future permitting; (2) injecting uncertainty into the State's prior appropriation doctrine—the doctrine on which all existing stream water permits are based; and (3) creating jurisdictional confusion that is certain to confuse and detrimentally affect water users within the County.

These problems can be easily corrected by amending 25 C.F.R. § 226.24 as follows:

§ 226.24 Lessee's use of water.

Lessee or his contractor's use of water shall be in accordance with the laws of the State of Oklahoma.

Thank you again for this opportunity to provide comments in this negotiated rulemaking. We hope that you amend the regulation as we have suggested. If not, the State may be forced to pursue all available legal remedies to protect its sovereign right to regulate the waters within its borders.

Sincerely,



Patrick R. Wyrick
Solicitor General