**Osage Negotiated Rulemaking Committee**
**Meeting 6 – February 26-27, 2013**
**Wah Zha Zhi Cultural Center, 1449 W. Main, Pawhuska, Oklahoma**
**Meeting Summary**

## Consensus Agreements

The Osage Negotiated Rulemaking Committee reached consensus on the following items during the meeting:

1. The Committee agreed to approve the meeting summary from the January Osage Reg-Neg meeting.
2. The Committee reached tentative consensus on the following sections of the draft regulation sections: §§ 226.11, 226.13, 226.9, 226.9A, 226.25, 226.28, 226.38 (pending the addition of some language), 226.39, 226.40A, 226.6, 226.42, 226.43, 226.43A, 226.43B, 226.22A, and 226.22B.
3. The Committee reached tentative consensus on most of the document, with the exceptions that some areas have been flagged for further work and that there were public comments that will need to be considered after this meeting.

## Welcome and Opening of the Meeting

The meeting opened with a prayer and introduction of all Committee members and staff who were present. Patrick Field, facilitator, reviewed the agenda for the meeting and invited members of the public interested in making a public comment to sign up to do so. Please note that the meeting began on Tuesday rather than Monday due to weather complications both for travelers and in Oklahoma.

Members of the Committee, including alternates, and staff to the meeting introduced themselves and provided their organizational affiliations. A full list of Committee members, staff, and members of the public who were in attendance can be found in Appendix A.

Committee members reviewed a draft version of the Meeting Summary from the Committee's January meeting and approved the Meeting Summary. The final, approved version of this document can be found on the BIA's website for this Negotiated Rulemaking at http://www.bia.gov/osageregneg/.

The facilitator explained that, during this meeting, the Committee would review different sections of the regulations and would seek to reach preliminary consensus on the draft regulatory language. Before seeking consensus, the proposed regulatory changes would be explained to the Committee and the public, public comment would be taken, and the Committee would consider revising the draft regulations in response to public comments. The facilitator reviewed the Committee's agreed-upon ground rules for reaching consensus, as detailed in the document titled "Operating Procedures," which can be found on the BIA's website for this Negotiated Rulemaking at http://www.bia.gov/osageregneg/. As part of this review, the facilitator explained that consensus is defined as unanimous consent of sitting Committee members and explained the process for proceeding if the Committee reaches an impasse. The facilitator also explained that the Committee would be attempting to reach tentative consensus on specific sections of the draft regulations in this meeting and would seek to reach final consensus on the entirety of the regulations at a future date.

The facilitator, Mr. Field, also reviewed the procedure and ground rules for making public comments. Mr. Field noted that individuals who preregistered to make comments would comment first, followed by those who registered to make a comment on the day of the meeting, in the order that registrations were recorded. Each commenter would have an equal amount of time to comment, distributed according to the number of people who want to comment during the public comment session. Comments should be directed at the Committee as a whole, not at specific members of the Committee. Finally, Mr. Field requested that commenters keep their comments germane to the specific purview and work of the Committee and, specifically, to the section of the regulations that the Committee was reviewing. Mr. Field reiterated these guidelines for public comment throughout the meeting, before each public comment period.

A staff member to the Osage representatives to the Committee explained that the various subcommittees looking at different parts of the Osage regulations had examined the regulations of the US Bureau of Land Management (BLM) that apply to oil and gas development on federal lands and Indian reservations outside of Osage County and had assessed their suitability to Osage County. He noted that, in many cases, the subcommittees found that these BLM regulations would work well in Osage County and had recommended that the Reg-Neg Committee adopt aspects of the BLM regulations. He noted that sections of the regulations denoted by a capital letter (such as 226.1A, as opposed to 226.1(a)) are new sections and have been numbered in this way for the convenience of the Committee so that the draft regulations do not have to be continually renumbered to reflect the addition of new language. The sections will be renumbered once all of the draft regulations are finalized.

**Definitions *(§§ 226.1, 226.1A)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee reviewed the Committee's proposed changes to 25 C.F.R. Part 226.1, pertaining to the "definitions" of terms that are used throughout the rest of the regulations in 25 C.F.R. Part 226. He explained that sub clause (b) had been revised to reflect the Osage Minerals Council's responsibility to oversee the mineral estate. Sub clause (c) had been revised to apply to any party that has been delegated authority by the Director of the Bureau of Indian Affairs or the Superintendent of the Osage Agency. Sub clause (d) is new language that defines lease to include any contract that authorizes exploration for, extraction of, or removal of oil or gas. Sub clauses (e), (f), and (g) have been revised to include authorized representatives of the lessee under the definition of "lessee." The staff member to the Osage representatives to the Committee explained that while this new language is meant to clarify the regulations, it is consistent with the way that the current regulations are being applied at present. The old sub clause (h) is no longer needed. Sub clause (i) defines raw natural gas as gas before it emerges from the wellhead, and sub clauses (k) and (l) defines oil wells and gas wells in relation to the production of raw natural gas. Sub clauses (m), (n), (o), (p), (q), (r), and (s) are all new and replicate language in US Bureau of Land Management (BLM) regulations. Sub clauses (m) and (n) are intended to give the Director of the Bureau of Indian Affairs and the Superintendent of the Osage Agency authority to add technical orders to supplement the regulations as needed, while sub clauses (o), (p), (q), (r), and (s) are intended to help enforce regulations related to the conservation of oil and gas. §226.1A is new text that legally clarifies that the regulations apply to oil and gas activity conducted in Osage County.

*Public Comment and Response from the Committee*

The Committee received the following public comments about §226.1 and §226.1A:

- Nona Roach inquired about sub clause (i), which seemed to her to be a sentence fragment.
- Roy St. John suggested that sub clause (b) should refer to "shareholders" rather than to "the Osage Nation or Tribe of Indians of Oklahoma," asserted that the Osage mineral estate is not defined, and that the definition of the Osage Tribal Government, as articulated in the 1906 Act, is much broader than the current scope and purview of the Osage Minerals Council.
- Bob Jackman inquired as to whether the definitions of "drainage regulations" and "maximum efficiency" need further clarification and asserted that the industry does not accept the Bureau of Land Management's (BLM) definition of drainage and that both the BLM and the Bureau of Indian Affairs (BIA) need to clarify their understanding of drainage.

Committee members and staff members to the Committee responded to the public comments. The Committee clarified that the text in sub clause (i) continues into the sub clause that was previously (j) to form a complete sentence. A staff member to the federal representatives to the Committee explained that the reason that shareholders are not referenced in the regulations is because the Osage mineral estate is governed by an elected body, the Osage Minerals Council (OMC) and the United States has a direct legal relationship with the OMC as the governing body of the mineral estate of the Osage Nation. The status of the OMC as the governing body of the mineral estate is articulated in the draft regulations. A staff member to the Osage representatives to the Committee clarified that the mineral estate is defined in the 1906 Act and that these regulations do not intend to reiterate all of the definitions contained in that Act. A staff member to the Osage representatives to the Committee stated that the definitions of "drainage regulations" and "maximum efficiency" have been taken from the BLM regulations and that further detail about how these definitions will be applied in the regulations is provided in the relevant section of the regulations and will be reviewed later in the meeting.

*Committee Discussion*

The Committee discussed the proposed revisions to §226.1. The Committee agreed to change the language from "oil and gas" to "oil and gas and any other marketable products" throughout the draft regulations, as needed. Please see the updated draft regulations, posted on the BIA's website for this Negotiated Rulemaking at http://www.bia.gov/osageregneg/, for the locations at which this change has been made. The Committee also discussed and accepted a proposal to remove the phrase "other than helium" from sub clause (p) of §226.1. An Osage representative to the Committee suggested that the proposed removal of the former sub clause (h) from §226.1 would subject all purchasers to the NYMEX price index, which is a futures price, and that therefore sub clause (h) should be reinstated. A staff member to the Osage representatives to the Committee suggested that this issue be discussed further when the Committee reviews the portion of the draft regulations pertaining to pricing and the use of the NYMEX index.

*Tentative Consensus*

The Committee did not test for tentative consensus regarding the definitions and will do so when revisions to other sections of the regulations have been completed.

**Leases, Rents, Royalties *(§§ 226.1B, 226.2, 226.4, 226.11)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee reviewed the Committee's proposed changes to 25 C.F.R. Parts 226.1B, 226.2, 226.4, 226.11, pertaining to "leases, rents,

and royalties." He explained that §226.1B(a) is a new paragraph that was drafted by a subcommittee in order to allow the Bureau of Indian Affairs (BIA) to adopt onshore orders and notices to lessees that are promulgated by the Bureau of Land Management (BLM), or that it writes itself, to apply to Osage County. He added that the Committee is thinking that the onshore orders related to gas measurement and to hydrogen sulfide would be particularly relevant to Osage County and should be adopted at the same time as the enactment of the new regulations. The staff member explained that the text of §226.1B(b) is taken from BLM regulations and defines the scope of authority of the Superintendent and that §226.1B(c) gives the Superintendent authority to monitor leases where there is a history of noncompliance. The staff member explained that the substantive proposed revisions to §226.2 are intended to allow the making of payments to the Osage Agency by cashier's check, money order, and electronic funds transfer. The proposed revisions to §226.4 are intended to allow the Superintendent to specify acceptable forms of payment in order to keep up to date with evolving technology.

A staff member to the Osage representatives to the Committee reviewed the Committee's proposed changes to §226.11, regarding "royalty payments." He explained that §226.11(a), pertaining to the royalty on oil, was unchanged from a tentative draft proposed in an earlier Reg-Neg meeting. He explained that there is a specified royalty rate and a gravity scale. To review, the reasoning behind these amendments is to come up with an objective measure to value oil without needing to investigate whether transactions are at arms length. He said that the Committee perceives the NYMEX price at Cushing to be a reasonable approximation of the oil price in Osage Countyplus a small premium for the mineral owner. There was previously some question as to whether the royalty should be calculated using "NYMEX + something," as some producers do sell oil at a premium above the NYMEX price, but that the subcommittee decided to stick with only NYMEX without an additional premium. The staff member said that the subcommittee investigated how royalty value has been regulated in Osage County historically and that it was originally the highest market price in the Midcontinent Field, and was subsequently narrowed successively to the highest posted or offered price in OK and Kansas, and then to the highest posted price in Osage County. He said that the Committee's objective was in part to address some of the changes that were made in regulatory revisions that were made in 1994 that based royalty payments on the actual selling price of oil as opposed to the highest posted price.

The staff member explained that §226.11(b), pertaining to the royalty on gas, has one proposed change from the proposed version that was presented in an earlier meeting. He explained that, previously, the Committee discussed measuring gas by MMBTUs at the well and multiplying that by the ONR-specified listed price and the royalty rate. However, the drafting subcommittee

had concerns that natural gas liquids can be very valuable and that this value needs to be captured. As a result, additional language has been added that allows the Superintendent to require dual accounting. According to sub clause (b)2, rather than adopting dual accounting across the board (which would be burdensome for producers), the Superintendent can require dual accounting in certain cases where the end yield is estimated to be higher than that which is being captured using simple accounting.

The staff member explained that §226.11(c) pertains to the payment of royalty on minerals that are lost, §226.11(d) adds flexibility such that the interest rate can be adjusted by the Superintendent in consultation with the Osage Minerals Council (OMC), and §226.11(e) adds a royalty rate for helium of 20%.

*Committee Deliberation and Additional Proposed Changes to Regulations*
A federal representative to the Committee suggested that there may be a contradiction between §226.11(a)2 and §226.11(a)1 in that the former refers to royalties being paid on the basis of gross proceeds of sales and the latter refers to royalties being paid on the basis of the NYMEX index. He suggested that §226.11(a)1 be amended to read: "20% of the value determined under subparagraph §226.11(a)2." The Committee agreed to make this revision.

An Osage representative to the Committee inquired about what would happen to the royalty rates on existing leases that currently have royalty rates below 20%. A staff member to the Osage representatives to the Committee explained that the draft regulations state that existing leases are subject to the new regulations except for changes in the terms of the lease, time of the lease, acreage, or royalty rate. As such, calculation of royalty payments on existing leases would be based on the NYMEX index but existing royalty rates would not change.

A federal representative to the Committee suggested that §226.11(b)2 be amended from "...compression, dehydration, gathering, or treating" to ""...compression, dehydration, gathering, treating, or transportation." The Committee agreed to make this revision.

A federal representative to the Committee said that the Department of Interior's Office of Natural Resources Revenue (ONRR), has created a dual accounting system that approximates the cost of processing in situations where the royalty payer does not have figures documenting the cost of processing. A staff member to the Osage representatives to the Committee suggested that, if a producer cannot document expenses incurred in processing, it may not make sense to allow them to deduct these costs.

A federal representative to the Committee suggested that, with reference to §226.11(d), the due date for payment be specified as the end of the lease year as opposed to 45 days after the end of the lease year. This timing would synchronize with systems in place at ONRR, thereby facilitating cooperation between the Osage Agency and ONRR. In addition, the federal representative to the Committee explained that, while late payments in Osage County are currently at charged interest at a rate of 1.5% per month, ONRR charges interest on the basis of rates linked to the IRS, as mandated by federal law. He proceeded to explain that, if certain accounting functions were to be contracted out to ONRR by the Osage Agency in the future, ONRR would not be able to manually calculate late payments for all leases on Osage lands at the 1.5% rate at this time due to the large number of leases that would be implicated. However, ONRR is developing a new late-payment module and the federal representative said that he could request that ONRR include the capacity to use different interest rates in that module.

A federal Committee member proposed that the Committee tie the royalty rate on helium to the royalty rate on natural gas. In response, a staff member to the Osage Committee members said that the Osage Committee members would prefer to keep these two royalty rates unlinked.

A federal Committee member proposed that §226.11(e) be amended to include the language "irrespective of any other royalty due on oil or gas." The Committee agreed to include this language.

*Public Comment and Response from the Committee*

The Committee received the following public comments during this section of the meeting:

- Rob Lyon said that he represents the Osage Producers Association. He said that Merrill's comment, on NYMEX pricing, was that "it's a reasonable approximation of actual sales price." He said that we've had two forums here, where purchasers have stated that they don't pay the NYMEX price because there's a transportation charge. He said that he wanted to remind people here that producers don't get the NYMEX price. There have been statements made that, in some cases, producers have gotten NYMEX price, but 99% of producers don't have the availability of an automatic purchasing system. Making the NYMEX pricing the market price for the producer in Osage County is not the right road to go down. Lyon concluded by saying that he did not know why the Osage could not just continue to use the current system of the highest posted price. It works and there's no reason to change it.
- Roy St. John referenced §226. 2(e) and said that there's been no change to this clause, but it should be changed because it leaves off OMC [Osage Minerals Council]

employees. The clause prohibiting government employees from holding a lease should be extended to include members of the OMC and OMC employees.

- Bob Jackman said that he was making a public announcement that he has released a report, which will be in the federal registry, that is a report on chronic problems in the BIA Agency. Also have a newspaper article. He said that his general comment is that this whole process is a joke. You are ordered by the federal court to strengthen the management of the BIA. It has failed in its duty to manage the mineral estate. The real need is strengthening the management of the Agency. You're neglecting the operators and the surface owners. You're creating a major rift between Osage and operators. We're going to court. This NYMEX theory will not fly. It's not common business sense. No one has said: how can we make the operators more efficient and still be legal. This is not a fair and balanced hearing. You've left out the producers from a seat at the table in the Committee. Where you're going with all of this is that you're going to court. We'll go back to federal court that ruled on this and make a motion that Judge Emily Hewitt rule that this process was flawed and the regulations are invalid. The chronic problem is chronic understaffing at BIA. You aren't going in that direction and I suggest that you caucus and reevaluate the direction you're going in.
- Nona Roach said that she agrees with what Mr. Jackman had to say. She said that §226.1B(c) talks about ability of the Superintendent to inspect leases with a history of noncompliance. Give me a break. Currently, you don't go out there at all. You're proposing to go out annually and see whether it's been fixed? On §226.2(b): talks about electronic funds transfer. Can we do that currently? Okay, so we can currently do wire transfers, but not debit cards. Does the money paid go into a non-interest bearing account? If so, there's a lot of money that's being wasted. There's millions of dollars sitting in bank accounts that isn't generating interest. Regarding §226.11(d), talking about 45 days, what does the ONRR system consider in terms of when a lease ends? Right now, the minimum royalty considers when the original lease was done (in some cases, in 1906). It isn't when the lease was purchased, it's when lease was formed in 1906.

Committee members and staff to the Committee made the following comments in response to public comments:

- A staff member to federal representatives to the Committee said that, currently, the Osage Agency accepts cashiers checks and electronic funds transfers. In addition, money paid to the Agency goes into a non-interest bearing account.
- An Osage Committee member said that the Committee had considered the question of how funds collected by the Agency would be kept and said that the challenge with

regards to this issue is that, if a lease is not approved, it is legally unclear who would own any interest that was generated.

- A federal Committee member clarified that the due date in the ONRR system for receipt of payments corresponds to the original beginning date of the lease. It does not change with an assignment of the lease.
- A staff member to Osage representatives to the Committee said that what he said was that the Committee perceives the NYMEX price at Cushing to be a reasonable approximation of the oil price in Osage County, including a small royalty for the mineral owner. He said that, historically, it has always been true that Osage headright holders get the highest price within a specific defined market area. This is not the actual sale price, but rather the highest offered price. Only in 1994 was it changed to the highest posted price. Intention of the proposed changes is that the regulations come into accordance with the historical norm, which is that the Osage royalty owner be paid a premium.
- A staff member to Osage representatives to the Committee said that the current process was a negotiating rulemaking proceeding. The process is not about whether the BIA is doing its job properly. Those issues are not within the scope of this Committee. The staff member stated that the information that was stated about the court case is incorrect. The case has been dismissed. He clarified that the Court of Federal Claims does not have authority to order injunctive relief. The case was settled for an amount that is well known. He said that, if people in public comments would like to threaten legal action, he would suggest that they be specific about who they represent and what their legal grievances are. The staff member said that Committee members and staff want to keep these proceedings civil and want to focus on the job at hand.
- An Osage Committee member said that currently, in Osage County, the highest posted price is not close to the average sales price. He said that the average sales price is $2.32 per barrel above posted price. The Committee member said that, by using the NYMEX index, the Committee is making the royalty value above the average purchase price, instead of the posted price, which is below the average purchase price. He said that if the Osage Agency were to use the same procedure that ONRR does, it would likely be very close to the royalty value calculation that is being proposed by the Committee. One of the things that the Committee is doing is simplifying the process for calculating royalty payments as using the NYMEX procedure is a much simpler way to calculate royalty. In contrast, one of the more time-consuming processes is figuring out data and then fighting over what the appropriate price would be.
- A staff member to Osage representatives to the Committee said that if the Osage Agency were to use the ONRR 75% Major Portion calculation, the royalty would be $1.05 higher than by using the NYMEX price. He said that ONRR spends a lot of time

determining what the major portion price would be and that the Committee was trying to avoid that in Osage County.

- A staff member to federal representatives to the Committee said that one of the subcommittees had discussed the possibility of making changes to the once-per-year standard to check for compliance. The staff member said that the once-per-year standard would be a regulatory minimum. The subcommittee did discuss what this would mean in terms of resources on the part of the Osage Agency. The staff member explained that the Director of the BIA has been very clear that the regulations should reflect the resource commitments that the BIA is able to make. The staff member concluded by saying that the BIA and federal government understands that a lot of the issues raised in these meetings has to do with operational issues and that the Agency is taking various measures to improve operations.
- Staff members to both the federal and the Osage representatives to the Committee explained that the reason that the Osage Minerals Council and its employees are not included in the conflict of interest provision in §226.2(e) is because the mineral estate is owned by its shareholders. Prohibiting financial participation by the OMC and its employees would also raise issues regarding intergovernmental regulations as it would not be appropriate for the federal government to tell the Osage what they can and cannot do with regards to their mineral resource. In the future, if the OMC decides that it wants to have its own operations, it should be able to do that on its own resource that it owns.
- An Osage Committee member asked if it would be possible to have an executive from Cushing, Texas, come and speak to the Committee about how they arrive at their posted price.
    - In response, Rob Lyon, a member of the public, said that he was not a purchaser, but two forums with purchasers were held in Pawhuska. He explained that the Cushing price is set on the commodities exchange in New York and that it is a trading price. Lyon said that producers such as him need to have a profit margin, and the purchasers cannot offer the NYMEX price because they need to transport oil on trucks (as opposed to pipelines) and that costs money.

*Tentative Consensus*

The Committee reached tentative consensus on §226.11.

**Reporting *(§§ 226.13, 226.30 & 226.32)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee explained that the proposed changes to the regulations related to reporting are largely technical and to give greater discretion to the Osage Agency in determining how reporting will be completed and the format in which reporting will be required. The staff member explained that the regulations have been written to allow for work to be subcontracted to another agency, such as the Office of Natural Resources Revenue (ONRR).

A staff member to the Osage representatives to the Committee summarized the proposed changes to §226.13: in sub section (a), the payment due date was changed to the 30th of the month to synchronize with ONRR's system. In sub section (b), authority is given to the Superintendent to specify the format of reports that is required and provides details on the specific types of information that is required to be submitted in reports. The staff member noted that the draft regulations have been changed to require submission of run tickets only when the Superintendent requests them in writing as opposed to mandatory submission of all run tickets. The staff member explained that this procedure is better aligned with ONRR's procedures in requiring submission of run tickets for auditing as opposed to requiring submission of all run tickets for reporting.

A staff member to the Osage representatives to the Committee summarized the proposed changes to §226.30: lessees will be required to maintain records for six years in case there is a need to go back and audit past operations. In addition, records will need to be maintained while auditing is underway. The staff member noted that this language was adapted from BLM regulations. In addition, the staff member noted that §226.32, titled "Well records and reports," has amendments proposed that allow the Superintendent to specify the manner and method of reporting that is required, thereby allowing changes to be made in the future in the way that reports are required in order to keep pace with technological and operational changes.

*Committee Deliberation and Additional Proposed Changes to Regulations*

A federal Committee member clarified that ONRR regulations do not require that reports be submitted on the 30th of the month, but rather on the last day of the month, as described by the following language: "Royalty payments are due at the end of the month, following the month during which the oil and gas is produced and sold, except when the last day of the month falls on a weekend of holiday. In such cases, payments are due on the first business day of the succeeding month." The Committee agreed to adopt this language into the Osage regulations.

Committee members and staff discussed the provision of run tickets to the Osage Agency. A staff member to the federal representatives to the Committee said that the lessee should have copies of all run tickets and should be able to provide these to the Agency. A federal Committee member added, and clarified, that the federal government, in the form of the Osage Agency, has a legal relationship with the lessee, not with the purchaser, and therefore can only legally compel the lessee to provide run tickets. An Osage member of the Committee said that the Osage Mineral Council's interest is simply in receiving run tickets in a timely way and that, while the federal government can only require that the lessee provide run tickets, in an audit situation the lessee would be able to compel purchasers (and other parties) to provide copies of run tickets.

An Osage representative to the Committee suggested that §226.13(b)(4) be amended such that the Superintendent be required to provide copies of all reports to the OMC on a monthly basis as opposed to on a quarterly basis. A staff member to the federal representatives to the Committee responded that this would present a resource burden on the Agency and having to comply with this frequency of reporting obligation would detract from the Agency's ability to fulfill other duties relating to management, administration, and enforcement. Another Osage representative to the Committee noted that, although the minimum reporting requirement is quarterly, if the systems that are being discussed by the Committee are implemented, then the OMC should receive information on a real-time or daily basis.

A federal representative to the Committee inquired about the intent and adequacy of the language in §226.13(b)(2) that natural gas be measured "at the well." A staff member to the Osage representatives to the Committee clarified that this phrase is a generallyaccepted industry term for metering gas before it enters the gathering system.

*Public Comments and Responses from the Committee*

The Committee received the following public comments during this section of the meeting:

- Rob Lyon said that he had commented on the run ticket issue previously. He said that, speaking for most of the little producers, they get run tickets in a jar or some place at the tank battery. The purchaser has that run ticket on a little handheld computer. It would be a lot easier for the producer if the regulations require that run tickets come from purchasers. The run tickets get lost, rained on, they're illegible. More often than not, they wouldn't be suitable for me to make a copy for the OMC. Lyon said that, to have a simplified and regular source of information, I think that you need to go to the purchaser. They have it in digital format. They're currently providing run tickets to BIA, so why not just keep getting it from them? He concluded by saying that: asking a

producer to provide run tickets that are stained or torn, you're asking for a huge headache on both sides.

- Nona Roach asked for confirmation regarding whether the Osage Minerals Council (OMC) was already receiving run tickets from the Osage Agency and, if so, why that system needed to be changed. She added that most producers do not have computers but that the purchasers have handheld computers and that much more information of various kinds could be collected if the information were to be collected from them.

Committee members and staff to the Committee made the following comments in response to public comments:

- A federal representative to the Committee said that the government would need to know whether the digital run ticket that the purchasers have was a scanned copy of the paper run ticket or whether it was keyed in by hand. He explained that this is important because mistakes can be made when keying in data and this would be important from an audit perspective. From an audit perspective, it would be important to have a copy of the paper run ticket.
    - In response, Rob Lyon said that he did not know how purchasers enter in that information.
- A staff member to federal representatives to the Committee said that copies of run tickets are being provided to the OMC by BIA at this time, pursuant to the settlement agreement, but that the parties had agreed that an alternative approach to reporting would be developed through the Reg-Neg process. The staff member explained that the intention of these proposed regulation is that they would take the place of the requirement that the BIA provide scanned copies of run tickets on a quarterly basis.

*Tentative Consensus*

The Committee reached tentative consensus on §226.13.

**Operations (rental, drilling, and production obligations; drainage; disposition of production): *(§§ 226.9, 226.9A, 226.15A, 226.21A)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee reviewed the proposed changes to the regulations:

- §226.9(a) increased rental rates from $1 per acre for an oil or gas lease and $2 per acre for a combination lease to $10 per acre and $20 per acre, respectively, to bring these prices up to date. In addition, these rates are indexed to the price of oil in cases where the price of a barrel of oil rises over $100, as specified in §226.43B(a).

- §226.9(b) gives the Superintendent the authority to extend the primary term of a lease.
- §226.9(c) clarifies the Superintendent's authority to order further production.
- §226.9(d) gives the Superintendent the authority to cancel a lease if a lessee refuses to develop when ordered to do so by the Superintendent.
- §226.9(e): with regards to the minimum time required for termination of a lease for not producing in paying quantities, the Committee had previously discussed a 30-day period, but Osage representatives to the Committee had expressed concerns that a 30-day period would be too restrictive, so this was amended to a 60-day period for lease termination. In addition, the draft regulation was revised to allow for extenuating circumstances. In such a situation, the lessee or operator is required to inform the Superintendent within 45 days, in writing, with an explain of the situation that is impeding production. The Superintendent would then have the authority to issue a temporary suspension of operations that would halt automatic termination of the lease.
- §226.9(f) specifies that the OMC has the right to request that the termination process be enforced and specifies that the Superintendent has to respond to written requests for information and action from the OMC.
- The language on drainage in §226.9A is adapted from BLM regulations to fit Osage circumstances. The staff member to the Osage representatives to the Committee noted that two types of drainage problems could arise in Osage County: one, that a producer outside of the county is draining from a lease within the County due to inadequate production in the latter lease and, two, that a producer within the County is producing in lower quantities on a lease with a higher royalty rate and therefore oil or gas is being drained into a lease with a lower royalty rate. The remedies specified in §226.9A are that the Superintendent can compel production by the lessee or may allow the lessee to pay royalties for the quantity drained. The staff member noted that this is the same language that applies to drainage on Indian lands across the country.
- The language in §226.15A is taken from BLM regulations and pertains to the laws, regulations, lease terms, and orders and instructions of the Superintendent with which the lessee must comply and also with the authorization of the Superintendent to conduct inspections.
- §226.21A relates to the disposition of production and specifies that the lessee is required to put minerals into marketable condition, provides guidance for the disposition of oil that has accumulated in a pit, and addresses transportation of oils and credentials for transporters.

*Committee Deliberation and Additional Proposed Changes to Regulations*

The Committee and staff members discussed which parties would be responsible for enforcement of the provisions in §226.21A related to documentation of oil and gas that is being

transported. Personnel of the Osage Agency would have authority to inspect documentation on the lease site while law enforcement personnel would have authority to inspect documentation off of the lease site.

The Committee and staff members discussed the provision of §226.9(a) that requires that rental payments "be paid before the end of the first year of the lease." A staff member explained that current practice of the Osage Agency is to collect rental payments at the beginning of the lease year and the Committee agreed to change the draft language such that rental payments "shall be paid at the beginning of the first year of the lease."

At the suggestion of a federal representative to the Committee, the draft text of §226.9(a) was amended such that rental payments would be required to be received by the due date for payment, as opposed to postmarked by the due date, as the text previously stated.

The Committee and staff members discussed the provision of §226.9(e) which provides for immediate termination of a lease that does not produce in paying quantities for 60 days. Committee members and staff discussed the potential difficulty of monitoring production over a sixty-day period, and a staff member to the Osage representatives to the Committee noted that, once a monthly report shows production at, or close to 0, the Osage Agency will be on notice to monitor the level of production on the lease over the next month. In addition, the termination provision is automatic, and could be retroactively applied, even if the discovery of production below paying quantities were to be discovered at a later time. The Committee and staff members also discussed the provision of §226.9(e) that requires operators to inform the Superintendent, in writing, by the 45$^{th}$ day of production below paying quantities. Staff members noted that the assumption is that the Superintendent would respond by the 60$^{th}$ day of production below paying quantities to a letter received by the 45$^{th}$ day by either granting a temporary suspension of operations (and thereby putting lease termination on hold) or by allowing automatic lease termination to go forward. Staff members noted that, if the Superintendent does not respond to the lessee's letter and the lease terminates on the 60$^{th}$ day of production below paying quantities, the lessee would have grounds for a complaint against the Superintendent and could appeal the termination. In addition, a staff member to the Federal representatives to the Committee stated that, at the discretion of the Superintendent, the 45-day deadline for receipt of a letter from a lessee or producer explaining a lack of production and requesting a temporary suspension of operations could be waived such that a letter could be submitted after the 45$^{th}$ day. However, all operators should submit a letter by the 45$^{th}$ day of production below paying quantities and it is fully expected that the Superintendent would respond before the lease is terminated. The Committee also discussed whether, after a lease was terminated due to production below paying quantities, and the

lessee successfully petitions the Osage Minerals Council for the granting of a new lease, whether a new environmental and archeological review would be required. Federal and Osage Committee members clarified that, while new environmental and archeological reviews would not be required, the new lease would be subject to the 20% royalty rate specified in the new draft regulations.

An Osage representative to the Committee also clarified that even the operators of low-yield wells that are producing about a barrel per day have to submit production reports and that, although they may not sell their oil for a few months, they are producing and that is clear in terms of the standard of production in paying quantities. An Osage representative to the Committee and a staff member to the Osage representatives also answered another Committee member's question by explaining that an operator would be able to submit a letter to the Superintendent requesting a temporary suspension of operations in cases such as equipment failure or catastrophic events that prevent production in paying quantities. At the behest of Osage representatives to the Committee, the draft regulations in §226.9(e) were amended such that automatic termination of a lease would occur after 90 consecutive days of production below paying quantities, as opposed to after 60 days of such production. In addition, the Committee agreed to remove the phrase "is not yet due or" from §226.9(e).

The Committee agreed to separate the last sentence of sub clause §226.9(g), "If a lessee holds both an oil lease and a gas lease covering the same acreage, such lessee is subject to the provisions of this section as to both the oil lease and the gas lease," into a new sub clause, §226.9(h).

The Committee and staff members discussed concerns expressed by one of the Osage representatives to the Committee that the Osage Minerals Council (OMC) was ceding too much control and authority to the Office of Natural Resources Revenue (ONRR). This Committee member said: What I heard in Denver is that you don't even want to hear enforcement come in as they'll come in and go after the little producers. I want to know what the producers feel about ONRR. We need to bring the producers into this discussion and the moms and pops will stay here through thick and thin. Seems like we're talking too much about ONRR and we're giving them too much authority. It also seems that we're giving the Superintendent a whole lot of power and more authority should remain with the Minerals Council. In response, another Osage representative to the Committee clarified that a lease would terminate automatically at 60 days and the authority given to the Superintendent is to prevent this termination by granting a temporary suspension of operations. This representative also suggested that review by the OMC could also be added into the decision-making process in cases of production below paying quantities by rewriting the regulations.

In response to a question by an Osage representative to the Committee, a staff member to the federal representatives to the Committee clarified that the Bureau of Indian Affairs (BIA) manages the Osage mineral estate and will continue to do that, even if the Bureau signs contracts with ONRR to provide certain services. This sort of agreement would be purely internal to the BIA. The BIA would contract with ONRR to run their system and then the Superintendent would use the data created by ONRR's systems. The BIA and OMC will then have the ability to analyze and use the information that is reported to ONRR. As far as the overall trust responsibility, BIA will continue to be responsible for the overall trust responsibility as a matter of law, even if BIA partners with ONRR. A federal representative to the Committee added that ONRR would not be making decisions with regards to management of the Osage mineral estate. Once OMC negotiates financial terms with a lessee, all that ONRR would do is to enforce those terms that OMC has negotiated. If OMC decided that oil should be calculated at a NYMEX rate, ONRR would enforce that. ONRR only enforce what the lessee and lessor agree to. The federal representative to the Committee added that, in terms of accounting functions and concerns about the independence of who the Osage Agency can hire, those concerns came from a trip to the Wind River Reservation.

The federal representative clarified that §202 of the Federal Oil and Gas Royalty Management Act (FOGRMA) allows ONRR to delegate authority to the tribe to conduct audits (he also noted that FOGRMA does not include the Osage Nation). One of the rules for having a cooperative agreement is that the tribe's auditors pass the same background check and qualifications as federal officials. However, as long as the minimal criteria are met, the Osage Agency can still hire whom it wants to. ONRR does not make decision. OMC and the Osage Agency negotiate leases and sets the financial terms of those leases. A staff member to the federal representatives to the Committee added that no agreement between the BIA and ONRR had yet been concluded and that discussions between these two agencies would only begin once the draft regulations are approved. An Osage representative to the Committee added that the Committee has been very careful not to create any sort of regulations that would require that the BIA have to get outside help. Rather, the OMC just wants basic services to be provided and the draft regulations are not aimed at forcing the BIA to contract with ONRR.

*Public Comments and Responses from the Committee*

The Committee received the following public comments during this section of the meeting:

- Stephanie Erwin said that she wanted to make sure that she understand a couple of points correctly: ONRR would not get involved until production starts? Who decides whether production is in "paying quantities" and what is the minimum number for that?

- Cynthia Boone inquired about how ONRR determines whether payments are late and how ONRR assesses late fees. She asked whether this assessment involves a percentage. She also suggested that, if the Superintendent doesn't act in 60 days, then the Acting Superintendent should act prior to lease termination.
- Ray McClain introduced himself as an Osage shareholder. He said that he firmly believes that within next two years, shareholders will be seeing helium royalties. It is good that the Committee is thinking about royalties on helium. But then the Committee took it out of the drainage regulations. Helium needs to be addressed thoroughly. Another thing that needs to be addressed: in §226.36, the text says: "adequate blowout preventers, approved by the Superintendent... and they must be equipped by proper size rams and...". McClain said that: I'm sure that producers and drillers have proper equipment in place. But no inspector can walk up and make sure that everything is proper. These blowout preventers need to be tested and reported on a schedule and audited on occasion.
- Bob Jackman said that, on the subject of rentals, often owners look at rentals as just another way to gouge us. We [the producers] would like to work in total cooperation, in partnership. The money is under the ground. This fine-tuning regarding rental rates, etc., needs to be in consultation with producers. In the federal registry, I have entered a comment today: I recommend that you go to a 6-month period of no-documented production. Six months is much better, because you have storms, equipment problems, etc. It would be to your benefit to go to a six-month period. Operators want to drill as fast as possible, but we need to conduct proper technical work. You've said that you're balancing all stakeholders, but you don't have any producers at the table. On drainage, you need to have petroleum geologists to help understand drainage. Texas does this better than anyone. The Superintendent should have the prerogative to waive automatic termination. I've seen lease termination used with a vengeance and there need to be protections put in place to protect producers from the Superintendent's unilateral decisions.
- Nona Roach said that, §226.9(a) allows a year to drill the well. If, by the end of the year, you have not drilled, them you can pay a delayed rental fee. But there's a discrepancy: it seems that you're paying for a full additional year, but sometimes people get confused and lose their leases. Also, Roach asked what the definition is of "actual drilling" that is referenced in §226.9(b). Lastly, she said that, with regards to the 60-day period of production below paying quantities resulting in lease termination: there are too many things that happen that keep you from producing the well. She said that she agrees with the Committee that a letter should be submitted by the producer to the Superintendent, but that she does not agree with the Committee that termination should be after 60 days. Right now, the OMC doesn't even have any idea how long some

of its leases haven't been in production. She asked: Do you want to terminate and then let it go into Chaparral's concession area and then let it lie fallow?

- Roy St. John said that he may be way off base with his question, but that §226.19 is talking about surface owners. He said: surface rights belong to people like me who are landowners and under title 52, Chapter 4 of the Osage statutes, Section 318, it seems that the CFRs are in violation of my rights.
- Rob Lyon said that, on the drainage provisions of §226.9A, the existing regulations already have language regarding out-of-county drilling and differential royalties and that the expansion of the proposed regulations concerns him. He said: generally, geology and economics should be considered as part of the regulations. Extenuating circumstances need to be considered. This is opening up too much latitude to the discretion of the Superintendent to the potential detriment of the producers and the shareholders. Lyon said that he had a question for Merrill in relation to §226.43B(a): Lyon said that most purchasers pay at an average price and asked if Merrill could explain how the adjustment factor would be calculated in relation to the Settlement Price. Finally, Lyon said that the 60-day period before termination is too short a time. Especially for the little guy, he's not going to have enough time to do remedial work and will need more time.
- Cynthia Boone introduced herself as a member of the Osage Minerals Council. She said: when I was here last month, I had requested that we have subcommittees of landowners and of producers. What I heard was that we're too far into the process to do that. I've been here a long time and when this process is done, I'll still be here. Looking at my notes from Wind River Reservation trip, what I heard is that ONRR will come in and take over and OMC won't even have control over hiring. If moms and pops aren't happy with NYMEX, then we need to protect them. When we discussed adopting the highest posted price, I didn't realize that we were talking about adopting NYMEX pricing. I have some real concerns about ONRR. Is the MOU signed by the Superintendent and ONRR? I have a lot of unanswered questions.

Committee members and staff to the Committee made the following comments in response to public comments:

- A staff member to federal representatives to the Committee explained that trust responsibilities for the Osage minerals estate lie with the Bureau of Indian Affairs (BIA), and that the Bureau could contract with other entities, such as ONRR, to provide certain services or fulfill certain responsibilities in fulfillment of its trust responsibilities. The responsibility for determining whether production is "in paying quantities" would lie with the Superintendent, as a representative of the BIA.

- A federal representative to the Committee added that ONRR also believes that it has some trust responsibilities. ONRR generates an Oil and Gas Operations Report on a monthly basis that shows, well by well, what is being produced. ONRR downloads that information to the BIA and it is up to the Superintendent to determine whether a well has not been producing in paying quantities for 60 days. ONRR will not decide this.
- A staff member to Osage representatives to the Committee explained that the definition of "paying quantities" can be found in §226.1(r): "Production in paying quantities means production from a lease of oil and/or gas of sufficient value to exceed direct operating costs and the cost of lease rentals or minimum royalties" and that that is the same definition that BIA is currently using.
- A federal representative to the Committee explained that ONRR's Oil and Gas Operations Report provides information about during which month oil is produced. ONRR compares the due date for payment according to the sales month and compares that automatically to the payment due date. ONRR then calculates an automatic interest payment for late payments on a daily basis that is defined by interest rates defined by the IRS.
- A staff member to Osage representatives to the Committee explained that the phrase "actual drilling" in §226.9(b) means when the drill breaks ground and drilling begins.
- A staff member to Osage representatives to the Committee explained that §226.43B(a) references the settlement value of a barrel of oil and that the monthly NYMEX price would be used to determine royalty under §226.11.
- A staff member to the federal representatives to the Committee said that she wanted to address concerns about certain interests not being included formally in the process. She said that this was discussed by the Committee at the last meeting and it decided that it was too late to form new subcommittees. She said: I want to note that this Committee was formed through a formal, public comment process. Every meeting of the meeting is open to the public and the Committee has provided public comment periods so that we can hear from all interests in Osage County. Many of the changes the Committee has made to the draft regulations have been in response to public comments and the Committee will continue to highlight those changes. The staff member said that she wants to reiterate that members of the public have the ability to email comments to Eddie Streeter, the Designated Federal Officer, and those comments will be entered into the record. The Committee's goal between this meeting and the next meeting is to go through all public comments received and make sure that the Committee has responded to them as well as possible.
- A staff member to the Osage representatives to the Committee said that the negotiated rulemaking proceeding is separate from the consultation process. Tribal and federal representatives continue to have those consultation meetings. The rulemaking is

focused specifically on regulations. The staff member said that he understands that there are other changes that members of the public might want to see, and those can happen, just not through this Committee.

- Partially in response to public comments, the Committee decided to amend the draft regulations in §226.9(e) such that automatic termination of a lease would occur after 90 consecutive days of not producing in paying quantities, as opposed to after 60 days.

*Tentative Consensus*

The Committee reached tentative consensus on §§226.9 and 226.9A.

**Operations (control of wells; measuring and storing oil; measurement of gas; site security; and reporting of accidents, fires, theft, and vandalism): *(§§ 226.36, 226.38, 226.39, 226.40A & 226.41)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee reviewed the proposed changes to the regulations:

- §226.36, regarding control of wells, is a hybrid of existing language and BLM language. Existing language is paragraph A. Paragraphs B, C, D, and E have text from BLM regulations. Sub clause A concerns the installation of blowout control devices; sub clause B features basic text regarding maintaining control while drilling wells; sub clause C concerns vertical bore holes; sub clause D concerns high pressure or loss of circulation; and sub clause E concerns protection of fresh water and other minerals. The staff member said that these regulations are an articulation of "good, prudent practice."
- The idea of §226.38 is to give the Superintendent ability to go out and measure the tank before the purchaser removes the oil. Sub section (c) says that the Superintendent has the right, but not the obligation, to witness all gaugings.
- §226.39, concerns the measurement of gas, which is an area in which onshore orders are likely to be very important.
- §226.40A addresses site security. There is also language about site security in onshore order #3, which the BIA Director could adopt. §226.40A requires that lessees have site security plans and submit them to the agency. This section has language about seals and running lines to storage tanks. The language in §226.40A is adopted from BLM regulations. The staff member added that these regulations are a part of good practice in the industry and that it is to everyone's benefit that there be greater clarity in regulations so that operators understand what they are, and are not, obligated to do.

- §226.41 incorporates language from BLM regulations concerning the reporting of accidents, fires, theft, and vandalism in order to clarify requirements for the timeframe and parameters under which reports must be made.

*Committee Deliberation and Additional Proposed Changes to Regulations*
A staff member to the federal representatives to the Committee suggested that the following text be removed from §226.25(b)(3): "If the lessees do not accept the apportionment, the oil or gas lessee who drilled the well must plug the well" on the basis that it seems wasteful to plug the well in the case that the oil lessee and the gas lessee cannot agree on the cost of the well. The Committee agreed to adopt this suggestion.

In addition, a staff member to the federal representatives to the Committee suggested that the word "productive" be struck from the first sentence of §226.28. The Committee agreed to adopt this suggestion.

As the suggestion of a staff member to the federal representatives to the Committee, a subcommittee will consider language to address the shutting of production valves for 48 hours after the removal of oil in §226.38(b).

A federal representative to the Committee suggested that the standard of pressure for measuring gas be changed from 14.65 pounds to the square inch to 14.73 pounds to the square inch as this latter figure is the standard used throughout the rest of Indian country and would thereby allow greater consistency for ONRR. A staff member to the Osage representatives to the Committee responded that he Osage Committee members oppose this proposed amendment as it would decrease the royalty payments due to the head right holders.

At the suggestion of a federal representative to the Committee, the Committee agreed to remove the phrase "in any calendar year" from §226.38(c).

Committee members discussed whether there would need to be a requirement for how often oil meters are inspected, calibrated, and adjusted in §226.38. The Committee agreed to explore this issue further in Subcommittee and revisit the issue at the next Reg-Neg meeting.

The Committee discussed whether a lessee might repeatedly decline to inform the Superintendent about the removal of a tank of oil in order to avoid paying royalties, as is regulated by §226.38(b). Committee members noted that termination of the lease was possible in cases of repeated violations and declined to adopt any language to amend the draft clause.

In response to a question from a federal representative to the Committee, Osage representatives clarified that the inspection of natural gas meters mandated by §226.39(b) would be required for all meters, regardless of the volume of gas produced. In addition, the Committee agreed to add the following language to the clause: "If the Superintendent is not present, he may request records relating to all meter inspections, calibrations, and adjustments."

*Public Comments and Responses from the Committee*

The Committee received the following public comments during this section of the meeting:

- Rob Lyon said that, with regards to the clause (§226.38(b)) requiring producers to call the Superintendent, that it is one more phone call, which is fine, as long as the Agency has a system that the producers can trust. He said: make sure that you have a telephone system in place so that the producer has proof that he or she called in. We don't want to get caught with a $500 fine because your system didn't register the phone call. Mr. Lyon also said that, regarding the clause (§226.40A) that requires seals and other measures for site security, that he thinks that it puts too much pressure on producers to keep track of seal numbers, etc. He asked: What is a site security plan? Sounds like something that was produced out of Washington. He said that if the Committee is worried about oil theft it is important to note that he has just as much interest as the Osage shareholders in producing in the proper quantities.
- Bob Jackman said: it's in the Federal Registry that there are infectious problems at BIA Agency. This is a $4 billion mineral estate. One person has more power and authority and responsibility than any other entity of that size. Whether this deal works is dependent on the Superintendent and the qualified petroleum engineers and geologists who are supporting him or her. One solution that I will propose will require the BIA to step out of its normal box: will require a senior official of government grade with petroleum experience and an Assistant Superintendent with similar qualifications. This is a unique situation, and you need to get qualified people in here. The selection process for this Committee was flawed; you're missing two partners. I protest. And I also protest the decision not to form subcommittees for producers and surface owners. Again, the lynchpin is the Superintendent.
- Nona Roach said: My wise 85-year old mom always told me when talking to men to paint a picture story. So I'm going to paint you a picture story. Since I have been battling the BIA Osage mismanagement for over 45 years, it occurs to me that it doesn't work. It's like a household in which the mother doesn't oversee the children. Suddenly dad decides that the children must be punished. It is not apparent to him that the good children are not at fault, but rather it is mom's fault. Consequently the poor sickly child doesn't have protection. The big kids still will destroy their rooms. You can't clean up

the house without addressing the underlying cause of the problems. Nothing good will come from you trying to legislate this problem away. The adult children are not your problem. With your new suggestions, you have proven to them that home is not where the heart is. There will be a great exodus and I will predict that the children will never come back in. You had all of the regulations in place. But you didn't enforce them. And now you're trying to whack the good operators who are trying to help you and produce this mineral estate with you and say that we're all the problem, but we're not. Ms. Roach also asked how many producers ONRR interfaces with across the country and how the BIA and ONRR would provide training in Osage County.

Committee members and staff to the Committee made the following comments in response to public comments:

- A federal representative to the Committee stated that ONRR interfaces with thousands of producers. The agency currently provides trainings across gas and oil country, and is well equipped to do so in Osage County.
- A staff member to the Osage representatives to the Committee explained that the language in §226.40A is drawn directly from BLM regulations and that site security plans currently are required everywhere in Indian Country expect for Osage County.
- A staff member to the federal representatives to the Committee added that, although many of the proposed amendments to the draft regulations are adapted from BLM regulations, there are internal discussions within BIA about how the agency will implement revised regulations in Osage County. This implementation likely will require training for producers and lessees on, for example, how to interface with the ONRR system. Training would also cover, for example, how to create and implement a site security plan. All of this is being discussed within BIA.

*Tentative Consensus*

The Committee reached tentative consensus on §§226.25, 226.28, 226.38 (pending the addition of some language), 226.39, and 226.40A.

**Bonds, Penalties, and Enforcement *(§§ 226.6, 226.42, 226.43, 226.43A & 226.43B)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee reviewed the proposed changes to the regulations:

- A staff member to the Osage representatives to the Committee explained that the purpose of bonding requirements is to make sure that, if a well is abandoned without being properly plugged and the land being properly reclaimed, that there is money

available to do those things. The Committee determined that the current bonding requirements are inadequate. The current requirements are based on the amount of surface area covered, as opposed to the number of wells, whereas in reality plugging and reclamation would be costs incurred per well, not over a given surface. There are a large number of wells in Osage County that were not plugged correctly. In §226.6, the bonding amount is required to be no less than $10,000. A subcommittee to the Committee conducted research that found that the average cost of plugging a well in Oklahoma is $8,000. The Committee decided to adopt the $10,000 figure based on the idea of charging 125% of the cost of plugging a single well in order to cover additional costs incurred beyond plugging the well, such as reclamation of the land. The staff member continued by explaining that, in order to mitigate the burden on producers, the draft regulations have been revised to expand the types of bonds that are allowable beyond surety bonds to include personal bonds. These provisions were taken from the BLM regulations. In addition, the staff member explained that the current regulations allow for a nationwide bond set at $150,000. In the draft regulations, this nationwide bond this has been replaced with a cap on the number of wells that have to be bonded at 20 wells. The logic behind this change is that a producer would be relatively unlikely to walk away from their wells if they have a larger number of wells, which is why producers are only required to bond 20 wells. Finally, §226.6 lists examples of the types of circumstances in which the Superintendent may require an increase or change in the per-well bond amount.

- §226.42 covers penalties for violation of lease terms. The staff member stated that current regulations have penalty of $500/day, and this is changed to $1500/day in the draft regulations. He noted that the language specifying a late charge for unpaid penalties has been moved because it applies to various other penalties also. It now appears in §226.43B. §226.43B(a) states that dollar amounts in various other sections of the regulations are adjusted with the price of a barrel of oil; this allows for fluctuation over time. Finally, a sentence is added to §226.42 that states that penalties are payable to the Superintendent thus keeping the money within Agency and may be used to carry out the duties and responsibilities set forth in the regulations.
- §226.43 specifies penalties for specific violations. The staff member said that most amounts set to $500 per day, except the penalty for improper disposal of fluid is $1000/day and failure to permit inspection by a transporter is also penalized at $1000/day. He added that two additional penalties are added to the current regulations, for failure to maintain adequate bonding and for failing to permit inspection by a transporter.
- §226.43A pertains to the use or dissemination of false, inaccurate, or misleading information and references the US criminal statute at 18 U.S.C. §1001 for knowingly

filing fraudulent reports and information. The staff member noted that the section combines some language from the current regulations and some language from BLM regulations. The penalties specified are identical to the penalties specified in BLM regulations for other Indian and federal lands.

*Committee Deliberation and Additional Proposed Changes to Regulations*

Committee members and staff members discussed the meaning of §226.43(c) and whether, with the draft language as written, a fine would only be incurred if both wells and tank batteries were unmarked. The Committee discussed the possibility of changing the text as it read at the meeting, "For failure to mark wells and tank batteries as required by § 226.34, $500 per day for each well and tank battery" to the following text: "For failure to mark wells or tank batteries as required by § 226.34, $500 per day for each well or tank battery." In this change, the two instances of the word "and" are changed to "or." The Committee discussed whether this might cause a fine in higher amounts to be levied than was intended by the Subcommittee, and the Subcommittee suggested various iterations of text. The Committee agreed to change the two instances of the word "and" to "or" in order to make the regulations clear and unambiguous.

Committee members and staff members discussed a suggestion from the federal representatives to add sub clause (l) to §226.43, which would read as follows: "For failure to comply with the Superintendent's orders as required by §226.30, not more than $500 per day." A staff member to the federal representatives to the Committee explained that this sub clause would add a penalty for not complying with the general record-keeping requirement in order to encourage proper record keeping. The Committee discussed whether adding this sort of clause might create a conflict between §226.42 and §226.43. The Committee decided not to adopt the proposed sub clause (l).

A federal representative to the Committee asked whether the Superintendent could compel a producer to post bonds in excess of $200,000 or to post bonds for more than 20 wells. A staff member to the Osage representatives to the Committee responded that the Superintendent could compel a producer to post bonds in excess of $200,000 but could not compel a producer to post bonds for more than 20 wells.

Committee members and staff members discussed a suggestion from a federal representative to add language to the draft regulations providing for a penalty for noncompliance with any aspect of the regulations, similar to the statement that can be found in 30 CFR §1241.51(a). The Committee discussed the pros and cons of taking this sort of approach: on the one hand, this would allow for penalties to be levied for any sort of violation of the regulations without needing to enumerate specific penalties for specific clauses, while on the other hand

enumerating specific clauses can make it easier for operators to determine which clauses they are required to follow. The Committee decided to retain the approach taken in the current draft regulations of enumerating specific clauses.

A staff member to the Osage representatives to the Committee suggested that the word "drilled" be eliminated from §226.6(c). The Committee agreed to adopt this suggestion.

At the suggestion of a staff member to the Osage representatives to the Committee, the Committee agreed to add the phrase "or other marketable products" after "oil and gas" to §226.43A.

At the suggestion of a staff member to the Osage representatives to the Committee, the Committee agreed to add the phrase "or such other rate as may be set by the Superintendent after consultation with the OMC" to §226.43B. A federal representative to the Committee raised the concern that any rate could be set, causing uncertainty for producers, but a staff member to the federal representatives to the Committee responded that the setting of the rate would have to be rational and based on a developed record pursuant to the Administrative Procedures Act.

*Public Comments and Responses from the Committee*

The Committee received the following public comments during this section of the meeting:

- Roy St. John said: I am a shareholder and I have a comment. I have to apologize, it's not in these regulations anywhere. I changed my document to OCR so that I could scan it and I didn't find any reference to concessions. It seems to be a common practice to provide concessions to developers. Since that isn't covered in regulations, don't we need checks and balances on that mechanism. Good, bad, or indifferent, it provides an un-level playing field for people who can't afford to do large mineral development.
- Bob Jackman said: My name is Bob Jackman and I am a petroleum geologist. The figure of using $8000 for plugging a well, where did you get this reference? Is that depth adjusted? The wells here are shallower than in the rest of the state. On the criminal and civil violations, do you have a comparable set of statutes for BIA employees that make false statements? Do we have fair and balance? How about also hammering BIA employees for making false statements?
- Nona Roach said: I understand that you don't have any requirement for purchasers to have a bond. Since we've had a company bankruptcy, it amazes me why you would never require a purchaser who is moving millions of dollars of oil to have a bond to cover all your money? If you're going to hammer us [producers] and require us to post bonds, why wouldn't you also require bonds from purchasers? There have been

multiple instances in which lessees were required to pay for the bankruptcy of purchasers. It's a huge economic impact on Osage County, and I wonder whether you would do that.

- Rob Lyon said: Regarding all these fines that we're talking about, everything I hear is very one-sided against the producer. I want to know if there's any discretion with the Superintendent. Sometimes we mail a form to the Superintendent, and we assume that the Superintendent gets the form, and then we get fined because the Superintendent never received it. Will we have to submit everything by certified mail in order to avoid fines? I think that you're penalizing the 99% to get at the 1% who don't play be the rules.
- Aaron Box said that, from the perspective of his operator, itemized penalties are easier to understand and to comply with.

Committee members and staff to the Committee made the following comments in response to public comments:

- A staff member to the Osage representatives to the Committee said that the Committee did recognize the need to cover concession agreements. In 226.1(d), the definition of "lease" is written to encompass contracts that allow for exploration for oil and gas, which would cover concession agreements. A staff member to the federal representatives to the Committee added that, because the explanation of "lease" is written to apply to concession agreements, all regulations that apply to leases would also apply to concession agreements. This staff member added that the OMC has always had the authority to negotiate the terms of its agreements for the Osage mineral estate.
- A staff member to the Osage representatives to the Committee said that, in terms of arriving at the $8000 figure for plugging a well, one of the subcommittees looked at numerous wells around Osage County, and the costs of plugging and reclamation ranged from $6000 to $30,000, in the latter case because there was junk in the well. That is how the Committee arrived at the $8000 figure. In response, a federal representative to the Committee inquired about the cost of plugging horizontal wells, which he said could cost up to $100 per foot to plug. An Osage representative to the Committee responded by saying that the subcommittee did consider horizontal wells, but that Oklahoma law does not require the plugging of horizontal wells heel to toe. Staff members added that §226.6(f) provides authority to the Superintendent to adjust the required bond amount as needed, which would cover circumstances such as horizontal wells.
- A federal representative to the Committee said that he has had the unpleasant order from a court to testify against federal employees who have made false statements. Responding to the comment regarding the need for penalties against federal employees who make false statements, the representative explained that there are plenty of

statutes that penalize federal employees for making false statements. Those rules and regulations are statutory. He said that he believes that they are found in Chapter 5 of the C.F.R., which regulates human resources. A staff member to the federal representatives to the Committee added that there are significant federal criminal and civil law that penalizes federal employees. If there are implications that BIA employees are involved in criminal acts, this needs to be raised with the Bureau and not with this Committee.

- Responding to the public comment suggesting the adoption of bonding requirements for purchasers, a staff member to the federal representatives to the Committee said that, as a matter of law, the enforceable relationship is between the BIA, lessee, and OMC. Therefore the regulations can require things of the lessee, but not of the purchaser. However, the lessees can make sure that certain things are required of the purchasers through the contracts that they sign with them.
- A federal representative to the Committee said that the other task that the Bureau of Indian Affairs is taking on, outside of the Reg-Neg process, is working to correct what has happened at the Agency in the past. He said that BIA is undertaking those improvements right now. If an Agency employee knowingly and willfully does something illegal, then the BIA is held liable. He said that there is also an appeals process that lessees can initiate which are described in Chapter 2 of CFRs. However appeals do not help anybody, as they are time consuming and costly for both operators and for the BIA. So BIA wants to minimize the number of appeals that operators file, and the Bureau is committing to do a better job.
- An Osage representative to the Committee commented on the feeling that the Committee is out to get the good guys in pursuit of the bad ones. He said that no one who follows the regulations is going to be penalized by provisions of the draft regulations, only the bad guys will be penalized.

*Tentative Consensus*

The Committee reached tentative consensus on §§226.6, 226.42, 226.43, 226.43A, and 226.43B.

**Documentation of the Reg-Neg Meeting**

In response to a request from a reporter to videotape a portion of the reg-neg meeting, Vanessa Ray-Hodge, Office of the Solicitor of the Department of Interior, made the following remarks:

- I'm an attorney for the DOI. OETA (the reporter) is here to record the meeting. Under the Department of Interior's policy, FACA committees are public committees, but are limited public committees. In order for the proceedings to be filmed, every Committee

member and the Designated Federal Officer must agree to be filmed. That being said, if the Committee does not agree to the request to be filmed, reporters and other members of the public are welcome to stay and take notes. All minutes of the Committee and additional materials are posted on the website of the Reg-Neg. There was a request by OETA to address the Committee, and the Committee Co-Chairs will decide whether to honor this request.

The Reg-Neg Committee Co-Chairs agreed to hear the request by Lis Exon of OETA to address the Committee. Ms. Exon made the following comments to the Committee:

- We [OETA] are an educational agency to provide news and information to communities without other access. We're the only reporters who are here today. There were other journalists here yesterday, but I'm the only here today, and my tool is a camera and film. I would like to provide information to the City of Tulsa and the Osage Nation. We really delve into issues, as our story lengths are longer. We really provide balanced, fair coverage of any issue that we cover. We would really appreciate the opportunity to report on and provide information about this process to the public.

Following the comments by Ms. Exon, a roll call vote of the Committee was taken as to whether to allow filming. A member of the Committee voted against filming and therefore video recording was not allowed.

Later in the meeting, Ms. Ray-Hodge made the following additional comment in response to concerns about the takingof still photography at the meeting by newspapers: video taping is different from photography. Photography is allowed, but I have received some complaints that it has been distracting. If I get other complaints, I will have to ask the photographers to stop taking pictures. The facilitator noted that in the spirit of fairness, OETA, like the newspapers, was allowed to take still photography .

**Surface and Environmental Issues *(§§ 226.19, 226.22A, 226.22B)***

*Presentation of Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee reviewed the proposed changes to the regulations:

- In §226.19(a), a typo in the current version of the regulations is proposed to be fixed: the word "unavoidable" would be changed to "avoidable." In §226.19(b), commencement money is proposed to be increased from the current $300 to $2500. §226.19(d) has a proposed increase of the flat fee per tank from $100 to $500 and has some clarifying edits to the current regulatory language in the way that the text

distinguishes between large and small tank size: the text is proposed to be amended from "50 feet square" to "2500 square feet." The staff member also explained that a subcommittee also considered whether there should be additional fees imposed for additional facilities and determined that fees for those facilities would instead be covered under surface damages and that there would be no upfront, flat fee for these other facilities.

- The text of §226.22A is taken directly from BLM regulations and this section concerning the prohibition of pollution is phrased in relatively general terms. Sub section (a) provides general instruction regarding the protection of mineral resources, other natural resources, and environmental quality through compliance with the Superintendent's orders and laws, regulations, etc. Sub section (b) concerns the exercise of due diligence and contains specific language regarding the disposal of produced water and surface reclamation. Sub section (c) concerns the reporting of spills and leakages and also clarifies that compliance with these regulations does not preclude compliance with other laws. Sub section (d) concerns the submission of a contingency plan when required by the Superintendent.
- §226.22B features text on safety precautions and is adapted directly from BLM regulations.

*Committee Deliberation and Additional Proposed Changes to Regulations*

A staff member to the Osage representatives to the Committee stated that the Osage Minerals Council representatives would like to put on record what the BLM's Onshore Oil and Gas Orders cover and why the OMC suggests that, eventually, all of the onshore orders be adopted by the BIA in management of the Osage minerals estate. The staff member stated that the OMC is of the view that adoption of the onshore orders would be to the benefit of the management of the mineral estate. In response, a staff member to the federal representatives to the Committee said that, while it would be a good idea to go through the onshore orders to see which orders would be good to adopt, at this point the onshore oil and gas orders are being considered outside of Reg-Neg process in conjunction with revisions to the regulations.

A staff member to the Osage representatives to the Committee reviewed the BLM's Onshore Oil and Gas Orders, as well as select BLM Notices to Lessees. These onshore orders and notices to lessees were presented in their order of priority for adoption, as determined by the OMC:

- Onshore order #5 provides requirements and standards for the measurement of natural gas. The staff member said that it is critically important that the Osage Agency adopt this Order.
- Order #6 is entitled Hydrogen Sulfide ($H_2S$) Regulations. This order was written to protect public health and safety as well as the health and safety of well workers. The

order lays out the standards that an operator must follow while handling $H_2S$. The staff member explained that the order uses a calculation called the radius of exposure that governs what actions an operator must take within certain vicinities of the point of exposure to hydrogen sulfide to protect human health.

- The third most important is Order #4, which deals with standards for the measurement of oil. The types of measures encompassed in this order have been addressed by this committee in terms of the use of seals and other measures.
- The fourth most important measure for the Osage is Order #3, entitled Site Security. This order provides minimum standards for site security for site rig up, and what measures can be used and cannot be used.
- The next items are BLM Notice to Lessees 4A regarding the calculation of royalty that is due in case of spillage, and Notice to Lessees 3A: how you report spills and discharges.
- Finally, onshore orders #2, #1, and #7 are not as applicable in Osage County as in other areas. Nevertheless, the staff member said that these should also be adopted. These three onshore orders pertain to drilling obligations, approval of operations, and disposal of produced water, respectively.

The Committee discussed whether the commencement money of $2500 per well could be better structured to minimize disturbance for surface owners. Specifically, the Committee discussed whether it would be better to provide commencement money per well pad as opposed to per well. The Committee noted that, while the disturbance to the surface owner is caused primarily by the presence of the well pad as opposed to the number of wells on a well pad, in most cases, there can also be cases where the well pad becomes quite large, particularly with the use of horizontal drilling. As such, the Committee agreed to retain the per-well commencement fee, as this would be simpler to implement and since additional money could be paid in the form of damages.

*Public Comments and Responses from the Committee*

The Committee received the following public comments during this section of the meeting:

- Jeff Henry, with the Osage County Cattlemen's Association, made the following comments: First, a couple of housekeeping issues: we have a lot of members who are tending to cattle still due to the snowstorm. We request that there be public comment during the next public meeting. Our suggestions to the proposed regulatory revisions are as follows: we think that the current proposed regulations are inadequate. The draft regulations were presented to the public very recently, and so we didn't have adequate time to analyze them. But, generally, the proposed revisions don't go nearly far enough. Nor do they change some of the more egregious current regulations. The process for development of the proposed revisions was flawed, rushed, and developed without

participation of landowners. The Committee denied the request to form a subcommittee of surface owners. Some of the immediate things that we think need to be addressed are the following: we are requesting a moratorium on the flaring of $H_2S$ gas. Also, numerous steps need to be taken protect surface and groundwater and to address roads and safety. I'm sitting next to AC Box, and he's the only operator who has come to meet with me. And I appreciate operators such as AC who are doing so much to meet the needs of surface owners. My request for the Committee today: we learned that BIA is only responsible for bringing regulations up to the standards of regulations in other places. Why not bring in outside professionals to create best-possible regulations? We would like to hear BIA's response.

- Ford Drummond, fourth generation rancher in Osage County, made the following comment: I'd like to talk about water. $H_2S$ is a big problem, but when you eliminate venting, it'll dissipate. Pollution of groundwater is permanent. We've got places in the County where we can't use the groundwater due to past contamination. We have specific suggestions that we've submitted regarding casing, testing, etc. of wells. First, reporting of hydraulic fracturing chemicals to FracFocus should be required here as is done in the rest of the state. Numerous steps need to be taken to protect groundwater. I also serve as the Chairman of the Oklahoma Water Resources Board. Currently the CFRs give the Superintendent authority to permit water use and withdrawal of groundwater. Surface water is publicly owned by the people of Oklahoma. Groundwater is the private property of the surface owner. The case Osage Nation vs. Irby found that Osage County is not a reservation. That means that laws of Oklahoma apply in Osage County, including the laws involving water rights. The BIA does not have the necessary expertise nor the authority to regulate surface water.
- Bob Hamilton made the following comment: I would like to add onto Drummond's concerns regarding fresh water. What's been going on for several decades is that the maps that the BIA is using to determine freshwater depth are outdated by several decades. So wells that are staked require surface casing, but with inaccurate records, the depth to which the BIA regulations require casing is very inadequate today. I would suggest that the BIA consult with USGS or other government agencies who have better information. I also suggest more consultation with other agencies, such as the Fish and Wildlife Service regarding endangered species issues. We have a beetle that is an endangered species and flies at night; flaring attracts the insects. I do applaud your adoption of Onshore Order #6 for wildlife concerns. In closing, transparency and openness and critical. I appreciate the opportunity to engage with this process. Surface owners feel like they have a voice and an opportunity to interact. Request that as much information as possible is listed publicly. For example, on the BIA's and Osage Agency's websites, contact information for emergency agencies, data regarding water depth, and

spatial tools that show lease ownership patterns in the county should all be made publicly available and easy to access. Openness and transparency are key.

- Tom Williams, on behalf of the Cattleman's Association, made the following comments: I direct an organization called Environmentally Friendly Drilling Systems. The intentions here are good, but inadequate. I appreciate the OMC endorsing onshore orders. The BLM's own regulations were inadequate, and so that's why they created the orders. You all need to adopt the orders also. The most important order is #1. I strongly hope that you include those orders in the CFRs. Other things that you didn't mention include the roads. This oil and gas activity is going to tear up the roads. Who is going to pay for the roads? You need a fund or something to pay for damage to the roads. Also, health and safety wasn't addressed. Order #6 goes part of the way to addressing this, but you need more. Finally, I want to echo what Ford said about endorsing FracFocus. If you're going to do hydraulic fracturing, you need to be transparent about what chemicals are being used.
- Ron Reed made the following comments: I would like to make a few comments related to some of the sections discussed this morning. I got all of the proposed changes on Friday afternoon, and so basically you gave us zero business days to review the changes. §226.18 pertains to the safety of the surveyor. A lot of surface owners have activity that impacts ability to conduct survey such as burning fields, aerial spraying, bison, wild horses, etc. Most surveyors are on foot, and these regulations are inadequate to protect the surveyors. Why wouldn't prior notification of surface owners be required? The surface owner and the lessee should have a written agreement, and if they can't agree, then they can go through an arbitration process. §226.21 includes language regarding arbitration and appointment of arbitrator. We've had occasions where the Superintendent has not made recommendations and isn't even on site. There are multiple reasons why the BIA superintendent isn't qualified. That is why there are court systems and judges to settle legal issues. There are hundreds of instances of salt water coming up in the county. Does the Committee really believe that we are doing everything to protect all parties?
- Bobby Thompson made the following comments: I share all of the concerns of the previous speakers. I share the same concerns as the last commenter regarding notification. I don't understand why I wouldn't be notified before something is happening on my property. Current regulations say that you'll be notified at a certain time, if you're a resident of Osage County. My wife is from Pawhuska, but we live in a different county. In other counties where I own lands, we don't have any of these problems. Operators fix all of their problems. I live in Bartlesville. I think that the regulations should be changed so that I'm notified even if I live in Bartlesville. I should get a phone call. After the operators get finished with a well site, they still have lead

lines and have other lines running around. These rights of way, why don't we have something in regulations so that operators have to clean it up or, at the very least, allow the landowner to clean it up. As it is, no one cleans it up.

- John Hurd, Chair of Osage County Cattlemen's Association (OCCA) Oil and Gas Committee, made the following comments: I appreciate all of the work that you're doing here. As a manager of a property with a lot of oil and gas production, we're faced with surface issues everyday. I would like to comment on §226.19(a): the regulations don't suggest use of Best Management Practices (BMPs). BLM's BMPs should be adopted. The Superintendent should not have so much discretion about all of the decisions that are made; instead, decisions should be governed by immediate arbitration. In §226.19(b) the commencement money for seismic activity should be changed to no less than $10,000 per acre. The reason for the $10,000 per acre fee is that it gives the oil company an incentive to keep their land use to a minimum. These amounts should be no less than $10,000 per acre, equivalent to power lines, flow lines, etc.
- Bob Jackman made the following comments: Ladies and gentleman. Bill Clinton ran his first election and won on the best campaign slogan ever: it's the economy, stupid. This situation can be summarized by: it's the BIA mismanagement, stupid. On hydrogen sulfide: there's no set policy in place regarding who to report to and who to call in case of an incident. On the water issue: the BIA lacks the expertise to understand the groundwater problem here. You have a $4 billion mineral estate and there's no geologist on staff. Geologists understand oil and water. I wrote a report and submitted it for inclusion in the federal register yesterday titled "Causes and Effects of Chronic Problems at BIA-Osage Agency & Solutions." In this report, on second page, item 2 has the following recommendation: immediately implement a $60 to $75 million project for plugging abandoned wells and restoring surface land. This program would be voluntarily funded by the oil companies and possibly by the OMC. There's considerable information regarding these types of programs on the web, and the Committee should look at Pennsylvania. Proposal #3 on page 2 is for the BIA to fund immediately a $5M water study because you have to properly inventory water in order to handle it.
- Nona Roach made the following comments: I have a problem with the tank battery issue. You're determining fees on things that are damages on my property. But I don't understand, of all of the things that you've taken out of CFRs, why you haven't taken that out. Next, I agree with other people regarding the water. I've been told that producers can suck all of the water out of my pond. I argued about that with the producer on my property. So someone needs to educate Mr. Halbert regarding water rights in Osage County. The other problem that I have is exactly what you said about groundwater. I have 3 injection wells on my property. One of them has bubbling crude

oil coming up. In the past, I had oil coming up outside of a well casing. Obviously a bad cement job. I've gone to the Agency to get the drilling report, and can't find it. How do you perform mechanical integrity testing on a horizontal injection well? You have now contaminated every bit of the groundwater. If you have oil bubbling up, then who knows what else is happening down below. I've asked BIA and EPA how you know what's going on below ground, when they're injecting salt water under pressure that's going to come up out of those same cracks.

Committee members and staff to the Committee made the following comments in response to public comments:

- An Osage representative to the Committee asked the public commenters who were concerned about access to their property whether they were interested in having fees and damages paid prior to commencement of any development activity.
    - In response, one member of the public said that he would like to receive notification prior to surveying of his property. Another member of the public said that it is very important that the lessee and the surface owner meet prior to any access. If they can reach an agreement, then great, otherwise they go through an arbitration process. The arbitration should not necessarily happen before commencement of operations.
    - A staff member to the Osage representatives to the Committee stated that the current regulations have no requirement for notification if the only activity is surveying or staking of a well.
- A staff member to the Osage representatives to the Committee reported that the current regulations only require notification if the surface owner is a resident of, and currently present in, Osage County. He speculated that this provision was written into the current regulations so as to reduce the burden of notification on producers.
- An Osage representative to the Committee reiterated that the Committee is focused on regulations and specific changes to the CFR and that the Committee cannot make operational changes.
- A federal representative to the Committee said that he heard some very good suggestions and that the BIA can do a better job of getting contact information on its website for emergency issues. He also said that the public should be able to get in touch with someone at the BIA after hours if there are issues.
- A staff member to the federal representatives to the Committee suggested that, due to the volume of comments received, including those received in writing, that a subcommittee discuss the public comments and report back to the Committee, possibly with revised draft regulatory language, in the next meeting.

- A federal representative to the Committee suggested that consideration of §226.18, regarding notification of surface owners, be revisited in the next meeting.
- After the Committee discussed the issue of how liability is determined around home/residential use of natural gas, the Committee suggested that it may revisit §226.27 in the next meeting.

- In response to a public comment calling for commencement fees of $4000 per well and $10,000 per acre, the Committee discussed the adequacy of the currently-proposed fees. The Committee agreed to retain the currently-proposed fee of $2500.
- The Committee discussed whether the regulations should require that some sort of agreement be concluded between surface owners and lessees. A federal representative to the Committee noted that elsewhere on federal lands, the concept of "bonding-on" is used and that concept might be applicable here. The Committee agreed that this concept would not be appropriate to use to compel producers to reach an agreement with surface owners.
- A federal representative to the Committee suggested that §226.19(d) should be revised or restructured to clarify that it applies to commencement payments only. In addition, responding to a comment from the public, the facilitator noted that operational issues may result in operators not following all aspects of the current regulations, such as a commencement payment of $100 per tank.
- A federal representative to the Committee said that the BLM currently has pretty strong measures in place to mitigate the risks associated with hydrogen sulfide and that BLM is considering revising Onshore Order #6 to further strengthen these protections and bring them into line with EPA regulations. An Osage representative to the Committee noted that the benefit of the Committee's adopting onshore orders is that those measures can be updated as needed over time without needing to update the C.F.R.
- A federal representative to the Committee suggested that adoption of Onshore Order #1 would satisfy the provisions of §226.22B.

*Tentative Consensus*

The Committee reached tentative consensus on §§226.22A, and 226.22B but noted public comment would need to be considered further in coming meetings.

**Process Items and Next Steps**

The Committee reached tentative consensus on most of the document, with the exceptions that some areas have been flagged for further work and that there have been public comments that will need to be explored further and maybe responded to in the regulations.

Committee members and the facilitator suggested to the public that concerned parties, including surface owners, will have the opportunity to comment at the next meeting, but that it would be best to send in written comments for the Committee to review before the next meeting. In response to a question from the public, Committee members and staff reported that written comments received during the meeting get published with the meeting summary, which is posted after the following meeting. Written comments that are submitted directly to DFO get posted right away. A staff member to the federal representatives to the Committee added that written comments during the February meeting would be posted on the website right away after the meeting. The staff member added that, the Committee would strive to consider all written and verbal comments closely since it is getting into the nitty-gritty of writing and revising regulations at this point in the process.

Three versions of the draft regulations would be produced after the meeting:

1. A redline comparison of all proposed changes to date as compared to the existing regulations.
2. A redline comparison highlighting the proposed changes made in the February meeting.
3. A document with brief rationales for proposed changes.

The Committee agreed to hold two more public meetings of the Reg-Neg Committee:

- March 13th and 14th at the Osage Casino Event Center in Tulsa.
- April 2 at the Wha Zha Zhi Cultural Center in Pawhuska.

Revised versions of the draft regulations will be posted on the website soon after both the February and the March meetings, thereby giving members of the public an opportunity to comment during subsequent meetings.

The final meeting, on April 2, will provide a space for final public comments and final deliberation by the Committee, and final consensus by the Committee on the regulations.

A staff member to the federal representatives to the Committee noted that people have been asking how they can continue to participate in the process. The staff member explained that, once the Reg-Neg Committee has concluded its work, that is not the end of the process and that is not the end of the period in which the public can engage. Once the Committee sends its proposed rules to the Department of Interior (DOI), DOI will do internal review and then the revised proposed rules will be posted in the Federal Register, and then there will be at least a 30-day public comment period. After this public comment period, DOI will evaluate the public comments and see if there is reason and justification for making additional changes. DOI may make its own changes. All of those things will be considered internal to the Department and not

subject to further consultation or public comment. Only then will the Department of Interior publish a final rule that will be considered law.

*Final Public Comment:*
Nona Roach made the following comments: I've been impressed by what has been accomplished by this Committee over the past few months. There's a new Acting Superintendent at the Osage Agency and the operations have been significantly cleaned up. Previously, there had been letters that the Agency claimed were never received, it took 70 days to process lease applications, etc. I have long memory of the raping and pillaging of the land that has been in my husband's family for years. The biggest improvement that I have seen is the attitude and morale among the Agency staff. It's made a world of difference and I hope for more improvements to come.

The meeting adjourned at 4:00 pm on February 27, 2013.

**Attachments**

A. Attendance
B. Action Items
C. Materials Distributed to the Committee
D. Written Public Comments Submitted

## Attachment A: Attendance

**COMMITTEE MEMBERS**

| Last Name | First Name | Organization | Principle or Alternate | February 26 | February 27 |
|---|---|---|---|---|---|
| Abbott | Sonny | Osage Minerals Council | P | X | X |
| Crum | Galen | Osage Minerals Council | P | X | X |
| Yates | Andrew | Osage Minerals Council | P | X | X |
| Bear | Curtis | Osage Minerals Council | P | X | X |
| Core | Melvin | Osage Minerals Council | P | X | X |
| Red Eagle | Myron | Osage Minerals Council | A | X | X |
| LaCounte | Darryl | Department of Interior, Bureau of Indian Affairs, Deputy Regional Director-Trust Services, Rocky Mountain Regional Office | P | | X |
| Stockbridge | James | Bureau of Land Management, Trust Liaison and ONRR Liaison | P | | X |
| Tyler | Paul | Office of Natural Resources Revenue, Program Manager, State and Indian Coordination | P | X | X |

**AGENCY AND OTHER STAFF**

| Last Name | First Name | Title | Organization | February 26 | February 27 |
|---|---|---|---|---|---|
| Godfrey | Merrill | Legal Representative | Akin Gump, *for* Osage Minerals Council | X | X |
| Reineke | Dan | Consultant | Consultant *for* Osage Minerals Council | X | X |
| Mouton | Mitch | Minerals Revenue Specialist | Office of Natural Resource Revenue | X | X |
| Ray-Hodge | Vanessa | Attorney for DOI | Department of Interior, Office of the Solicitor | X | X |
| Impson | Robert | Deputy Regional Director, Trust Services | Bureau of Indian Affairs | X | X |
| Streater | Eddie | Designated Federal Officer | Bureau of Indian Affairs | X | X |
| Loftin | Rhonda | Acting Superintendent | Osage Agency | X | X |
| Canady | Cammi | Realty Assistant | Osage Agency | X | X |
| Field | Patrick | Facilitator | Consensus Building Institute | X | X |
| Kansal | Tushar | Facilitator | Consensus Building Institute | X | X |

**MEMBERS OF THE PUBLIC**

| Last Name | First Name | Public Comment | February 26 | February 27 |
|---|---|---|---|---|
| Boone | Cynthia | Yes | X | X |
| Box | Aaron | Yes | X | X |
| Dionisio | Monica | No | X | X |
| Drummond | Ford | Yes | | X |
| Duty | Shannon | No | | X |
| Erwin | Stephanie | Yes | | X |
| Gray | Jim | No | X | |
| Hamilton | Bob | Yes | | X |
| Heskett | Linda | No | X | X |
| Henry | Jeff | Yes | | X |
| Holcombe | Steve | No | | X |
| Hurd | John | Yes | | X |
| Jackman | Bob | Yes | X | X |
| Johnson | Mary L. | No | X | X |
| Kay | Mark | No | X | |
| Krehbiel | Lenzy | No | X | |
| Lindsey | Amy | No | X | X |
| Lyon | Rob | Yes | X | X |
| McClain | Ray | No | X | |
| Meyer | Jane | No | X | X |
| O'Toole | Dan | No | X | |
| Perrier | Jim | No | | X |
| Prather | Gayle | No | | X |
| Prather | Melvina | No | | X |
| Reed | Ron | Yes | | X |
| Roach | Nona | Yes | X | X |
| Ross | Brian | No | X | |
| Sicking | Jamie | No | X | |
| St. John | Roy | Yes | X | X |
| Swan | Jim | No | | X |
| Swan | Kathy | No | | X |
| Thompson | Bobby | Yes | | X |
| Whitehorn | M. | No | X | |
| Whitewing | Joyce | No | | X |
| Williams | Thomas | Yes | X | X |
| Wilson | Julie | No | X | X |

**Attachment B: Action Items**

| Task | From | Deadline |
|---|---|---|
| Arrange March 13 and 14 and May 2 meeting locations | OMC | Ongoing |
| Prepare meeting summary of February meeting | CBI | March 13 |
| Produce draft regulatory language. | All subcommittees | March Meeting |
| Post draft regulatory language for early review. | DOI/OMC | As early as possible before the March Meeting |
| Publicize meetings in advance via Federal Register and Osage Minerals website and other means | DOI | Late February |
| Organize next detailed meeting agenda | Co-Chairs | March 13 |
| Create three documents:<br>1. A redline comparison of all proposed changes to date as compared to the existing regulations.<br>2. A redline comparison highlighting the proposed changes made in the February meeting.<br>3. A document with brief rationales for proposed changes. | DOI | March 13 |
| Send materials for public repository to OMC | BIA | Ongoing |

**Attachment C: Materials Distributed to the Committee**

1. Final Agenda for Meeting #6 (February 2013 meeting).
2. Draft Meeting Summary from Meeting #5 (January 2012 meeting).
3. Committee Operating Procedures
4. Proposed Revisions to Portions of 25 C.F.R. Part 226 – Discussion Draft February 2013

# Attachment D: Written Public Comments Received

Jeff Henry 2/27/2013

**OSAGE COUNTY CATTLEMEN'S ASSOCIATION**

**Outline of Position/Requests Re: Oil and Gas Development, Regulation and Enforcement in Osage County February 26-27, 2013 Rulemaking Hearing in Pawhuska, OK**

A. **COMMENTS ON PROPOSED REVISIONS TO CFR AND PROCESS FOR DEVELOPING SAME**

1. **Proposed Revisions to CFR Inadequate**. While we appreciate the initial attention paid by the Rulemaking Committee to surface issues as part of the Rulemaking process, the proposed revisions to 25 CFR 226 (Proposed Revisions), which were just posted on February 22, 2013, are inadequate and fail to sufficiently protect public health, natural resources and property rights in Osage County. The Proposed Revisions do not go far enough in adopting some of the best management practices being used by the industry today nor do they change some of the more egregious provisions of the existing regulations. The full list of comments on the Proposed Revisions is attached hereto as Exhibit "A."

2. **Process for Development of Proposed Revisions Deeply Flawed**. In addition, the development of the Proposed Revisions was rushed and conducted without any comprehensive involvement of the landowners the Proposed Revisions are supposed to protect, nor were state agencies or industry experts familiar with state of the art regulations and practices widely used elsewhere consulted. The Rulemaking Committee denied a landowner request at its January 25, 2013 hearing for a subcommittee to be formed to address the Proposed Revisions.

B. **IMMEDIATE STEPS NEEDING TO BE TAKEN TO ADDRESS CRISIS**

1. **Moratorium on Flaring of H2S Critically Needed**. Because of the inadequacies of the Proposed Revisions and because of the critical public health threat and environmental damage caused by H2S gas, the BIA should require all associated produced gas currently being flared to be tested for H2S. Further, BIA should issue an immediate six-month moratorium on all flaring and combustion of natural gas containing H2S exceeding 10 ppm to allow regulators and producers time to (a) develop uniform rules and processes for safe disposal of H2S gas from horizontal drilling, (b) hire and train capable and knowledgeable enforcement personnel to vigorously monitor/regulate operations, and (c) conduct H2S safety training for all stakeholders (producers, regulators, surface owners, emergency first responders).

2. **Numerous Steps Needing to be Taken to Protect Fresh Water**. BIA should immediately:

(a) Require all existing water wells within 2,000 feet of new oil or gas wells to be tested by the operators prior to drilling and the information to be made publically available; (b) cease using faulty/outdated maps of freshwater aquifers (BIA has been using faulty maps for over 20 years); (c) coordinate with EPA and USGS to acquire best known information regarding the fresh water aquifers of Osage County; (d) until (c) is accomplished, require all wells to have casing set and cemented to surface at least 200' below that recommended by BIA's outdated maps, or at least 50' below any known freshwater aquifer, whichever is deeper; (e) require operators to report the chemicals used in hydraulic fracturing to be reported to the FracFocus website as has been adopted by most states, is voluntary being done by most prudent operators on Federal lands and is being considered by the BLM; and (f) cease issuing permits for surface and groundwater withdrawals.

3. **Comprehensive Outside Review of Oil and Gas Program Needed.** The BIA/DOI/OMC should invite STRONGER, a non-profit public/private organization created to review oil and gas regulations, to (a) conduct a comprehensive review of the Osage County oil and gas program, industry practices, regulation and

enforcement, (b) share best-in-class regulations and industry practices from other states/entities and producers in place elsewhere, and (c) recommend specific changes to the existing CFR rules. The Rulemaking Committee should accept the STRONGER recommendations for formal public comment and submission for formal adoption.

4. **Multi-Agency Coordination Meeting**. The BIA should host a multi-jurisdictional meeting with OCCA, OK Corporations Commission, EPA, BLM, OK Department of Environmental Quality, US Fish and Wildlife Service, US Geological Survey, OK Department of Wildlife Conservation, OK Department of Natural Resources, and the OK Water Resources Board to clearly delineate each party's respective areas of responsibility going forward following adoption of the STRONGER recommendations.

5. **Pull Enforcement from Conflicted BIA and Give to BLM**. Because the BIA (a) lacks the funding, staffing and technical expertise required to enforce current regulations and (b) suffers from a conflict of interest whereby it is performing both the royalty collection and land protection functions including having head right owners as enforcement personnel, the land protection function should be removed from BIA and given to the BLM. Such bifurcation of the leasing and enforcement roles was implemented with the Interior Department's Minerals Management Service in the aftermath of the BP Gulf Disaster. We should not have to wait until the equivalent of a BP disaster occurs in Osage County for this situation to be fixed.

**CONCLUSION**: **Osage County Needs to Go from Worst to First**. The OCCA's goal is for the oil and gas program in Osage County to go from the worst in North America to the best. If the aforementioned steps are taken, we will be well on our way to realizing that goal.

Jeff Henry 2/27/2013
John Hurd

**EXHIBIT "A'**
**COMMENTS REGARDING PROPOSED REVISIONS TO 25 CFR 226**
**OSAGE NEGOTIATED RULEMAKING COMMITTEE**
**February 26, 2013**

## I. Introduction

While we appreciate the attention paid by the Rulemaking Committee to surface issues as part of the Rulemaking process, the proposed revisions to 25 CFR 226 (Proposed Revisions), which were just posted on Friday, are inadequate and fail to sufficiently protect public health, natural resources and property rights in Osage County. Moreover, any new regulations must be coupled with adequate resources for the recruitment and training of capable regulators to enforce these new regulations. Preferably, the BIA should utilize the BLM to conduct these functions as they capably do for other Federal lands.

BLM's own regulations were not adequate in keeping pace with advances in new oil and gas activity, new challenges on environmental protection and better ways to produce oil and gas while protecting the environment. As a result, the BLM made some substantial improvements by passing the Oil and Gas Onshore Orders (Orders). These Orders should be immediately incorporated into the Proposed Revisions as affirmatively applying to Osage County.

In reviewing the Proposed Revisions, the BIA substituted certain regulations from 43 CFR 3150 and 3160, which were inadequate and outdated, thus leading to the passage of the current 7 Orders. While the Proposed Revisions make an attempt to fix the problem, some are not up to current industry best practices. It was also surprising in this review that many relevant American Petroleum Institute standards and Recommended Practices (RPs) were not incorporated into the Proposed Revisions. Adopting these standards and RPs will be the most effective way to significantly and quickly improve oil and gas development practices in Osage County.

## II. General Comments

The following are general comments regarding the Proposed Revisions. However, there are some issues which we believe need to be addressed that are not contained therein.

1. Roads - new activity to develop the Mississippi Lime play will bring larger rigs, many loads of equipment and trucks particularly associated with hydraulic fracturing of horizontal wells. This traffic is a major issue and causes a host of problems with which many states and public municipalities have had to grapple. The most logical way is to prepare. This requires initiating a fund to make repairs and to develop good engineering principals to mitigate as much of the problem up front. There are some models that states like Texas, Pennsylvania and Ohio have developed that the Rulemaking Committee (Committee) should consider.

2. Increased activity and more natural gas production create jobs and revenue for Osage County, but it also means there will be safety and health issues. The Orders (particularly Order # 6) address this; however, training for regulators, first responders and the public needs to be included and should be done at the expense of the companies who will be creating these potential problems.

3. Third-party testing of the air and water. There is no better way to determine environmental impact than by developing a baseline of the environment before drilling takes place. All permits should require third party testing of water wells within 2,000 feet of the permitted wellbore. Air quality after the well has been drilled and completed should also be third-party tested and made available to the public as part of a transparent regulatory process.

4. The public's concern with hydraulic fracturing can easily be address by requiring companies to post the composition of the fracturing fluids on a website called FracFocus. This was developed by the Ground Water Protection Council, the Interstate Oil and Gas Compact Commission and has been endorsed by all the national oil and gas associations. Most states now require this and it is being considered by the BLM. Language for this requirement is shown in the Appendix of these comments.

5. BIA needs to consult with US Fish and Wildlife Service and Oklahoma Department of Wildlife Conservation with respect to impacts on threatened, endangered and sensitive species including without limitation Bald and Golden Eagles, American burying beetles, and Greater Prairie Chickens.

III. **Specific Comments Re: the Proposed Revisions and Unchanged Sections (in sequential order)**

**Definitions**

**226.1(o)** The definition of "Avoidably lost" includes "venting" of produced gas. Venting of any gas containing 10 ppm or greater of hydrogen sulfide should be expressly prohibited.

**Superintendent Responsibilities**

**226.1B(a)** The BIA is "authorized to issue and make effective" onshore orders, including those of the BLM, but there is nothing mandating the application of these orders to Osage County. These orders must be affirmatively applied to govern oil and gas operations in Osage County. The language should be "The Bureau of Indian Affairs hereby adopts BLM Onshore Orders 1-7 for immediate application to all oil and gas development in Osage County, Oklahoma."

**226.1B(b)** The mandate to "require that all operations be conducted in [a] manner which protects other 'natural resources' and environmental quality" should be expanded to include explicit reference to air, land, water, and wildlife habitat. Also, all oil and gas activities should be conducted so as to not unduly interfere with the ongoing operations and private property rights of the surface owner.

**226.1B(c)** Annual inspections of non-compliant lease sites are wholly inadequate. Inspections of these sites should be done at least monthly until compliance is verified for a period of 1 year, and then should change to annual.

**Sale of Leases**

**226.2(b)** Within 10 days following full execution of the Lease, the surface landowner(s) affected by the Lease should be notified by the BIA that the minerals under their surface have been leased.

**226.2(e)** This states that, "No lease, assignment thereof, or interest therein will be approved to any employee or employees of the Government..." This prohibition needs to be expanded so that Osage Mineral Headrights can not be held by BIA Osage Agency employees who work in the land protection enforcement division, thus eliminating this conflict of interest where regulators of the Osage mineral estate are also personally benefiting from the mineral income.

**Bonds**

**226.6(a)** Language needs to be added here to clarify that the Bonding Amount must cover not just the cost to plug a single well but also to reclaim the well site and surrounding lands impacted thereby to the condition it was in prior to drilling and not released until reclamation has been properly completed.

**226.6(c)** The Bonding Amount should not be capped at 20 wells but should be calculated on all the wells.

**Drilling and Production Obligations**

**226.9(a)** This requires drilling to commence within 12 months of leasing or the mineral lease is terminated. However, such conditions appear to be variable with some of the recent large concessions granted in Osage County. Some concessions appear to still have a mandate of at least one well drilled per quarter section to hold the lease, while others do not have drilling requirements at that fine of a scale. These large concessions typically include expansive blocks of land that have not had a successful oil and gas producing history. Forcing drilling on every quarter section to hold the lease exposes the Lessee to excessive financial risk (dry holes), and causes excessive impacts to the land and wildlife. Leases should be structured to allow focused drilling, rather than a "shotgun" approach.

**226.9(g)** The first sentence should be revised to state "...for the protection of the air, land, water, natural resources and overall environmental quality of the leased land and lands directly adjacent thereto." Also, all oil and gas activities should be conducted so as to not unduly interfere with the ongoing operations and private property rights of the surface owner.

**General Requirements re Operations**

**226.15A** Fourth line should be revised as follows: "; which protects air, land, water, other natural resources and overall environmental quality of the leased land and lands directly adjacent thereto." Also, all oil and gas activities should be conducted so as to not unduly interfere with the ongoing operations and private property rights of the surface owner.

**Information for Surface Owners**

**226.18**

- This does not address landowner notification. The BLM Order 1 does an adequate job of addressing this key issue. (See Appendix language which also shows how both the State of Colorado and Utah have passed regulations, which provide proper landowner notification).
- Landowners must be notified prior to first entry onto the property by any lessee, regardless of the activity, so that prior to surveying and staking a well a producer shall notify the Landowner of producer's intentions and schedule a meeting to discuss same as well as all other issues. In all cases, such notification and meeting should be held at least 60 days prior to lessee's desired commencement of activities on the property.
- At this meeting, the lessee and landowner should begin discussion and negotiations of a written agreement governing all aspects of the proposed development, including without limitation the location and size of the well site, location and scope of access to and from same, location and nature of electric lines and flow lines, temporal, geographic and other restrictions on drilling, completion and operational activities to protect human health and safety and air, land, water, wildlife and other natural resources and overall environmental quality of the land, residential/agricultural/commercial disturbance, amount of Damages, insurance, liability and indemnification requirements, and any and all factors deemed important by the parties.
- In the event the parties can not agree on the terms of a written agreement within 60 days following the meeting, then each party shall have 10 days to appoint an arbitrator and the two arbitrators shall agreed upon a third Arbitrator. If a Third arbitrator cannot be agreed upon, then the parties shall appeal to the District Judge, who shall have 20 days to select the third Arbitrator. After the 3rd Arbitrator has been selected the arbitrators shall have 30 days to access value, location, size or any matters aggrieved upon and make a written agreement. It takes a minimum of 2 arbitrators to make a final decision. If in the event one party does not appoint arbitrator or does not abide by date limits, then District Judge shall also appoint such arbitrator.

**Use of Surface**

**226.19(a)**

- This language does not encourage using best practices to protect surface lands and water, namely, practices regarding pad drilling, the proper construction of access roads, adequate protection of water, and burial of electric lines. The BLM's Best Management Practices contain language which minimizes surface disturbance and encourages better protection of land and water.
- This provision should also reference that the use of the surface shall be governed by the written agreement to be executed by lessee and the landowner.
- Instead of the Superintendent being the decision maker re: routing of pipelines, electric lines, etc., this should be governed immediately by arbitration.
- The last sentence should be changed to "…., nor permit any avoidable nuisance, threats to public health or safety, or pollution of air, land, water, wildlife, other natural resources, or overall environmental quality of the land." Also, all oil and gas activities should be conducted so as to not unduly interfere with the ongoing operations and private property rights of the surface owner.

**226.19(b)**

- The amount for seismic exploration damages should be increased to no less than $ 4,000 per mile for seismic line laid on the ground and $10.00 per acre for 3D seismic.
- The commencement/damage payment for a well site is a significant improvement but the amount should be increased to no less than $10,000 per acre, and shall be negotiated as part of the written agreement required pursuant to Section 226.18.
- Commencement/damage payments should also be made for redrilling of a well site that has previously been plugged, abandoned and reclaimed.
- As in most surface use requirements, the surface owners are compensated for roads, collection lines and electric transmission lines. These amounts should be no less than $10,000 per acre equivalent for roads, flow lines, and power lines.
- The following requirements should be added to Section (b):
- (1) When constructing the drill pad, Lessee shall first blade-off the topsoil, pushing it into a berm such that it shall be available for restoration of the site when the well is plugged. The size of the drill pad hosting at least 3 horizontal wells should be no greater than 3 acres and vertical wells no later than greater than 1.5 acres.

  (2) Within 90 days of well completion, Lessee will (a) reduce the size of the well pad to as small of an area as is reasonably practicable for oil field operations, but in no event greater than .75 acres for

horizontal wells, and no greater than .3 acres for vertical wells, and (b) restore the original contour and soil profile (topsoil on top), and plant vegetation per the instructions of the Surface Owner.

- (3) BIA encourages drilling of multiple wells from one well pad site to reduce the amount of surface impact. In addition, reference should be made to the written agreement to be executed by the parties.

**226.19(c)** Schedule for tendering payment of commencement/damage payment should be governed by the written agreement between the lessee and landowner.

**Damages Settlement**

**226.21** In the event the parties can not agree on damages pursuant to the written agreement, then each party shall have 10 days to appoint an arbitrator and the two arbitrators shall agreed upon a third Arbitrator. If a Third arbitrator cannot be agreed upon, then the parties shall appeal to the District Judge, who shall have 20 days to select the third Arbitrator. (After the 3rd Arbitrator has been selected the arbitrators shall have 30 days to access value, location, size or any matters aggrieved upon and make a written agreement. It takes a minimum of 2 arbitrators to make a final decision. If in the event one party does not appoint arbitrator or does not abide by date limits, then District Judge shall also appoint such arbitrator.

**Prohibition of Pollution**

**226.22(a)**

- Insert "....that will prevent pollution of air, land, and water and the migration of ...." as well as "damage to wildlife habitat, other natural resources and overall environmental quality" at the end of sentence.
- Recommend inserting "when Oil Based Drilling Fluid is being used, the operator shall use a closed loop fluid system and all associated waste will be properly disposed by recycling or injection."
- Also insert: "all flow back fluids used in hydraulic fracturing will be either recycled or disposed of by injection."
- All pits, regardless of use, should be lined with 30 ml plastic, unless otherwise approved by surface owner.

**226.22(e)** Modify to include tank batteries in the requirement that pits be lined with at least 30 mil plastic.

**Environmental Obligations**

**226.22A**(a) In the second sentence, add reference to BLM Onshore Orders 1-7 with which lessees must comply.

**226.22A(b)**

- In first sentence add reference to "air, land, water, wildlife habitat, other natural resources and overall environmental quality as well as use of private property."
- In the last sentence, add reference to the written agreement between the parties and the surface owner as governing reclamation.

**226.22A(d)** Delete the word "reasonably" as it is not reasonable not to require this. It should always be required.

**Safety**

**226.22B** There should be explicit reference to Onshore Order 6 re: H2S gas.

**Easements**

**226.23** Insert "and Surface Owners," behind Mineral Council in the first sentence.

**Lessee's Use of Water**

**226.24**

- "Lessee or his contractor may, with the approval of the Superintendent, use water from streams and natural water courses . . . . Lessee or his contractor may use water from reservoirs . . . ." The Superintendent does not have any authority to allow oil companies to take water from surface streams or reservoirs. Surface water is publicly owned by the State of Oklahoma and groundwater is private property belonging to the

overlying surface owner. Water permits for surface and groundwater are issued and regulated by the Oklahoma Water Resources Board (OWRB). Oil companies must file for a permit with the OWRB before any water may be taken from a surface or groundwater source. Osage Nation v. Irby (597 F. 3d 1117 - Court of Appeals, 10th Circuit 2010) made it clear that Osage County is not an Indian reservation and Oklahoma law and property rights apply in Osage County, including water law. Scarce water resources must be protected during this historic drought, and the BIA does not have the expertise or authority to regulate or permit surface or groundwater in Osage County.

- This section is a major issue which was not changed. It is almost incomprehensible the landowner and the beneficiaries to the water are not consulted and required to provide approval.
- Reduction, reuse and recycling of produced water and hydraulic fracturing water must be done first before fresh water sources can be tapped, and then only following consultation and approval of "the surface owner and affected parties" This issue will become more evident when large volumes of water are used for drilling deeper wells and large hydraulic fracturing activities. This change will also encourage operators to recycle, re-use and conserve precious water resources in Osage County.

**Disposition of Casings, Improvements**

**226.29**

- Osage County is littered with abandoned oil field equipment, pools of oil and saltwater on the surface. The Rulemaking Committee did not make any substantive changes to this section and there is no reason to believe the problem will cease until you include language that identifies there will be better oversight, quality assurance the wells were properly plugged and the sites restored.
- The default should be that permanent improvements, along with personal property, should be removed from the property unless otherwise provided by the written agreement between the lessee and landowner.
- This section should be modified to include the requirement that within 90 days of well plugging, in addition to removal of all permanent improvements and personal property, Lessee will remediate the well site by restoring the original soil contour and soil profile (topsoil on top), and plant vegetation per the instructions of the Surface Owner.

**Well Records**

**226.32**

- Section (a) should be modified to mandate Lessees also report all freshwater well drilling data to the BIA and Oklahoma Water Resources Board. Freshwater wells are often drilled in conjunction with horizontal wells, but they are apparently not being logged and reported. This information would be very valuable in addressing the freshwater aquifer data needs discussed below in Section 226.35.
- Well Records and water well testing should be done within 2,000 ' of each oil or gas wellbore.

**Line Drilling**

**226.33** The distances from the boundary line of leased lands should be increased to 600 ft.

**Formations Protected**

**226.35**

- It is not in 25 CFR 226, but BIA staff state that their current standards call for setting of well surface casing to a depth of 50ft below the deepest freshwater aquifer to protect freshwater resources. However, the freshwater aquifer data/maps that BIA is using are outdated and inaccurate. An example is in the NE/4, Section 7, T26N, R9E, where RAM/Halcon plans to drill two horizontal wells. BIA data says the deepest freshwater for that location is 155ft, but active residential wells of 250ft and 290ft are located ¼ mile to the east. BIA's freshwater aquifer data/maps need immediate updating and ground-truthing with known freshwater well data. Until that update is complete, surface casing should be required to a depth of 200ft below that recommended by BIA's outdated data/maps to insure freshwater protection (same as Title 800:30-3-2(12)(C)(i), which governs mineral development on state-owned lands).
- Lessee should also be required to conduct third party before-and-after water quality tests on all freshwater wells in quarter sections adjacent to well drilling locations or within not less than 2,000 feet of wellbores, with results reported to BIA and Surface Owners.
- This section is not adequate and the BIA should include the language from BLM Order # 1 in its place. (See comments on 226.36 (e) below).

**Control of Wells**

**226.36**

- This section is woefully inadequate, and the requirements are not even based on current industry best practices or API specifications. The BIA should substitute BLM Order # 2, which does a much better job of well control in place of this section.
- Hydrogen sulfide gas (H2S) is a deadly component often at highly toxic levels in the abundant yields of natural gas often associated with the new horizontal wells being drilled in the Osage. Flaring (open burning) is used to eliminate H2S, but byproducts of this combustion (sulfur dioxide, etc.) also pose significant health risks to humans, livestock, wildlife, and soil chemistry (acidification). This Section should be modified to prohibit general open flaring of natural gas with levels of H2S in excess of 10 ppm. If short-term flaring must be allowed (well drilling/completion, no available pipeline, emergencies), then Lessee must use the best current flaring technology for the oil and gas industry. Current best industry standards for flare technology follow API guidelines and utilize a "clean-burn variable tip flare."

**226.36(e)** The proposed language makes an attempt of addressing the issue on protecting water, but is not prescriptive on how; for example, there need to be requirements that new casing be cemented to surface and assurance be provided that the cement job was done properly. API have excellent RPs which should be included and are followed by all prudent operators today.

**Site Security**

**226.40A** We commend the insertion of this section is a major improvement. Surface landowners should be also consulted and the proposed security plan should be included in a surface use agreement.

**Accidents**

**226.41** There is no provision for reporting environmental accidents, i.e. salt water spill, oil spills, H2S leaks, etc., or killing of livestock. These need to be added.

**Penalties for Lease Violations**

**226.42** This section is a significant improvement, however the threat of the penalties in the past have not deterred poor practices so we recommend the enforcement of these rules must be enhanced.

**Penalties for Regulation Violations**

**226.43.** Need to add penalties for failure to avoid pollution to air, land, water, wildlife habitat, other natural resources and overall environmental quality, and such penalty should be $1,000 per day.

**APPENDIX**

The Environmentally Friendly Drilling Program supports a website developed by the Colorado School of Law http://www.oilandgasbmps.org/ This includes links to the Rocky Mountain region Federal and State oil and gas regulatory bodies. It is a good way for the BIA committee to compare these various regulations.

**The State of Ohio** has done a very good job of developing new regulations. Ohio is one of the oldest producing states in the US. An emerging new play called the Utica caused them to address many of the problems other regions were dealing with up-front. They adapted the "best of" other regulatory framework other regulatory models for their region and needs. The Environmental Defense Fund, API, STRONGER and BLM all played a part. This is a good example for how Osage could do.

**BLM Policies and Guidance**

**43 C.F.R. § 3104.1 - Bond Obligations** - Required bonding for oil and gas lease operations in order to ensure that the operator performs all obligations of the lease contract, including but not limited to surface reclamation and cleanup of abandoned operations. Minimum amount - $10,000.

**43 C.F.R. § 3104.5 - Increased Amount of Bond** - Authorizes the supervising BLM officer to increase the amount of a bond applying to certain operators who represent a high risk based on various factors including, a history of previous violations, royalties due, or revised reclamation cost estimates.

The BLM continues to improve the way it manages oil and gas development on the public lands. BLM issued a Best Management Practice (BMP) policy on June 22, 2004. The policy instructs field offices to incorporate appropriate BMPs into Applications for Permit to Drill and associated on- and off-lease rights-of-way approvals. By reducing the area of disturbance, adjusting the location of facilities, and using numerous other techniques to minimize environmental effects, BLM is significantly reducing impacts associated with new energy development to wildlife habitat, scenic quality, water quality, recreation opportunities, and other resources.

http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices.html%20

**Modifications to regulations 25 CFR Part 226 should incorporate the use of these BMPs and especially include the Oil and Gas Orders; the authority is referenced in the 43 CFR 3164.1. They can be found on the BLM website and the Federal Register.**

**Order # 1 BLM ONSHORE OIL ANS GAS Federal Register Vol. 72 # 4 March 7, 2007**

**F. Surface Use**

Onshore Oil and Gas Order No. 1 specifically addresses surface use. That Order provides for safe operations, adequate protection of surface resources and uses, and other environmental components. The operator/lessee is responsible for, and liable for, all building, construction, and operating activities and subcontracting activies conducted in association with the APD. Requirements and special stipulations for surface use are contained in or attached to the approved APD.

Minimum Standards and Enforcement Provisions for Surface Use.

The requirements and stipulations of approval shall be strictly adhered to by the operator/lessee and any contractors. Violation: If a violation is identified by the authorized officer he shall dtermine whether it is major or minor, considering the definitions in 43 CFR 3160.0-5, and shall specify the appropriate corrective action and abatement period.

**Order # 2 (which excluded Osage) Standards for Well Control FR 52 #223**
Note section III Well Control Equipment and section B Casing and Cementing which needs to be included In the proposed Osage regulations.

**Onshore Oil and Gas Order No. 3, Site Security**
Some of the language from this section was included in the proposed regulations. This section should be incorporated in the new regulations.

**Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases;Onshore Oil and Gas Order No. 6, Hydrogen Sulfide Operations** BLM 43 CFR 3160 FR 55 # 226

The purpose of this Order is to protect the public health and safety and those personnel essential to maintaining control of the well. This Order identifies the Bureau of Land Management's uniform national requirements and minimum standards of performance expected from operators when conducting operations involving oil or gas that is known or could reasonably be expected to contain hydrogen sulfide (H2S) or which results in the emission of sulfur dioxide (SO2) as a result of flaring H2S.
This Order also identifies the gravity of violations, probable corrective action(s), and normal abatement periods.

**Onshore Oil and Gas Order No. 7, Disposal of Produced Water**

This Order supersedes Notice to Lessees and Operators of Indian and Indian Oil and Gas Leases (NTL--2B), Disposal of Produced Water. The purpose of this Order is to specify informational and procedural requirements for submitted of an application for the disposal of produced water, and the design, construction and maintenance requirements for pits as well as the minimum standards necessary to satisfy the requirements and procedures for seeking a variance from the minimum standards. Also set forth in this Order are specific acts of noncompliance, corrective actions required and the abatement period allowed for correction.

**In addition to the BLM regulations and Orders the BIA should also consider some relevant State Regulations:**

**Relevant provisions of the Colorado Oil and Gas Conservation Act include:**

**§ 34-60-127 – Reasonable Accommodation** – The "Reasonable Accommodation" provision of the Oil and Gas Conservation Act requires that oil and gas operations be conducted in a manner that accommodates surface owners and minimizes intrusion upon and damage to surface lands. This can be achieved by selecting alternative locations for wells, roads, pipelines, and production facilities, or employing alternative means of operations, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.

Operators shall provide financial assurance to the commission, prior to commencing any operations with heavy equipment, to protect surface owners who are not parties to a lease, surface use or other relevant agreement with the operator from unreasonable crop loss or land damage caused by such operations. The determination that crop loss or land damage is unreasonable shall be made by the Commission after the affected surface owner has filed an application in accordance with the 500 Series rules. Financial assurance for the purpose of surface owner protection shall not be required for operations conducted on state lands when a bond has been filed with the State Board of Land Commissioners.

The financial assurance required by this section shall be in the amount of two thousand dollars ($2,000) per well for non-irrigated land, or five thousand dollars ($5,000) per well for irrigated land. In lieu of such individual amounts, operators may submit statewide, blanket financial assurance in the amount of twenty five thousand dollars ($25,000). Relief granted by the Commission upon application by a surface owner pursuant to this section may include an order requiring the operator to conduct corrective or remedial action, and any monetary award for unreasonable crop loss or land damage that cannot be remediated or corrected is not limited to the amount of the operator's financial

assurance hereunder

**§ 34-60-124 – Oil and Gas Conservation and Environmental Response Fund** – The Oil and Gas Conservation Act created the Conservation and Environmental Response Fund to "investigate, prevent, monitor, or mitigate conditions that threaten to cause, or that actually cause, a significant environmental impact on any air, water, soil, or biological resource; to gather background or baseline data on any air, water, soil, or biological resource that the commission determines may be so impacted by the conduct of oil and gas operations; and to investigate alleged violations…that threaten to cause or actually cause a significant adverse environmental impact."

**§ 34-60-128 –Colorado Habitat Stewardship Act of 2007**– The Habitat Stewardship Act was enacted "to minimize adverse impacts to wildlife resources affected by oil and gas operations." The Act requires oil and gas operators to complete timely consultations with the wildlife commission, the division of wildlife, and affected surface owners prior to beginning operations, and it requires the implementation, "whenever reasonably practicable," of "best management practices and other reasonable measures to conserve wildlife resources."

Further, the **Habitat Stewardship Act** charges the COGCC to promulgate rules by July 1, 2008 to establish standards for minimizing adverse impacts to wildlife resources and to ensure proper reclamation of habitats during and following oil and gas operations. The Act requires the rules, at a minimum, to address:

- developing a timely and efficient consultation process with the division of wildlife governing notification and decision making for minimizing adverse impacts and other issues related to wildlife
- encouraging operators to utilize comprehensive drilling plans and geographic area analysis strategies to provide for orderly development of oil and gas fields
- minimizing surface disturbance and fragmentation in important wildlife habitat areas by incorporating appropriate best management practices

**Wildlife protection provisions** can also be found in **§ 33-1-101** which declares:
"It is the policy of the state of Colorado that wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of [Colorado] and its visitors..."

**Hydraulic Fracturing:** Requires the operator of the well must complete the chemical disclosure registry form and post the form on the chemical disclosure registry. This registration is through FracFocus website.

**Insurance** All operators shall maintain general liability insurance coverage for property damage and bodily injury to third parties in the minimum amount of one million dollars ($1,000,000) per occurrence. Such policies shall include the Commission as a "certificate holder" so that the Commission may receive advance notice of cancellation.

**Relevant regulations from Utah Rule R649-3. Drilling and Operating Practices which also address surface rights protection:**

As in effect on February 1, 2013

1. These rules and all subsequent revisions as approved by the board are developed pursuant to the requirements of the Surface Owner Protection Act of 2012 in Title 40, Chapter 6. It is the intent of the board and the division to encourage owners or operators and surface land owners to enter into surface use agreements. Surface use agreements should fairly consider the respective rights of the owner or operator and the surface land owner and also comply with the requirements of R649-3-34.

2. Definitions

3. Oil and gas operations shall be conducted in such manner as to prevent unreasonable loss of a surface land owner's crops on surface land, unreasonable loss of value of existing improvements owned by a surface land owner on surface land, and unreasonable permanent damage to surface land.

4. In accordance with Section 40-6-20, an owner or operator may enter onto surface land under which the owner or operator holds rights to conduct oil and gas operations and use the surface land to the extent reasonably necessary to conduct oil and gas operations and consistent with allowing the surface land owner the greatest possible use of the surface land owner's property, to the extent that the surface land owner's use does not interfere with the owner's or operator's oil and gas operations.

4.1. Except as is reasonably necessary to conduct oil and gas operations, an owner or operator shall mitigate the effects of accessing the surface land owner's surface land, minimize interference with the surface land owner's use of the surface land owner's property, and compensate a surface land owner for unreasonable loss of a surface land owner's crops on the surface land, unreasonable loss of value to existing improvements owned by a surface land owner on the surface land, and unreasonable permanent damage to the surface land.

4.2. An owner or operator may but is not required to obtain location or spacing exceptions from the division or board or utilize directional or horizontal drilling techniques that are not technologically feasible, economically practicable, or reasonably available.

5. In accordance with Section 40-6-21, non-binding mediation may be requested by a surface land owner and an owner or operator, by providing written notice to the other party, if they are unable to agree on the amount of damages for unreasonable crop loss on the surface land, unreasonable loss of value to existing improvements owned by the surface land owner on the surface land, or unreasonable permanent damage to the surface land.

5.1. A mediator may be mutually selected by a surface land owner and an owner or operator from a listing of qualified mediators maintained by the division and the Utah Department of Agriculture and Food, which includes the mediators identified on the Utah State Courts website with "property" or "real estate" as an area of expertise, or a mediator may be selected from any other source.

5.2. The surface land owner and the owner or operator shall equally share the cost of the mediator's services.

5.3. The mediation provisions of this subsection do not prevent or delay an owner or operator from conducting oil and gas operations in accordance with applicable law.

6. A surface use bond shall be furnished to the division by the owner or operator, in accordance with the following provisions of Subsection R649-3-38-6.

6.1. A surface use bond does not apply to surface land where the surface land owner is a party to, or a successor of a party to:

6.1.1. A lease of the underlying privately owned oil and gas;

6.1.2. A surface use agreement applicable to the surface land owner's surface land; or

6.1.3. A contract, waiver, or release addressing an owner's or operator's use of the surface land owner's surface land.

6.2. The surface use bond shall be in the amount of $6,000 per well site and shall be conditioned upon the performance by the owner or operator of the duty to protect a surface land owner against unreasonable loss of crops on surface land, unreasonable loss of value of existing improvements, and unreasonable permanent damage to surface land.

6.3. The surface use bond shall be furnished to the division on Form 4S after good faith negotiation and prior to the approval of the application for permit to drill. The mediation process identified in R649-3-38-5 may commence and is encouraged to be completed.

6.4. The division may accept a surface use bond in the form of a cash account as provided in R649-3- 1-10.2.1 or a certificate of deposit as provided in R649-3-1-10.2.3. Interest will remain within the account.

6.5. The division may allow the owner or operator, or a subsequent owner or operator, to replace an existing surface use bond with another bond that provides sufficient coverage.

6.6. The surface use bond shall remain in effect by the operator until released by the division.

6.7. The surface use bond shall be payable to the division for the use and benefit of the surface land owner, subject to the provisions of these rules.

6.8. The surface use bond shall be released to the owner or operator after the division receives sufficient information that:

6.8.1. A surface use agreement or other contractual agreement has been reached;

6.8.2. Final resolution of the judicial appeal process for an action for unreasonable damages, as defined in R649-3-38-6.2, has occurred and have been paid; or

6.8.3. Plugging and abandonment of the well is completed.

6.9. The division shall make a reasonable effort to contact the surface land owner prior to the division's release of the surface use bond.

**Chemical disclosure for hydraulic fracturing.**

1.1. The amount and type of chemicals used in a hydraulic fracturing operation shall be reported to www.fracfocus.org within 60 days of hydraulic fracturing completion for public disclosure.

February 27, 2013

**Negotiated Rule Making Public Comment** ; by Ron P. Reed

I did not have ample time to review all the proposed changes made by the Negotiated Rule Making Committee that were posted late Friday afternoon February 22, 2013 which would be zero business days to evaluate before proposed February 24, 2013 meeting. I would urge the Rules Committee for a minimum of 30 days for surface owners, their legal counsel, their experts and others to review any and all proposed changes, deletions or additions to CFR 226 before any voting to accept or deny.

**CFR 226.18 (Information to be Given Surface Owners prior to Drilling operations)** Surface Owners must be notified prior to first entry by lessee, regardless of the activity which would include surveying and staking of well. The safety of the surveyor and conversation with the surface owner are mandatory for beginning the process of all aspects of the proposed drilling process. There are many safety factors to be considered such as pasture burning, aerial weed spraying, hunting seasons, Greater Prairie Chicken booming grounds, and unruly bulls, bison, or Wild Mustang just to mention a small number of factors for safety of surveyors and to minimize other potential dangers , damages and liability. ***Why wouldn't prior notification to surface owners be the right and best thing to do?***

This complete process of notification to surface owners, for drilling sites, roadways, and all considerations of drilling a well can be taken care of at one time in advance of drilling with a written agreement and if not agreeable by both parties, then in that event the arbitration process would commence on all or any parts of the disagreement.

**CFR 226.21 ( Procedure for Settlement of damage Claims.)** If the mineral lessee and the surface owner can not agreed on the entire spectrum of land usage or damages or any parts thereof, then in that event each should appoint an arbitrator and those two selected should agree on 3rd arbitrator. In the event the two cannot agree on third arbitrator or one party does not appoint an arbitrator or follow date limits, then the District Judge shall appoint the arbitrator (s). The arbitration process must first be completed before future District Court action by either parties. No party is withheld from filing future action in District Court.

At present time there is absolutely no guidelines if BIA Superintendent does not make a ruling or has no time limits for ruling. There are multitude reasons the BIA Superintendent is not qualified or has legal basis to make decision that have financial or other impacts to third parties. The District Court would be the Competent Jurisdiction to handle all surface disagreements. That is why there is court systems and Judges that are used to settle disputes of all legal issues. ***Why is not having the District Court and District Judges the right and best thing to do?***

*** The fresh well water in Osage County MUST be put in the Highest standard. Previous errors by the BIA on fresh water wells that were using the incomplete and outdates fresh water zones and maps causing literally 100's of water wells in Osage County to be contaminated by salt water is outrageous and irresponsible. A complete overhaul of protecting Osage County fresh water must begin NOW with exact and up to date fresh water zones locations, expanding immediate cementing regulations and other precautions to insure the safety of fresh water for future generations. A county wide survey and determination of every well in Osage County to satisfy without a doubt, that all fresh water wells have the utmost protection from contamination from any source. There are several areas now in Osage County that cannot drill for water because of salt water contaminating the water supply. Let's don't ruin the God given fresh water supply by allowing a complete array of mineral dysfunctions. **What type of new regulations, mapping of water zones and cementing/plugging of oil wells will insure maximum protection of fresh ground water?**

All of our responsibilities are to preserve mother earth and everyone and things on it, while making use of the natural resources we have been blessed with. ***Does the Negotiated Rule making committee believe they are doing everything to protect all parts and parties?***

Thank you.

Ron P. Reed, P.O. Box 695, Pawhuska, Oklahoma

Part of Ranching Family having 5 generations in Osage County, Oklahoma since 1901.