APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 18, 2017

Nos. 15-5121 & 16-5022

UNITED STATES OF AMERICA,
Plaintiff,

v.

OSAGE WIND, LLC; ENEL KANSAS, LLC;
ENEL GREEN POWER NORTH AMERICA, INC.,
Defendants - Appellees.

OSAGE MINERALS COUNCIL,
Movant to Intervene - Appellant.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:14-CV-00704-JHP-TLW)

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Before **BRISCOE**, **EBEL**, and **PHILLIPS**, Circuit Judges.

EBEL, Circuit Judge.

This case presents the question whether a large-scale excavation project—which involved the excavation, modification, and use of rock and soil during the installation of wind turbines—constituted "mining" under the pertinent federal regulations that address mineral development on Indian land. When an entity engages in "mining" of minerals owned by the Osage Nation, a federally approved lease must be obtained from the tribe. 25 C.F.R. § 214.7. The Bureau of Indian Affairs (BIA) has defined "mining" as the

"science, technique, and business of mineral development[.]" 25 C.F.R. § 211.3. We hold that the term "mineral development" has a broad meaning. While it includes commercial mineral extractions and offsite relocations, which are not at issue here, it also encompasses action upon the extracted minerals for the purpose of exploiting the minerals themselves on site.

The Osage Mineral Council (OMC), acting on behalf of the Osage Nation, appeals from the award of summary judgment to Defendant Osage Wind, LLC (Osage Wind),[1] arguing that Osage Wind engaged in "mining" without procuring a federally approved mineral lease. Appeal No. 15-5121. OMC also appeals from a separate order denying its motion to intervene below. Appeal No. 16-5022. Because we hold that OMC is a proper party to this appeal without having formally intervened in the district court, we DISMISS as moot Appeal No. 16-5022. On the merits, we hold that Osage Wind's extraction, sorting, crushing, and use of minerals as part of its excavation work constituted "mineral development," thereby requiring a federally approved lease which Osage Wind failed to obtain. Accordingly, we REVERSE the award of summary judgment for Osage Wind in Appeal No. 15-5121, and REMAND for further proceedings consistent with this opinion.

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[1] Osage Wind, LLC is wholly owned by Defendant Enel Kansas, LLC, which is wholly owned by Defendant Enel Green Power North America, Inc.

I. BACKGROUND

A. Legal Background

Congress established an Indian reservation for the Osage Nation in 1872, Act of June 5, 1872, ch. 310, 17 Stat. 228, and Oklahoma thereafter incorporated the Osage-occupied territory as Osage County, Okla. Const., art. XVII, § 8. In 1906, Congress *severed* the Osage mineral estate in Osage County from the surface estate. Act of June 28, 1906 (Osage Act), ch. 3572, 34 Stat. 539, §§ 2-3. The Osage Act parceled out the surface estate to individual tribe members—a distribution practice known as "allotment"—and made these allotted lands freely alienable. Id. § 2. The Act also ensured that the property owners could use the land for "farming, grazing, or any other purpose not otherwise" prohibited by the Osage Act. Id. § 7.

The mineral estate beneath those lands, however, was not allotted to individual members of the tribe. Id. § 3. Rather, the mineral estate was reserved for the benefit of the Osage Nation. Id. The United States was established as legal trustee for the mineral estate while the Osage Nation retained beneficial ownership. See, e.g., Osage Nation v. Irby, 597 F.3d 1117, 1120 (10th Cir. 2010). The Act further empowered the Osage Nation to issue leases for "all oil, gas, and other minerals" in the reserved mineral estate. Osage Act, 34 Stat. 539, § 3. Those leases required the approval of the U.S. Department of Interior (DOI) and were subject to further regulation by DOI rulemaking. Id.

The DOI promulgated several regulations pertinent to this case. First, 25 C.F.R. Part 211 governs the development of Indian mineral resources generally, and it provides the applicable definition of "mining" in this case:

> Mining means the *science, technique, and business of mineral development* including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals; Provided, when sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt is the subject mineral, an enterprise is considered 'mining' only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year.

Id. § 211.3 (emphasis added). Because Part 211 applies broadly to all Indian lands, the parties agree that this definition governs mining activities conducted on the Osage Nation's reserved mineral estate.

Second, 25 C.F.R. Parts 226 and 214 implement the Osage Allotment Act and thus apply specifically to the Osage mineral estate. While Part 226 regulates the leasing of oil and gas resources, Part 214 governs all other resources in the mineral estate, including solid mineral resources. At issue here is 25 C.F.R. § 214.7, which provides that "*[n]o mining or work of any nature will be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior* and delivered to the lessee."[2] (emphasis added). Accordingly, if Osage Wind engaged in "mining" (as defined in § 211.3) of the Osage mineral estate, then it was required to secure a lease from Osage Nation with approval from the United States. The Osage Nation manages its mineral

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[2] OMC does not argue on appeal that Osage Wind's activities constituted "work of any nature" under 25 C.F.R § 214.7, so we do not address the significance of that phrase in our analysis.

estate and enforces this lease requirement through OMC, which is the Appellant in this case.

B. Factual Background

In 2010, Osage Wind leased surface rights to approximately 8,400 acres of private fee land in Osage County, Oklahoma, for the purpose of building a commercial wind farm—a facility that collects and stores wind-generated electricity. The planned wind-farm involved the installation of eighty-four wind turbines secured in the ground by reinforced concrete foundations, underground electrical lines running between the turbines and a substation, an overhead transmission line, meteorological towers, and access roads. These structures would occupy around 1.5 percent of the total acreage of leased surface land. In September 2011, OMC and the United States expressed concern that the planned project would interfere with oil and gas production by blocking access to the mineral estate.

Acting on that concern, OMC filed a lawsuit in October 2011 to prevent Osage Wind from constructing the proposed wind farm. See Osage Nation ex rel. Osage Minerals Council v. Wind Capital Grp., LLC, No. 11-CV-643-GFK-PJC, 2011 WL 6371384 (N.D. Okla. Dec. 20, 2011) (unreported). In that case, OMC did *not* claim that Osage Wind's excavation of solid mineral resources required a federally approved lease under 25 C.F.R § 214.7. Instead, OMC alleged that the planned wind farm would unlawfully deprive OMC's oil-and-gas lessees of reasonable use of the surface estate. Wind Capital Grp., 2011 WL 6371384, at *2. This prior litigation hinged on a federal regulation 25 C.F.R § 226.19, which is not at issue here. Section 226.19 entitles OMC's oil-and-gas lessees to

reasonable use of the surface land to support their underground oil-and-gas operations.[3] Id. OMC lost that case on the merits because there was no evidence that its own lessees were planning on using the surface estate in a manner that would conflict with Osage Wind's proposed use of the land. Wind Capital Grp., 2011 WL 6371384, at *8. OMC originally appealed but then dismissed its appeal.

Nearly two years later, in October 2013, Osage Wind initiated site preparation and road construction, and by September 2014, excavation work for the planned wind turbines began. Each turbine required the support of a cement foundation measuring 10 feet deep and up to 60 feet in diameter. To accommodate these foundations, Osage Wind dug large holes in the ground. This process involved the extraction of soil, sand, and rock of varying sizes—all of which was of a common mineral variety, including limestone and dolomite. Rock pieces smaller than 3 feet were crushed into even smaller sizes and then, after each foundation was poured and cured, the crushed rocks were pushed back over the hole and compacted into the excavated site. Larger rock pieces were then positioned next to the holes from which they came.

In November 2014, the United States—rather than OMC—filed suit to halt this excavation work on the basis that such sand, soil, and rock extraction by Osage Wind was "mining" under 25 C.F.R. § 211.3 and

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[3] OMC also asserted in that prior litigation an equivalent state-law claim under an Oklahoma statute, Okla. Stat. tit. 52, § 803(B), which similarly entitles lessees of the mineral estate to make reasonable use of the surface estate. Wind Capital Grp., 2011 WL 6371384, at *8-9.

thus required a mineral lease under 25 C.F.R. § 214.7. After discovering that Osage Wind had completed excavation in late November 2014, the United States withdrew its request for an injunction and filed an amended complaint for damages based on the alleged unauthorized extraction of reserved minerals. On September 30, 2015, the district court awarded summary judgment to Osage Wind, concluding that the excavation work did not constitute "mining" under § 211.3, so Osage Wind's excavation work did not trigger the lease requirement of § 214.7. Importantly, at no time before the district court's final judgment did OMC become a formal party to the proceedings—instead it relied on the United States, as trustee for the mineral estate, to litigate the case on behalf of the tribe.

After the summary judgment order, the United States had 60 days to appeal. See Fed. R. App. P. 4(a)(1)(B). OMC did not know whether the United States intended to appeal from the adverse judgment, and repeatedly sought clarification from the government about its appeal intentions. On the *final* day of the appeal deadline, OMC received a phone call from the United States communicating the government's intention not to appeal. OMC then scrambled to protect its interests. First, it filed a motion to intervene as a matter of right under Fed. R. Civ. P. 24(a). Next, minutes later, it filed a notice of appeal from the summary judgment order that was entered against the United States. Appeal No. 15-5121. On February 22, 2016, the district court denied the intervention motion for "lack of jurisdiction due to the pending [merits] appeal." JA 576. OMC then promptly appealed to our

Court that decision denying its intervention motion. Appeal No. 16-5022.

II. DISCUSSION

Before we reach the principal question in this case, we address two threshold issues. We first hold that OMC has adequately appealed the underlying merits decision, even though it did not formally join the proceedings below. As a result of that holding, there is no need to address whether OMC properly intervened in the district court. We then conclude that Osage Wind has not established its res judicata burden of showing that OMC could have raised the instant claim in its earlier 2011 lawsuit regarding oil-and-gas interference. Finally, on the merits, we determine that Osage Wind's excavation activities constituted "mining" under § 211.3, so a federally approved lease was required under § 214.7.

A. Right to Appeal

The instant action was initially brought by the United States as trustee for the Osage mineral estate. OMC was not a party to the proceeding below, yet it seeks to appeal. When the government informed OMC on the final day of the appeal deadline that it would not appeal, OMC acted quickly: it immediately submitted an intervention motion and then, minutes later, filed a notice of appeal from the underlying lawsuit. As a strictly procedural matter, because the district court did not rule on the intervention motion before OMC filed the appeal notice, OMC was not formally a party to this lawsuit when it appealed. It is black-letter law generally that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Marino v. Ortiz, 484 U.S. 301, 304 (1988) (per curiam). But there is an exception

to this rule for would-be appellants that have a sufficiently "unique interest" in the subject matter of the case. Plain v. Murphy Family Farms, 296 F.3d 975, 979 (10th Cir. 2002).

In Devlin v. Scardelletti, 536 U.S. 1, 14 (2002), the Supreme Court held that "nonnamed class members . . . who have objected in a timely manner to approval of [a] settlement at [a] fairness hearing have the power to bring an appeal *without first intervening*" in the underlying class action suit. (emphasis added). That is because a contrary rule "would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them," id. at 10, and "appealing the approval of the settlement is [the appellant]'s only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate," id. at 10-11.

This Court extended Devlin's rationale beyond the class-action context in Plain v. Murphy Family Farms, 296 F.3d at 979-80 (10th Cir. 2002). In Plain, we allowed an appeal by a decedent's children from an order apportioning damages in a wrongful-death suit, even though the children had *not successfully intervened* in the district court.[4] Id. Just as unnamed class members have a unique interest in a binding class settlement, we reasoned that the Plain children also "have a *unique interest* . . . under [State] law in the distribution of the wrongful death damage award." Id. at 979 (emphasis added).

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[4] The children in Plain attempted to intervene as of right twice, but the district court denied their attempts both times. Id. at 978.

Like the appellants in Devlin and Plain, OMC too has a unique interest in this matter. The Osage Nation (acting through OMC) in fact owns the beneficial interest in the mineral estate that is the subject of this appeal. The district court's decision effectively forced OMC to watch from the sidelines as Osage Wind disrupted the mineral estate, which is owned by OMC's tribe. OMC's interest in fighting that perceived intrusion is at least as significant as the Plain children's interest in obtaining a higher share of wrongful-death damages, or the Devlin class members' interests in challenging a binding settlement they believed was unfair.

To be sure, unlike the children in Plain, OMC did not attempt to intervene below until the eleventh hour. But that is because the United States, as trustee for the mineral estate, was representing OMC's interests all along. See Oklahoma ex rel. Edmonson v. Tyson Foods, Inc., 619 F.3d 1223, 1232 (10th Cir. 2010) ("[A] potential party could not be said to have unduly delayed in moving to intervene if its interests had been adequately represented until shortly before the motion to intervene."). It was not until the United States signaled it would not appeal that OMC acted quickly to get involved in the case. "After all, an earlier motion to intervene—when the movant's interests were adequately represented by a party—would have been denied" because Rule 24 bars intervention of right while the movant's interests are protected by an existing party. Id.; see also Fed. R. Civ. P. 24(a)(2) (granting the right of intervention to qualifying persons "unless existing parties adequately represent" them). Thus, because the United States was adequately representing OMC's interests throughout the litigation, OMC's

failure to intervene earlier does not foreclose application of the unique-interest exception.

Neither does our decision in Southern Utah Wilderness Alliance v. Kempthorne, 525 F.3d 966 (10th Cir. 2008). Kempthorne involved an appeal by nonparty oil-and-gas companies from an order declaring that the Bureau of Land Management (BLM) violated procedural regulations in issuing certain leases to those companies. Id. at 967. The lessees were not parties to the litigation below; the action was brought by an environmental advocacy group against the BLM to enforce compliance with certain administrative procedures in issuing oil-and-gas leases. Id. Even though the district court's order "effectively 'froze'" the lease interests at issue, id. at 968, we held that the lessees, as nonparties, did not have a sufficiently unique interest to pursue the case themselves on appeal.

Kempthorne does not control here for at least two reasons. First, Kempthorne involved an interest shared by *both* BLM and the nonparty lessees seeking appeal: the validity of federally issued leases for oil-and-gas production. On the other hand, the instant case concerns a lease-requirement for use of the Osage mineral estate—in which only Osage Nation has a reserved property interest, and the United States is involved merely as a trustee charged with protecting and advancing Osage Nation's sole beneficial interest in that property. Second, we noted in Kempthorne that the oil-and-gas lessees were not indispensable parties in the district court because the issue of the case was the vindication of a *public* right (compliance with administrative procedural requirements), rather than a right personal to the lessees. Id. at 969 n.2. But here, OMC is arguing that it had an individualized

right to manage its own property, issue a lease, and require royalties for the use of its own minerals. The claim thus is not the violation of a public right which happens to affect OMC, as it was in Kempthorne, but rather a violation of a right unique to OMC established by 25 C.F.R. § 214.7. For these reasons, we decline to give controlling weight to Kempthorne and hold instead that OMC has a "unique interest" in pursuing the underlying merits case on appeal.

Although we hold that OMC has a unique interest in this case entitling it to appeal without having intervened below, we emphasize the limited nature of our decision. A generalized interest in vindicating a legal right is not enough to trigger our unique-interest exception. An interested person must have a particularized and significant stake in the appeal, and must further demonstrate cause for why he did not or could not intervene in the proceedings below. OMC's interest here is particularized and significant because the Osage Nation *owns* the beneficial interest in the mineral estate at issue. Further, OMC did not intervene below because the United States was adequately representing its interests all along, and OMC could not have intervened as of right earlier because it only discovered in the very last moments that the United States was not going to appeal. In these unique circumstances, we permit OMC to go forward with this appeal.

As a result of this holding, it is not necessary to decide whether OMC properly intervened in the district court below, i.e., whether OMC satisfied the requirements of Fed. R. Civ. P. 24. That is the subject of Appeal No. 16-5022. Having concluded that OMC is

properly a party to the merits appeal, we dismiss Appeal No. 16-5022 as moot.

B. Res Judicata

In October 2011, OMC filed a lawsuit to prevent interference with oil-and-gas production under 25 C.F.R. § 226.19, which resulted in a final judgment on the merits against OMC. In that prior litigation, OMC did not raise the instant claim of a lease requirement for solid mineral extraction under 25 C.F.R. § 214.7. Relying on the res judicata doctrine, Osage Wind now seeks to preclude OMC from appealing the judgment below on the theory that OMC *could have* asserted the instant claim in the earlier litigation. See Wilkes v. Wyoming Dep't of Emp't Div. of Labor Standards, 314 F.3d 501, 503-04 (10th Cir. 2002) ("Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action." (emphasis in original) (quoting Satsky v. Paramount Comm., Inc., 7 F.3d 1464, 1467-68 (10th Cir. 1993))). Because Osage Wind has the burden of proving its affirmative defense of claim preclusion, Nwosun v. Gen. Mills Rest., 124 F.3d 1255, 1257 (10th Cir. 1997), we will not bar OMC from asserting the instant claim unless Osage Wind can show that the claim reasonably could have been raised in the prior lawsuit. We hold that Osage Wind has not met its burden.

Osage Wind does not explain how the instant claim would have been *ripe* for adjudication in 2011, almost three years before turbine excavation work began. At that early stage, the magnitude of the planned excavation work was not known to OMC or the United States, so it was not apparent that Osage Wind's

proposed wind farm would violate 25 C.F.R. § 214.7. More to the point, if OMC had sought relief under § 214.7 in the prior lawsuit, Osage Wind might have rejoined that it had ample time to secure the approved lease, rendering the claim unripe for judicial review.

This is a plausible basis to defeat the application of res judicata, yet Osage Wind offers no response.[5] We cannot say that Osage Wind has carried its burden to prove claim preclusion when it offers no counterargument to OMC's ripeness theory, which we find facially plausible. Accordingly, res judicata does not apply to OMC's instant claim, and we proceed to the merits.[6]

C. Whether Osage Wind's Excavation Work Constituted Mining

Osage Wind engaged in large-scale mineral excavation work to install wind turbines. It first removed rock sediment and soil from the ground, creating large holes into which it could pour a cement foundation for each turbine. Next, it sorted the extracted rock material into small and large pieces, and then crushed the

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[5] Osage Wind was on notice of this ripeness argument because the United States made the exact same argument before the district court.

[6] Osage Wind also invites us to affirm on the ground that OMC's instant claim is barred by the laches doctrine—which gives courts discretion to reject stale claims brought after unreasonable delay. See Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1337 (10th Cir. 1982) (explaining that the laches doctrine is "vigorously enforced in cases involving mineral properties"). We decline to dispose of the case on the equitable doctrine of laches. The United States commenced this action within three months after turbine excavation work began, which is not an unreasonable amount of time to wait before filing suit.

smaller pieces so they would be the proper size for backfilling the holes. Finally, it positioned the bigger rock pieces adjacent to the backfilled excavation sites. All of this was done to add structural support to the large wind turbines installed deep in the ground. The question here is whether this excavation work—digging, sorting, crushing, and backfilling—constitutes "mining" under 25 C.F.R § 211.3.

1. *Administrative Deference to Agency Materials*

We first explain that our analysis does not depend on administrative deference to agency materials. The BIA (an agency within DOI) has recently taken the informal position in one instance that a so-called "Sandy Soil Lease" is required for roadwork that disrupts the mineral estate. Further, the Bureau of Land Management (BLM) (also within DOI) has suggested that large-scale excavations require authorization by permit or contract. See Mineral Materials Disposal; Sales; Free Use, 66 Fed. Reg. 58892, 58894 (Nov. 23, 2001); see also Bureau of Land Management, Unauthorized Use of Mineral Materials on Split Estate Lands, Instruction Memorandum No. 2014-085 (Apr. 23, 2014), available at https://www.blm.gov/policy/im-2014-085. We address these in turn.

Consider first the Sandy Soil Lease. The record reveals a single instance where a contractor for Oklahoma Department of Transportation (ODOT) requested and received a Sandy Soil Lease before building a highway through Osage County—an endeavor that involved digging and backfilling incident to surface construction work. Even if this evidence demonstrated a DOI policy of *requiring* such a lease (rather

than ODOT voluntarily seeking one out),[7] this kind of informal agency position warrants deference only to the extent that it is thoroughly considered and well-reasoned, or otherwise manifests certain qualities that gives it the "power to persuade[.]" Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); accord Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1351-52 (2015). But the record here does not show any context behind the adoption of the Sandy Soil Lease requirement. OMC points to no agency interpretation, informal guidance document, adjudicatory decision, or anything else that explains or even mentions the Sandy Soil Lease other than negotiation letters involving ODOT's contractor, and the lease document itself. Thus, we cannot say that DOI's Sandy Soil Lease requirement for mere surface construction has the power to persuade.

OMC also directs us to BLM guidance materials that require a mineral lease for large-scale excavation work. In a preamble to the final rule adopting 43 C.F.R. § 3601.71—a separate and unrelated regulation to the one at issue in this case—the BLM explained that "a contract or permit" is required when a surface-estate owner engages in more than "minimal personal use of federally reserved mineral materials . . . ." 66 Fed. Reg. at 58894. Further, an internal BLM instruction memorandum, published in April 2014, explains:

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[7] The district court found that the Sandy Soil Lease negotiations did not show a BIA policy that such a lease was required, instead the negotiations merely demonstrated an instance where a road contractor voluntarily agreed to pay for excavation of roadway materials.

> Any separation or alteration of the various constituents of the material, through methods such as screening or crushing, constitutes a mineral use of the materials and requires a contract or permit. Furthermore, any use of the materials in a construction project, such as . . . building foundations . . . also constitutes a mineral use of the materials—even if the material was not altered in any way—and also requires a contract or permit.

Bureau of Land Management, supra. OMC relies on these guidance documents to inform its interpretation of "mining" in 25 C.F.R. § 211.3 and the lease requirement in § 214.7.

We do not defer to these BLM documents because they explain the effect of a *separate* regulation, 43 C.F.R. § 3601.71.[8] That regulation—promulgated and administered by BLM, a separate bureau within DOI—governs mineral extraction activities on "public lands," which is expressly defined to *exclude* "lands held for the benefit of Indians[.]" Id. § 3601.5 (definition of "public lands" as that term appears in 43 C.F.R. pt. 3600). Therefore, the BLM could not have been exercising delegated interpretive authority with respect to the Osage lands at issue here. Thus, we give these BLM materials no authoritative status in our analysis

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[8] This regulation defines "unauthorized use" of minerals on public lands: "[Y]ou must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit. Violation of this prohibition constitutes unauthorized use." 43 C.F.R § 3601.71(a).

of the BIA's regulations. Instead, we analyze the regulatory text at issue here by its own terms.

2. *Textual Analysis of § 211.3*

"Mining means the science, technique, and business of *mineral development*, including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals[.]" 25 C.F.R § 211.3 (emphasis added). After this threshold definition, the regulation then offers a caveat known as the de minimis exception for common-variety minerals: "Provided, when [common minerals] [are] the subject mineral, an enterprise is considered 'mining' only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year." Id.

At the outset, the significance of the de minimis exception must be clarified. OMC contends that this proviso establishes a separate definition specifically for common-variety minerals—any extraction of such minerals exceeding 5,000 cubic yards constitutes mining, *regardless* of whether the activity can be classified as "the science, technique, [or] business of mineral development." Id. But that interpretation is plainly wrong. The inclusion of the de minimis exception does not negate the need initially to satisfy the threshold definition of mining. Rather, it exempts from the definition of mining lower-volume extractions of common-variety minerals. OMC's contrary reading contorts the plain language of the regulation, so we reject it.[9]

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[9] The parties agree that the extracted rock here was of a common, nonprecious variety potentially subject to the de mimimis exception. When measured by the *aggregate* amount of rock removed from all eighty-four holes, there is no dispute that the total

With that understanding we turn to the district court's interpretation of the regulation. The district court held that the definition of mining *necessarily* involves the commercialization of mineral materials, i.e., the sale of minerals. While the definition of mining certainly *includes* commercial mineral extractions and even offsite relocation of minerals, the district court's limitation of "mineral development" to those contexts is overly restrictive. The text of § 211.3 does not indicate that mining is confined to commercializing extracted minerals or relocating them offsite—instead it refers merely to the "science, technique, and business of mineral development." § 211.3. Finding no support in the § 211.3's text itself, Osage Wind attempts to buttress its preferred narrowing construction by reference to other provisions that contemplate the sale of minerals. We are not persuaded.

Osage Wind first points to 25 C.F.R. § 214.10, which governs royalty rates on Osage mineral leases. That rule provides that, for certain minerals, "the lessee shall pay quarterly a royalty of 10 percent of the value at the nearest shipping point of all ores, metals, or *minerals marketed*." Id. § 214.10(d) (emphasis added). But this royalty clause does not purport to limit the definition of "mining" in § 211.3 to an

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volume exceeded 5,000 cubic yards, which would make the de minimis exception inapplicable here. Osage Wind argues that the relevant amount of extracted minerals should be the amount removed from *each individual* hole. Measured on that individual basis, the volume of removed rock is less than the 5,000-cubic-yard threshold. However, this was a single integrated project unified by proximity of time, space, and purpose. Accordingly, we look to the total amount of minerals extracted, and hold that the de minimus exception does not apply.

operation that produces minerals destined for the market, rather it merely provides that "marketed" minerals are subject to a 10-percent royalty.

Osage Wind also relies on the Osage Act itself to support this proposed commercialization requirement. The Osage Act permits owners of allotted surface lands to sell their properties, but expressly excluded "the *sale* of the oil, gas, coal, or other minerals" because the mineral estate was reserved to the Osage Nation. Osage Act, § 2 (emphasis added). But this does not mean that "mining" only occurs when the extracted minerals are being *sold*. Rather it means simply that surface estate owners cannot sell what does not belong to them, i.e., the mineral estate. We therefore do not see how the Osage Act supports the view that the minerals *must* be sold or marketed in order to trigger the defining of "mining" under 25 C.F.R. § 211.3.

To be sure, although we hold that § 211.3's mining definition is not limited to commercial extraction of minerals, we leave undisturbed the well-settled notion that mining *includes* the removal of minerals to make commercial use of them or to relocate them offsite. To hold otherwise would collide with the traditional and commonly shared understanding of mining. But more to the point, the phrase "mineral development" in § 211.3 undoubtedly encompasses traditional mining activities. In the context of natural resources, the term *develop* can mean "to make actually available or usable (something previously only potentially available or usable)" such as "[develop]ing the natural resources of the region[.]" Webster's Third New Int'l Dictionary 618 (1986). Thus, commercial extractions or

offsite relocations of minerals are included within § 211.3's ambit.[10]

But that is not what Osage Wind did here. Osage Wind did not remove minerals and then transport them offsite or otherwise commercialize the minerals themselves. Instead, Osage Wind sorted and then crushed the minerals and used them as backfill to support its wind turbine structures. The question is whether these excavation activities can be characterized as "mineral development" under § 211.3.

In analyzing this issue, we are cognizant of the long-established principle that ambiguity in laws designed to favor the Indians ought "to be liberally construed" in the Indians' favor. See, e.g., Millsap v. Andrus, 717 F.2d 1326, 1329 (10th Cir. 1983) (citing Alaska Pac. Fisheries v. United States, 238 U.S. 78, 89 (1918)). Without question, the regulations at issue here are designed to protect Indian mineral resources and "maximize [Indians]' best economic interests." 25 C.F.R. § 211.1 (purpose and scope of 25 C.F.R. pt. 211). Thus, to the extent there is doubt concerning § 211.3's scope, we adopt the interpretation that favors the Osage Nation.

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[10] The former U.S. Bureau of Mines published a dictionary of mining terminology that confirms this observation, defining mining as follows: "The science, technique, and business of mineral discovery and exploitation. Strictly, the word connotes underground work directed to severance and treatment of ore or associated rock. Practically, it includes opencast work, quarrying, alluvial dredging, and combined operations, including surface and underground attack and ore treatment." Paul W. Thrush, Bureau of Mines, U.S. Dep't of Interior, A Dictionary of Mining, Mineral, and Related Terms (Dictionary of Mining) 715 (1968), available at http://files.eric.ed.gov/fulltext/ED059035.pdf.

With that in mind, we look to the text of § 211.3 which defines mining as "the science, technique, and business of *mineral development*[.]" Id. (emphasis added). By its plain terms, this definition contemplates an activity that is aimed at *developing* minerals. But neither the regulation nor the Osage Act clarify the outer limits of what it means to "develop" minerals in this context.

The list of examples in § 211.3 offers some interpretive assistance. Section 211.3 provides that mining "includ[es] but [is] not limited to: opencast work, underground work, and in-situ leaching *directed to severance and treatment of minerals*[.]" (emphasis added). The phrase "directed to severance and treatment of minerals" is best construed to qualify all elements in the list—opencast work, underground work, and in-situ leaching. Antonin Scalia & Bryan A. Garner, Reading Law: Interpretation of Legal Texts 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series.").[11] Therefore, each item in the list

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[11] In other circumstances, a post-series modifier might be better understood to qualify only the last element in a list, known as the "nearest reasonable referent." Scalia & Garner, supra, at 152; see also Lockhart v. United States, 136 S. Ct. 958, 963 (2016) (applying a qualifying clause at the end of a series only to the "last antecedent" in the series). But context does not support that interpretation here. See Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (acknowledging that "other indicia of meaning" can defeat the application of the last antecedent rule). In this case, applying "directed to severance and treatment of minerals" only to the last element in the series—in-situ leaching—would likely be redundant. The former U.S. Bureau of Mines has indicated that "in-

involves an activity that is "directed to severance and treatment of minerals," which means that each example of "mineral development" involves some action upon the minerals to take advantage of them for some purpose. Because it is natural to construe a definition in light of its examples, this suggests at the very least that "mineral development" includes, but is not limited to, *action upon the minerals in order to exploit the minerals themselves*.

It might be reasonable to adopt the construction favored by Osage Wind, which sets as the definitional boundary the commercialization of the minerals. But because the phrase "mineral development" is ambiguous in this regulation, the Indian canon of interpretation tilts our hand toward a construction more favorable to Osage Nation, so we adopt the broader definition of "mineral development" when construing § 211.3: "mineral development" includes acting upon the minerals to exploit the minerals themselves.

We agree with Osage Wind, however, that merely encountering or incidentally disrupting mineral materials would not trigger § 211.3's definition. In other words, "the simple removal of dirt does not constitute mining." 53A Am. Jur. 2d Mines and Minerals § 14. There is simply no sense in which the word "mineral development" means only the removal of dirt without some further manipulation, commercialization, or

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situ leaching" already involves the severance and treatment of minerals. Dictionary of Mining 581 (defining "in-situ" as "in the natural or original position"); id. at 630 (defining "leaching" as the dissolving of soluble minerals out of the ore by exposing the rock to chemicals, acids, or water). To avoid this surplusage, it makes more sense to apply the phrase "directed to the severance and treatment of minerals" to each element in the series.

offsite relocation of it. The problem here is that Osage Wind did not merely dig holes in the ground—it went further. It *sorted* the rocks, *crushed* the rocks into smaller pieces, and then *exploited* the crushed rocks as structural support for each wind turbine. The ultimate question is whether this operation constitutes "mineral development" as we have conceptualized the term. We hold that it does.

3. *Sorting and Crushing for Backfill Constitutes "Mineral Development"*

After Osage Wind removed the rock materials from each hole, it acted upon the minerals by altering their natural size and shape in order to take advantage of them for a structural purpose. Osage Wind needed to stabilize these tall wind turbines, and "develop[ed]" the removed rock in such a way that would accomplish that goal. This constitutes "mining" as defined by § 211.3.

To be sure, the sorting and crushing of rocks to provide structural support does not fit nicely with traditional notions of "mining" as that term is commonly understood. Indeed, surface construction for a wind farm is a far cry from a typical mining operation, complete with canaries and sink shafts. But as we discussed, the text of § 211.3 refers to "mineral development," which is not cabined or confined by the regulation or statute itself. Because there is ambiguity in the scope of "mineral development" and the extent to which that phrase includes the sorting and crushing of minerals for the purpose of backfilling and stabilization, we adopt the interpretation that favors the Osage Nation. Accordingly, Osage Wind's excavation work here constituted "mining" under § 211.3, thereby requiring Osage Wind to secure a federally approved

lease from OMC under § 214.7. Summary judgment for Osage Wind was therefore improper.

4. *This Result Does Not Conflict with Osage Act*

Osage Wind argues this result contradicts the Osage Act itself. We disagree. It is true that the Osage Act provides that surface lands overlying the mineral estate should be freely usable for activities such as "farming, grazing, or any other purpose not otherwise" prohibited by the Act. Osage Act, § 7. It goes further to say that surface fee owners "shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States[.]" Id. § 2. But our interpretation does not conflict with these provisions.

The expansive authority granted to surface-estate owners to use and develop their land is necessarily limited by the Act's reservation of the mineral estate to the Osage Nation, which itself has the right to demand a lease for certain uses of its minerals. Admittedly, surface construction activities may often implicate and disrupt the mineral estate—building a basement or swimming pool necessarily involves digging a hole in the ground, displacing rock and soil in the process. But as we have held, merely encountering or disrupting the mineral estate does not trigger the definition of "mining" under 25 C.F.R. § 211.3. If the minerals are not being shipped offsite or commercialized, then they must be acted upon for the purpose of exploiting the minerals themselves.

Moreover, to the extent there is a conflict between free use of the surface estate and exploitation of the mineral estate, the BIA has implemented a reasonable solution to that problem. As explained earlier, under

§ 211.3, any use of common-variety minerals that is less than 5,000 cubic yards will not trigger the OMC's right to demand a lease because the BIA has exempted such activities from the definition of mining. Id. Thus, in practice, owners of the surface estate retain virtually uninhibited use of their lands, unless of course they seek to *develop* more than 5,000 cubic yards of common-variety minerals. But in that scenario, the BIA has reasonably concluded that *development* of such minerals goes beyond mere use of the surface estate and implicates the mineral estate reserved to the Osage Nation.

Thus, our interpretation does not impermissibly conflict with the Osage Act's references to free use of the surface estate.[12]

III. CONCLUSION

Our dispositions of these consolidated appeals are as follows. First, because OMC is an appropriate party to the merits appeal, thereby making it unnecessary to decide whether it properly intervened below, we DISMISS as moot OMC's appeal from the denial of intervention, Appeal No. 16-5022. Second, because Osage Wind was required to procure a lease under 25 C.F.R. § 214.7, we REVERSE the district court's order granting summary judgment, Appeal No. 15-5121, and REMAND for further proceedings consistent with this opinion.

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[12] Osage Wind, LLC's Motion to Dismiss Appeal for Lack of Jurisdiction and Osage Minerals Council's Motion to Strike Osage Wind's Supplemental Authority are denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 14-CV-704-JHP-TLW

September 30, 2015

UNITED STATES OF AMERICA,
Plaintiff,

v.

(1) OSAGE WIND, LLC;
(2) ENEL KANSAS, LLC; and (3) ENEL GREEN POWER NORTH AMERICA, INC.,
Defendants.

OPINION & ORDER

Before the Court are Defendants' Motion to Dismiss or for Summary Judgment [Doc. No. 26] and Plaintiff's Motion for Partial Summary Judgment as to Counts I and II of the Amended Complaint [Doc. No. 24]. After consideration of the briefs, and for the reasons stated below, Defendants' Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

BACKGROUND

I. Factual Background

The material facts are undisputed. Defendant Osage Wind, LLC ("Osage Wind") has engaged in constructing the Osage Wind Farm Project ("the Project), a wind farm constructed in Osage County, Oklahoma. [Doc. No. 17-1, at ¶ 3 (Declaration of Bill Moskaluk)]. The Project is undertaken pursuant to leases of approximately 8,400 acres of privately owned fee surface estate lands. [*Id.* at ¶ 5]. Once completed, the Project

will consist of 84 turbines, underground collection lines running between turbines and a substation, one overhead transmission line, two permanent meteorological towers, and access roads, with the total footprint covering approximately 1.5% of the 8,400 acres of leased property. [*Id.* at ¶ 9].

The turbine foundations are made from concrete, with each foundation measuring approximately 10 feet deep and between 50 and 60 feet in diameter. [*Id.* at ¶¶ 15(a)(i)-(ii)]. For each turbine foundation, Osage Wind excavated soil, sand, and rock of varying shapes and sizes. [*Id.* at ¶ 15(a)(i)]. Rock pieces that were larger than three feet long were stockpiled beside the hole and remain in place. [*Id.*]. Excavated rock pieces that were less than three feet long were crushed to a size of roughly three inches or smaller. [*Id.* at ¶ 15(a)(ii)]. Once the foundation for a turbine was poured and cured, the crushed rock, sand, and soil excavated from the hole were pushed back into the foundation site from which they came and compacted into the excavated site. [*Id.* at ¶ 15(a)(iv)].

The excavated soil, sand, and rock were not used for any purpose other than to return them to the hole from which they came. [*Id.* at ¶ 15(a)(v)]. None of the excavated soil, sand, or rock was moved to or used at another location, except for backfilling purposes. [*Id.*]. None of the excavated sand, soil, or rock was used to mix or prepare the concrete for any foundation. [*Id.*]. No excavated material was sold or used for any commercial purpose. [*Id.* at ¶ 15(a)(vi)].

II. Procedural History

In 2011, the Osage Nation, acting through the Osage Minerals Council, filed a Complaint for Declaratory and Injunctive Relief against Osage Wind and

other defendants in the Northern District of Oklahoma. [Doc. No. 2 in Case No. 11-CV-643-GKF-PJC] (the "Prior Litigation"). The U.S. Government was not a party to the Prior Litigation. [Doc. No. 37 in Case No. 11-CV-643-GKF-PJC]. In the Prior Litigation, the Osage Nation sought to prevent interference with its oil and gas rights guaranteed by 25 C.F.R. § 226, as a result of digging incident to the defendants' planned wind energy project. On December 20, 2011, Chief Judge Frizzell dismissed the Prior Litigation on the merits. [*Id.*].

Plaintiff, the United States of America ("Plaintiff" or "United States"), filed this action on November 21, 2014. [Doc. No. 2]. In the First Amended Complaint for Declaratory Judgment and Damages, Plaintiff alleges the Defendants' construction activities interfere with the Osage Nation's reserved mineral rights, and Defendants failed to obtain the necessary prior approvals before excavating the turbine foundations for the Project. [Doc. No. 20]. Specifically, Plaintiff asserts Defendants violated 25 C.F.R. § 211.48, which prohibits "exploration, drilling, or mining operations on Indian land" without obtaining permission from the Secretary of the Interior ("Secretary"), and 25 C.F.R. § 214.7, which forbids "mining or work of any nature" on reserved Osage County land unless a mineral lease covering such land is approved by the Secretary. [*Id.*]. Plaintiff alleges "Defendants initiated excavation work and substantial disturbance and invasion of the mineral estate" without obtaining the required prior approvals or appropriate lease. [*Id.*].

The First Amended Complaint alleges five counts, all of which hinge on whether the Defendants violated 25 C.F.R. § 211 and/or 25 C.F.R. § 214. Count I seeks

a declaration regarding the applicability and violation of 25 C.F.R. § 211 as to Defendants' construction activities. Count II seeks a declaration regarding the applicability and violation of 25 C.F.R. § 214 as to Defendants' construction activities.

On December 19, 2014, Plaintiff filed a Motion for Partial Summary Judgment as to Counts I and II of the Amended Complaint, along with a Motion for Expedited Consideration. [Doc. Nos. 24, 25]. On December 29, 2014, Defendants filed a Motion to Dismiss or for Summary Judgment. [Doc. No. 26]. On March 27, 2015, Defendants filed a Notice of Supplemental Authority [Doc. No. 38], which Plaintiff moved to strike as improperly filed [Doc. No. 39]. On July 14, 2015, Defendants filed a Notice to the Court, advising construction of the Osage Wind Farm has been completed and the Wind Farm has commenced commercial operation. [Doc. No. 41]. Plaintiff also moved to strike Defendants' second Notice as improper. [Doc. No. 42]. The pending motions are now fully briefed and ripe for review.

DISCUSSION

To resolve the dispositive motions at issue, the Court must consider facts outside the pleadings, specifically, the documents and affidavits accompanying the parties' briefing.[1] For this reason, the summary judgment standard applies. As a general rule, summary judgment is appropriate where "the pleadings,

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[1] Defendants objected to Plaintiff's submission of Exhibits 1-3 attached to its Motion for Partial Summary Judgment as not properly authenticated. In response, Plaintiff submitted an affidavit from Mary Jeannine Hale verifying the authenticity of Exhibits 1-3. Accordingly, Plaintiff's objection is moot.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* In making this determination, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. Thus, the inquiry for this Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

The central issues of this case are (1) whether the doctrine of res judicata bars the United States' claims in this matter, and (2) the proper interpretation of the scope and meaning of 25 C.F.R. Parts 211 and 214. With all material facts regarding Defendants' excavation processes being undisputed, this case presents a pure question of law that is appropriately decided on summary judgment. Plaintiff contends Osage Wind's extraction and use of limestone, dolomite, and other sedimentary minerals from the Osage mineral reserve to facilitate the placement of wind turbine foundations require approval from the Bureau of Indian Affairs ("BIA") and a lease between Defendants and the Osage Nation that is accepted by the BIA. [Doc. No. 24, at 4]. Plaintiff argues Osage Wind's failure to obtain the proper approvals and persistence with its excavation and extraction activities amount to violations of Parts

211 and 214. Defendants contend Osage Wind's construction activities do not constitute "mining" for purposes of the regulations and therefore no lease or permit pursuant to either regulation is required. [Doc. No. 26]. Defendants further contend the final judgment in the Prior Litigation bars the United States' claims in this action under the doctrine of res judicata.

III. Res Judicata

As a threshold matter, the Court will address Defendants' argument that the doctrine of res judicata bars the United States' First Amended Complaint. "'Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action.'" *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002) (quoting *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1467-68 (10th Cir. 1993)). To apply res judicata, three elements must be present: "'(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits.'" *Id.* at 504 (quoting *King v. Union Oil Co.*, 117 F.3d 444-45 (10th Cir. 1997)) (alterations omitted).

Here, Defendants' argument that res judicata bars the United States' action fails on the second element.[2] Defendants assert the United States is in privity with the plaintiff in the Prior Litigation, the Osage Nation, and is therefore bound by the final judgment on the merits in the Prior Litigation. Preclusion is in

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[2] It is undisputed the Prior Litigation reached a final judgment on the merits.

order "when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication." *Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008). Here, the United States is acting as the trustee with respect to the Osage Nation and its mineral estate, with the Osage Nation as the beneficiary. [Doc. No. 20, at ¶ 4]. However, it is settled law that when the United States is acting on behalf of an Indian tribe, the United States cannot be bound by a prior action brought by the tribe in which the United States did not participate. This is the case because, when the United States litigates on behalf of Indians, it is both acting formally as a trustee and "asserting its own sovereign interest in the disposition of Indian lands." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) (citing *Heckman v. United States*, 224 U.S. 413, 445 (1912)). In effect, "the Government assumed a fiduciary role over the Indians not as a common-law trustee but as the governing authority enforcing statutory law." *Id.* Here, the United States is protecting the Osage Nation's interest in the mineral estate while also enforcing the federal Osage Allotment Act and federal regulations that protect Osage mineral rights.

Therefore, the Prior Litigation, which the Osage tribe brought to protect its interest in the land on which Osage Wind built the wind farm, does not bind the United States in protecting its own sovereign interest in such land. *See, e.g.*, *Minnesota v. United States*, 305 U.S. 382, 386 n.1 (1939) ("In the case of patents in fee with restraints on alienation it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party has no binding effect but that the

United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto."); *United States v. Candelaria*, 271 U.S. 432, 443-44 (1926) (United States' interest in protecting Indian land rights "cannot be affected by . . . a judgment or decree" "where the United States has not authorized or appeared in the suit"); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 459 (10th Cir. 1952), *cert. denied* 343 U.S. 919 (1952) (noting Supreme Court precedent "clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party, brought by the restricted Indian or an Indian tribe or pueblo.").

Although Defendants correctly note that where the United States has litigated an issue affecting an Indian tribe, the *tribe* may not re-litigate the matter, *see Nevada v. United States*, 463 U.S. 110, 135 (1983), the *reverse* is not true. *Bryan County, Oklahoma v. United States*, 123 F.2d 782, 786 (10th Cir. 1941), *cert. denied* 315 U.S. 819 (1942) (concluding that, although a prior judgment "operated to estop the [Indian] allottees from asserting a claim in their own right," "this in nowise affects the right of the United States to maintain this suit" both as "a guardian of the Indians to enforce an agreement creating a vested right in the Indians" and "in its own behalf as a sovereign right.").

Moreover, it is well established the United States "'must have a laboring oar in a controversy'" to be bound by prior litigation in which it was not formally a party. *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003) (quoting *Drummond v. United States*, 324 U.S.

316, 318 (1945)). The United States bears the "laboring oar" when it "'assume[s] control over litigation.'" *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)). Here, the United States did not bring the Prior Litigation and there is no evidence the United States "assumed control" over it. *See Montana*, 440 U.S. at 155 (listing seven factors to consider in determining whether the United States assumed control over an action).

Because the United States cannot be bound by the Prior Litigation under the second element of the test for claim preclusion, the Court need not address the third element—whether the same issues in this case were or could have been decided in the Prior Litigation. Accordingly, the Court will proceed to address the merits of the case.

IV. Osage Mineral Leasing—Statutory and Regulatory Background

In 1906, Congress passed the Osage Allotment Act, which severed the mineral estate from the surface estate in Osage County, Oklahoma, and placed it in trust for the Osage Nation. Osage Allotment Act of 1906 ("Osage Act"), ch. 3572, 34 Stat. 539, § 3; *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010). Under the Osage Act, the affected surface lands could be alienated, subject to restrictions, Osage Act, § 2(7), and owners of such surface land were granted "the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein." Osage Act, § 7. The Osage Act further contemplated uses of the surface estate that included "houses, orchards, barns, or plowed land." Osage Act, § 2(2).

Those same lands, however, were also subject to leasing for mineral exploitation by the Osage Nation, with the approval of the Secretary and "under such rules and regulations as he may prescribe." *Id.* at § 3. Although the reservation of the mineral estate to the Osage Nation originally lasted only twenty-five years, the reservation currently runs "in perpetuity." Act of Oct. 21, 1978, Pub. L. No. 95-496, 92 Stat. 1660, § 2. As a result, the surface lands of the Project site may be privately held and properly leased to Defendants, while the underlying mineral estate remains subject to a separate mineral lease secured from the BIA and the Osage Nation.

Pursuant to its rulemaking authority, the Department of Interior ("DOI") promulgated 25 C.F.R. Parts 211 and 214. Part 211 governs the development of reserved Indian tribal solid mineral resources generally, while Part 214 implements the Osage Act and applies specifically to the Osage mineral estate. Plaintiff alleges Defendants' construction activities violated both of these regulations. Specifically, Plaintiff alleges violation of § 211.48(a), which prohibits "exploration, drilling, or mining operations on any Indian lands" without first obtaining a mineral lease or permit, and § 214.7, which prohibits "mining or work of any nature" in affected areas of Osage County without first obtaining a lease from the Secretary.[3] Therefore,

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[3] 25 C.F.R. § 211.48(a) provides in full: "No exploration, drilling, or mining operations are permitted on any Indian lands before the Secretary has granted written approval of a mineral lease or permit pursuant to the regulations in this part." The first sentence of 25 C.F.R. § 214.7 provides: "No mining or work of any nature will be permitted upon any tract of land until a

Defendants' liability turns on the proper interpretation of these two regulations.

V. Osage Wind's Construction Activities Do Not Violate 25 C.F.R. § 211

A. "Mining" Is Limited to Commercial Mineral Development

Plaintiff contends Defendants engaged in "mining" under Part 211, which required Defendants to obtain a mineral lease or permit. Section 211.3 defines "mining" as:

> the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals; Provided, when sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt is the subject mineral, an enterprise is considered "mining" only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year.

Plaintiff argues Defendants' "extensive extraction, handling, sorting, crushing, and utilization of minerals," which were incident to construction of a large-scale commercial wind farm operation, amounted to the "science, technique, and business of mineral development" under the regulation. [Doc. No. 24, at 9]. However, it is clear to the Court that "mineral development" covers the activities of an entity engaged in the science, technique, and business of *developing minerals*, not those of an entity that incidentally

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lease covering such tract shall have been approved by the Secretary of the Interior and delivered to the lessee."

encounters minerals in connection with surface construction activities. In other words, a commercial mineral development purpose is required to invoke the leasing requirements of § 211.48.

The Court reaches this conclusion for several reasons. First, each of the key terms used in § 211.3 under the limitation of "including but not limited to" relates to the phrase "mineral development," and each term refers to a specific method of extracting minerals for commercial purposes—opencast work, underground work, and in-situ leasing directed to severance and treatment of minerals. Other terms that would fall within the scope of "including but not limited to" must be of the same character. *See Bloate v. United States*, 559 U.S. 196, 209 (2010) (rejecting a broad reading of the phrase "including but not limited to" on the ground that "such a reading would violate settled principles of statutory construction because it would ignore the structure and grammar of [the statute], and in so doing render even the clearest of the subparagraphs indeterminate and virtually superfluous."). Thus, excavating minerals incidentally to construction is not contemplated by the term "mineral development."

Second, contrary to Plaintiff's assertion, the term "opencast work" refers to a method of mining with a purpose of developing the excavated material. The Bureau of Mines defines "opencast method" in relevant part as a "mining method consisting of removing the overlying strata or overburden, extracting the coal, and then replacing the overburden." U.S. Bureau of Mines, *Dictionary of Mining, Mineral, and Related Terms* 2171 (U.S. Dep't of the Interior 2d ed. 1996). "Opencast" is defined as "[a] working in which

excavation is performed from the surface. Commonly called open pit." *Id.* These definitions make it plain that opencast mining involves the extraction of mining material for the purpose of using it elsewhere.[4] This activity is fundamentally different from the excavation and backfilling activities in which Osage Wind engaged in constructing the wind farm. Accordingly, Defendants' activities did not constitute "opencast work."

Third, other subsections of Part 211 confirm "mineral development" refers only to mineral development for commercial purposes. For example, § 211.27 provides an initial lease term of ten years which, "absent specific lease provisions to the contrary, *shall continue as long thereafter as the minerals specified in the lease are produced in paying quantities*." (emphasis added). Further, Section 211.47(a) provides the lessee shall "[e]xercise diligence in mining . . . on the leased lands *while mineral production can be secured in paying quantities*." (emphasis added). These provisions presuppose that "mining" subject to a lease under Part 211 results in the commercial development of minerals. Perhaps tellingly, the United States fails to address the meaning of these provisions or how they could be squared with a broader definition of "mining" that would cover excavation incident to construction.

Additionally, the definition of "lease" in § 211.3 does not further Plaintiff's cause. The regulation defines "lease" as "any contract approved by the United States . . . that authorizes exploration for, extraction of, or removal of any minerals." Plaintiff takes this

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[4] The Tenth Circuit has found it "helpful to refer to dictionary definitions" in matters of statutory interpretation. *Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000).

definition to mean that a lease is *required* for any exploration, extraction, or removal of any minerals. However, § 211.48 is the operative provision that states when a lease is required, which is prior to any "exploration, drilling, or mining operations." As discussed above, Defendants' construction activities do not fall within the definition of "mining."

Further, the Indian Mineral Development Act of 1982, 25 U.S.C. § 2102, does not offer support to Plaintiff's argument that mineral "development" encompasses mere extraction and processing. In § 2102, Congress provided that tribes could, subject to the Secretary's approval, enter into joint ventures, leases, or other agreements "providing for the exploration of, or *extraction, processing, or other development of* . . . mineral resources" or "providing for the sale or other disposition of the production or products of such mineral resources." (emphasis added). According to a plain reading, § 2102 refers to agreements with tribes for the "development" of mineral resources. Nowhere does it indicate that incidental excavation and backfilling of minerals amounts to extraction and processing for "development" purposes, as contemplated by § 2102.

Though Plaintiff correctly points out that the regulation should be read broadly in favor of the Osage Nation, Plaintiff's interpretation of "mining" would cover such a broad range of activity as to render the term meaningless. This cannot have been the regulators' intent, and the Court declines to read the regulation as broadly as Plaintiff proposes. Accordingly, the Court concludes Defendants did not engage in "mining" under 25 C.F.R. Part 211.

B. The "De Minimus" Exception Does Not Apply to Defendants' Activities

Nor did Defendants engage in "mining" by virtue of the amount of minerals extracted during Osage Wind's construction activities. Plaintiff argues the final provision in § 211.3's definition of mining applies to Defendants' activities because Defendants' "extraction" of common minerals such as sand, limestone, and silt exceeded 5,000 cubic yards in one year.[5] Plaintiff argues the use of the term "extraction" in § 211.3 means that whether common minerals are being "mined" turns on the total volume of "extracted" minerals, not whether the extraction is for any a commercial purpose or indeed, any particular purpose. [Dkt. 24, at 11-12; Dkt. 29, at 8].

However, Plaintiff's broad interpretation of the "de minimus" exception does not square with other provisions in the regulation. Specifically, Plaintiff's interpretation does not account for the definition of

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[5] The Court notes its skepticism with the United States' conclusory assertion that Defendants extracted more than 5,000 cubic yards in a year. While the Court agrees Defendants excavated more than 5,000 cubic yards of minerals across the 84 turbine foundations, the Court is not convinced that the 5,000 cubic yard threshold is meant to apply across *all* excavations done by a single entity. The Project's 84 turbines span across 8,400 acres, and no single foundation hole would satisfy the 5,000 cubic yard threshold. By Plaintiff's own math, Defendants likely excavated only around 720 cubic yards of material per foundation. It strains logic to conclude that the regulators intended the 5,000 cubic yard threshold to apply across *all* holes excavated by one entity, no matter how far apart or how many surface estates are covered. The United States has failed to provide any rationale for aggregating all 84 turbine sites in concluding Defendants' excavations exceeded the 5,000 cubic yard threshold.

"permit" in Section 211.3, which states, "Permit means any contract issued by the superintendent and/or area director to conduct exploration on; or removal of *less than 5,000 cubic yards per year* of common varieties of minerals from Indian lands." (emphasis added). By reading the definitions of "mining" and "permit" together, it becomes clear that the 5,000 cubic yard threshold applies only to extraction or removal of common minerals for *development purposes*. A broader reading would mean that any time a surface owner digs a hole on his or her land that would disturb any quantity of common minerals, he or she would have to obtain either a permit or a lease for any digging and backfilling. A broader reading would also mean that every proposed construction project in Osage County that requires digging and backfilling, including building a single-family home, multi-family apartment building, commercial building, or septic tank, would be subject to approval by the Osage Nation. The United States does not allege this is the case in Osage County, and the Court will not impose such a requirement.

The Court's narrower reading of the "de minimus" exception, which requires a mineral development purpose, is bolstered by the agency's statements during rulemaking: "[c]ommon varieties of mineral resources extracted in small amounts are excluded from the definition of mining, especially because *the purpose of such extraction is often for local and/or tribal use*. However, permits for these *small operations* are still reviewed and approved at the superintendent's office." 61 Fed. Reg., 35,634, 35,640 (July 8, 1996) (emphasis added). The agency's statement focuses on the "purpose" for extracting and using the minerals, and the agency's use of the term "operations" indicates a

permit is required only when minerals are being used for some purpose other than extraction and backfilling incident to surface construction. Accordingly, the "de minimus" exception in Part 211 does not apply to Defendants' construction activities. Plaintiff's claim that Defendants violated 25 C.F.R. § 211 fails as a matter of law.

VI. Osage Wind's Construction Activities Do Not Violate 25 C.F.R. § 214

Plaintiff contends Defendants engaged in "mining or work of any nature" in Osage County without securing a lease from the Secretary of the Interior, in violation of 25 C.F.R. § 214.7. "Mining" is not defined in Part 214. However, as discussed above, under the instructive definition of "mining" found in 25 C.F.R. § 211.3, Defendants' excavation activities do not constitute "mining."

Plaintiff separately asserts Defendants' activities amount to "work of any nature" under § 214.7 because of Defendants' large-scale excavation that "necessarily, purposefully, and repeatedly requires invasion and conversion of the sub-surface minerals." [Doc. No. 29, at 4]. Plaintiff points out that without the limestone and rock materials found in place, "Defendants would have had to purchase backfill materials elsewhere or negotiate a lease with the Osage tribe providing recompense for the backfill materials mined from the mineral estate." [*Id.* at 4-5]. In other words, Plaintiff argues both the large-scale displacement of minerals and the backfilling of minerals amount to "mining or work of any nature," even if Defendants did not move the extracted material offsite or sell this material. [Doc. No. 24, at 6-7]. To bolster its argument, Plaintiff points to negotiations that took place between

a contractor for the Oklahoma Department of Transportation ("ODOT") and the DOI for a Sandy Soil Permit or Lease, when the contractor performed roadwork on U.S. Highway 60 that required excavation and backfilling of minerals. [*Id.* at 7; Doc. No. 24-1]. In this regard, Plaintiff attaches an unexecuted "Sandy Soil Lease" between the Osage Nation and ODOT. [Doc. No. 24-2].

Although on its face, the phrase "work of any nature" is not limited to mining work, in context it was plainly intended to mean mining-related exploration and construction. Specifically, applying § 211.3's definition of "mining" to Part 214's regulations using the doctrine of *in pari materia*,[6] the Court concludes the activities requiring a Part 214 lease are those that are defined as "mining" in Part 211, and not "work of any nature" unrelated to mining. As discussed above, § 211.3 defines "mining" by reference to commercial "mineral development." Thus, Part 214 requires a lease only for work related to "mining" as defined in Part 211. "Work of any nature," read in isolation, could describe any kind of "work," but the phrase takes

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[6] *In pari materia* is a canon of construction pertaining to related statutes. Statutes that are *in pari materia* "may be construed together, so that inconsistencies in one statute may be resolved by looking to another statute on the same subject. BLACK'S LAW DICTIONARY (10th ed. 2-14). The rule means that "a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a later act can be regarded as a legislative interpretation of an earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting and is therefore entitled to great weight in resolving any ambiguities and doubts." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (citation, quotation marks, and alterations omitted).

meaning when read as work related to "mineral development."

The Court finds Plaintiff's interpretation of the phrase "work of any nature" to be overly broad and impractical, particularly in light of the permissible uses of the surface estate that may involve disturbing underlying minerals. The 1906 Osage Act contemplated uses of the surface estate that included "houses, orchards, barns, or plowed land," all of which would necessarily involve some incidental digging and backfilling of minerals, but none of which, according to the record before the Court, require a lease or permit from the BIA prior to construction. Osage Act, § 2(2). Further, the United States acknowledges that Part 214 has "not precluded the building of the many houses, ranches, commercial business, water towers and sports fields already existing in Osage County." [Dkt. 29 at 10]. Despite this acknowledgment, the United States fails to offer any practical measure of when a surface use infringes on the mineral rights.

Moreover, Part 214 is silent as to leasing requirements for any activity other than mining, which is reflected in the title of Part 214, "Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas." *See United States v. Hernandez*, 655 F.3d 1193, 1197 (10th Cir. 2011) (noting that legislative titles may be helpful when interpreting ambiguous statutory language). Further, the title of Part 214.7 itself refers to "operation," which suggests a reference to a mining operation, rather than any surface activity that requires digging and backfilling.

Other sections of Part 214 bolster the Court's conclusion that "mining or work of any nature" is limited to mining operations and mining-related activities.

See 25 C.F.R. § 214.13 ("Lessees shall exercise diligence in the conduct of prospecting and mining operations"); 25 C.F.R. 214.14(a) ("Lessees may use so much of the surface of the leased land as shall be reasonably necessary *for the prospecting and mining operations and buildings required by the lease*.") (emphasis added); 25 C.F.R. § 214.10(d) (for "substances other than gold, silver, copper, lead, zinc, coal, and asphaltum the lessee shall pay quarterly a royalty of 10 percent of the value at the nearest shipping point of all ores, metals or minerals marketed."). In light of the language of the Osage Act, and as a matter of common sense, the drafters of Part 214 could not have intended to require BIA approval prior to any surface use that requires incidental digging and backfilling.

The Tenth Circuit's decision in *Millsap v. Andrus*, 717 F.2d 1326 (10th Cir. 1983), does not require a different conclusion. In *Millsap*, the Tenth Circuit considered the extent to which the Osage hard mineral estate included common rock, such as limestone or dolomite, and concluded such minerals were indeed reserved to the mineral estate. Importantly, however, the offending party in *Millsap* was excavating minerals for a *commercial* purpose, namely, selling the limestone as road base. *Id.* at 1327 n.1. By contrast, Osage Wind backfilled the excavated materials into the hole from which they came or left them on the surface beside the hole. The limestone and other excavated materials were not developed, moved offsite for use elsewhere, or sold at a profit. As a result, Osage Wind's excavating and replacing the materials at the same location did not affect any right of the mineral estate owner, which distinguishes it from the commercial activity addressed in *Millsap*.

The Court is also not guided toward a different conclusion by the proffered lease negotiations between ODOT and the DOI in connection with road work. Besides the fact that the attached lease is unsigned, and besides the fact that the attached negotiation letters refer confusingly to both a "permit" and a "lease," [*see* Docs. 24-1, 24-2], these documents do not persuade the Court that a lease is *required* under § 214.7 for mere excavation and backfilling. At best, the evidence merely reflects that a single road contractor agreed to pay for excavation of roadway materials. The United States has failed to identify any prior administrative interpretation of Part 214 (or Part 211) *requiring* a mineral lease or permit for otherwise lawful excavation incident to surface construction. In short, the United States does not suggest that its interpretation of Part 214 is a longstanding one that deserves any deference.

Although the United States denies this consequence, the United States' broad reading of Part 214 would require every proposed excavation in Osage County—including basements, house foundations, septic tanks, and football fields—to secure a mineral lease under Part 214. This was not Congress' intent in enacting the Osage Act. The Osage Act took the former surface estate out of reservation status and transitioned it to fee ownership. The Osage Act contemplated that the surface estate be used for various purposes, "for farming, grazing, or *any other purpose not otherwise specifically provided for herein*." Osage Act, § 7 (emphasis added). This intent would be defeated if any construction requiring excavation on privately held surface lands in Osage County were subject to the leasing requirements of Part 214.

Osage Wind excavated holes to build foundations and then replaced the minerals or left them on the surface. Such use is consistent with Congress' contemplated use of the surface estate. Here, the mineral owner has lost nothing because the excavated minerals are replaced and not used for any purpose. Defendants have not marketed or sold minerals or otherwise engaged in mineral development. As a result, they are not required to obtain a lease under Part 214 for their lawful surface construction activities. Plaintiff's claim that Defendants violated 25 C.F.R. § 214 fails as a matter of law.[7]

VII. No Deference to the United States' Interpretations of Parts 211 and 214 Is Required

In this case, the Court finds no deference to the United States' interpretation of the federal regulations in Parts 211 and 214 is required. Plaintiff is correct that an agency is entitled to deference "when it adopts a reasonable interpretation of regulations it has put in force." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008). In this case, however, Plaintiff's reading of the regulations defies their plain language and is accordingly not a reasonable interpretation or a "permissible construction of the statute" requiring deference. *See id.* ("we accept the agency's position unless it is plainly erroneous or inconsistent with the regulation.") (citation and quotation marks omitted); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The

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[7] As the Court decides this matter on the merits in Defendants' favor, it need not address Defendants' argument that the doctrine of laches separately bars this suit.

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Further, while Plaintiff correctly states this Court is bound to apply the general rule that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed with doubtful expression being resolved in favor of the Indians," the Court does not find any such "doubtful expression" in the regulatory text at issue. *Millsap v. Andrus*, 717 F.2d, 1326, 1329 (10th Cir. 1983) (citing *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918)). Although the United States' reading of the regulations would almost certainly result in a financial boon to the Osage Nation, the Court simply cannot reasonably read the regulatory terms "mining" and "work of any nature" to encompass any activity that disturbs or alters the hard mineral estate.

CONCLUSION

For the reasons outlined above, the Court concludes that Plaintiff's claims fail as a matter of law. Accordingly, Defendants' Motion for Summary Judgment [Doc. No. 26] is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment [Doc. No. 24] is **DENIED**. Further, Plaintiff's Motion for Expedited Consideration [Doc. No. 25] is **DENIED**, and Plaintiff's Motions to Strike [Doc. Nos. 39, 42] are **DENIED**.

s/
James H. Payne
United States District Judge
Northern District of Oklahoma

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

October 23, 2017

Nos. 15-5121 & 16-5022

UNITED STATES OF AMERICA,
Plaintiff,

v.

OSAGE WIND, LLC; ENEL KANSAS, LLC;
ENEL GREEN POWER NORTH AMERICA, INC.,
Defendants - Appellees.

OSAGE MINERALS COUNCIL,
Movant to Intervene - Appellant.

ORDER

Before **BRISCOE**, **EBEL**, and **PHILLIPS**, Circuit Judges.

This matter is before the court on appellees' Motion to Stay the Mandate pending the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States and the final disposition of these cases by this court. Upon consideration the motion is granted.

Entered for the Court

s/_____

ELISABETH A. SHUMAKER, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

October 26, 2017

Nos. 15-5121 & 16-5022

(D.C. No. 4:14-CV-00704-JHP-TLW) (N.D. Okla.)

UNITED STATES OF AMERICA,
Plaintiff,

v.

OSAGE WIND, LLC; ENEL KANSAS, LLC;
ENEL GREEN POWER NORTH AMERICA, INC.,
Defendants - Appellees.

OSAGE MINERALS COUNCIL,
Movant to Intervene - Appellant.

ORDER ADDRESSING APPELLANT'S "RESPONSE TO APPELLEES' MOTION TO STAY ISSUANCE OF MANDATE"

Before **BRISCOE**, **EBEL**, and **PHILLIPS**, Circuit Judges.

THE COURT has received Appellant's "Response to Appellees' Motion to Stay Issuance of Mandate." In light of that response, the Court has considered anew its previous order granting a stay of the mandate in this case pending Appellees' petition for certiorari before the United States Supreme Court.

It is the Court's judgment that our opinion in this case presents several substantial issues of federal law upon which there is a substantial possibility that the Supreme Court would decide to review by certiorari, even in the absence of direct conflicting authority and

even considering the other arguments advanced by Appellant's responsive brief.

Although not dispositive to our decision to grant a stay of the mandate, the Court also observes that there is no argument advanced of any compelling injury that any party will suffer if the mandate is stayed for the short period of time to allow the Supreme Court to consider a certiorari petition in this case.

Accordingly, it is ORDERED that the Court's previous order to stay the mandate is left as is without modification or revocation.

Entered for the Court

s/

ELISABETH A. SHUMAKER, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

October 17, 2017

Nos. 15-5121 & 16-5022

UNITED STATES OF AMERICA,
Plaintiff,

v.

OSAGE WIND, LLC; ENEL KANSAS, LLC;
ENEL GREEN POWER NORTH AMERICA, INC.,
Defendants - Appellees.

OSAGE MINERALS COUNCIL,
Movant to Intervene - Appellant.

ORDER

Before **BRISCOE**, **EBEL**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

s/_____
ELISABETH A. SHUMAKER, Clerk