

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

(1) UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 14-CV-704-JHP-TLW
)	
(1) OSAGE WIND, LLC;)	
(2) ENEL KANSAS, LLC; and)	
(3) ENEL GREEN POWER)	
NORTH AMERICA, INC.,)	
)	
Defendants.)	

**COMPLAINT FOR DECLARATORY JUDGMENT AND
PRELIMINARY AND PERMANENT INJUNCTION**

Plaintiff, the United States of America, by and through Danny C. Williams, Sr., United States Attorney for the Northern District of Oklahoma, and Cathryn D. McClanahan, Assistant United States Attorney, for its Complaint against the above-named defendants, alleges as follows:

NATURE OF THE ACTION

1. In this civil action, the United States seeks a preliminary and a permanent injunction and a declaratory judgment that the ongoing excavation activities of Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. (collectively “Defendants”) in Osage County, Oklahoma, are unlawful and must be suspended until Defendants have obtained all requisite federal regulatory approvals and have entered into appropriate leases approved by the Secretary of the Interior (“the Secretary”).

2. Defendants have been conducting and continue to conduct unauthorized mineral excavation activities in connection with the construction of a wind energy project on 8,400 acres in Osage County, Oklahoma. The project consists of between 84 and 94 wind turbines and

associated infrastructure. Currently, Defendants are engaged in excavating and constructing foundations for the wind turbines, associated buildings and structures, as well as trenching for cables. Defendants are digging numerous pits measuring more than 50 feet wide and more than 10 feet deep. As part of this process, Defendants are excavating sand, soil of various types, and rock encountered in place. Defendants are crushing some of these extracted materials and using them to reinforce the concrete turbine foundations.

3. The United States seeks, on an expedited basis, preliminary and permanent injunctions, and a declaratory judgment that the ongoing activities of Defendants in Osage County, Oklahoma, are unlawful and must be suspended immediately and until they have obtained the requisite federal regulatory approvals and have entered into appropriate leases approved by the Secretary of the Interior.

PARTIES

4. The Osage Nation (“Osage Nation”) is a federally recognized Indian tribe. The United States is authorized to bring lawsuits on behalf of trust Indian beneficiaries pursuant to 25 U.S.C. § 175. The United States is further authorized to litigate this case in order to fulfill its fiduciary responsibility to protect trust Indian resources. *See United States v. Colvard*, 89 F. 2d 312 (4th Cir. 1937). Further, as trustee, the United States is charged with the administration, protection, and management of the estate. *See Act of June 28, 1906 § 3, 34 Stat. 539, 543-44*, amended in relevant part by *Act of Mar. 2, 1929, 45 Stat. 1478* (extending restricted trust status of mineral estate to 1959); *Act of June 24, 1938, 52 Stat. 1034* (extending restricted trust status of the mineral estate to 1983); *Act of Oct. 21, 1978, 92 Stat. 1660* (extending restricted trust status of minerals estate in perpetuity). In furtherance of those trust responsibilities, the Bureau of Indian Affairs has promulgated and administers regulations governing activities affecting the

Osage minerals estate. The United States brings this lawsuit in its capacity as trustee of the Osage minerals estate, as well as to enforce compliance with federal law.

5. Defendant Osage Wind, LLC, is a Delaware limited liability company and has its headquarters at 717 Kihekah Avenue, Pawhuska, Oklahoma 74056. It is 100% owned by Enel Kansas, LLC.

6. Defendant Enel Kansas, LLC, is a Delaware limited liability company and has its headquarters at Southlake Technology Park, 16105 West 113th Street, Suite 105, Lenexa, Kansas 66219. It is 100% owned by Enel Green Power North America, Inc.

7. Defendant Enel Green Power North America, Inc. is incorporated under the laws of Delaware and has its headquarters at One Tech Drive, Suite 220, Andover, Massachusetts 01810.

JURISDICTION AND VENUE

8. This Court has jurisdiction under 28 U.S.C. §§ 1345, which provides that the district courts shall have original jurisdiction in all civil actions commenced by the United States or any agency thereof. *McCarty v. Hollis*, 120 F. 2d 540 (10th Cir. 1941).

9. Venue is proper in this district under 28 U.S.C. § 1391(b), inasmuch as the property at issue is located in Osage County, Oklahoma. 28 U.S.C. § 1661(b).

FACTS

The Osage Nation and the Osage Mineral Estate

10. The Osage Nation is a federally recognized Indian tribe. The Osage Reservation was originally established through the Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm to the Great and Little Osage Indians a Reservation in Indian Territory).

11. In 1906, Congress enacted the Osage Allotment Act, which severed the mineral estate from the surface estate of Osage Reservation and placed the mineral estate in trust for the tribe. *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539. The surface estate was allotted to individual members of the Osage Nation for the purpose of homesteading. *Id.* at §2. Congress regarded the surface estate as suitable for farming and grazing. S. Rep. No. 59-4210, 59th Congress (1906) (Division of the Lands and Funds of Osage Indians, Oklahoma) at 2.

12. Congress, in the Osage Allotment Act, specifically reserved “oil, gas, coal, or other minerals covered by the lands” to the Osage Tribe. Osage Allotment Act at §3. In severing the mineral estate from the surface estate, Congress did not contemplate uses of the surface estate which would interfere with the mineral estate beyond those normally associated with homesteading, farming, and grazing.

13. The Osage Minerals Council is an independent agency within the Osage Nation established by Article XV of the Osage Nation Constitution. Among the responsibilities of the Osage Minerals Council is the negotiation of leases for the development and extraction of minerals from the Osage mineral estate.

14. The Bureau of Indian Affairs and its Osage Agency in Pawhuska, Oklahoma, administers many of the United States’ trust duties related to the Osage mineral estate.

Defendants’ Mining Activities

15. Defendants are constructing a wind energy project consisting of between 84 and 94 turbines, underground collection lines, an overhead transmission line, two permanent meteorological towers, and a network of access roads.

16. Immediately below the surface, the mineral estate contains limestone, sandy soil (sand and gravel), and other minerals belonging to the Osage Nation.

17. The installation of the wind energy project's turbines and foundations requires substantial excavation of the subsurface estate belonging to the Osage Nation, which is held in trust by the United States and regulated by the Bureau of Indian Affairs.

18. The foundations for the wind turbines are made from reinforced concrete, in a conical shape with a base diameter of more than 50 feet, buried to a depth of approximately 10 feet in the subsurface estate.

19. For each of the turbines, Defendants are digging pits measuring more than 60 feet wide and 30 feet deep and excavating limestone, sandy soil and other minerals from the subsurface estate. Rock from the excavations comes out in pieces of varying size and shape.

20. Defendants are utilizing rock crushers to crush the limestone to a roughly ½ inch size. The crushed rock is placed next to the site from which it was excavated.

21. Once a foundation for the turbine is poured and has cured, the crushed rock, sand and soil from the excavation are pushed back into the excavated site as backfill.

22. Upon information and belief, unless Defendants are restrained, the erection of all the planned turbines will involve excavation and use by Defendants of over 60,000 cubic yards of minerals.

The Defendants' Activities Require Prior Approvals

23. Generally, the development of Indian tribal solid mineral resources is governed by federal regulations found at 25 C.F.R. § 211. There are specific regulations applicable to non-oil and gas mining on the Osage Mineral Reserve as set forth in 25 C.F.R. § 214.

24. Pursuant to 25 C.F.R. § 214.7, "No 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."

25. Additionally, “Leases of minerals other than oil and gas may be negotiated with the tribal council after permission to do so has been obtained from the officer in charge [the superintendent of the Osage Indian Agency].” 25 C.F.R. § 214.2.

26. According to 25 C.F.R. § 211.3, “mining” is “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 mineral exceeds 5,000 cubic yards in any given year.”

Notice to the Defendants Regarding Unauthorized Activities

27. On information and belief, excavation and earth movement activities began on or around September 2014. On September 29, 2014, the BIA first learned of Defendants’ unlawful activities when an employee of the BIA Osage Agency observed employees and agents of Osage Wind performing the excavation activities detailed above.

28. Osage Agency Superintendent Robin Phillips wrote to Defendant Enel Green Power North America, Inc. on October 9, 2014, and demanded that the subject activities cease until an appropriate permit or lease for the excavation and use of minerals from the Osage Mineral Reserve was approved by the Osage Nation and the BIA.

29. On October 29, 2014, the Osage Mineral Council approved Resolution 3-25, requesting the assistance of the United States to protect the Osage Mineral Reserve from unauthorized commercial use.

30. Despite these notices, Defendants have not sought and have expressly refused to seek appropriate authorization.

COUNT I

**DECLARATION REGARDING THE DEFENDANTS' ACTIVITIES
AND THE APPLICABILITY OF 25 C.F.R. § 211**

31. The United States realleges and incorporates the preceding paragraphs.

32. The Defendants are engaged in unauthorized mining and excavation in the subsurface lands of the Osage mineral estate without first obtaining a lease approved by the Secretary.

33. 25 C.F.R. § 211 sets forth the regulations that are generally applicable to the leasing of tribal lands for mineral development. Although these regulations specifically carve out from their coverage certain sets of regulations for specified Indian tribes (*see* 25 C.F.R. § 211.1(e)), no such carve out is made for the Osage Nation. Thus, by their terms, the regulations in § 211 are applicable to the mining and extraction of solid minerals from the subsurface lands of the Osage mineral estate.

34. 25 C.F.R. § 211.48 explicitly prohibits “exploration, drilling, or mining operations on Indian land” without obtaining from the Secretary (a) “written approval of a mineral lease or permit” and (b) “after a lease or permit is approved, written permission before any operations are started on the leased premises.”

35. 25 C.F.R. § 211.3 defines “Indian Land” as “any lands owned by any individual Indian . . . or other tribal group which owns land or interests in the land, the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.” In the case of the Osage Nation, the Indian lands are the subsurface mineral estate which was reserved by Congress for the benefit of the Tribe.

36. Upon information and belief, Defendants have or will extract and use more than 5,000 cubic yards of sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt

this year. In fact, upon information and belief, Defendants contemplate extracting and using over 60,000 cubic yards of minerals from the subsurface estate. Therefore, they are engaged in “mining” under the definition set forth in the Code of Federal Regulations.

37. The Defendants are excavating, extracting, severing, converting, and crushing minerals from the subsurface Osage mineral estate for a commercial purpose without obtaining a proper lease, permit or approval as required by federal law.

38. By reason of the foregoing, an actual and justiciable controversy exists. The United States therefore seeks a declaratory judgment that Defendants must cease their current activities in the Osage mineral estate until they obtain proper federal authorization to conduct such activities.

COUNT II

DECLARATION REGARDING THE DEFENDANTS’ ACTIVITIES AND THE APPLICABILITY OF 25 C.F.R. § 214

39. The United States realleges and incorporates by reference the preceding paragraphs.

40. The regulations applicable to mining on Osage reservation lands provide 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.” 25 C.F.R. § 214.7. Here, the Defendants have violated the regulations because they are engaged in mining or other work without having first obtained an appropriate lease and prior approvals.

41. “Leases of minerals other than oil and gas may be negotiated with the tribal council after permission to do so has been obtained from the officer in charge [the Superintendent of the Osage Agency].” 25 C.F.R. § 214.2.

42. The United States therefore seeks a declaratory judgment that Defendants must cease all mining excavation activities in the Osage mineral estate until they obtain the authorizations required under 25 C.F.R. § 214.

COUNT III

**PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF TO HALT
EXCAVATION, DIGGING AND EARTH MOVING ACTIVITIES**

43. The United States is entitled to a preliminary injunction and permanent injunction from this Court to preserve the status quo and to prevent immediate and further irreparable harm to the United States. The United States will present a Motion for Preliminary Injunction.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court:

1. Enter a declaratory judgment under 25 U.S.C. § 2218 that Defendants are in violation of 25 C.F.R. § 214 and must refrain from engaging in mining and excavation activities in the Osage mineral estate until they obtain proper federal authorizations allowing such activities.

2. Enter a declaratory judgment under 25 U.S.C. § 2218 that Defendants are in violation of 25 C.F.R. § 211 and must refrain from engaging in mining and excavation activities in the Osage mineral estate until they obtain proper federal authorizations allowing such activities.

3. Enter a judgment assessing damages, as determined, to the Osage mineral estate for unlawful or unauthorized mining and excavation.

4. Enter a preliminary injunction to halt all mining and excavation activities within the area of the Osage Mineral Council's jurisdiction and a permanent injunction ordering the

Defendants to refrain from engaging in those activities until proper federal authorizations have been obtained.

5. Award such other and further relief as the Court determines to be just and proper.

Respectfully submitted,

UNITED STATES OF AMERICA

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