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.	)	

PLAINTIFF'S MOTION FOR PRELIMINARY 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, moves this Court, pursuant to Fed. R. Civ. P. 65, to preliminarily enjoin the Defendants from taking any action to excavate or cause excavation of sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt. Specifically, the United States requests that Defendant halt placement of wind turbine bases in Osage County, Oklahoma. In support thereof, Plaintiff states as follows:

I. Factual Background

A. Osage Reservation and Mineral Interests in Modern Osage County

The Osage Nation is a federally recognized Indian tribe whose Reservation was established in 1872 and comprised what is now Osage County, Oklahoma. Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm the Great and Little Osage Indians); *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 3056 (2011). In 1906, Congress passed the Osage Allotment Act which allotted most of the surface estate of the reservation, dividing it up among members of the Osage Nation. Act of June 28, 1906, ch. 3572,

34 Stat. 539 at §2; *Osage Nation*, 597 F.3d at 1120-21. That same Act severed the mineral estate from the surface estate and placed it in trust for the Osage Nation. Osage Allotment Act, §3, 34 Stat. at 542; *Osage Nation*, 597 F.3d at 1120.

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. In allotting the surface estate, Congress provided that each member of the Nation was entitled to three 160 acre tracts, one of which was designated the allottee's homestead tract. Osage Allotment Act at § 2; *Millsap v. Andrus*, 717 F.2d 1326, 1328 (10th Cir. 1983). The allotted lands were subject to leasing for mineral exploitation by the Osage Nation "with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe," except that no mining or prospecting was permitted on the homestead lands without "the written consent of the Secretary of the Interior." Osage Allotment Act at § 3.

The Tenth Circuit, in reviewing the Osage Allotment Act, noted that "Nothing in the scheme or the legislative history suggests any intent to limit the mineral reservation," and concluded that minerals like limestone and dolomite were reserved along with the oil and gas underlying the surface estate. *Millsap*, 717 F.2d at 1328, 1329. The Court explained that the "argument that the surface owner has virtually nothing left if rock of so common a variety as limestone or dolomite is a 'mineral' is of little persuasive value even if true since it was rejected by the Supreme Court [in an analogous case]." *Id*. at 1329 n.6 (citing *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983).

Although the Osage Allotment Act originally provided for restrictions on the alienation of the allotted surface lands, those restrictions have expired and the Tenth Circuit has subsequently held that the Osage Reservation was disestablished by the 1906 Act. Osage

Allotment Act at § 2 (homestead land inalienable for 25 years; other lands inalienable for three years); *Osage Nation*, 597 F.3d at 1127. By contrast, the mineral estate of that reservation has remained held in trust by the United States for the benefit of the Osage Nation to this very day. Act of Oct. 21, 1978 § 2, 92 Stat. 1660 (amending earlier statute in order to provide that mineral estate is reserved to the Nation "in perpetuity").

As a result of the Osage Allotment Act's severance of the mineral estate from surface estate, the surface of the project site is privately held and leased to Defendants. All of the minerals underlying the project site, however, are part of the Osage Mineral Reserve. As a general matter, the development of Indian tribal solid mineral resources is governed by federal regulations found at 25 C.F.R. § 211 and additional specific regulations (applicable to non-oil and gas mining) set forth in 25 C.F.R. § 214.

B. Defendants' Project

Some or all of Defendants are lessees of surface estate owners and are currently engaged in the construction of a "wind farm." Responsive Comments of Enel Green Power North America, Inc., Cause No. PUD 201400232 (filed November 21, 2014), Oklahoma Corporation Commission, attached hereto as Exhibit 1 ("Responsive Comments"); Michael Overall, *Wind Farm Faces New Challenge From Osage Nation*, Tulsa World, Oct. 23, 2014, 2014 WLNR 29717437, attached hereto as Exhibit 2. The project at issue consists of the placement of between 84 and 94 wind turbines and 1.8 miles of new transmission line from the project's substation to an interconnection point with the electric grid. *Id*. Currently, Defendants are engaged in excavating and constructing foundations for the wind turbines. *Id*. These excavation sites measure approximately 10 feet deep and between 50 and 60 feet in diameter. Responsive Comments, Exhibit 1. The materials encountered and excavated include sand, soil of various

types and a variety of native rocks, including limestone and other minerals reserved to the sub-surface estate. *Id*. Rock is excavated in large pieces and converted to backfill (rocks that are approximately ½ inch diameter in size) by use of a rock crusher. *Id*. After the foundation is placed, poured and cured, the crushed rock backfill is pushed back into the excavated site. *Id*.

On September 29, 2014, an employee of the Bureau of Indian Affairs ("BIA"), Osage Agency first observed evidence of these excavation activities. These activities were immediately recognized to meet the definition of mining (as discussed below) and, as such, required prior approval. The Superintendent of the BIA, Osage Agency wrote to Defendant Enel Green Power North America, Inc. to demand that project work cease until an appropriate permit or lease for the excavation and use of the minerals from the Osage Mineral Reserve was in place. Letter from BIA Superintendent Robin Phillips to Mr. Francesco Venturini, dated October 9, 2014, attached hereto as Exhibit 3 ("Phillips Letter"). Project work has not ceased, and, in fact, placement of foundations continues. Responsive Comments, Exhibit 1.

II. Legal Issue and Argument: Standard for Granting a Preliminary Injunction

The purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In determining whether to grant a preliminary injunction, the court must consider four factors: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether the movant will suffer irreparable harm without an injunction; (3) whether the threatened injury to movant outweighs harm to the opposing party; and (4) whether the public interest will be served by an injunction. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998).

No one factor is dispositive and the court must consider all four to determine whether injunctive relief should issue. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-47 (10th Cir. 2001). If the United States can establish the last three factors, the weight of the first factor bends. *Id*. Instead of showing a substantial likelihood of success, the United States need only proved that there are "'questions going to the merits . . . so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Id*. (quoting *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999)).

A. The United States has a substantial likelihood of showing that Defendants' excavation, processing and use of materials in placing wind turbine foundations is "mining" and requires compliance with the Code of Federal Regulations.

Congress has authorized the Department of the Interior ("Department") to promulgate regulations governing the leasing of oil, gas and other minerals on Osage lands. Osage Allotment Act at §3. Accordingly, the Department has promulgated two sets of regulations, one governing oil and gas leasing of Osage lands, 25 C.F.R. § 226, and the other, applicable here, governing all non-oil and gas mining on the Osage Mineral Reserve, 25 C.F.R. § 214. 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." Further, 25 C.F.R. § 214.2 states, "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]." Pursuant to these regulations, Defendants were (and are) required to obtain prior authorization for "mining or work of any nature" within the Osage Mineral Reserve.

The Part 214 regulations do not define "mining", but that term is defined in the regulations generally covering the development of Indian tribal solid mineral resources. Specifically, 25 C.F.R. § 211.3[1] defines mining as,

> [T]he 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.

This definition provides a de minimis exception, allowing up to 5,000 cubic yards of extraction in a given year before an otherwise incidental use of the mineral estate by a surface owner becomes subject to federal regulation.[2] The definition permits reasonable use of mineral estate by a surface user while also remaining consistent with the United States' fiduciary responsibility to ensure the mineral estate is conserved and used for the benefit of the Osage Indians. *See Millsap*, 717 F.2d at 1328 ("The [Osage Allotment] Act . . . evidences a congressional intent to maintain control over the more valuable resources to prevent their improvident depletion by individual tribe members.").

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[1] The Part 211 regulations were promulgated pursuant to the May 11, 1938, "Act to regulate the leasing of certain Indian lands for mining purposes," 52 Stat. 347 at §4. The same statute provides that the regulations governing mineral leasing on Indian lands generally will not supersede Department regulations directed specifically to the Osage lands. *Id*. at § 6 (excepting the Osage Reservation and other enumerated lands from application of §§ 1-4. Applying the federal definition of mining in Part 211 in the present context simply fleshes out, rather than supersedes, the federal regulations set forth in Part 214.

[2] In the preamble to the Part 211, the Department explained "Common 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." Leasing of Tribal Lands for Mineral Development and Leasing of Allotted Lands for Mineral Development, 61 Fed. Reg. 35634, 35640 (July 8, 1996). The Department's approach here is consistent with that of the Bureau of Land Management's mineral materials regulation which also provides that a surface owner may use materials within the boundaries of the surface estate without a contract or permit only if the use is of a minimal amount for personal use. 43 C.F.R. § 3601.71(b)(1).

Defendants use of the mineral estate for their purposes is not the typical incidental use Congress would have expected in allotting the surface estate to individual Indians to be used as homesteads. *See Watt*, 462 U.S. at 53 (explaining that, in the analogous context of the Stock-Raising Homestead Act of 1916 ("SRHA"), "Congress plainly expected that the surface of SRHA lands would be used for stock-raising and raising crops").[3] Defendants "incidental" use of the mineral estate for their surface activities easily exceeds the de minimis threshold allowed under the Department's general Indian land mining regulations. The dimensions of each foundation site hold are 10 feet by 50 feet (at a minimum).[4] Accordingly, each foundation site requires the excavation of at least 726 cubic yards (again, using the minimum dimensions). The proposed wind farm operations on the Osage Mineral Reserve, according to the most conservative calculations, involve more than 60,000 cubic yards. And, the work done to date this year – more than seven foundation sites in approximately four months – surpasses the 5,000 cubic yard threshold described in the regulations. Activities involving the reserved mineral estate at such a scale constitute mining and must comply with the Part 214 regulations.

Beyond simply the inordinate scale on which the mineral estate is being appropriated, it should be noted that Defendants substantially change the material extraction and by use of a rock crusher. Consequently, Defendants are most certainly engaged in the "treatment of minerals" contemplated by 25 C.F.R. § 211.3. Activities at such a scale, and which treat the minerals in

[3] The intent of Congress in severing the property estates was relevant in *Watt* to determine the scope of the minerals reserved in that statute. Here there can be no argument that the limestone and other minerals Defendants are excavating were reserved because the Tenth Circuit has so held. *Millsap*, 717 F.2d at 1329.

[4] To be conservative and give every benefit to Defendants, the United States is using dimensions previously provided by the Defendants to the Department. It should be noted, however, that there are recorded observations of pits being dug to a depth of 30 feet. See Exhibit 3, attached hereto. If excavation is truly occurring to that depth, each foundation requires the removal of approximately 2,180 cubic yards of material.

order to utilize them in surface activities, constitute mining, even outside the context of federal law. *See Bursey v. South Carolina Dept. of Health and Environmental Control*, 600 S.E.2d 80, 82, 87 (construction of back-up dam, requiring quarry encompassing "ten to sixty acres" and "blasting with dynamite, de-watering, crushing, stockpiling, and making concrete" goes "beyond mere 'excavation'" and therefore did not meet "on-site construction" exception to state mining law), *aff'd*, 631 S.E.2d 899 (S.Car. 2006), *overruled on other grounds*, 714 S.E.2d 547 (S.Car. 2011).[5]

As well, there are acreage limitations that are being flagrantly disregarded by Defendants. The wind farm project at issue here involves in excess of 8,000 acres. Responsive Comments, Exhibit 1. Yet, 25 C.F.R. § 214.8 states:

> No person, firm, or corporation shall hold under lease at any one time without special permission from the Secretary of the Interior in excess of [960 acres] . . . [f]or beds of placer gold, gypsum, asphaltum, phosphate, iron ores, and other useful minerals, other than coal, lead, and zinc . . . .

Defendants are excavating, processing and using rock, sand and soil from the Osage Mineral Reserve for a commercial purpose. The United States has reached the conclusion, after careful study and review, that these activities constitute "mining" and are therefore regulated by 25 C.F.R. § 214. Based on a plain reading of the statutes and regulations, there is a high likelihood of success on the merits.

[5] Of course, state laws aimed at simply regulating mining activities would not necessarily have the same intent as the federal regulations here that do not simply regulate mining but protect a federal interest in the mineral estate and ensure that any mining that does occur benefits the Osage Nation.

B. The Osage Mineral Reserve will undoubtedly suffer immediate and irreparable (and incalculable) harm in the absence of a preliminary injunction to maintain the status quo.

A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because damages would be inadequate or difficult to ascertain. *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1354 (10th Cir. 1989). The very interests that the United States is charged to protect – those of the Osage Mineral Reserve and the Osage Nation – will suffer an irreparable injury if Defendants are allowed to continue in the illegal excavation and mining operations described above.

First, under the regulations, leases that cover mineral interests must be negotiated with the appropriate tribal body (the Osage Minerals Council) and approved by the Secretary of Interior ("Secretary"). 25 C.F.R. § 214. If the Defendants are allowed to simply disregard these regulations and continue their mining activity, the Secretary and the Osage Minerals Council have lost all ability to negotiate or ensure fair compensation for the benefit of the Osage Nation from Defendants' use of the mineral estate, or, moreover, to ensure that Defendants' use of the mineral estate is on terms acceptable to the Osage Nation and within the parameters set forth by Part 214. Defendants here have conveniently precluded both the Secretary and the Osage Minerals Council from considering the number of sites, the location of sites, the amount of excavated materials to be used or the environmental wisdom of the project. Defendants effectively (and purposefully) cancel the ability of the United States or the Osage Minerals Council to say "no" or to negotiate modifications to the proposed project.

It is important to note that the BIA notified Defendants of applicable regulations and permitting procedures in early October 2014. Phillips Letter, Exhibit 3. Not only did Defendants disregard this letter, they apparently elected to pursue a beat-the-clock strategy and have

intensified excavation activities. Defendants have deprived (and propose to continue to deprive on a very grand scale) federal authorities of the timely opportunity to conduct legally mandated reviews designed to avert or minimize harms to the environment, wildlife habitat, cultural resources and Osage burials, including compliance with the National Environmental Policy Act, the National Historic Preservation Act and the Endangered Species Act.

Second, after-the fact calculation of monetary damages is made impossible here by the actions of the Defendants. Defendants are crushing the mined resources that they find during excavation and reusing them for other purposes to advance their commercial interests. Responsive Comments, Exhibit 1. While they are relieving themselves of the burden of purchasing necessary materials on the open market, they are also eliminating the possibility of a fair measure of the quality and quantity of materials encountered and used. There is no open market negotiation or arms-length purchase and sale of the mined substances to examine at some later date.

Finally, related to this issue of monetary damages is the irreparable nature of the alteration of the minerals encountered. Beneath the surface, Defendants are undoubtedly encountering a variety of rock and soil mixtures and formations. The materials are taken from the ground and forever altered to suit the commercial need of the Defendants. Large rock formations are excavated and large boulders put to the side of the holes dug for foundation placement. These boulders (already altered once) are then crushed in order to make them useful for Defendants' own commercial and construction purposes.

As a general rule, when "interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (internal quotations

omitted). *See also United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) (uniqueness of land "settled beyond the need for citation"). Similarly, Defendants are forever altering the landscape, soil composition, quality, value and contour of the Osage Mineral Reserve, effectually usurping the Osage Nation's right to manage the mineral estate reserved for it. Such usurpation of a property interest in itself constitutes irreparable harm. *See RoDa Drilling Co.*, 552 F.3d at 1211 ("Essentially, while being denied record title, RoDa simply cannot participate in the everyday operations of its own interests, and the damages arising from that denial are incalculable"). Here, large formations are being broken apart and brought to the surface by the Defendants. These rocks are then crushed into even smaller specimens. All of this is being done at a scale well-beyond the de minimis mining exception provided in the federal regulations with unpredictable consequences to future attempts by the Osage Nation to develop the minerals currently being disrupted by Defendants.

C. The "injury" that Defendants may sustain if required to obey the law is eclipsed by the irreparable harms to the Osage Mineral Reserve.

By proceeding with their excavation and mining activities with no regard for the applicable regulations and directives from the United States, Defendants are "largely responsible for their own harm." *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). It would be disingenuous for a Defendant to disregard permitting regulations, excavate and alter minerals as it wished and then cry foul when an enforcement action started. *Sierra Club v. U. S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (any harm to party opposing injunctive relief was "largely self inflicted" as it spent $800 million without waiting for a $40 permit to issue). To be blunt, "alleged illegal activities of the defendants are not worthy of any protection by this Court." *Storer Communications, Inc. v. Mogel*, 625 F. Supp. 1194, 1203 (S.D. Fla. 1985).

D. The public interest is a consideration that solidly favors issuance of a preliminary injunction in this matter.

The Tenth Circuit has recognized a public interest in seeing that federal laws and regulations which promote national policies towards Indians are enforced. *Prairie Band of Potawatomi Indians*, 253 F.3d at 1253 ("this court's case law suggests that tribal self-government may be a matter of public interest"); *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex. rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) ("the injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government"). When Congress decided that surface estate of the Osage Reservation should be allotted to individual Osage Indians for homesteading purposes, it nevertheless determined that the mineral estate should be reserved for the benefit of the entire tribe and subsequently extended the initially period in which the mineral estate was reserved to one extending in "perpetuity." Osage Allotment Act at § 3; Act of Oct. 21, 1978 §2, 92 Stat. 1660 (amending earlier statute in order to provide that mineral estate is reserved to the Nation "in perpetuity").

This Circuit has long recognized a trust relationship[6] that exists between the United States Government and members of the Osage Tribe. In *Chouteau v. Comm'r of Int. Revenue*, 38 F.2d 976, 978 (10th Cir. 1930), the Court stated, "The mineral reserves under the [Osage] lands are held in trust by the United States for the tribe and its members, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the members of the tribe who are still recognized as dependents on Governmental care." A

[6] "Throughout the history of the Indian trust relationship, [the Supreme Court has] recognized that the organization and management of [a statutory Indian] trust is a sovereign function subject to the plenary authority of Congress." *U.S. v. Jicarilla Apache Nation*, —— U.S. ——, ——, 131 S.Ct. 2313, 2323 (2011). "[T]he Government has often structured the trust relationship to pursue its own policy goals. Thus, while trust administration 'relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States.'" *Id*. at 2324.

preliminary injunction serves the public interest by ensuring that congress's intent that the mineral estate be preserved for and used to benefit the Osage Nation is given effect through enforcement of the Part 214 regulations.

III. Conclusion

Based upon the points and authorities submitted herein, the United States respectfully requests that the Court enter a preliminary injunction directing the Defendants to halt all excavation, digging and earth-moving activities in Osage County, Oklahoma.

Respectfully submitted,

UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2014, via U.S. Mail, I transmitted the forgoing to the following who are not ECF registrants:

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