Nos. 15-5121 & 16-5022

In the United States Court of Appeals for the Tenth Circuit

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
THE HONORABLE JAMES H. PAYNE, DISTRICT JUDGE
DISTRICT COURT NO. 4:14-CV-00704-117-JHP-JFJ

APPELLEES' PETITION FOR PANEL REHEARING AND/OR REQUEST FOR *EN BANC* DETERMINATION

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Dated: October 2, 2017

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In accordance with Rules 35 and 40 of the Federal Rules of Appellate Procedure and Tenth Circuit Rules 35.1 and 40.1, Petitioners–Appellees, Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. (collectively, "Osage Wind"), respectfully request Panel rehearing and/or rehearing *en banc* of the published Opinion entered by the Court on September 18, 2017 (Attachment 1 hereto; hereinafter, the "Opinion of the Court"). The members of the Court were Circuit Judges Briscoe, Ebel, and Phillips. Judge Ebel authored the Opinion of the Court.

RULE 35(b) STATEMENT

In the reasoned and studied professional judgment of the undersigned, the Opinion of the Court should be reheard by either the Panel or the *En Banc* Court, because, in accordance with Fed. R. App. 35(b)(1)(B), this case involves "one or more questions of exceptional importance." It allowed the Osage Nation through the Osage Minerals Council, after having previously litigated and lost a prior suit against Osage Wind, to sit out the United States' prosecution of the claims here, then appeal the adverse decision out-of-time because the United States originally brought the action. Further, and more importantly, the Opinion of the Court grants to the Osage Nation an expansive veto right over commercial and larger personal surface construction activities in Osage County, Oklahoma. Finally, the Opinion of the Court provides an open-ended definition of "mining," which potentially has far-reaching consequences and application, as it could require a lease anytime minerals are "acted upon with the purpose of exploiting the minerals themselves." (Attachment 1, p. 25).

SUMMARY OF THE GROUNDS FOR REHEARING

The Osage Nation and the Osage Minerals Council (the "OMC") have brought challenge after challenge[1] in an attempt to stop Osage Wind's construction of the wind-energy facility at issue (the "Project"). When the Osage Nation received in 2011 the construction plans for the Project and became aware of Osage Wind's intent to build the wind-energy facility, consisting of wind turbines and their foundations, it brought the Prior Litigation seeking a preliminary and permanent injunction enjoining the commencement of the Project. At the time the OMC brought the Prior Litigation, no turbines had yet been built, and no construction for the Project had begun. Despite this, the Osage Nation and the OMC alleged (with, apparently, no issue of ripeness) that the *future* construction of the Project would interfere with the Osage Nation's access to the mineral estate. The Osage Nation and the OMC lost the Prior Litigation on the merits, and later decided not to appeal that decision.

Then, three years later in 2014, the Osage Nation enlisted the assistance of the United States government to bring the underlying lawsuit, alleging Osage Wind was required to obtain a lease approved by the Department of the Interior or by the OMC prior to the construction of the wind turbine foundations, because said construction involved the extraction of sand, soil and rock, and, in some cases, crushing of the rock. Thus, the United States contended that such activities were "mining," which required Osage Wind to obtain a lease in accordance with 25 C.F.R. Parts 211 and 214. The

[1] The underlying lawsuit was the fifth challenge (excluding the appeals) by the Osage Nation and/or the OMC. Brief of the Appellees, at 8.

United States lost the claims on summary judgment and chose not to appeal the judgment.

The Opinion of the Court allows the OMC to step into the shoes of the United States in order to prosecute this appeal, despite that the OMC sought and was denied permission to intervene in the district court proceedings. Thus, the Court allowed the OMC to prosecute the appeal despite never having been made a party to the proceedings, based on the OMC's purported "unique interest" in the subject matter of the case. (Attachment 1, pp. 8-9). The Court overlooks the fact that the OMC was denied the opportunity to intervene at the district court level, and therefore should be precluded from intervening at the appellate level, especially given the Prior Litigation brought by the OMC.

Further, the Court decided that the 2014 claims were not barred by *res judicata* based on the Prior Litigation because Osage Wind did not explain how the 2014 claims would have been ripe for adjudication in 2011, "almost three years before turbine excavation work began," and because Osage Wind offered no counterargument to the OMC's ripeness argument. But the Court has overlooked key facts and law related to the ripeness issue, as it has overlooked Osage Wind's argument that the OMC could *and should* have raised the claims in the Prior Litigation, though that construction had not yet begun (just as was true of the claims it litigated in the Prior Litigation).

Rehearing also is required because the Opinion misapprehends and misapplies the Indian canon of construction in deferring to the OMC's proffered interpretation of 25 C.F.R. § 211.3's definition of "mining." Finding that the phrase "mineral development"

was ambiguous, the Court applied the "long-established principle that ambiguity in laws designed to favor Indians ought 'to be liberally construed' in the Indians' favor." (Attachment 1, p. 21). But, respectfully, the Indian canon of construction should not apply in interpreting the Osage Allotment Act's use of the phrase "mineral development," because the Act allotted the land to Osage tribal members when the mineral estate was severed. Thus, the Act contemplated both a tribal mineral owner, and exclusively individual Indian surface owners, and the canon does not countenance favoring one over the other. Thus, Rehearing should be granted because the Court misapplied the Indian canon of construction to define "mineral development," as used in the definition of "mining," to include "sorting and crushing minerals for the purpose of backfilling and stabilization." (Attachment 1, pp. 23-24). That is, the Court used an Indian canon of construction to conclude that excavation incident to surface construction is "mining," despite that the surface construction could and, in fact does, benefit Indian surface owners.

ARGUMENT AND AUTHORITIES

I. STANDARDS GOVERNING REHEARING

Panel rehearing is appropriate where an issue of law or fact has been overlooked or misapprehended by the Court. FED. R. APP. P. 40(a)(2). Rehearing *en banc* is

appropriate where "the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a)(2).[2]

Here, the Court overlooked that the OMC was not allowed to intervene in the district court proceedings, and no party timely appealed that decision, which operates to Osage Wind's prejudice. Further, the Court overlooked Osage Wind's argument regarding ripeness and the applicability of the doctrine of *res judicata*. It appears that the Court misapprehended the facts and circumstances surrounding the Prior Litigation, given the OMC's prior claims and requests for relief were similar (despite the fact that no construction had begun) and those claims were permitted to go forward and were heard on the merits. Finally, the Court misapprehended the circumstances under which it was applying the Indian canon of construction and misapplied the canon to favor the interests of the tribal mineral estate over the interests of the individual Indian surface estate owners.

II. REHEARING SHOULD BE GRANTED ON THE ISSUE OF THE OMC'S RIGHT TO APPEAL.

In its Opinion, the Court held that the OMC satisfied the unique-interest exception to the general rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." (Attachment 1, p. 9, citing *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). In so holding, the Court relied on *Devlin v. Scardelleti*, 536 U.S. 1 (2002) and *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002).

[2] "[G]ranting *en banc* review [is] a very subjective endeavor for the court." Jody Martin, Comment, *The Most Abused Prerogative:* En Banc *Review in the United States Court of Appeals for the Fifth Judicial Circuit*, 1994, 14 MISS. C.L .REV. 395, 411.

(Attachment 1, pp. 9-10). But in neither of those cases was the appealing party a litigant who had already brought similar claims in prior litigation, lost, and then opted not to prosecute an appeal in that prior case. And in neither of those cases was the United States government a party to the proceedings. On the contrary, here, the OMC brought the Prior Litigation on its own, lost, opted not to prosecute an appeal of that decision, and then requested the United States prosecute the claims in this matter and declined to participate. Once it became unhappy with the United States' decision, it decided to once again litigate on its own behalf, presenting an entirely different posture of the case, especially with regard to the issues of *res judicata*. These are unique circumstances that the Court should have considered, as they present a distinction with a difference, because such inequitable conduct has prejudiced Osage Wind. Allowing the OMC to appeal the decision in this case essentially gives them a third federal bite at the apple of challenging this Project by losing one federal litigation,[3] then using the United States government to prosecute the claims, and then refusing to honor the United States' decision-making. *Pueblo of Picuris in State of New Mexico v. Abeyta*, 50 F.2d 12, 14 (10th Cir. 1931) ("We conclude that power is vested in the Attorney General, as the head of the department of justice, to initiate, control and dismiss such a suit."). Irrespective of the OMC's "'unique interest' in the subject matter of the case," the United States' decision should have been final where the OMC had brought a panoply of prior challenges to the Project (including

[3] The OMC and the Osage Nation have had other procedural "bites" at the apple of the Project in their various state court and administrative challenges to the Project. *See supra* note 1.

challenges in the Prior Litigation to the manner and effect of construction at a time years before construction began).

III. REHEARING SHOULD BE GRANTED ON THE ISSUES OF RES JUDICATA AND LACHES.

Under the doctrine of *res judicata* or claim preclusion, a party and its privies are prohibited by a final judgment on the merits from relitigating issues that were *or could have been* raised in the prior litigation. *Wilkes v. Wyo. Dep't. of Emp't. Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002). The Court held that Osage Wind had not met its burden of demonstrating that the OMC could have raised its claims in the Prior Litigation because Osage Wind "does not explain how the instant claim would have been *ripe* for adjudication in 2011, almost three years before excavation work began." (Attachment 1, p. 14); *see Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (Ripeness requires an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."). The Court finds "facially plausible" the OMC's argument that its claims would not have been ripe, based on the Court's misunderstanding that at that time, in 2011, "the magnitude of the planned excavation work was not known to the 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." *Id.* The Court therefore found facially plausible OMC's lack-of-ripeness theory, and found that Osage Wind offered no counterargument to that theory. *Id.* Thus, said the Court, *res judicata* did not apply.

This analysis is contradicted by the Appellees' Brief, the OMC's filings in the Prior Litigation, and the record in this case. First, as Osage Wind explained in its brief, in 2011 (prior to surface construction and prior to any excavation), the OMC received for review and comment the site plans for the construction of the Project. Brief of the Appellees, at 4-5. Those plans demonstrated the magnitude of the required excavation, as they identified 84 turbine sites and 10 alternate sites. *Id.* The plans further showed the placement of each turbine and the total "footprint" of the project. *Id*. at 5. That the OMC was aware of the magnitude of the planned excavation is evident from the trial court's findings in the Prior Litigation that each foundation would initially be 16 feet in diameter, down to four feet below the surface, then expanding in a conical shape with a maximum diameter of 50 feet, to a depth of 10 feet. *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Grp., LLC*, No. 11-CV-643-GFK-PJC, 2011 WL 6371384, *1 (N.D. Okla. 2011) (unreported); *see also* Jt. App. 070, 087, 243.

Upon receiving these plans, rather than informing Wind Capital Group[4] that such excavation would require a mining lease, the Osage Nation and the OMC initiated litigation. Despite that construction had not yet begun, the OMC challenged the Project's alleged effect on the development of the Osage Mineral Estate. The OMC alleged that the construction of the wind turbines "will require extensive digging to construct deep pits containing concrete foundations. . . ," that the Osage Nation would be irreparably harmed "if Defendants are allowed to begin construction and interfere with Osage Nation's rights

[4] Wind Capital Group is Osage Wind, LLC's predecessor in interest as to the Project. Brief of the Appellees, p. 4.

associated with developing its mineral estate." *Id.* 242. The OMC sought to enjoin future construction of the Project. The OMC's own allegations therefore demonstrate that it knew in 2011 the extent to which the foundations would require the ground be excavated.

Moreover, the Court's statement that Osage Wind offered no counterargument to the ripeness theory overlooks Osage Wind's argument that the claims in the Prior Litigation and the claims asserted in this case arose out of the same set of facts and sought the same relief, which is sufficient under principles of *res judicata*. Brief of the Appellees, at 27. If the claims asserted in the Prior Litigation in 2011 were ripe based on site plans of the yet-to-be-constructed Project, then it makes no sense that other claims based on those same plans would not have also been ripe. *See Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982) (agency's policy regarding granting of permits to drill oil wells was ripe because it affected investment decisions of many oil and gas developers and caused them financial losses). In the Prior Litigation, the OMC's claims were based on the site plans, not actual construction. *Id*. It was in response to receipt of the site plans (not actual construction) that the OMC filed the Prior Litigation, challenging the Project's alleged effect on development of the Osage Mineral Estate. Brief of Appellees, at 5. The same could *and should* have been done with the underlying claims here, but the OMC chose to wait to bring these claims.

Similarly, the Court also decided that laches does not apply because the United States commenced this action within three months of the beginning of the turbine *excavation*. While technically true, the Court again overlooks that the OMC had the plans detailing the excavation for years prior, and *construction* had begun a year earlier. Brief

of the Appellees, at 4-5. Further, the Court overlooks that, despite having the site plans in 2011, and Osage Wind's expected substantial investments before initiating excavation, neither the OMC nor the BIA even suggested a permit or lease would be required until October 2013 (*see* Jt. App. at 074),[5] a suggestion that Osage Wind disputed immediately. After Osage Wind responded, disputing such contention, the OMC failed to further respond, but instead waited until more than a year after Project construction began to bring its claims. (*Id.* at 5-6). Thus, the OMC delayed unreasonably in even asserting a permit or lease was required and further delayed in bringing this litigation. Laches should apply.

Because the Court overlooked this argument, the Panel or the Court *En Banc* should rehear these arguments and find that *res judicata* bars the OMC from relitigating claims that could and should have been litigated in the 2011 Prior Litigation and the claims, like the other claims litigated and decided, were at that time ripe for review.

IV. REHEARING SHOULD BE GRANTED ON THE APPLICATION OF THE INDIAN CANON OF CONSTRUCTION.

A. The Indian canon of construction does not apply.

The Court found specifically that "[i]t might be reasonable to adopt the construction favored by Osage Wind, which sets as the definitional boundary the commercialization of minerals." (Attachment 1, p. 23). But the Court relied upon the

[5] This reality—that the United States and the OMC knew of the basis of their claims in 2013 *at the latest*—directly refutes the Court's conclusion that laches should not apply because "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." (Opinion of the Court, at 15 n.6).

"long-established principle that ambiguity in laws designed to favor the Indians ought 'to be liberally construed' in the Indians' favor." (Attachment 1, p. 21). The canon cannot be applied to hold that, in disestablishing the Osage reservation, severing the mineral estate from the surface estate, Congress intended to provide the Osage Nation or the OMC a veto power over construction on the lands allotted to individual members.

Reliance on the canon fails to account for the fact that the Osage Act allotted all of the surface lands in trust to members of the Osage Nation. *Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010) ("the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement."); *see Confederated Tribes of Chehalis Reservation v. State of Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (Canon does not apply to dispute between two tribes); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) ("No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians.").[6] The original surface allotment owners were also Indians whom the Osage Act provided could "manage, control and dispose of their lands the same as any citizen of the United States." Osage Act, § 2(7).

The Indian canon of construction the Court invoked provides that statutes passed for the benefit of Indians should be "liberally construed with doubtful expression being resolved in favor of the Indians." *See Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir.

[6] It bears noting that the Court decided the issue based on the canon of construction at the insistence of a litigant that may not have standing to bring the lawsuit, as the OMC's authority to bring this action under federal law is currently in dispute. Shannon Shaw Duty, *Osage Minerals Council Votes to Sue Osage Nation over Mineral Estate*, OSAGE NEWS (Sept. 24, 2017), *available at* http://osagenews.org/en/article/2017/09/24/osage-minerals-council-votes-sue-osage-nation-over-mineral-estate-ownership/.

1983). Here, the Court applied this canon to favor the Indian mineral owner over the Indian surface owner (or their successors in interest, who necessarily acquired their interest by operation of law). But the Osage Act itself expressly contemplated that the lands allotted to the surface owner could be used "for farming, grazing, or any other purpose not otherwise specifically provided for herein . . . ." Osage Act § 7. Thus, however the surface land is currently titled (whether it has retained its Indian ownership or has subsequently passed to non-Indians), the Court should not have applied the canon to favor one Indian interest over another. Instead of applying the canon to an ambiguity not specifically raised, the Court should have deferred to the District Court's exhaustive analysis of the issues presented.

B. The OMC did not specifically argue that the phrase "mineral development" was ambiguous.

Finally, the Court misapplied the Indian canon of construction because, although the OMC argued generally that the Indian canon of construction should apply, neither the OMC (nor the United States) ever specifically identified any ambiguous term or doubtful expression to which the canon of construction would or should apply.[7] Osage Wind argued specifically that there was no ambiguity in the regulations. Brief of the Appellees, at 30. The Court *sua sponte* read ambiguity into the phrase "mineral development" in order to apply the canon of construction and reach a result favorable to the OMC. This is at odds with the language of the Osage Allotment Act itself, as was demonstrated and

[7] Because the OMC did not at the district court level raise the argument that "mineral development" was an ambiguous or doubtful expression, the Court should conclude that this specific argument was waived. *See Sydney v. ConMed Elec. Surgery*, 275 F. Appx. 748 (10th Cir. 2008).

discussed at length in Osage Wind's appellate brief. For example, the link to commercial development is found throughout the regulations. *See* Brief of Appellees, at 37-38, citing Section 214.10(d) (contemplating commercial production of minerals by tying the amount of the royalty to the value of the minerals marketed), Section 214.13(a) (emphasis added) (requiring lessees to exercise diligence in the conduct and prospecting of *mineral operations*) and Section 214.11 (providing for a lien in favor of the "Osage Tribe" on "the mining plant machinery, and all minerals mined on the property leased."). The Court failed to interpret definitions of "mining" and "mineral development" in light of the broader text of the regulation.

Finally, this result gives the OMC veto power over many surface construction activities. The Court held that the sorting and crushing of minerals for backfill falls within the definition of "mining." (Attachment 1, p. 24). But the Court states that building a basement or swimming pool may implicate and disrupt the mineral estate but that "merely encountering or disrupting the mineral estate does not trigger the definition of 'mining' under 25 C.F.R. § 211.3." The minerals "must be acted upon for the purpose of exploiting the minerals themselves." (Attachment 1, p. 25). This, however, still grants the OMC a veto over certain surface construction if, for example, the landowner wishes to use the minerals as a backfill for building his or her basement. Although the Court found that the BIA regulation has exempted the use of minerals less than 5,000 cubic yards from the *lease* requirement, it overlooked that a *permit* is still purportedly required by the same regulations, 25 C.F.R. 211.3 (defining "permit" as a contract for the "removal of less than 5,000 cubic yards per year of common varieties of minerals . . . .").

Thus, the Court has essentially given the BIA and the OMC a veto power, one it certainly would have exercised here, over certain—and maybe even all—surface construction (including likely all commercial construction in any event) on any land as to which the Osage Nation owns the underlying minerals, in direct contravention of the intent of the Osage Allotment Act.

CONCLUSION

For the reasons detailed in this Petition, either the Panel or the Court *En Banc* should grant rehearing and (i) find that the OMC's procedural delay bars this appeal; (ii) conclude *res judicata* bars the OMC from relitigating claims that could and should have been litigated in the Prior Litigation because the claims were at that time, like the other claims litigated and decided, ripe for review, (iii) find that the Indian canon of construction should not apply where Indian interests stand to potentially benefit by either outcome of the case, and (iii) render an interpretation taking into account all relevant terms of the regulations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with Fed. R. App. P. 35(b)(3) and Fed. R. App. P. 40(b) because it contains 3,885 words, thus not exceeding 3,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 10th Cir. R. 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font.

Dated: October 2, 2017.

/s/ Ryan A. Ray
Ryan A. Ray

CERTIFICATION OF DIGITAL SUBMISSION

In accordance with Section II(I) of this Court's CM-ECF User's Manual, I hereby certify that:

1. There were no privacy redactions made to this brief as there were none required by any privacy policy;

2. The digital submission is an exact copy of the written document filed that is being mailed to the clerk this date for filing; and

3. The digital submission has been scanned for viruses with Trend Micro Client/Server Security Agent, which was last updated on October 2, 2017 and, according to the program, is free of viruses.

Dated October 2, 2017.

/s/ Ryan A. Ray
Ryan A. Ray

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I further certify that the attached document was mailed by first class mail to:

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I further certify that, on October 2, 2017 and in accordance with 10th Cir. R. 35.4, I forwarded, via U.S. Mail, six (6) hard copies of this brief exactly as filed to:

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