

Nos. 15-5121 & 16-5022

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**In the United States Court of Appeals  
for the Tenth Circuit**

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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.

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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

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**APPELLEES' MOTION TO STAY ISSUANCE OF MANDATE**

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*Counsel for Defendants-Appellees*

Dated: October 20, 2017

In accordance with Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure and Tenth Circuit Rule 41.1(B), Defendants–Appellees, Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. (collectively, “Osage Wind”), respectfully move the Court for an Order staying the issuance of the mandate in this case pending the filing by Osage Wind of Petition for Writ of Certiorari in the Supreme Court of the United States and final disposition of the Petition by that Court. In support of this Motion, Osage Wind states as follows:

1. On September 18, 2017, a three-judge panel of this Court issued its opinion, reversing the district court’s grant of summary judgment in favor of Osage Wind, in a case brought by the United States government relating to whether Osage Wind was required to obtain a lease from the Osage Minerals Council (the “OMC”) or the Bureau of Indian Affairs in accordance with 25 C.F.R. Parts 211 and 214 in order to construct a wind-energy facility in Osage County, Oklahoma.

2. On October 2, 2017, Osage Wind filed with this Court a Petition for Panel Rehearing and/or Request for *En Banc* Determination (the “Petition for Rehearing”).

3. On October 17, 2017, this Court denied the Petition for Rehearing.

4. Osage Wind anticipates that it will file a Petition for Writ of Certiorari with the Supreme Court of the United States, seeking review of this Court’s September 18, 2017 decision. The deadline for filing the Petition is ninety (90) days following the denial of the Petition for Rehearing, or January 16, 2018. *See* Sup. Ct. R. 12(1), (3).

5. This Court has the power to stay the issuance of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court when (i) “the certiorari

petition would present a substantial question and . . . there is good cause for a stay” Fed. R. App. P. 41(d)(2)(A), and (ii) “there is a substantial possibility that a petition for writ of certiorari would be granted.” 10th Cir. R. 41.1(B).

6. Osage Wind’s Petition for Writ of Certiorari will present, in substance, one or more of the following questions for the United States Supreme Court’s consideration:

**Question I.** May the Indian canon of construction be applied to favor one Indian over another Indian, where the statute and regulations are being interpreted to resolve a dispute between a mineral estate owner and a surface estate owner, and, when the statute was enacted, both the mineral estate owner and the surface estate owner are Indians?

**Question II.** Does a Court of Appeals have jurisdiction over a non-party’s appeal of a district court’s ruling on the merits, when the district court case was prosecuted by the United States of America, the OMC was not a party to the district court case and failed to timely intervene, and the United States expressly decided not to file a notice of appeal?

**Question III.** Does surface construction requiring incidental removal and replacement of subsurface materials on fee-owned lands in Osage County (where surface and mineral ownership is severed, with the Osage Tribe owning only the minerals) amount to “mining” such that it is subject to the regulatory jurisdiction of the United States Department of the Interior’s Bureau of Indian Affairs (the “BIA”) or the OMC?

7. Question I involves the application of the Indian canon of construction, which could potentially apply in any number of cases in which interests under a statute of more than one Indian tribe or individual Indian are involved, and therefore has far-reaching consequences. Question II involves the ability of a nonparty to appeal a decision adverse to the United States government, but which the United States government declined to appeal. As such, it affects not just the parties to this case, but affects all

decisions decided against the United States government in the future, as well as the ability of non-parties to appeal.

8. Thus, the questions to be presented by Osage Wind in its Petition for Writ of Certiorari qualify as substantial.

9. Additionally, there is good cause for stay of the mandate. No prejudice will result to the Movant to Intervene/Appellant, the OMC, if the Court grants a short stay, allowing Osage Wind to file its Petition for Writ of Certiorari. Given that further proceedings are required in the District Court for the Northern District of Oklahoma, staying the mandate will avoid the complications that could occur if the case were to proceed in that court and in the United States Supreme Court simultaneously.

10. Further, there is a substantial possibility that Osage Wind's Petition for Writ of Certiorari will be granted, because the case implicates the "Considerations Governing Review on Certiorari" set forth by the U.S. Supreme Court. *See* Sup. Ct. R. 10.

11. First, this Court's decision is at odds with the U.S. Court of Appeals for the Ninth Circuit in that it applied the Indian canon of construction to favor one Indian interest over another. *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."). This Court found the regulations at issue were ambiguous and then applied the Indian canon of construction to favor the argument advanced by the OMC, despite the

fact that the Osage Act itself “allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement.” *Osage Nation v. Irby*, 597 F.3d 1117, 1123 (10th Cir. 2010). Thus, Osage Wind’s Petition for Writ of Certiorari implicates a conflict between Circuits. *See* Sup. Ct. R. 10(a).

12. Second, given the far-reaching consequences of this Court’s decision—including its potential effects on the ability of a non-party to appeal a lower court’s decision without properly intervening, and the application of the Indian canon of construction to cases where either outcome would benefit Indians—Osage Wind’s Petition for Writ of Certiorari involves “important question[s] of federal law that [have] not, but should be settled by [the Supreme] Court. Sup. Ct. R. 10(c).

13. Counsel for Osage Wind requested the parties’ positions on this Motion and has been advised that the OMC objects to this Motion.

**WHEREFORE**, Osage Wind respectfully moves this Court for an Order staying the issuance of the mandate in this case pending the filing of Osage Wind’s Petition for Writ of Certiorari in the Supreme Court of the United States and the final disposition of this case by that Court.

Respectfully submitted,

/s/ Ryan A. Ray

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**ATTORNEYS FOR  
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**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. No paper copies of this motion are required to be submitted here; and
3. The digital submission has been scanned for viruses with Managed Antivirus-BitDefender, which was last updated on October 20, 2017 and, according to the program, is free of viruses.

Dated October 20, 2017.

/s/ Ryan A. Ray

**Ryan A. Ray**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 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:

Jeffrey S. Rasmussen, Esq.  
Rebecca Sher, Esq.  
Peter J. Breuer, Esq.  
Cathryn D. McClanahan, Esq.  
Rachel Heron, Esq.

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

Charles R. Babst, Jr., Esq.

/s/ Ryan A. Ray  
**Ryan A. Ray**