CASE NO. 15-5121 and 16-5022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

OSAGE WIND, LLC, et al.,
Defendants-Appellees,

and

OSAGE MINERALS COUNCIL,
Movant to Intervene/Appellant.

On Appeal from the United States District Court
For the Northern District of Oklahoma
The Honorable Judge James H. Payne
Case No.4:14-cv-00704-JHP-TLW

RESPONSE TO APPELLEES' MOTION TO STAY ISSUANCE OF MANDATE

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October 24, 2017

On Friday, October 20 at 5:30 p.m., Osage Wind filed a motion under Federal Rule of Appellate Procedure 41 to stay the mandate in this case. In its motion, Osage Wind informed this Court that the Osage Minerals Council (hereinafter "OMC") would oppose the motion. Dkt. 01019889011 at ¶ 13.

But less than one work day after Osage Wind filed its motion, this Court issued an order granting the motion.

I. THIS COURT MUST REVIEW DE NOVO, BASED UPON THE ARGUMENTS CONTAINED HEREIN, ITS PREMATURE ORDER GRANTING THE RULE 41 MOTION.

OMC has a due process right to notice and an opportunity to respond to Osage Wind's motion for a stay pending appeal before the Court issues a ruling on the motion. That due process right is codified in Federal Rule of Appellate Procedure 27, which states in relevant parts: "A motion authorized by Rules 8, 9, 18 or 41 [i.e. the four rules regarding stays pending appellate review] may be granted before the 10 day period runs only if the court gives reasonable notice to the parties that it intends to act sooner." (emphasis added.). In this matter, the Court did not provide any notice that it intended to act sooner.

Under the Rule, the Court should not yet have ruled on the motion. It therefore should review that order de novo based upon OMC's timely substantive response, contained below.

II. THIS COURT MUST DENY OSAGE WIND'S MOTION TO STAY PENDING SUPREME COURT REVIEW BECAUSE THIS COURT CANNOT FIND THAT THERE IS A "SUBSTANTIAL POSSIBILITY" THAT THE SUPREME COURT WILL GRANT OSAGE WIND'S PETITION FOR CERTIORARI.

Federal Rule of Appellate Procedure 41(2)(A) states:

> A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question[1] and that there is good cause for a stay.

Tenth Circuit Rule 41.1, titled "Stay not routinely granted," states that the court will not grant a stay "unless the court finds there is a substantial possibility that a petition for certiorari would be granted." (emphasis added).

To determine if there is a substantial likelihood, we then turn to Supreme Court Rule 10, which states in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
> >
> > . . .

[1] OMC's position is that Osage Wind's motion should have been denied without prejudice because the motion does not state a substantial question that Osage Wind will present. Instead Osage Wind vaguely lists three questions and says it will present "one or more" of those. Doc. 01019889011 at ¶6. Osage Wind therefore has not provided this Court with adequate information from which this Court can comply with its obligation to find whether a question that will be presented is substantial.

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Osage Wind lists three questions that it might present to the Supreme Court. It is vast understatement to say that there is not a substantial possibility the Supreme Court will grant certiorari of any of those three issues. The questions that Osage Wind lists are weaker than virtually any that are presented to the Supreme Court.

Indicative of the lack of any strong argument, Osage Wind petitioned for rehearing and rehearing en banc in this Court and this Court denied that motion without even requesting a response from OMC. The standard for rehearing en banc is similar to the standard for certiorari. *Compare* Fed. R. App. Proc. 35(b)(1) *with* Supreme Ct. R. Proc. 10. This Courts' denial of a petition for rehearing is not probative regarding merit, but the fact that the Court en banc denied the motion without requesting that OMC file a response brief is indicative of the lack of merit under the similar discretionary standard for a petition for writ of certiorari.

OMC will now discuss each of Osage Wind's three possible questions in turn:

> **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?

The Supreme Court is highly unlikely to grant certiorari on this question for multiple independent reasons.

First, the issue was not presented to either the District Court or to this Court by Osage Wind. The United States and OMC argued that the Indian canon of construction applied. One of those canons is that ambiguities in construction must be resolved in favor of the Indians. OMC Opening Brief at 33. Osage Wind's only response, both in this Court, Osage Wind Response Brief at 30, and in the District Court, Jt. App. at 304, was that the canon did not apply because the statute was not ambiguous. But under Supreme Court Rule 10 Osage Wind now needs to show a conflict between the circuits, and it is attempting to create one after-the-fact by saying it might present to the Supreme Court a question that it did not present to this Court. Like this Court, the Supreme Court generally does not rule on issues not raised below or not decided below. *Glover v. United States*, 531 U.S. 198 (2001).

Second, Question I is also not presented by the facts of this case. Osage Wind is not an Indian. Osage Wind Br. at 1. Therefore, there is not even a second Indian involved in this matter.

Third, the Ninth Circuit cases that Osage Wind cites are not in conflict with this Court's decision. *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) stated, in a single paragraph, the

obvious point that the Indian canons of construction do not apply in favor of one tribe against another. The Ninth Circuit briefly noted that "the government owes the same trust duty to all tribes, including the Quinault Tribe[, the federally recognized Tribe against whom the Chehalis were attempting to apply the canons.]" Defendants only other case citation is to dicta, unrelated to the Indian canons of construction, contained in *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1986), stating, again obviously, that the United States has a fiduciary obligation to all federally recognized Indian Tribes.

In short, Osage Wind will attempt to frame the issue as a conflict between the circuits, but its argument is divorced from the facts and law, and the question also was not presented to this Court. The Supreme Court will notice these obvious deficiencies, and the Supreme Court is therefore highly unlikely to grant certiorari on the new issue that Osage Wind is seeking to raise.

> **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?

It is incredibly unlikely the Supreme Court would grant certiorari on Question II because question II is merely an assertion that this Court misapplied a properly stated rule of law to the specific facts of this case.

In the question presented, Osage Wind states a narrow issue. Its stated question is based upon its own, contested, view of the facts of the case. The Supreme Court does not decide factual disputes, and the question would not be of sufficient importance in any case.

Osage Wind attempts to evade those problems and to then fit its question within the guidance of Supreme Court Rule 10, by claiming the issue is one of broad applicability. It claims the question "affects all decisions against the United States government in the future, as well as the ability of non-parties to appeal." Doc 01019889011 at ¶7. The Supreme Court will readily see though that attempt to bring the issue within Rule 10 - that Osage Wind's argument that the question has broad applicability is contrary to the narrowly stated question that Osage Wind might present.

This Court properly stated the applicable rule and applied that rule to the unique fact that the United States brought the suit as trustee, and that the appellant is the trust beneficiary. On the narrow issue, this Court's decision is firmly grounded upon a correctly stated rule of law, and this Court's uncontroversial application of that law to the facts of this case. There is no split in the circuits on the applicable rule of law, and the Supreme Court's own rule notes that it will rarely grant certiorari to a claim that a circuit court properly stated a rule of law but then misapplied the rule on the facts.

Osage Wind's second question falls well outside the type of issues that the Supreme Court hears.

> **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?

Under Supreme Court Rule 10, the Supreme Court looks for cases where there is a split in authority in the circuit courts on issues of significance. Question III is neither.

Osage Wind does not even attempt to argue that the Supreme Court might be interested in Question III. In paragraphs seven to twelve of its motion, Osage Wind provides this Court with a very short discussion of why it claims the Supreme Court should grant certiorari on questions I and II. Notably, its own motion does not include any similar discussion of question III.

CONCLUSION

For the reasons stated above, the Osage Minerals Council requests that this Court deny the Appellees' Motion to Stay Issuance of Mandate.

Respectfully submitted this 24th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

This response brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 1,822 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the count and it is Microsoft Office Word 2016.

This response brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements. This motion has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ *Jeffrey S. Rasmussen*
Attorney for Appellant

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **RESPONSE TO APPELLEES' MOTION TO STAY ISSUANCE OF MANDATE**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 10/24/17, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2017, a copy of this **RESPONSE TO APPELLEES' MOTION TO STAY ISSUANCE OF MANDATE** was served via the ECF/NDA system which will send notification of such filing to all ECF registrants.

I further certify that the foregoing was served on the following via U.S. First Class Mail:

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