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United States v. Osage Wind, LLC

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***United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017)**

Summer L. Carmack

The Osage Nation, as owner of the beneficial interest in its mineral estate, issues federally-approved leases to persons and entities who wish to conduct mineral development on its lands. After an energy-development company, Osage Wind, leased privately-owned surface lands within Tribal reservation boundaries and began to excavate minerals for purposes of constructing a wind farm, the United States brought suit on the Tribe's behalf. In the ensuing litigation, the Osage Nation insisted that Osage Wind should have obtained a mineral lease from the Tribe before beginning its work. In its decision, the Tenth Circuit applied one of the Indian law canons of construction and concluded that the digging, crushing, and sorting of minerals by Osage Wind amounted to "mineral development" under the definition of "mining," and therefore required a mineral lease issued by the Osage Mineral Council.

I. INTRODUCTION

In *United States v. Osage Wind, LLC*, the Osage Mineral Council ("OMC"), acting on behalf of the Osage Nation, appealed the United States District Court for the Northern District of Oklahoma's grant of summary judgment to Osage Wind, LLC ("Osage Wind").¹ The United States Court of Appeals for the Tenth Circuit reviewed two threshold issues and one merits issue: (1) whether OMC may appeal the summary judgment decision if it was not "formally a party to the lawsuit when it appealed" because the United States acted on its behalf in the underlying proceedings;² (2) whether, under the doctrine of res judicata, Osage Wind met its burden of proving that OMC's claim should be precluded because it could have been raised in an earlier lawsuit between the parties;³ and (3) whether Osage Wind's excavation activities constituted "mineral development" within a federal regulation definition of "mining," and therefore required a federally-approved, tribally-issued lease from OMC.⁴

The Tenth Circuit reversed and remanded the summary judgment ruling, holding that OMC had the right to appeal the judgment because of its "unique interest" in the subject matter of the case," and that the claim was not barred by res judicata.⁵ The Court also concluded that summary judgment was improper because the excavation work of Osage Wind qualified as "mining" and required a lease through OMC.⁶

1. *United States v. Osage Wind*, 871 F.3d 1078, 1081 (10th Cir. 2017).
2. *Id.* at 1084.
3. *Id.*
4. *Id.*
5. *Id.* at 1087.
6. *Id.* at 1092.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Historical Context

In 1872, Congress reserved lands for the Osage Nation in Oklahoma.⁷ The Osage Act, enacted in 1906, began allotment of those previously-reserved, tribally-held lands.⁸ The surface estate of the lands was severed from the mineral estate and divided into separate allotments for individual tribal members.⁹ The mineral estate was “reserved for the benefit of the Osage Nation,” with the United States acting as legal trustee.¹⁰ The Osage Act provides that the Osage Nation may “issue leases for ‘all oil, gas, and other minerals.’”¹¹ The leases issued by the Osage Nation must be approved by the Department of the Interior.¹² OMC supervises the mineral estate and leasing on behalf of the Osage Nation.¹³

B. Prior Litigation

Osage Wind leased the surface rights of private fee-land within the Tribe’s reservation boundaries in 2010 for purposes of constructing a commercial wind farm.¹⁴ OMC and Osage Wind were first involved in litigation in 2011, when OMC filed suit against Osage Wind alleging construction of the wind farm on the leased surface estate would block OMC’s oil-and-gas lessees from the mineral estate.¹⁵ OMC cited a federal regulation which “entitles OMC’s oil-and-gas lessees to reasonable use of the surface land to support their underground oil-and-gas operations[,]” but its claim failed when OMC failed to show that its oil-and-gas lessees’ activities and Osage Wind’s construction would conflict.¹⁶

C. Current Litigation

Osage Wind proceeded with its project, and in late 2014 began excavation to construct platforms for its wind turbines.¹⁷ Each turbine structure required the support of a “cement foundation measuring 10 feet deep and up to 60 feet in diameter.”¹⁸ Osage Wind created the holes for

7. *Id.* at 1082 (citing Act of June 5, 1872, Ch. 310, 17 Stat. 228).

8. *Id.* (citing Act of June 28, 1906, Ch. 3572, 34 Stat. 539, § 2 [hereinafter Osage Act]).

9. *Id.* (citing Osage Act, §§ 2-3).

10. *Id.* (citing Osage Act, § 3; *see, e.g.*, Osage Nation v. Irby, 597 F.3d 1117, 1120 (10th Cir. 2010)).

11. *Id.* (citing Osage Act, § 3).

12. *Id.* (citing Osage Act, § 3).

13. *Id.* at 1082-83.

14. *Id.* at 1083.

15. *Id.*

16. *Id.* (citing 25 C.F.R. § 226.19 (2014)).

17. *Id.*

18. *Id.*

these foundations by removing “soil, sand, and rock of varying sizes.”¹⁹ “Rock pieces smaller than 3 feet were crushed into even smaller sizes and then, after each foundation was poured and cured, the crushed rocks were pushed back over the hole and compacted into the excavated site.”²⁰

The United States, as trustee of Osage Nation’s mineral estate, filed suit shortly after the excavation work began, seeking an injunction order against Osage Wind.²¹ In its injunction request, the United States alleged that Osage Wind’s excavation activities constituted “mining” and required a federally-approved mineral lease.²² Upon completion of the excavation, the United States withdrew its injunction request and sued Osage Wind for damages for failure to obtain a mineral lease.²³ The district court granted summary judgment in favor of Osage Wind after narrowly interpreting 25 C.F.R. § 211.3²⁴ as applicable only to mineral development conducted for commercial purposes.²⁵

The United States had sixty days to file an appeal after summary judgment was awarded.²⁶ During this time, OMC repeatedly inquired into the United States’ intention to appeal the judgment, and did not receive an answer until the “*final* day of the appeal deadline.”²⁷ After it learned the United States did not plan to file an appeal, OMC “scrambled” and filed a motion to intervene as a matter of right and a notice of appeal of the summary judgment decision.²⁸ The two motions were filed within minutes of one another; however, the district court denied OMC’s motion to intervene, citing a “lack of jurisdiction due to the pending [merits] appeal.”²⁹ OMC then appealed the district court’s decision denying its motion to intervene.³⁰

III. ANALYSIS

The Tenth Circuit first resolved whether OMC had the right to appeal, even though it was not party to the suit, and whether the res

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (citing 25 C.F.R. §§ 211.3, 214.7).

23. *Id.* at 1083-84.

24. 25 C.F.R. § 211.3 defines “mining” as “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 a mineral exceeds 5,000 cubic yards in any given year.”

25. *Osage Wind*, 871 F.3d at 1089.

26. *Id.* at 1084.

27. *Id.* (emphasis in original).

28. *Id.* (citing FED. R. CIV P. 24(a)).

29. *Id.*

30. *Id.*

judicata doctrine barred OMC's suit.³¹ After settling those threshold issues, the Court determined whether the district court's summary judgment decision and its interpretation of applicable mining statutes was proper.³²

A. Osage Mineral Council's Right to Appeal

The Tenth Circuit recognized OMC was not a party to the suit when it appealed the district court's summary judgment decision.³³ Because of the short time frame between filings, the district court did not have time to rule on OMC's motion to intervene prior to its filing of the appeal notice.³⁴ Generally only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.³⁵ However, OMC fell within a narrow exception that applies to "would-be appellants that have a sufficiently 'unique interest' in the subject matter of the case."³⁶ The Court ruled OMC possessed the right to appeal because its unique interests were substantial, and to hold otherwise would "effectively force[] OMC to watch from the sidelines as Osage Wind disrupted the mineral estate, which is owned by OMC's tribe."³⁷

Even though OMC did not attempt to intervene until the last moment, it "d[id] not foreclose application of the unique-interest exception" because OMC's interests were represented by the United States up until the moment OMC filed for intervention.³⁸ Had OMC motioned to intervene *before* the United States indicated it did not plan to appeal the district court's ruling, OMC's motion "would have been denied" because its "interests [were] protected by an existing party."³⁹ The Court stressed the narrowness of the unique-interest exception, and reiterated that the

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (citing *Plain v. Murphy Family Farms*, 296 F.3d 975, 979 (10th Cir. 2002)).

37. *Id.* at 1084-85 (citing *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (allowing nonnamed class members to appeal a settlement hearing, even though the nonnamed members had not first filed a motion to intervene); *Plain*, 296 F.3d at 979-80 (allowing a decedent's children to appeal, where a district court twice denied motions to intervene by a decedent's children in a wrongful-death lawsuit, stating that the children's interests was sufficiently unique)). The Court also distinguished OMC's claims from its holding in *Southern Utah Wilderness Alliance v. Kempthorne*, 525 P.3d 966 (10th Cir. 2008), because OMC possessed a "sole beneficial interest" in the property at issue, rather than a shared interest as in *Kempthorne*. *Id.* at 1085-86 (citation omitted). Further, the fact that OMC's right to issue leases was an individualized right, rather than a *public* right distinguished the present facts from those in *Kempthorne*. *Id.* at 1086.

38. *Id.* at 1085 (See *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010)).

39. *Id.* (quoting *Oklahoma ex rel. Edmondson*, 619 F.3d at 1232; see also FED. R. CIV. P. 24(a)(2)).

“interested person must have a *particularized* and *significant* stake in the appeal, and must further demonstrate cause for why [they] did not or could not intervene in the proceedings below.”⁴⁰ The Tenth Circuit then dismissed as moot OMC’s appeal of the district court ruling denying intervention.⁴¹

B. Claim Preclusion under the Doctrine of Res Judicata

Osage Wind contended that OMC’s claims concerning mineral leases should be barred because it did not assert those claims in its 2011 litigation.⁴² “Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action.”⁴³ The party asserting a res judicata defense has the burden of proving the opposing party could have asserted its claim in prior litigation.⁴⁴ The Court held that Osage Wind did not meet the requisite burden of proof, because OMC’s present claim would not have been ripe during the 2011 lawsuit, as “the magnitude of the planned excavation work was not known to OMC or the United States” at that time.⁴⁵

C. Excavation Work as “Mining”

The Court next turned to whether Osage Wind’s excavation activities constituted mining and thus required a mining lease.⁴⁶ In its decision, the Tenth Circuit acknowledged and applied an Indian law canon of construction and referenced the “long-established principle that ambiguity in laws designed to favor the Indians ought ‘to be liberally construed’ in the Indians’ favor.”⁴⁷ Because the regulations at issue “[were] designed to protect Indian mineral resources and ‘maximize [Indians]’ best economic interests,” they were interpreted in a manner favoring OMC as the representative of the Osage Nation.⁴⁸

The pertinent regulation in this case, 25 C.F.R. pt. 211, deals with Indian mineral resources generally, and “applies broadly to all Indian lands.”⁴⁹ 25 C.F.R. § 211.3 provides that “[m]ining means the science, technique, and business of *mineral development*[.]”⁵⁰ However, the

40. *Id.* at 1086 (emphasis added).

41. *Id.*

42. *Id.*

43. *Id.* at 1086-87 (quoting *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1467-68 (10th Cir. 1993)) (emphasis in original).

44. *Id.* at 1087 (citing *Nwosun v. Gen. Mills Rest.*, 124 F.3d 1255, 1257 (10th Cir. 1997)).

45. *Id.* at 1087.

46. *Id.*

47. *Id.* at 1090.

48. *Id.*

49. *Id.* at 1082, 1088.

50. *Id.* at 1089. (emphasis in original).

regulation mentions an exception to the mining definition if the extracted minerals are common, so long as the excavation of the common minerals does not “exceed[] 5,000 cubic yards in any given year.”⁵¹ The minerals extracted during Osage Wind’s project were common to the area, but the volume of common-variety minerals extracted were measured by the total amount removed from each hole created, and far exceeded the 5,000 cubic yards mentioned in the regulation exception.⁵²

Osage Wind ineffectively argued that “mineral development” referred only to commercialization of the extractions, pointing to the Osage Act and other regulations concerning commercialized minerals.⁵³ The Court thought this interpretation “overly restrictive,” and instead held the term “mineral development” to have a “broad meaning.”⁵⁴ Interpreting the regulation in a light most favorable to the Tribe, the Court concluded that while the ambiguous term “mineral development” certainly includes commercialization and other traditional mining activities, “it also encompasses action upon the extracted minerals for the purposes of exploiting the minerals themselves on site.”⁵⁵ The Court was clear to distinguish “merely encountering or disrupting” minerals from the “exploitation” of minerals, stating that the former was not enough to qualify as mining under § 211.3.⁵⁶ By removing the minerals from the ground, sorting the rocks by size, crushing the larger rocks into smaller bits, and using the crushed fragments to support the foundations of its wind turbines, Osage Wind’s actions effectively exploited the minerals and constituted “mineral development.”⁵⁷ For this reason, the Court held summary judgment in favor of Osage Wind improper because a federally-approved lease from OMC was required under 25 C.F.R. § 214.7.⁵⁸

IV. CONCLUSION

This case is important because of the broad interpretation used by the Court in defining the scope of regulated mining activities as it pertains to tribal mineral estates. The Court’s ruling serves as an example of a Court effectively applying one of the Indian law canons of construction. By interpreting the regulations at issue in a manner favorable to the Osage Nation, the Court recognized the Osage Nation’s assertion of inherent sovereignty by requiring persons and entities to comport with its leasing requirements. Although it could be argued that the Court’s ruling discourages the productive use of property by companies seeking to work on privately-owned lands, it also reinforces the importance of proper

51. *Id.* (citing 25 C.F.R. § 211.3 (2014)).

52. *Id.* at n. 9.

53. *Id.* at 1090.

54. *Id.* at 1091.

55. *Id.* at 1081, 1091-92.

56. *Id.* at 1092.

57. *Id.* at 1091-92.

58. *Id.* at 1092.

consultation with tribes before working within reservation boundaries.