

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

(1) UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 15-CV-453-JED-FHM
)	
(1) MUSTANG RUN WIND PROJECT,)	(Related: <i>U.S. v. Osage Wind, LLC, et al.</i> ;
LLC;)	NDOK Case No. 14-CV-704-JHP-TLW)
(2) TRADEWIND ENERGY, INC.;)	
(3) ENEL KANSAS, LLC; and)	
(4) ENEL GREEN POWER NORTH)	
AMERICA, INC.,)	
)	
Defendants.)	

**COMPLAINT FOR DECLARATORY JUDGMENT AND
PRELIMINARY AND PERMANENT 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, for its Complaint against the above-named defendants, alleges as follows:

NATURE OF THE ACTION

1. In this civil action, the United States seeks a preliminary and a permanent injunction and a declaratory judgment that the ongoing excavation activities of Mustang Run Wind Project, LLC, Tradewind Energy, Inc., Enel Kansas, LLC, and Enel Green Power North America, Inc. (collectively “Defendants”) in Osage County, Oklahoma, are unlawful and must be suspended until Defendants have obtained all requisite federal regulatory approvals and have entered into appropriate leases approved by the Secretary of the Interior (“the Secretary”).

2. Defendants have announced their intention to, and may already be conducting, unauthorized mineral excavation activities in connection with the construction of a wind energy

project on 9,500 acres in Osage County, Oklahoma. The project consists of approximately 68 wind turbines and associated infrastructure. Defendants propose to dig numerous pits measuring more than 50 feet wide and more than 10 feet deep. As part of this process, Defendants propose to excavate sand, soil of various types, and rock encountered in place. Defendants propose to crush some of these extracted materials and use them to reinforce the concrete turbine foundations.

3. The activities that Defendants may engage in are substantially similar to the activities of another project in Osage County (Osage Wind, LLC), which is already the subject of litigation in this court. *United States v. Osage Wind, LLC, et al.*; NDOK Case No. 14-CV-704-JHP-TLW. Osage Wind is also associated with Enel Kansas, LLC, and Enel Green Power North America, Inc., defendants in both matters.

4. The United States seeks, on an expedited basis, preliminary and permanent injunctions, and a declaratory judgment that the anticipated or ongoing activities of Defendants in Osage County, Oklahoma, are unlawful and must be suspended immediately and until they have obtained the requisite federal regulatory approvals and have entered into appropriate leases approved by the Secretary.

PARTIES

5. The Osage Nation (“Osage Nation”) is a federally recognized Indian tribe. The United States is authorized to bring lawsuits on behalf of trust Indian beneficiaries pursuant to 25 U.S.C. § 175. The United States is further authorized to litigate this case in order to fulfill its fiduciary responsibility to protect trust Indian resources. *See United States v. Colvard*, 89 F. 2d 312 (4th Cir. 1937). Further, as trustee, the United States is charged with the administration, protection, and management of the estate. *See* Act of June 28, 1906 § 3, 34 Stat. 539, 543-44,

amended in relevant part by Act of Mar. 2, 1929, 45 Stat. 1478 (extending restricted trust status of minerals estate to 1959); Act of June 24, 1938, 52 Stat. 1034 (extending restricted trust status of the minerals estate to 1983); Act of Oct. 21, 1978, 92 Stat. 1660 (extending restricted trust status of minerals estate in perpetuity). In furtherance of those trust responsibilities, the Bureau of Indian Affairs (“BIA”) has promulgated and does administer regulations governing activities affecting the Osage minerals estate. The United States brings this lawsuit in its capacity as trustee of the Osage minerals estate, as well as to enforce compliance with federal law.

6. Upon information and belief, Defendant Mustang Run Wind Project, LLC is an Oklahoma limited liability company and a wholly owned subsidiary of Enel Kansas, LLC.

7. Upon information and belief, Defendant Tradewind Energy, Inc. is a Kansas for-profit corporation, the developer of the Mustang Run Wind Project, and a subsidiary of Enel Kansas, LLC.

8. Upon information and belief, Defendant Enel Kansas, LLC, a Delaware limited liability company, is a wholly owned subsidiary of Enel Green Power North America, Inc.

9. Upon information and belief, Defendant Enel Green Power North America, Inc. is a Delaware corporation.

JURISDICTION AND VENUE

10. This Court has jurisdiction under 28 U.S.C. § 1345, which provides that the district courts shall have original jurisdiction in all civil actions commenced by the United States or any agency thereof. *McCarty v. Hollis*, 120 F. 2d 540 (10th Cir. 1941).

11. Venue is proper in this district under 28 U.S.C. § 1391(b), inasmuch as the property at issue is located in Osage County, Oklahoma. 28 U.S.C. § 1661(b).

FACTS

The Osage Nation and the Osage Minerals Estate

12. The Osage Nation is a federally recognized Indian tribe. The Osage Reservation was originally established through the Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm to the Great and Little Osage Indians a Reservation in Indian Territory).

13. In 1906, Congress enacted the Osage Allotment Act, which severed the minerals estate from the surface estate of Osage Reservation and placed the minerals estate in trust for the tribe. *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539. The surface estate was allotted to individual members of the Osage Nation for the purpose of homesteading. *Id.* at § 2. The 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.

14. The Congress, in the Osage Allotment Act, specifically reserved “oil, gas, coal, or other minerals covered by the lands” to the United States in trust for the Osage Tribe. Osage Allotment Act at § 3. In severing the minerals estate from the surface estate, the Congress did not contemplate uses of the surface estate which would interfere with the minerals estate beyond those normally associated with homesteading, farming, and grazing.

15. The Osage Minerals Council is an independent political entity within the Osage Nation established by Article XV of the Osage Nation Constitution. Among the responsibilities of the Osage Minerals Council is the negotiation of leases for the development and extraction of minerals from the Osage minerals estate.

16. The BIA and its Osage Agency in Pawhuska, Oklahoma, administers many of the United States’ trust duties related to the Osage minerals estate.

Defendants’ Mining Activities

17. Defendants are constructing a wind energy project consisting of approximately 68 turbines, underground collection lines, overhead transmission line, and a network of access roads.

18. Immediately below the surface, the minerals estate contains limestone, sandy soil (sand and gravel), and other minerals belonging to the United States in trust for the Osage Nation.

19. The installation of the wind energy project's turbines and foundations requires substantial excavation of the subsurface estate belonging to the Osage Nation, which is held in trust by the United States and regulated by the BIA.

20. The massive excavation activities necessary to place the wind turbines are expected to be substantially similar to the excavation already accomplished by Osage Wind, LLC and discussed at length in *United States v. Osage Wind, LLC, et al.*; NDOK Case No. 14-CV-704-JHP-TLW, Declaration of Bill Moskaluk, Dkt. 17-1 at 5.

21. The foundations for the wind turbines are made from reinforced concrete, in a conical shape with a base diameter of 50 to 60 feet, buried to a depth of approximately 10 feet in the subsurface estate. These activities include the excavation of limestone, sandy soil and other minerals from the subsurface estate. Rock from the excavations comes out in pieces of varying size and shape.

22. Defendants utilize rock crushers to crush the limestone, and the crushed rock is placed next to the site from which it was excavated.

23. Once a foundation for the turbine is poured and has cured, the crushed rock, sand and soil from the excavation are pushed back into the excavated site as backfill.

24. Upon information and belief, unless Defendants are restrained, the erection of all the planned turbines will involve excavation and use by Defendants of well over 40,000 cubic yards of minerals.

The Defendants' Activities Require Prior Approvals

25. Generally, the development of Indian tribal solid mineral resources is governed by federal regulations found at 25 C.F.R. § 211. There are specific regulations applicable to non-oil and gas mining on the Osage Mineral Reserve set forth in 25 C.F.R. § 214.

26. 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.”

27. Additionally, “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].” 25 C.F.R. § 214.2.

28. According to 25 C.F.R. § 211.3, “mining” is “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 mineral exceeds 5,000 cubic yards in any given year.”

Notice to the Defendants Regarding Unauthorized Activities

29. On information and belief, Defendant Enel Kansas, LLC and/or Defendant Enel Green Power North America, Inc. participated in the Osage Wind, LLC project described in detail in *United States v. Osage Wind, LLC, et al.*; NDOK Case No. 14-CV-704-JHP-TLW.

There, excavation and earth movement activities began on or around September 2014. On September 29, 2014, the BIA first learned of Defendants' unlawful activities when an employee of the BIA Osage Agency observed employees and agents of Osage Wind performing excavation activities as detailed above.

30. With respect to Osage Wind, Osage Agency Superintendent Robin Phillips wrote to Defendant Enel Green Power North America, Inc. on October 9, 2014, and demanded that the subject activities cease until an appropriate permit or lease for the excavation and use of minerals from the Osage minerals estate was approved.

31. On October 29, 2014, the Osage Mineral Council approved Resolution 3-25, requesting the assistance of the United States to protect the Osage minerals estate from unauthorized commercial use.

32. On July 31, 2015, Osage Agency Superintendent Robin Phillips wrote to Defendant Tradewind Energy advising that an approved mineral lease pursuant to federal regulations was required prior to the contemplated invasion and use of the Osage minerals estate.

33. Despite these notices, Defendants have not sought but rather have expressly refused to seek appropriate authorization.

34. Mustang Run Wind Project, LLC, applied for a conditional use permit to construct and operate wind turbines with the Osage County Board of Adjustment. When the application was denied, Mustang Run filed a Petition for review with the District Court for Osage County (Case No. CV-2014-34), and the matter is currently pending before Oklahoma's Supreme Court. *Mustang Run Wind Project, LLC, v. Osage County Board of Adjustment*, Case No. 113463 (Okla. S. Ct.). Therein, Mustang Run pled with the court for expedited consideration because it is a "multi-million dollar wind energy facility." Motion for Expedited Appeal and/or for Accelerated

Appeal, *Mustang Run Wind Project LLC, v. Osage County Board of Adjustment*, No. 113463 (Okla. S. Ct.), filed January 27, 2015. Indeed, Mustang Run alleged that “every minute” that the turbines are not operational in Osage County, some parties will be “deprived” of “revenue stream”. *Id.* Nonetheless, the Oklahoma Supreme Court denied Mustang Run’s motion.

COUNT I

DECLARATION REGARDING THE DEFENDANTS’ ACTIVITIES AND THE APPLICABILITY OF 25 C.F.R. § 211

35. The United States realleges and incorporates the preceding paragraphs.

36. The Defendants are engaged in unauthorized mining and excavation in the subsurface lands of the Osage minerals estate without first obtaining a lease approved by the Secretary.

37. 25 C.F.R. § 211 sets forth the regulations that are generally applicable to the leasing of tribal lands for mineral development. Although these regulations specifically carve out from their coverage certain sets of regulations for specified Indian tribes (*see* 25 C.F.R. § 211.1(e)), no separate provision is made for the Osage Nation. Thus, by their terms, the regulations in § 211 are applicable to the mining and extraction of solid minerals from the subsurface lands of the Osage minerals estate.

38. 25 C.F.R. § 211.48 explicitly prohibits “exploration, drilling, or mining operations on Indian land” without obtaining from the Secretary (a) “written approval of a mineral lease or permit” and (b) “after a lease or permit is approved, written permission before any operations are started on the leased premises.”

39. 25 C.F.R. § 211.3 defines “Indian Land” as “any lands owned by any individual Indian . . . or other tribal group which owns land or interests in the land, the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United

States.” In the case of the Osage Nation, the Indian lands are the subsurface minerals estate which was reserved by the Congress for the benefit of the Tribe.

40. Upon information and belief, Defendants have or will extract and use more than 5,000 cubic yards of sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt this year. In fact, upon information and belief, Defendants contemplate extracting and using over 40,000 cubic yards of minerals from the subsurface estate in the Mustang Run Wind Project. Therefore, they are engaged in “mining” under the definition set forth in the Code of Federal Regulations.

41. The Defendants will or already are excavating, extracting, severing, converting, and crushing minerals from the subsurface Osage minerals estate for a commercial purpose without obtaining a proper lease, permit or approval as required by federal law.

42. By reason of the foregoing, an actual and justiciable controversy exists. The United States therefore seeks a declaratory judgment that Defendants must cease their current activities in the Osage minerals estate until they obtain proper federal authorization to conduct such activities.

COUNT II

DECLARATION REGARDING THE DEFENDANTS’ ACTIVITIES AND THE APPLICABILITY OF 25 C.F.R. § 214

43. The United States realleges and incorporates the preceding paragraphs.

44. The regulations applicable to mining on Osage reservation lands provide that “[n]o 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.” 25 C.F.R. § 214.7. Here, Enel Kansas, LLC and Enel Green Power North America, Inc. have already violated the regulations with impunity with respect to the Osage Wind sister operation.

See United States. v. Osage Wind, LLC, et al.; NDOK Case No. 14-CV-704-JHP-TLW. Mustang Run Wind Project, LLC, and Tradewind Energy, Inc., now also unashamedly plan to engage in mining or other work without having first obtained an appropriate lease and prior approvals and despite the clear instructions of Osage Agency Superintendent Phillips.

45. “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 Agency].” 25 C.F.R. § 214.2.

46. The United States therefore seeks a declaratory judgment that Defendants must cease all mining excavation activities in the Osage minerals estate until they obtain the authorizations required under 25 C.F.R. § 214.

COUNT III

PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF TO HALT EXCAVATION, DIGGING AND EARTH MOVING ACTIVITIES

47. The United States realleges and incorporates the preceding paragraphs.

48. The United States is entitled to a preliminary injunction and permanent injunction from this Court to preserve the status quo and to prevent immediate and further irreparable harm to the United States and the Osage minerals estate. The United States will shortly present a Motion for Preliminary Injunction.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court:

1. Enter a declaratory judgment under 25 U.S.C. § 2218 that Defendants are in violation of 25 C.F.R. § 214 and must refrain from engaging in mining and excavation activities in the Osage minerals estate until they obtain proper federal authorizations allowing such activities.

2. Enter a declaratory judgment under 25 U.S.C. § 2218 that Defendants are in violation of 25 C.F.R. § 211 and must refrain from engaging in mining and excavation activities in the Osage minerals estate until they obtain proper federal authorizations allowing such activities.

3. Enter a judgment assessing damages, as determined, to the Osage minerals estate for unlawful or unauthorized mining and excavation.

4. Enter a preliminary injunction to halt all mining and excavation activities within the area of the Osage Mineral Council's jurisdiction and a permanent injunction ordering the Defendants to refrain from engaging in those activities until proper federal authorizations have been obtained.

5. Award such other and further relief as the Court determines to be just and proper.

Respectfully submitted,

UNITED STATES OF AMERICA

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