CASE NOS. 15-5121 and 16-5022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

WIND FARM, 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

APPELLANT'S OPENING BRIEF

JEFFREY S. RASMUSSEN
REBECCA SHER
PETER J. BREUER
Fredericks Peebles & Morgan LLP
1900 W. Plaza Drive
Louisville, CO 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839
Attorneys for Osage Minerals Council

[Oral Argument Requested]

May 2, 2016

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Appellant discloses that they have no parent corporations and that no publicly-held corporation owns 10% or more of the stock of any Appellant.

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STATEMENT OF JURISDICTION

This lawsuit arises from the failure of Osage Wind, LLC, Enel Kansas LLC, and Enel Green Power North America, Inc. (hereinafter collectively "Wind Farm") to obtain a lease approved by either the Department of Interior or by the Osage Minerals Council ("OMC") prior to the extraction, processing, and/or re-use of more than 60,000 cubic yards of common minerals which are the beneficial property of the OMC. The Plaintiff was the United States, which filed the district court suit in part based upon its trust responsibility to the OMC. Jt. App. 178

Jurisdiction in the district court was based upon 28 U.S.C. § 1345 (civil action by the United States). Jt. App. 180, ¶8. The district court disposed of all claims under the United States' complaint in an order and judgment granting summary judgment for Wind Farm and denying summary judgment for the United States on September 30, 2015. Jt. App. 504. The September 30, 2015 Order resulted in a final judgment. Jt. App. 523. The OMC moved to intervene as a plaintiff in the case on November 30, 2015. Jt. App. 524. Also on November 30, 2015, the OMC filed a timely notice of appeal from the September 30th order. Jt. App. 532. (Because the United States was a party, the appeal period was 60 days, which then rolled over to Monday, November 30, 2015.)

The district court denied the OMC's motion to intervene on February 22, 2016, Jt. App. 576, and the OMC filed a timely notice of appeal from that order on March 1, 2016, Jt. App. 578.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF PRIOR OR RELATED CASES

The Osage Nation through the OMC previously filed a Complaint for Declaratory and Injunctive Relief against Osage Wind and other defendants in the Northern District of Oklahoma. The prior litigation was assigned Case No. 11-CV-643-GKF-PJC and was captioned as *Osage Nation v. Wind Capital Group, LLC, et al*. In the prior litigation, OMC sought to prevent interference with its oil and gas rights guaranteed by 25 C.F.R. Part 226 ("Leasing of Osage Reservation Lands for Oil and Gas Mining"), as a result of Wind Farm's planned wind energy project. On December 20, 2011, that complaint was dismissed on the merits. An appeal was not taken.

STATEMENT OF THE ISSUES

The Osage Allotment Act of 1906 ("Osage Act"), Ch. 3572, 34 Stat. 539, and implementing regulations codified in 25 C.F.R. part 214, control the mining and exploitation of non-oil and gas minerals located in Osage County, Oklahoma. The controlling law requires that a company which intends to engage in the science and technique of mining or that extracts more than 5,000 cubic yards of common

minerals in a year from the Osage mineral estate must first negotiate a lease for the minerals with the beneficial owner of those minerals, the OMC, and said lease must be approved by the Secretary of the Interior. The issues in appeal 15-5121 are:

Does the large-scale excavation and use of OMC minerals incident to the construction of large foundations for wind turbines meet the definition for mining under 25 CFR Part 211 and therefore require Wind Farm to obtain a lease?

Does Wind Farm's extraction of 60,840 cubic yards of hard common minerals, regardless of use and/or Wind Farm's crushing/use of 45,630 cubic yards of hard common minerals for Wind Farm's commercial purposes), constitute mining under 25 CFR § 211.3's *de minimus* exception?

On the OMC's second appeal, case no. 16-5022, the issue is which Court should decide whether OMC is entitled to intervene to appeal the district court decision permitting Wind Farm to extract, crush, and use OMC's minerals without a lease, and then whether OMC has met the requirements for intervention.

STATEMENT OF THE CASE

A. THE WIND FARM PROJECT

Wind Farm leased surface rights to approximately 8,400 acres of lands in Osage County, Oklahoma to complete a 150 Megawatt wind farm. Wind Farm completed the project in July 2015 and produces and sells the power produced from the wind project to Associated Electric. While the surface estates are owned in fee

by private citizens, the OMC is the beneficial owner of the subsurface estate, with the United States owning the subsurface rights in trust for the OMC. Jt. App. 511. Included within the OMC's subsurface rights are the rights to rocks, gravel, oil, gas, and other minerals. Jt. App. 512. Wind Farm did not seek a lease from the OMC for any subsurface rights (and therefore did not obtain a lease of subsurface rights approved by OMC or the United States), nor did it seek or obtain a federal permit for its activities. Jt. App. 197.

On the land for which it only held a surface lease, Wind Farm began to excavate for and then construct large concrete foundations for eighty-four wind turbines, and to construct underground collection lines, an overhead transmission line, two permanent meteorological towers, and a network of access roads (the "Project"). Jt. App. 055-59 ¶¶ 3, 5, 9. Each foundation required a large area to be excavated, measuring approximately 10 feet deep and 50 to 60 feet in diameter. Jt. App. 58, ¶15.a. For each of these concrete foundations, Wind Farm excavated approximately 19,440 cubic feet (720 cubic yards) of dirt, sand, gravel, limestone, and other common minerals, so it excavated a total of 1,632,959 cubic feet (60,480

cubic yards) of OMC's minerals for all eighty-four foundations. Jt. App. 207, fn. 9.[1]

Rocks larger than three feet long were removed from the subsurface and placed on the surface near the foundation hole. *Id.* OMC Minerals smaller than three feet were crushed to less than three inches. *Id.* After each foundation was poured and cured, Wind Farm used the OMC minerals that it had excavated and crushed, which were approximately 75% of the materials excavated or 45,630 cubic yards, for backfill and compacting.[2] *Id.* The use of these 45,630 cubic yards of OMC's common minerals as backfill allowed Wind Farm to forego the expense of purchasing backfill.

Wind Farm itself estimates that the surface "footprint" of the Project is approximately 126 acres, spread across 8,400 acres. Jt. App. 56 ¶9.[3] The record

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[1] In its brief, the OMC will use the figures which the United States provided to the district court. It appears that the United States rounded down from 727 cubic yards to 720. The calculation is (depth)(π)(r^2). In feet, that would be 10(π)(25)(25) = 19,634 cubic feet, or 727 cubic yards per foundation. The undisputed evidence was that the foundations were 50-60 feet in diameter and that the excavated hole was somewhat larger still, and then backfilled after the concrete was set. The record does not show the amount of OMC's minerals which Wind Farm extracted for parts of its project other than foundations for the 84 generators.

[2] Only OMC minerals smaller than 3 feet were crushed and used to complete the backfill. App. 58, ¶15.

[3] Wind Farm did not define what it meant by the conclusory reference to the "footprint," and its own map of the Project would seem to indicate that the amount of the subsurface which it would claim are now inaccessible is far more than the 1.5% which it claims is the surface "footprint." App. 64.

does not show how many acres of common minerals are now inaccessible. It would be between the footprint and the total acres,[4] and going down to a depth which also is not established.

To attempt to escape the requirement that it comply with the federal regulations or otherwise pay the OMC for Wind Farm's use of OMC's minerals, Wind Farm claimed that it did not need to enter into a lease or other contract with the OMC because it was only using, not selling the OMC's minerals, and that it therefore came within a loophole in the federal regulations at 25 U.S.C. Part 214, and could excavate and use OMC minerals without compensation.

B. OSAGE MINERAL LEASING STATUTORY AND REGULATORY REQUIREMENTS

The OMC is the entity which is legally authorized to make decisions regarding the subsurface mineral rights which the United States holds in trust for the benefit of the Osage Tribe and its headright holders.[5] The Tribe's Reservation was established in 1872 and comprised all of the land now in Osage County, Oklahoma. Act of June 5, 1872, ch. 310, 17 Stat. 228 ("An Act to Confirm the Great and Little

[4] The record shows that Wind Farm expects a setback from the bases of the structures, but the record does not contain the distance of such setback. *E.g.*, Jt. App. 160. OMC believes the setback requirements would exponentially increase the amount of minerals that it can no longer access beyond those directly under the bases.

[5] In the Osage Allotment Act, Congress directed the Secretary of Interior to collect and distribute royalty income every quarter to persons on the 1906 tribal membership roll. The right to receive quarterly trust distributions is referred to as a "headright." *Taylor v. Tayrien*, 51 F.2d 884, 886 (10th Cir. 1931).

Osage Indians"). Congress, in 1906, severed the mineral estate of Osage County, Oklahoma, from the surface estate. Osage Allotment Act of 1906 ("Osage Act"), Ch. 3572, 34 Stat. 539, § 3. Section 3 of the Osage Act reserved all oil, gas, coal and minerals to the Osage Tribe and provides that "leases for all oil, gas, and other minerals . . . may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe." 34 Stat. at 543. Surface owners, subject to restrictions not applicable here, could alienate the surface estate. Osage Act, § 7. Surface owners could further "use and lease said lands for farming, grazing, or any other purpose not specifically provided for herein." *Id.* All minerals in Osage County, including rocks and gravel, have always been exclusively available for use only through the authorization from the Osage Tribal government and the Secretary of the Interior. *See Millsap v. Andrus*, 717 F.2d 1326, n.6 (10th Cir. 1983) (recognizing the Osage Tribe's right to lease all minerals including rock and gravel as "the argument that the surface owner has virtually nothing left if rock of so common a variety as limestone or dolomite is a "mineral" is of little persuasive value even if true . . . .").

In contrast to the surface estate, the Osage mineral estate was placed in trust of the United States for the benefit of the Osage Tribe. The Tribe comprised the "headright holders." When the United States subsequently reaffirmed the self-

governance rights of the Osage Tribe, the entity which had been the Osage Tribal Council, i.e. the entity which held and exercised the ownership interests in the subsurface estate for the headright holders, became the OMC. *See* Reaffirmation of Certain Rights of the Osage Tribe, P.L. 108-431, 118 Stat. 2609 (2004); Act of Oct. 21, 1978 § 2, 92 Stat. 1660 (amending earlier statute in order to provide that mineral estate is reserved to the Tribe "in perpetuity").[6] The Department of Interior promulgated two regulatory parts to meet its trust responsibility regarding the Osage minerals; 25 C.F.R. Part 226 provides rules for oil and gas minerals, while Part 214 provides federal rules governs leases of OMC's hard minerals.

C. FACTS RELATED TO INTERVENTION.

On October 29, 2014, the OMC approved Resolution 3-25, formally requesting the assistance of the United States to protect the Osage Mineral Reserve from Wind Farm's unauthorized use. Jt. App. 184 ¶29.

The United States filed suit on November 11, 2014, Jt. App. 12, and filed an amended complaint on December 12, 2014, Jt. App. 178. In its amended complaint, the United States requested a declaratory judgment that Wind Farm's activities were unlawful and that Wind Farm was obligated to obtain the requisite federal regulatory

[6] Many members of the Tribe, i.e. headright holders, are now constituents of both the OMC and the Osage Nation, but there are thousands of members of the Nation who are not headright holders, and who are, therefore, not members of OMC. In this way, as in several other ways, the relationship between the Osage Nation/Osage Tribe/OMC and the United States is unique.

approvals and to enter into appropriate leases approved by the Secretary. Jt. App. 179 ¶3.

The United States initiated the lawsuit "in its capacity as trustee of the Osage minerals estate, as well as to enforce compliance with federal law." Jt. App. 179 ¶4.

On December 29, 2014, Wind Farm filed a motion to dismiss or for summary judgment on all claims in the United States' First Amended Complaint, alleging that Wind Farm's extraction, crushing, and reuse of the minerals did not constitute mining or that res judicata barred the United States' claims.

On September 30, 2015, the district court issued its Opinion & Order, holding first that the United States was not barred in bringing these claims by the doctrine of res judicata, and then holding that Wind Farm's activities did not constitute mining under 25 C.F.R. Parts 211 or 214. In reaching its decision, the Court held that the United States' interpretation of its regulations was entitled to no deference. Jt. App. 521. All claims were dismissed against Wind Farm. Jt. App. 523.

On October 2, 2015, counsel for the OMC contacted Charles Babst, Attorney for the United States Department of the Interior, Office of the Solicitor, regarding the district court's Opinion & Order. Jt. App. 574. Mr. Babst informed the OMC's counsel that the federal decision of whether or not to appeal does not come from his office, and that the OMC would be informed as soon as Mr. Babst was informed of the ultimate decision. *Id.*

On November 4, 2015, November 13, 2015, and November 23, 2015, counsel for the OMC contacted Mr. Babst to inquire whether the United States would file an appeal in this matter, and each time OMC was informed that the decision was still under consideration. *Id.*

On November 30, 2015 (the date of the appeal deadline), counsel for the OMC received a phone call from Mr. Babst communicating the United States' decision that it would not file an appeal in this case. *Id.*

On November 30, 2015, the OMC filed a Motion to Intervene for the Purposes of Appeal and Brief in Support. Jt. App. 524.

Soon thereafter, and also on November 30, 2015, the OMC, as the aggrieved real party in interest and proposed intervenor, filed a Notice of Appeal from the district court's Opinion & Order and Judgment. Jt. App. 532.

On February 22, 2016, the district court denied the OMC's motion to intervene in a docket text order citing "lack of jurisdiction due to the pending appeal" as the reason for the denial. Jt. App. 576.

SUMMARY OF ARGUMENT

In what appears to simply be misguided penny-pinching, Wind Farm decided that it would obtain leases of the surface rights for 8,400 acres of land, but that it would neither seek nor obtain leases for the subsurface minerals from the OMC or

the federal government. It would simply take the Indians' subsurface minerals and use OMC's minerals, without payment, to advance Wind Farm's for-profit enterprise.

The district court erred when it agreed with Wind Farm's assertion that because Wind Farm was only excavating, crushing, and using the minerals, but not selling the minerals, it was not invading the OMC's beneficial ownership of the minerals.

The Osage Act states that all of the minerals are the property of the Osage Tribe (now the OMC). In implementing regulations, the United States excepted uses below 5,000 cubic yards from leasing requirements. That exception more than covers any foundation for a house or other building.[7] But Wind Farm's very large Project far exceeds 5,000 cubic yards. Wind Farm therefore was required to obtain a lease. It failed to. It instead trespassed on the minerals that the United States owns in trust for the OMC.

In response to the United States' complaint, Wind Farm asserted, and the district court held, that Wind Farm's surface leases gave it the right to excavate, crush, and use the minerals as long as it was only using, not selling, the OMC's minerals. The United States represented itself, in both its own capacity and as the OMC's trustee, before the district court, but then on the day a notice of appeal was

[7] 5000 cubic yards is 135,000 cubic feet, or a ten foot deep foundation for slightly more than three high school basketball courts.

due it informed the OMC that it was not going to appeal. The OMC has taken multiple paths to be permitted to appeal from the decision related to the OMC's hard minerals. The OMC must be permitted to intervene in this litigation as a party for the limited purpose of prosecuting this appeal of the district court's final decision, as the OMC's Motion to Intervene for Purposes of Appeal satisfied all requirements of Federal Rule of Civil Procedure 24(a), the OMC is the primary party injured by the district court's decision, and its interests are *per se* not being adequately represented in this litigation.

ARGUMENT

I. THE OMC IS A PROPER PARTY TO THIS APPEAL.

A. STANDARD OF REVIEW.

The district court denied the OMC's motion to intervene solely based upon a legal conclusion that once OMC filed a notice of appeal, the district court was deprived of jurisdiction to rule on OMC's motion to intervene. The district court's decision that it lacks jurisdiction is an issue of law which this Court reviews de novo. *Bill's Coal Co. v. Bd. of Pub. Util.*, 887 F.2d 242, 244 (10th Cir. 1989).

B. OMC'S MOTION TO INTERVENE IS PROPERLY BEFORE A FEDERAL COURT, EITHER THIS COURT OR THE DISTRICT COURT.

The United States brought the underlying district court matter in part based upon its assertion that the hard minerals that Wind Farm was unlawfully extracting, crushing, and then re-using were owned by the United States in trust for the OMC.

After the United States somehow managed to lose on that issue before the district court, it followed its internal process for determining whether it was going to appeal. The OMC requested that the United States inform the OMC of its decision as soon as possible. The United States provided the OMC with its decision on the very same day that a notice of appeal was due: it had decided not to appeal. That then put the OMC into an unmapped procedural area. The OMC knew where it wanted to go, but the best path to that destination was and remains open to debate and/or disagreement. The OMC knew that it needed to file an appeal based upon its interest as the beneficial owner of the minerals that Wind Farm had improperly excavated, crushed, and re-used, but until that very day its interests had been being represented by the United States.[8] The OMC promptly responded by moving to intervene and then filing a notice of appeal on its due date. In its motion to intervene and notice of appeal, the OMC asserted that it was a real party in interest (because the United States was litigating the case, inter alia, as the trustee for the OMC) and that it had sufficient grounds to intervene.

The district court denied the OMC's motion to intervene solely based upon its conclusion that the OMC's notice of appeal deprived the district court of authority

[8] If the OMC had been given more forewarning that the United States was not going to continue to represent the OMC's interest on appeal, the OMC could have moved to extend the time for appeal, but that was not possible where it had less than one day of notice.

to rule on the motion. The whole of the district court's order regarding the OMC's motion to intervene is a CM/ECF entry which states:

> MINUTE ORDER by Judge James H Payne *: Denying Osage Mineral Council's motion for lack of jurisdiction due to the pending appeal* ; denying [46] Motion to Intervene (This entry is the Official Order of the Court. No document is attached.) (pll, Dpty Clk)

Jt. App. 576 (all as in original).

The OMC then filed a second notice of appeal in this case, in which the OMC appealed from the order denying its motion to intervene. It is doubtful that this second appeal was necessary, but the OMC filed it prophylactically to give it a second possible path to its endpoint.

No matter which path the OMC took, it expected arguments that a different path would have been better or perhaps required. The OMC simultaneously took as many paths as it could; and in so doing it clearly showed that it was seeking to present to this Court the merits issue of whether Wind Farm wrongly used (and is continuing to use) the OMC's minerals in violation of federal law.

While academicians might be interested in debating which path is best or should be used, the OMC has little interest in that question. Instead as discussed in section I of this brief, OMC's sole interest is in establishing that at least one of the paths permits this Court to reach the merits issue presented in section II.

OMC moved to intervene before it filed its notice of appeal. As discussed below, there is then a split in authority in the courts of appeals on whether a motion to intervene is an issue collateral to the appeal.

If the motion is on a collateral issue, then the district court erred when it held that jurisdiction over the issue had been transferred to this Court upon OMC's filing of a notice of appeal, and district court erred by not ruling on the substance of the motion to intervene. OMC appealed from that order refusing to reach the merits of the motion to intervene, and this Court would therefore be required to decide whether the OMC is a proper party to intervene to prosecute the current appeal, or possibly to remand that issue for the district court to resolve the motion to intervene to prosecute this appeal.

On the other hand, if intervention is not a collateral issue, then jurisdiction over the question was transferred to this Court when the appeal is taken, and the issue is therefore properly before this Court.

While either path ultimately leads to the same result, OMC's view is that the better rule of law is that, at least as applied to the facts of this case, the district court retained jurisdiction to rule on the motion to intervene.[9] As Wright and Miller state:

> There is a split of opinion on the question whether the district court loses jurisdiction to grant intervention to appeal after a notice of appeal

[9] While the OMC believes that the correct rule of law is that the district court retained authority to decide the motion to intervene after the OMC appealed, the OMC would actually prefer the opposite result.

> has been filed. Although a notice of appeal ousts district court jurisdiction for most purposes, it would be better to recognize that the district court can act. The district court need not be given a preliminary education about the case to support an intelligent ruling, and its action is in support of the appeal process, not in derogation of it.

Charles Alan Wright and Arthur R. Miller, 15A *Federal Practice & Procedure* §3902.1 (2d ed.). *See also* Allen Ides, *The Authority of A Federal District Court to Proceed After A Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 322 (1992) ("[A] district court retains a general authority to take any action designed to aid an appeal. According to *Moore's Federal Practice*, which has been cited favorably by a number of courts on this precise point, "the district court should have full authority to take any steps during the pendency of the appeal that will assist the court of appeals in the determination of the appeal.").

The filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal*." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (emphasis added); *see also Stewart v.* Donges, 915 F.2d at 275; *Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1264 (10th Cir. 2006).

In assessing what aspects of a case are "involved in the appeal" of an interlocutory order, courts tend to divest the district court of jurisdiction only with respect to the particular issues decided in the order being appealed. *E.g.*, *McCauley v. Haliburton Energy Svcs., Inc.*, 413 F.3d 1158 (10th Cir. 2005) (analyzing whether

the district court is divested of the merits of a matter when a party appeals from the denial of a motion to compel arbitration of the merits of that matter); *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) (holding that "filing of notice of interlocutory appeal divests the district court of jurisdiction over the *particular* issues involved in that appeal") (emphasis added); *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2nd Cir. 1996) (holding that a district court's jurisdiction is divested only with respect to "issues decided in the order being appealed"); *Knutson v. AG Processing Inc.*, 302 F. Supp. 2d 1023, 1031 (N.D. Iowa 2004) (holding that the district court is divested of jurisdiction only "*over the matters appealed*") (emphasis added); *Gentry v. Hopkins*, 1900 WL 62318 (D. Kan. 1990) (finding the appeal of the summary judgment of plaintiffs' claims did not "involve" defendant's counterclaim so as to divest the court of jurisdiction over the counterclaim).

Applying this general rule to the facts of this case, the OMC's motion to intervene is separate from the merits of the appeal. The merits of the case are whether Wind Farm is permitted to invade the OMC's mineral estate and use substantial quantities of the Osage Mineral Estate without first obtaining a lease. The district court could have decided the OMC's motion to intervene without

speaking at all to the merits of the case.[10] The district court's resolution of that issue would have assisted this Court instead of infringing on this Court's authority. It was not barred.

C. THE OMC MEETS ALL OF THE REQUIREMENTS FOR INTERVENTION.

The OMC is a proper appellant in this case because it was entitled to intervene as a matter of right, sought intervention in the district court, and timely filed a notice of appeal. The district court erred in denying the OMC's motion to intervene for lack of jurisdiction without considering or making any findings on the substance of the OMC's motion. This Court should correct that error by allowing the OMC to intervene for the purposes of appealing the district court's *Order & Opinion* and *Judgment* of September 30, 2015.

Alternatively, this Court does not need to decide the issue of the district court's jurisdiction to rule on the motion to intervene because the OMC easily satisfies the "unique interest" inquiry as established in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) and *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002). Under *Plain* and related cases, a non-party will be allowed to intervene on appeal "where the party has a unique interest in the litigation and becomes involved in the

[10] In its briefs to the district court, the OMC also noted that if it concluded that jurisdiction over the motion to intervene had been transferred to this Court, the district court could still issue an indicative ruling, to assist this Court.

resolution of that interest in a timely fashion both at the district court level and on appeal." *Abeyta v. City of Albuquerque*, 664 F.3d 792, 796 (10th Cir. 2011).

Here, the OMC seeks to intervene for the limited purpose of appealing a district court's decision that will cause immediate and grave harm to the OMC's sovereign rights and property interests. *See* §II, *infra*. The OMC's rights as a sovereign will be seriously harmed if intervention is denied and such harm outweighs Wind Farm's prejudice, if any. *See* 7C Wright & Miller, *Federal Practices and Procedure* § 1916 (3d ed. 2011) ("Since in situations in which intervention is of right the would-be intervenor may be seriously harmed if intervention is denied, court should be reluctant to dismiss such a request for intervention as untimely[.]").

1. The District Court Erred in Denying OMC's Intervention as of Right Under Federal Rule of Civil Procedure 24(a)(2).

Upon the timely filing of a motion under Federal Rule of Civil Procedure 24(a)(2), a court must grant intervention as of right to anyone who:

> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The movant bears the burden of demonstrating: (1) the motion to intervene is timely; (2) it has an interest relating to the property or transaction that is the subject of the action; (3) its interest may be impaired or impeded; and (4) its interest is not

adequately represented by existing parties. *Albert Inv. Co.*, 585 F.3d 1386, 1391 (10th Cir. 2009); *Coalition of Ariz./N.M. Counties*, 100 F.3d at 840. For more than three decades, the tendency of this Court has been to follow a liberal line in allowing intervention as of right under Rule 24(a)(2). *WildEarth Guardians v. United States Forest Service*, 573 F.3d 992, 995 (10th Cir. 2009); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (hereinafter "*Clinton*"); *Coalition of Arizona/New Mexico Counties*, 100 F.3d at 841; *Nat'l Farm Lines v. I. C. C.*, 564 F.2d 381, 384 (10th Cir. 1977). *See also United States v. City of L.A.*, 288 F.3d 391, 397-98 (9th Cir. 2002) (a "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts").

The central concern in deciding whether intervention as of right is required is "the practical effect of the litigation on the applicant for intervention." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1193 (10th Cir. 2007) (*en banc*). Rule 24(a)(2) is not mechanical; it requires the exercise of judgment based on the specific facts and circumstances of the case, thereby expanding the circumstances in which intervention as of right would be appropriate. *San Juan County*, 503 F.3d at 1199. With these basic principles in mind, we address each of the four requirements for intervention as of right under Rule 24(a)(2).

2. The OMC's Motion to Intervene was Timely.

As noted above, Wind Farm's sole argument on the merits of OMC's motion to intervene was that OMC's motion was not timely. Its contention is plainly incorrect: timeliness is measured from the point at which OMC became aware that the United States was no longer going to represent OMC's interests, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-95 (1977), and OMC filed its motion to intervene on the very same day that it acquired that knowledge.

Because the district court did not make any findings or comments on the timeliness factor, this Court may look directly to the record in conducting its analysis. *Clinton*, 255 F.3d 1246, 1250 ("when district court makes no findings on timeliness, court of appeals does not remand but applies de novo level of review.").

"[T]he timeliness of a motion to intervene is assessed 'in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'" *Clinton*, 255 F.3d at 1250 (quoting *Sanguine, Ltd. v. United States Dept. of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)).

The Tenth Circuit has ruled that it "measure[s] delay from when the movant was on notice that its interest may not be protected by a party already in the case." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir.

2010). In *Tyson Foods*, the Tenth Circuit found that the Cherokee Nation's motion to intervene was unduly delayed where the Nation had known of its interest in the litigation for more than four years and where the Nation's interests were not adequately represented by another party in that litigation. *Id*. at 1232-34. Importantly, the *Tyson Foods* Court held that,

> a potential party could not be said to have unduly delayed in moving to intervene if its interests had been adequately represented until shortly before the motion to intervene. After all, an earlier motion to intervene—when the movant's interests were adequately represented by a party—would have been denied. *See San Juan County, Utah v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (plurality opinion).

Id. at 1232 (collecting cases). Further, the Tenth Circuit has denied motions to intervene where it found that a party's and a proposed intervenor's interests are aligned. *San Juan County*, 503 F.3d at 1204.

In a case procedurally similar to the issue now before this Court, a group of tribal members moved to intervene in a case after the district court granted summary judgment against the United States, which had represented the group's interests at the district court level, and the United States indicated that it might not appeal. *Smoke v. Norton*, 252 F.3d 468, 469 (D.C. Cir. 2001). The district court denied the group's motion as untimely, and the Court of Appeals reversed that decision, holding that "[i]n these circumstances, a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because the

potential inadequacy of representation came into existence only at the appellate stage." *Id*. at 471 (internal citations omitted).

These holdings are directly applicable to the issue before this Court. Until the date that the OMC filed its motion to intervene, the OMC's interests were aligned with the United States' interests in this case, and an earlier-filed motion to intervene under Rule 24(a) would likely have been denied under the reasoning that the United States adequately represented OMC's interests. *Tyson Foods*, 619 F.3d at 1232.

The OMC filed its motion to intervene on the same day that it discovered that the United States was not going to appeal and, therefore, no longer represented the OMC's interests in this case. The OMC, by and through counsel, began contacting the United States to determine if the United States was going to appeal the district court's decision by communicating with Charles Babst, Solicitor for the United States, beginning on October 2, 2015. Jt. App. 574. The OMC was informed that no decision had been made yet, the decision would be made by someone in the United States Department of Justice, and that the OMC would be informed as soon as Mr. Babst was informed of the ultimate decision. The OMC followed up with Mr. Babst on November 4, 2015 by phone call, of November 13, 2015 by letter, and again on November 23, 2015, by phone call. *Id.* It was not until November 30, 2015 (the deadline to appeal), that the United States, as trustee of the Osage Mineral Estate,

communicated its decision to the OMC that it would not file an appeal. *Id.* Therefore, the OMC's motion to intervene was timely filed.

Wind Farm's argument in the district court that the OMC's motion was untimely because OMC waited on its trustee to file a notice of appeal fails because there was no undue delay between the time that the OMC knew that its interests were no longer adequately represented and the time of filing for intervention.

The OMC filed its motion to intervene within a matter of hours of learning that the United States would no longer protect OMC's interests in this case. *See United Airlines,* 432 U.S. 385, 394-95 (nonparty's motion to intervene was timely even though it was filed after the entry of final judgment because she sought to intervene "as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she moved to intervene to protect those interests."); *Tyson Foods*, 619 F.3d at 1232 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) ("A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties.").

In the district court, Wind Farm relied on *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966 (2008) for its position that the OMC's motion was untimely because the OMC should have intervened prior to resolution at the district

court level. Jt. App. 539. However, *Kempthorne* is distinguishable from the facts and procedural stature of this case, and its holding is inapplicable.

In *Kempthorne*, the nonparty did not articulate a unique interest in the outcome of the case distinct from the BLM, which adequately represented its interest in the case below, the district court had actually remanded the case to the BLM "for further administrative consideration," and the Tenth Circuit found it persuasive that "they found nothing in the record to suggest … that BLM's interests are now adverse to Movants'." *Id*. at 968, 971. Importantly, in ruling against the movant's motion, this Court found that intervention "would serve **no useful purpose**" given the administrative remand. *Id*. at 971 (emphasis added). Unlike the movant in *Kempthorne*, intervention here would certainly serve a useful purpose to the OMC by allowing it to appeal an expansive decision that undermines the territorial integrity of the Osage Mineral Estate.

The second and third timeliness factors—prejudice to the existing parties and to the applicant—are discussed below. As for the fourth factor, there are no "unusual circumstances" that militate against a finding the motion is timely. Under the circumstances presented here, where the OMC filed within hours of learning that its interests would no longer be adequately represented by the current parties, the timeliness of the OMC's motion to intervene is clearly established.

3. Any prejudice to Wind Farm is outweighed by the Irreparable Harm and Prejudice to the OMC if it is Denied the Opportunity to Pursue an Appeal in this Case.

No party would be "unfairly prejudiced" by the OMC's intervention for the purpose of appealing the Court's decision. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Certainly the United States would not be prejudiced by the OMC vindicating on appeal the position which the United States took in this Court. As for Wind Farm, the OMC simply seeks to stand in the shoes of the United States on appeal. The only prejudice claimed by Wind Farm flows from the fact of an appeal; it is not aggravated in any way by the timing of the motion to intervene. *See Tyson Foods*, 619 F.3d at 1236 ("the prejudice to other parties must be prejudice caused by the movant's delay, not by the mere fact of intervention."). The OMC did not seek to conduct discovery or otherwise delay the proceedings in the district court. Nothing more was required for the OMC to timely assert its right to intervene in this case.

However, the OMC will be severely prejudiced if it is not allowed to intervene. The OMC has protectable interests related to the subject of this action. Further, OMC has standing to assert and protect its claimed interests as a sovereign and for its members in its capacity as *parens patriae*. *E.g.*, *Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc.*, 570 F.2d 300, 302-03 (10th Cir. 1978). The district court's determination that Wind Farm's activities are not governed by 25 CFR part

214 is a direct interference with the OMC's sovereign and statutory right to determine how to develop its mineral estate in the best interests of the Osage headright holders, and a violation of the OMC's property rights over the minerals that Wind Farm is using.

Additionally, this Court has recognized that the precedential effect of the disposition of an action may independently constitute a sufficient interest to support mandatory intervention. *Natural Res. Def. Council v. U.S. Nuclear Reg. Comm'n*, 578 F.2d 1341, 1344 (10th Cir. 1978) ("A decision in favor of plaintiffs ... could have a profound effect upon [the applicants]. Hence, [the applicant] does have an interest within the meaning of Rule 24(a)(2)."). The district court's disposition of this action has impaired and impeded the OMC's interests and the OMC will be without remedy if it is not allowed to intervene for purposes of appeal. In considering the timeliness of the OMC's Motion, the prejudice to the OMC outweighs any prejudice to the existing parties.

4. The OMC has Substantial, Protectable and Particularized Interests Sufficient to Support Intervention as of Right.

The applicant must show that "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a). This practical standard does not require the intervenor to show actual impairment. *Clinton*, 255 F.3d at 1253. Rather, the applicant "must show only that impairment of its substantial legal interest is possible if intervention is denied" and

"[t]his burden is minimal." *Id.* The central concern in deciding whether intervention is proper is the "practical effect of the litigation on the applicant for intervention." *San Juan County*, 503 F.3d at 1193. The *en banc* court concluded that the interest requirement is "not a mechanical rule, and requires courts to exercise judgment based on the specific circumstances of the case." *Id*. at 1199. At a minimum, the "applicant must have an interest that could be adversely affected by the litigation, but practical judgment must be applied in determining whether the strength of the interest and potential risk of injury to that interest justify intervention." *Albert Inv. Co.*, 585 F.3d at 1392.

The OMC is the elected, governing body of the Osage Mineral Estate and represents the headright owners of the Osage Mineral Estate, and has those powers and authority which were previously vested in the Osage Tribal Council, in accordance with the Act of June 28, 1906, 34 Stat. 539, as amended. The OMC retains these powers for the "purpose of continuing its previous duties to administer and develop the Osage Mineral Estate in accordance with the Osage Allotment Act of June 28, 1906, as amended. . . ." Osage Nation Const. Art. XV, § 4. Further, Section 3 of Article XV further establishes the OMC's authority to litigate on behalf of the Osage Mineral Estate and the Osage headright holders: "The right to income from mineral royalties shall be respected and protected by the Osage Nation through the Osage Minerals Council formerly known as the Osage Tribal Council and

composed of eight (8) members elected by the mineral royalty interest holders." *Id*. at § 3 (emphasis added). *See also* Osage Nation Congress, Resolution 11-22 at ¶ 4 (Sept. 26, 2011) ("The Osage Minerals Council has the authority to act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate, including the initiation, prosecution and settlement of claims relating to the Osage Mineral Estate;").

Given the OMC's statutory and constitutional interest in the Osage Mineral Estate, it plainly has a substantial legal interest in this case as *parens patriae* to the Osage headright owners, which was impaired. Such is the exact type of interest the Tenth Circuit recognized in *Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc.*, 570 F.2d 300, 302-03 (10th Cir. 1978).

In this case, where Wind Farm has infringed on the OMC's sovereign rights and property rights by taking and using a substantial amount of OMC's minerals for Wind Farm's economic gain without first negotiating a lease with the OMC or making any effort to follow federal procedures, the OMC has established interests that will be eviscerated if it is not allowed to intervene for the purpose of appealing the district court's devastating decision.

5. The OMC's Interests in this Litigation Are Not Adequately Represented by Any Other Party.

The "adequate representation" element of Rule 24(a)(2) requires an applicant to show only that representation of its interests "may be" inadequate and the burden

of making that showing is treated as minimal. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972); *Natural Res. Def. Council, Inc.*, 578 F.2d at 1345 (it is enough to show the representation may be inadequate); *WildEarth Guardians*, 573 F.3d at 996 (an intervenor need only show the possibility of inadequate representation). The possibility that the interests of the applicant and the parties may diverge "'need not be great' in order to satisfy this minimal burden." *Clinton*, 255 F.3d at 1254.

The Tenth Circuit has recognized a non-party's post-judgment right to intervene for the purposes of appeal where no existing party will protect the movant's interest on appeal. *Elliot Indus. Ltd. P'ship. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103-04 (10th Cir. 2005). *See also* 15A *Federal Practice & Procedure, Juris.* § 3902.1 at 4 (2d ed. 2015) ("the failure of any other party to appeal would virtually compel the conclusion that the intervenor's interests were not adequately represented.").

Here, the OMC's interests are not adequately represented by any party in this litigation, as demonstrated by the United States' failure to appeal the district court's decision despite the decision's harmful effects on its trust beneficiary. The government's decision not to pursue an appeal deprives the OMC of recourse to which it would otherwise be entitled. For the foregoing reasons, the OMC should be permitted to present the merits of this matter (§II of this brief) to this Court.

D. ALTERNATIVELY, THIS COURT SHOULD ALLOW THE OMC TO INTERVENE ON APPEAL.

Regardless of its status as an intervenor, the OMC is entitled to appeal as an interested party that has a unique interest in the litigation and was involved in the resolution of that interest in a timely fashion both at the district court level and on appeal. *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002).

The United States initiated this litigation at the request of the OMC in the United States' capacity as trustee of the Osage Mineral Estate. As such, the OMC will be barred from re-litigating the matter. *Nevada v. United States*, 463 U.S. 110, 135 (1983). This is analogous to the plaintiffs in *Devlin* and *Plain* in that the OMC is a "part[y] to the proceedings in the sense of being bound by the [court's decision]." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). And like the plaintiffs in *Devlin* and *Plain*, the OMC should be allowed to intervene on appeal to protect its interests "from being bound by a disposition of [its] rights [it] finds unacceptable and that a reviewing court might find legally inadequate." *Id*. at 11.

As the governing body charged with the administration and protection of the Osage Mineral Estate on behalf of the Osage headright owners, the OMC satisfies the unique interest inquiry. The OMC is the primary party injured by the district court decision, and its interests are *per se* not being adequately represented by its trustee, the United States. The OMC participated in this litigation to the extent permissible while the United States represented the OMC's interests by requesting

the United States to initiate the litigation. Jt. App. 184¶29, and by making a timely application to intervene as soon as its interests were no longer adequately represented. *San Juan County*, 503 F.3d at 1204; *Tyson Foods*, 619 F.3d at 1232. The OMC has demonstrated its interest in the subject matter of this litigation and that it will be gravely prejudiced if its right to intervene for the purposes of appeal is not granted.

The OMC meets the minimum standards for intervention as a matter of right and for intervention on appeal. The OMC respectfully requests that this Court permit OMC to intervene for the purposes of appeal.

II. THE DISTRICT COURT ERRED BY PERMITTING WIND FARM TO EXTRACT, CRUSH, AND USE MORE THAN 5,000 CUBIC YARDS OF OMC'S COMMON MINERALS.

A. STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision granting summary judgment. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). *De novo* review applies the same standard as the district court applies in Federal Rule of Civil Procedure 56(c). *Bucanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995). Summary judgment is only appropriate where the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

When analyzing the Mining Laws, the canons of construction require they be construed in favor of the OMC. The Mining Laws were enacted to ensure that individual Indians and Indian tribes had their minerals developed in a manner that maximized their economic interest while minimizing adverse cultural impacts. Osage Allotment Act; 25 C.F.R §211.1(a). As a matter of law, statutes passed or regulations enacted for the benefit of an Indian or Indian tribe must be liberally construed with doubtful expressions resolved in favor of the tribe. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1057 (10th Cir. 2011); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997). The canons further provide "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002). Previous Tenth Circuit decisions make clear that the canons apply to the Osage mineral estate. *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983) (citing *Alaska Pac. Fisheries*, 248 U.S. at 89).

As the Osage Minerals Council is forwarding the same interpretation of regulations as the creating agency, it is due the same *Chevron* deference. *E.g.*, *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 726-33 (10th Cir. 2006). Deference under *Chevron* is due if an agency's interpretation is not "arbitrary,

capricious, or manifestly contrary to the statute." *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1236-37 (10th Cir. 2002). The Court must uphold the agency's interpretation if it is a "reasonable" elaboration of the statutory scheme. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999). In making the reasonableness determination, the Court must consider "the text, the structure, and the underlying purpose" of the statute. *Midwest Crane & Rigging v. Fed. Motor Carrier Safety Admin.*, 603 F.3d 837, 840 (10th Cir. 2010). Affording deference to agency interpretations of regulations is important to ensure that statues are applied in a consistent and proper manner. *Haggar* at 392.

B. THE AGENCY'S REASONABLE INTERPRETATION OF MINING, NOT THE DISTRICT COURT'S UNREASOANBLE INTERPRETATION, MUST BE GIVEN DEFERENCE.

The district court's grant of summary judgment for Wind Farm and denial of summary judgment for the United States is incorrect because it failed to properly interpret the relevant regulations and underlying laws and failed to give deference to the agency's interpretation of its own regulations. The clear intent of the regulations was to protect the hard mineral estate of the Osage Tribe. The removal and use of hard minerals, including limestone or other rocks, by Wind Farm clearly requires authorization in the form of a permit or lease approved by the United States.

Congress intentionally and explicitly constrained the use of the surface estate in order to protect the tribal interest in the underlying mineral estate. Section 2(7) of the Osage Act states "nothing herein shall authorize the sale of the oil, gas, coal, or other mineral covered by said lands, said mineral being reserved to the use of the Tribe…" Section 4 of the Osage Act specifies that the mineral estate is to benefit all members of the Osage Tribe and to provide a revenue source for the Tribe. *Id.* at §4(2) (royalties to benefit Nation members); §4(3) (royalties to fund Osage schools); §4(4) (royalties to support emergency fund). Even when Congress did allow for use of the surface estate for activities such as railroads, the Osage Act specifies "[t]hat such railroad companies shall not take or acquire hereby any right to title to any oil, gas, or other mineral in any of said lands." *Id.* at § 11.

C. WIND FARM'S ACTIVITIES VIOLATED THE REQUIREMENTS OF 25 CFR PART 214.

The primary statutes and regulations at issue in this case apply only to the OMC's mineral interests. For current purposes, the analysis starts with the 1906 Act, which applies only to the Osage Tribe; and the regulations adopted pursuant to that Act. 25 C.F.R. Part 214 applies to hard minerals, while 25 C.F.R. Part 226 applies to oil and gas minerals. In the present matter, because we are discussing hard minerals, the governing regulations are Part 214. Section 214.7 provides: "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 Interior and

delivered to the lessee." Part 214 does not contain definitions of many of the terms used in that part, but the definitions in the closely analogous regulations under Part 211 are borrowed for application under part 214. *E.g.*, Jt. App. 504; 192; 233 (district court and both parties below used definitions in 25 C.F.R. § 211.3 by analogy).[11]

The definition of mining under 25 C.F.R. 211 contains two parts. In full, 25 C.F.R. § 211.3 defines mining as:

> Mining means 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.

Where, as here, the minerals are not precious minerals but instead are common minerals, the question is whether or not more than 5,000 cubic yards are being extracted in a year (in which case a lease is required) or less than 5,000 cubic yards (in which case, at most, only a permit would have been required).

[11] 25 C.F.R. § 214.1 is denominated as the definitions section for Part 214, but the only term it defines is the "officer in charge" of the Osage Indian Agency. 25 C.F.R. part 211 expressly does not apply to Osage lands, but its definition section, § 211.3, contains 22 definitions of terms applicable to leasing of tribal lands. Those definitions therefore are not directly applicable, but are used by analogy under 25 C.F.R. Part 214.

1. Mining

The district court incorrectly determined that Wind Farm did not engage in mining. Specifically, it incorrectly determined that the action of Wind Farm did not constitute mining because mining requires sale of the minerals. Jt. App. 512-13. Furthermore, it incorrectly concluded that the actions did not constitute mining because the minerals were not removed from the location and the reuse of common minerals did not constitute open case mining. *Id.* at 514-15.

As referenced above, 25 CFR §211.3 contains a broad definition of "mining" as the science, technique, and business of mineral development. The mining definition goes on to give examples of common mining techniques such as opencast work, underground work, and in-situ leaching. However, this list of examples is merely illustrative and not exhaustive.

Allowing mining to be defined either by the general phrase of "science, technique, and business of mineral development" or through specific examples conforms to the intent of Part 211, and by analogy Part 214. In *United States v. West*, this Court had the opportunity to review a statute which implemented a similar grammatical structure which defined a playground as an outdoor facility intended for recreation containing three or more separate apparatus intended for recreation of children including, but not limited to, sliding boards, swing sets, and teeterboards. 671 F.3d 1195, 1201 (10th Cir. 2012). The *West* court concluded that limiting the

definition of a playground to only those that featured sliding boards, swing sets, and teeter boards was incorrect because the principle of *ejusdem generis*[12] was inapplicable when the sentence is structured as the regulation currently being discussed is structured (i.e., that the general preceded the specific) and that application of *ejusdem generis* would serve to defeat the purpose of the statute. *Id; see also Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97, 104 (9th Cir. 1976); *United States v. Migi*, 329 F.3d 1085, 1088-89 (9th Cir. 2003). In essence, if the use of "including, but not limited to" acts to present a contrary intent *ejusdem generis* is inapplicable.

Here, the same reasoning applies. The definition of mining is constructed with the general preceding the specific. The construction of the regulation and use of "including but not limited to" expresses a contrary intent and acts to create two "types" of mining within the definition. Furthermore, and perhaps more importantly, this expansive dual definition conforms to the Osage Act's intent to protect the mineral estate for the benefit of the Indian tribe. To restrict the mining definition to only those specific examples would act to allow mining and depletion of the minerals without payment so long as it did not meet the specific definitions of opencast mining or other expressly referenced examples of forms or subtypes of mining.

[12] *Ejusdem generis* is the statutory construction principle to limit general terms following specific terms. *Black's Law Dictionary* 556 (8th ed. 2004).

a) Science, Technique, and Mineral Development

Wind Farm completed the excavation for the foundations for its wind turbines through the use of the science, technique, and business of mineral development. The excavation of large areas for use as wind turbine foundations can only be accomplished through the use of mining (i.e., excavation and removal) technique and science. Wind Farm admitted that it was performing extensive extraction, handling, sorting, crushing, and utilization of minerals. Jt. App. 58 ¶15.

The district court erroneously concluded that because Wind Farm was not selling the extracted minerals, it was not engaged in mining. There is no language in the Osage Allotment Act, or in the regulations, upon which the Court based that element. The district court simply added a requirement to the law which is not in the statute and which is contrary to the Agency's regulations and the agency's interpretation. This is contrary to law for multiple reasons. First, the agency's determination is entitled to *Chevron* deference. Second, the underlying law must be liberally construed to benefit the tribal entity. Third, the law and regulations refer to mining, not to sale of minerals. The OMC does not even need to rely upon the required deference and presumptions here, but that deference and those presumptions turn this from a more difficult question into a relatively easy legal issue. The district court erred.

Without extracting and reusing of the common minerals, Wind Farm would have been forced to purchase back fill materials. As such, the common minerals have been extracted from the ground and have been developed from being simply dormant in the ground to be being crushed and compacted for use as backfill.

b) Opencast Mining

Wind Farm removed the common minerals from the Osage mineral estate through a mining process called opencast mining. While opencast mining is often used for mining coal it can be used for other minerals. Cambridge Business English Dictionary (Cambridge University Press) *available at* Cambridge Dictionaries Online, dictionary.cambridge.org/us/dictionary/english/opencast-mining. [13] More specifically, opencast is the mining of minerals from the surface as opposed to underground as defined in Collins Dictionary.[14]

In order to read into the law a requirement that OMC's minerals were had to intended for sale before a lease would be required, the lower court drew an incorrect inference from a definition of opencast coal mining. Jt. App. 513. ("The Bureau of Mines defines 'opencast method' in relevant part as a 'mining method consisting of removing the overlying strata or overburden, extracting the coal, and then replacing

[13] The Tenth Circuit has often used dictionary definitions to assist in the interpretation of statutes. *Chicksaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000).

[14] *See* www.collinsdictionary.com/dictionary/english/opencast (last visited April 20, 2016).

the overburden'"). It is logical that a definition of opencast coal mining would reference removal to another location for use or further development. However, that does not mean that opencast mining of other minerals which can be used on site is not "mining". At its base opencast mining simply the extraction of materials for use, not the location of their use or whether they are sold to third parties. Opencast mining was the exact activity that Wind Farm performed with OMC's minerals, without obtaining the required lease of those minerals.

D. WIND FARM EXTRACTED (AND USED) FAR MORE THAN 5,000 CUBIC YARDS OF COMMON MINERALS.

The extraction of 60,480 cubic yards of minerals required Wind Farm to obtain a lease. As it relates to common minerals, an entity engages in mining if the "extraction of such a mineral exceeds 5,000 cubic yards in any given year." 25 C.F.R. § 211.3 (emphasis added).

As the district court acknowledged, the federal agency determined that Wind Farm was engaged in mining, and that the agency's determination was entitled to deference if it was a "reasonable interpretation of regulations it has put in force." Jt. App. 521. But then the district court made the virtually inexplicable decision that the agency's conclusion that Wind Farm was engaged in mining was unreasonable and that therefore "No Deference to the United States' interpretations of Parts 211 and 214 is required." *Id.*

The district court's conclusion is wrong. The district court's own interpretation, in derogation of the agency's interpretation, is itself unreasonable. The agency's interpretation is not merely reasonable, but far better than the rule that the district court seeks to impose on the OMC's minerals. The district court provided two primary reasons for substituting its interpretation for the agency's interpretation. First, the lower court incorrectly reads the plain language of the regulations and misinterprets agency rulemaking statements in order to conclude that activity is not mining unless the mined minerals are then sold to a third party. Jt. App. 514.[15] Second, the lower court incorrectly determines that under facts of some theoretical future case, the United States' interpretation would require permits or leases for simple digging activities. Jt. App. 518. Both arguments fail to correctly apply the Osage Act and its underlying regulations.

1. The lower court's analysis and conclusion are patently incorrect and ignore the plain language of the definition of mining of common minerals.

The lower court reached its "commercial sale" conclusion by incorrectly reading together the definition of "permit" with the mining definition when it should

[15] To support its strained interpretation of the regulation, the Court uses the euphemism that mining requires "commercial mineral development," but it is clear from its opinion that it uses this phrase to mean sale of minerals. If actual commercial use were the standard, Wind Farm would lose. Wind Farm is a multi-million dollar commercial enterprise. It was making commercial use of the minerals, but using them for its own commercial uses on the surface that it was leasing.

have applied the "lease" definition. From that, and without any substantive analysis, the lower court concluded that mining required removal of the mined materials for use elsewhere when neither the definition of "permit" nor the definition of "mining of common minerals" includes such language.

The definition of mining of common minerals contemplates a scenario that cannot occur under a permit and as such any conclusion reached by the lower court was incorrect. It is helpful to see the definitions of permit, lease, and mining side by side to illustrate where the lower court erred:

> Permit – any contract issued by the superintendent and/or area director to conduct exploration; or the removal of <u>less than 5,000 cubic yards</u> per year of common varieties of minerals from Indian Lands
>
> Lease - any contract approved by the United States…that authorizes exploration for, extraction of, or removal of any minerals
>
> Mining - 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 <u>exceeds 5,000 cubic yards</u> in any given year.

25 C.F.R. § 211.3 (emphasis added). Side-by-side, the lower court's application of the permit definition to mining is patently incorrect. By its very terms the permit definition does not contemplate a scenario where a company extracts more than 5,000 cubic yards of common minerals. Meanwhile, mining involves the removal of *more than* 5,000 cubic yards of common minerals. A permit is simply for exploration of mineable minerals or the removal of small amounts of common

minerals. In no way does the permit definition effect or instruct a court on how to interpret the effect of the definition of mining of common minerals. [16]

With the permit definition being inapplicable to the definition of mining of common minerals, the lower court should have applied the lease definition. Leases, unlike permits, have their own complete subparts explaining how to secure and then makes payments under said lease. 25 CFR Part 211 Subpart B (acquiring a lease); 25 CFR Part 211 Subpart C (Exploring payments under leases). All of the payment, rents, and royalties language refers to leases and not permits. 25 CFR Part 211 Subpart C.[17]

Instead of working within the clear and explicit language provided by the definitions, the lower court attempted to shoehorn the permit definition by misconstruing agency statements during rulemaking. The lower court cited the agency's statement that "[c]ommon varieties of mineral resources extracted in small amounts are excluded from the definition of mining, especially because *the purpose of such extraction is often for local and/or tribal use.* However, permits for these *small operations* are still reviewed and approved at the superintendent's office." Jt. App. 516 (citing 61 Fed. Reg., 35634, 35640 (July 8, 1996)) (emphasis provided by

[16] Additionally, Section 214 makes no reference to a "permit" so it would be improper to resort to the permit definition found in Section 211.

[17] While there are a few fleeting references to permits they are inconsequential. All references related to payments, rents, and royalties are discussed under the guise of a lease.

lower court). From this, the district court concludes that a "permit is required only when minerals are being used for some purpose other than extraction and backfilling incident to surface construction." Jt. App. 517. The statement by the agency is only concerned with *small amounts* of extraction not being included as mining. These small operations, i.e. those below the 5,000 cubic yard marker, require a permit. This statement by the agency does not somehow require the definition of mining of common minerals to only be applied when extraction is for commercial use elsewhere.

Ignoring the district court's linguistic gymnastics to require commercial use elsewhere, the actual application of the 5,000 cubic yards threshold is simple. Under the provision, the test for finding whether mining has occurred turns on the total volume of common minerals extracted. If more than 5,000 cubic yards of OMC's common minerals have been extracted, mining has occurred and OMC's approval via a lease approved by the Secretary is required. Accordingly, the removal of more than 5,000 cubic yards of OMC's common minerals in a given year is a violation of the regulation. That was exactly what the agency had concluded, and its determination was far more reasonable than that which the district court then applied, in which the district court decided that a multi-million dollar commercial Project can extract, crush, and re-use OMC's property for free; that all it needs to do is lease the

surface and then take the minerals that are owned by OMC, not owned by the surface owner. Everyone except the Indian entity benefits.

There is no dispute here that Wind Farm extracted and then used far more than 5,000 cubic yards of minerals per year. It does not get to use those minerals for free, and to tie up other minerals for free. Just as it leased the surface estate, it was required to obtain a lease for the minerals that it was going to extract, use, or otherwise prevent OMC from using. They are, after all, OMC's minerals, not Wind Farms.

Here, the district court has made a mistake by attempting to wrangle out requirements that do not exist. The clear language of the definition of mining of common minerals simply turns on the extracted minerals and contains no requirement for sale for use off-site. Wind Farm extracted OMC's minerals, far in excess of the 5,000 cubic yard threshold. It used them for its own commercial project, and it was required to have a lease in order to do so.

2. The United States' interpretation is well within the bounds of the statute.

Underlying the district court's refusal to accept the United States' interpretation is the unfounded red herring fear that such an interpretation would make work of any kind impossible in Osage County. The district court imagines a parade of horrors where even the simplest of homeowner projects would require a permit for fear of violating either the Osage Act or its underlying regulations.

However, such a parade of horrors: 1) is simply unrelated to the case which was before the district court; and 2) even if it were material, it is negated by the Department of the Interior's standing practice of allowing personal use of surface estates.

Regarding the first point, the district court could have, and should have, simply stated that its holding was limited to the facts of the particular case or, more generally, to extraction of over 5,000 cubic yards of materials. Clearly defining the limited scope of the holding is the standard method which courts use to rule out slippery slope interpretations or a perceived parade of horrors which would result from expansive interpretation of a precedent.

In fact, the district court's failure to limit its holding creates the exact opposite concern from that which the district court expressed. The district court has issued a blanket holding that an entity which obtains a surface lease can extract and use any amount of OMC's minerals, so long as it does not sell them.

The appropriate rule is somewhere between the two extremes, and it is no coincidence that the agency's regulations adopt and define an intermediate position: extraction over 5,000 cubic yards is mining, and requires a lease. There were, of course, other intermediate positions that the agency could have adopted, e.g. stating that excavation for houses is permitted, permitting private use but requiring leases for commercial uses (such as Wind Farm's commercial use) or changing to some

number other than 5,000. But the choice that the agency made here is very reasonable, permitting common uses but requiring an entity engaged in substantial excavation and use to obtain a lease from the mineral owner. The district court was required to respect that very reasonable intermediate position which the agency had set.

Second, people have been building houses and other structures in Osage County for over 100 years, and the record shows that the parade of horrors that the district court used as its excuse for permitting Wind Farm to engage in a largescale use of OMC's minerals simply has not occurred. There is a reason it has not occurred. The Department of the Interior ("DOI"), the federal department in which the Bureau of Indian Affairs ("BIA") resides, has long allowed surface estate owners to conduct small personal projects that lightly interfere with the mineral estate. The Bureau of Land Management ("BLM"), another DOI agency, has provided regulatory language allowing for the use of mineral materials within the boundaries of the surface estate without a sale contractor or permit when a minimal amount of minerals are removed for personal use. 43 C.F.R. § 3601.71. The BLM has specified that "minimal personal use" contemplates activities such as digging for a swimming pool, landscaping, or creating grade. Mineral Materials Disposal; Sales; Free Use, 66 FR

58892, 58894 (Nov. 23, 2001).[18] Notably the BLM's policy regarding unauthorized uses of mineral materials by surface estate owners specifically states that,

> [a]ny separation or alteration of the various constitutes of the material, through methods such as screen or crushing, constitutes a mineral use of the materials and requires a contract or permit. Furthermore, any use of the materials in a construction project, such as for road base, building foundations, or ornamentation, also constitutes a mineral use of the materials – even if the material was not altered in any way – and also requires a contract or permit.

Bureau of Land Management, Unauthorized Use of Mineral Materials on Split Estate Lands, Instruction Memorandum No. 2014-084 (April 23, 2014); Jt. App. 399.

The 1906 Osage Act contemplated uses of the surface estate that included "houses, orchards, barns, or plowed land," all of which would necessarily involve some incidental digging. Osage Act, § 2(2). Below, the United States acknowledged that Section 214 had "not precluded the building of the many houses, ranches, commercial business, water towers and sports fields already existing in Osage County." Jt. App. 379.

The imagined horrors of the lower court simply have no basis in reality because of the operation of the DOI policy. The reason is simple: the policies of the BIA are not so archaic as to require a permit for the removal of small personal amounts of minerals. It would appear the BIA, in following the Osage Act's

[18] The United States stated that the policy of the BLM was also that of the BIA, Jt. App. 398 n. 5, and it is logical that the BIA would adopt the reasoning of another DOI bureau on an issue that is nearly identical.

contemplated personal use of the surface estate, has adopted the BLM standards. Quite simply, the BIA allows personal use of the surface estate but requires a lease for the large commercial extraction undertaken by Wind Farm.

The district court had a very simply way of preventing the parade of horribles: as was required of it under *Chevron* deference, it should have held that mining of common minerals occurs if the extraction is over 5,000 cubic yards. Building houses in Osage County has never been blocked, but extracting, crushing and reusing vastly more than 5,000 cubic yards of OMC's minerals required a lease. That is the rule the agency set, it is reasonable, and the District Court erred by not following it.

CONCLUSION

Of course Wind Farm does not want to pay the OMC for crushing and using OMC's minerals if it can use them for free. But Congress stated that all of the minerals in Osage County are the property of the Tribe, and the United States, as trustee for the OMC then adopted a rule which balanced OMC's property interests with those of common users, but which required large-scale users such as Wind Farm to obtain a lease. The district court failed to properly interpret and apply Sections 211 and 214 to the actions of Wind Farm. Wind Farm engaged in mining for the above discussed reasons and as such was required to obtain a lease from the DOI. Without a lease Wind Farm was free to expropriate OMC's minerals. Accordingly, this Court should reverse the lower court granting of Wind Farm's Motion for

Summary Judgment and denying the United States' Motion for Summary Judgment. Additionally, this Court should instruct that the United States' Motion for Summary Judgment be granted.

REQUEST FOR ORAL ARGUMENT

Due to the importance to the OMC of the issues raised, and the devastating consequences to the OMC if the District Court's decision is not reversed, the OMC requests oral argument.

RESPECTFULLY SUBMITTED this 2nd day of May, 2016.

FREDERICKS PEEBLES & MORGAN LLP

By: /s/*Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839
Email Address:
jrasmussen@ndnlaw.com

Attorney for Osage Minerals Council

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Section 1. Word count

As required by Fed. R. J.A. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 12,715 words.

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Jeff Rasmussen
Attorney for Osage Minerals Council

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I hereby certify that a copy of the foregoing **APPELLANT'S BRIEF**, 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 Sunbelt Vipre Enterprise version 6.2.5.1, dated 4/19/2016, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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Jeffrey S. Rasmussen
Attorney for Osage Minerals Council

CERTIFICATE OF SERVICE

I certify that on May 2nd, 2016, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF AND APPENDIX VOLUMES 1 - 3** with the Clerk of the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I also hereby certify that on the 3rd day of May, 2016, the original and seven (7) copies of the foregoing **APPELLANT'S OPENING BRIEF** and the original of the **APPENDIX VOLUMES 1 - 3** were delivered via courier to the Clerk of the Court, United States Tenth Circuit Court of Appeals.

By s/*Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen
Attorney for Osage Minerals Council