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

UNITED STATES OF AMERICA, **Plaintiff,** **And** **OSAGE MINERALS COUNCIL,** **Intervenor-Plaintiff,** **v.** **OSAGE WIND, LLC; ENEL KANSAS, LLC; and ENEL GREEN POWER NORTH AMERICA, INC.,** **Defendants.**	**Case No. 14-CV-704-GKF-JFJ**

Plaintiff the United States' Response to Defendants' Motion to Reconsider (Dkt. 229)

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The Court should dismiss Defendants' Motion to Reconsider Opinion and Order Granting Osage Minerals Council's Motion for Judgment on the Pleadings [Dkt. 207, amended by Dkt. 219] and Opinion and Order Denying Defendants' Objections to Magistrate Judge's Opinions and Orders [Dkt. 210 and 214] (Motion to Reconsider, Dkt. 229).

Primarily, the Motion to Reconsider should be dismissed because it is – without excuse – untimely and secondarily because it fails to meet the legal standard by which such motions are evaluated. However, even were the Court to precede to Defendants' arguments, their motion fails to provide any legal argument that supports the relief it seeks. Defendants continue to blame the United States for not informing them a lease *was required* even though Defendants' argued all the way to the Tenth Circuit that a lease *was not required* because they were not engaging in mining activity. Defendants have vigorously maintained that they possessed solid, detailed legal analysis before excavation and only proceeded because of it. It is unfathomable to believe that, prior to this action being filed in 2014, Defendants merely awaited word from the United States to abandon their own position. Federal agency personnel did ask Defendants to stop work pre-filing. They would not. Defendants' determination to proceed on their own analysis is clear. Congressional intent is equally clear that the argued defenses would run afoul of the expressed, firm intent that the Osage Mineral Estate (OME) be used only through a leasing process involving negotiation and approval by the Bureau of Indian Affairs.

I. Background

As the Court well knows this matter's extensive history, the United States incorporates the history of the case as set out in the Court's May 21, 2021, Opinion and Order (Dkt. 226). As to the immediate history leading to the parties now briefing these issues for a second or third time, Defendants have raised equitable affirmative defenses seeking to mitigate their mining of the OME without a lease by alleging inequitable conduct by the Plaintiff and Intervenor-Plaintiff Osage Minerals Council (OMC). Dkt. 174. On January 11, 2021, the Court granted the OMC's Motion for Judgment on the Pleadings, precluding Defendants from asserting equitable defenses of estoppel, laches, waiver, unclean hands, and *in pari delicto* (Judgment on Pleadings Order). Dkt. 207, as amended by Dkt. 219. As Defendants never sought reconsideration of this Order, it has guided months of discovery.

Defendants have now asserted in depositions and correspondence their intent to seek supplemental discovery and call second depositions of witnesses if their motion is granted. In other words, Defendants would like a "mulligan" for the last six months of discovery that has consumed massive resources for all concerned.

Defendants' Motions to Compel discovery from the United States and OMC were still pending when the Judgment on Pleadings Order was entered. Dkts. 177 at 28; 179; 191 at 8; 193. After the Order granting Judgment on the Pleadings, the Court entered its Order denying Defendants' Motions to Compel (Discovery Orders). Dkts. 210, 214. Thereafter, Defendants filed a Partial Objection to the Magistrate Judge's Discovery Order. Dkt. 218. Both the United States and OMC filed briefs in

opposition (Dkts. 223-24), to which Defendants filed a Reply (Dkt. 225). The Court's subsequent Opinion and Order rejected Defendants' arguments. Dkt. 226. Now, Defendants seek "reconsideration" of these Orders that have governed this case.

II. Argument

A. Defendants' Motion to Reconsider is untimely.

Motions to Reconsider are not explicitly recognized by the Federal Rules of Civil Procedure. Instead, Fed. R. Civ. P. 59(e) contemplates a motion to alter or amend a judgment if filed within 28 days of entry of judgment. As this scenario does not apply here, and Defendants do not argue to the contrary, their motion is based solely on the Court's discretion to reopen its previous Orders. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983); Fed. R. Civ. P. 54(b).

However, the Court should dismiss Defendants' Motion for its unreasonably late date alone. This Court has recognized that a party who "strongly disagreed with the Court's opinion and order" is obligated to "immediately" raise its arguments "in a timely motion to reconsider." *Fisher v. S.W. Bell Tel. Co.*, 07-CV-0433-CVE-FHM, 2009 WL 936712, at *6 (N.D. Okla. Apr. 6, 2009), aff'd, 361 F. App'x 974 (10th Cir. 2010) (unpublished), and aff'd, 361 F. App'x 974 (10th Cir. 2010) (unpublished). In *Fisher*, this Court held that "a four month delay is an unreasonable period of delay to file a motion to reconsider" and sufficient reason to deny it. *Id*.

Here, Defendants presented lengthy arguments in response to the OMC's Motion for Judgment on the Pleadings. Clearly at issue were the equitable defenses Defendants intended to raise and the evidence that would be relevant, or not, based

on the availability of those defenses. The Court's January 11, 2021, decision rejected Defendants' arguments and informed discovery dispute issues pending before Judge Jayne, enabling her to resolve the dispute with a detailed Opinion and Order on January 16, 2021, followed by another Opinion and Order, after *in camera* document review, on February 13, 2021. After seeking more time to respond to this ruling, Defendants lodged a partial objection on March 8th (Dkt. 218).

Since Judge Jayne's Orders, considerable paper discovery and nine depositions have occurred. The January 11th Order has guided discovery for nearly six months, with all parties consuming tremendous resources on depositions, paper discovery, motion practice, and discovery disputes. It appears Defendants sat by allowing this waste of resources, only to bring a motion to reconsider that will barely be ripe for ruling by close of discovery – nearly nine months after entry of the Orders.

The only explanation for the delay is offered in a two-line footnote: "because the breadth ascribed to [the January 11, 2021, Order] was not clear until the entry of the Objections Order." Dkt. 229 at fn. 1. This statement is untrue – Defendants fully understood the import. Nine days after entry of the Order, Defendants propounded more discovery. Defendants expressly acknowledged the requests (consisting of numerous requests for admission, interrogatories and document demands) were objectionable pursuant to Judge Jayne's Order. *See* Exhibit 1, January 20, 2021, letter from Lynn Slade. The United States, as Defendants admitted they expected, objected to this discovery. Defendants then sought a 30(b)(6) deposition on the very topics Judge Jayne's Order barred. *See* Exhibit 2, March 19, 2021, letter from Sarah

Stevenson. The United States resisted, and Defendants yielded. Defendants well knew the United States believed the Court's January 11, 2021, ruling controlled.

B. Defendants' Motion is improper under the applicable standard of review.

In the Motion's "Standard of Review" section, Defendants ask the Court to utilize its discretion to reopen the previous Orders under Fed. R. Civ. P. 54(b). Dkt. 229 at 9-10. Defendants fail, though, to recognize this Court's authority that provides the basis for such review. A motion to reconsider should only be granted when a party can establish (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) a need to correct clear error or prevent manifest injustice. *Lindley v. Life Investors Ins. Co. of America*, Nos. 08–CV–0379–CVE–PJC, 09–CV–0429–CVE–PJC, 2010 WL 2541704, at *1 (N.D. Okla. June 18, 2010).[1]

This Court has cautioned those seeking reconsideration that its opinions are not "a first draft." *Id*. at *2. The Court will not revisit arguments that "should have been presented before or have already been rejected." *Id*. Specifically, a party's invitation for "closer inspection" of previously considered material will not carry the day. *Id*. A motion to reconsider simply is not appropriate "'to reargue an issue previously

[1] Defendants essentially claim manifest injustice as the sole basis for their motion. Dkt. 229 at 12-13. As evidenced by the deposition excerpts attached as an exhibit to Defendants' Motion, the injustice they claim is that Plaintiffs may seek discovery concerning Defendants' past actions when Defendants may not seek the same from Plaintiffs. Dkt. 229-1. This deposition testimony is from one of Defendants' experts who opined that if the developer had been clearly apprised of the necessity of a lease to mine, they would have avoided taking the minerals (the excerpts omit the fact that the expert never reviewed the materials to see if Defendants were, or were not, clearly apprised). However, this testimony merely reiterates Defendants' self-serving allegation that they were never apprised of the need for a lease (all the while arguing they were not engaged in mining activities).

addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion[.]'" *SFF-TIR, LLC v. Stephenson*, 264 F. Supp. 3d 1148, 1214–15 (N.D. Okla. 2017), citing *Servants of the Paraclete v. Does*, 204 F.3d 1005,1012 (10th Cir. 2000).

C. Should the Court reach the merits of the Motion, it should still be denied.

1. This Court properly enforced the law of the case despite Defendants' continuing refusal to accept the Tenth Circuit's decision.

Attempting to establish legal justification for their Motion, Defendants' allege the Judgment on Pleadings Order misapplies the Tenth Circuit decision, ***or*** the Court should depart from application of the rule of the case doctrine. Dkt. 229 at 11. First, Defendants assert that "delay-based defenses had not been briefed in the district court." Dkt. 229 at 10, fn 7. This is far from true. Defendants raised the laches issue in the District Court in their Response to Plaintiff's Motion for Preliminary Injunction (Dkt. 17 at 27) as well as in their Motion to Dismiss or for Summary Judgment (Dkt. 26 at 28, fn 3). While the District Court did not opine as to the laches defenses, Defendants have been arguing laches since this suit began.

The next untruth is Defendants' contention that the only basis for the Tenth Circuit's holding regarding timeliness was a footnoted "suggest[ion]" in Appellees' Brief. Defendants argued there that "the OMC delayed in bringing this challenge for years after it had all the knowledge it needed to file suit." Brief of Appellees at fn. 11, *United States v. Osage Wind, LLC*, No. 15-5121 (10th Cir. June 16, 2016), Doc. No. 01019639458.

Both pleadings, containing laches arguments, that Defendants filed before the District Court [2] were included in the record before the Tenth Circuit. OMC Jt. App. Vols. 1-3 at 46, 54. Defendants even submitted to the Tenth Circuit a Notice of Supplemental Authority about the timeliness issue and specifically urged the Court to find that "laches should similarly bar **relief** in the OMC's favor here." *See* Exhibit 3, Appellees Notice of Supplemental Authority at 2 (emphasis added). Based on *this* record, the Tenth Circuit declined Defendants' assertion of laches. Dkt. 79 at fn 6.

Defendants now assert that this Court should exercise its discretion and depart from law of the case doctrine due to "Plaintiffs' years-long knowledge of the extent of excavations[.]" Dkt. 229 at 7. Defendants argue this despite their arguments to the Tenth Circuit that laches should apply. Having received an unfavorable decision there, Defendants hope to persuade this Court to ignore the Tenth Circuit's plain language. Defendants unabashedly assert this Court has discretion to rule differently than the Tenth Circuit on the same arguments they raised in the Tenth Circuit record.

Defendants also continue to assert that this Court misunderstood the arguments when it rendered the Judgment on Pleadings and that the Court impermissibly extended the law of the case doctrine to foreclose, not only defenses to the merits of the action, but also to the affirmative defenses as to remedy. Dkt. 229 at 10-13. This

[2] Defendants' whole argument is that principles of equity require this Court to allow their delay-based affirmative defenses as to remedy. Yet if the United States seeks remedies that are not equitable in nature, then Defendants' arguments are irrelevant. *Sun Oil Co. v. Fleming*, 469 F.2d 211, 214 (10h Cir. 1972) ("The legal action of ejectment is the proper remedy for the recovery of possession [of property occupied wrongfully]. It follows that the equitable defense of laches cannot prevail.")

argument misstates the Judgment on Pleadings Order's clear wording. In that order, the Court recognized that the "remainder" of Defendants' state delay-based affirmative defenses are not applicable to tribes or the United States acting as trustee. Dkt. 207 at 5. The Court did not solely rely on the Tenth Circuit decision – that three months was not "unreasonable delay" (Dkt. 78 at 45, fn 6) – in reaching this conclusion. *Id*. at 5-8. Further, the Court specifically addressed Defendants' assertion that affirmative defenses should apply as to remedies, again utilizing law that does not rely on the Tenth Circuit decision. *Id*. at 8-10. Finally, the Court addressed Defendants' allegation that their defenses are viable under federal law. *Id*. at 10-11. Here again the Court identified legal reasoning outside of the Tenth Circuit decision as support for its conclusion. *Id*.

Defendants may dislike the way the Tenth Circuit ruled, but that does not empower this Court to overturn the Tenth's considered decision. Defendants chose to pursue delay-based arguments, highlighting them with additional argument and authorities after briefing had closed, and are now bound by the decision.

Defendants do not establish any of the grounds warranting reconsideration. Instead, they maintain the same arguments they previously brought before this Court as well as the Tenth Circuit. Defendants present no new evidence, no "manifest injustice" not already argued *ad nauseum*, and no change in controlling law. They merely regurgitate citations to case law already found unpersuasive by this Court. Defendants' motion should be dismissed or, in the alternative, denied.

2. Defendants' suggestion that this Court is free to revisit Tenth Circuit law of the case is incorrect.

Defendants suggest this Court has ample discretion to "rule otherwise," than the Tenth Circuit on laches. Dkt. 229 at 11. Defendants cite to the "exceptionally narrow" grounds wherein law of the case may be revisited when (1) evidence in a subsequent trial is substantially different, (2) controlling authority has subsequently made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice. *Id.* Recognizing that not one of these "narrow" grounds exists, Defendants state that the "issues and evidence are 'substantially different' from those before the Tenth Circuit." *Id.* Defendants are incorrect, failing to acknowledge that they sought dismissal of the case in whole (remedies and all) under their chosen laches argument.

Defendants repeatedly misstate the facts in this matter and present no evidence that the United States had years-long knowledge of the extent of excavation Defendants would undertake. For instance, Defendants intimate that the United States "simply wait[ed] until filing of suit to spring their theories, in 'gotcha' fashion[.]" Dkt. 229 at 16. As Defendants well know, discovery has shown that Ms. Stevenson (and other Modrall Sperling attorneys) was carefully considering the precise federal regulations at issue here more than a year before this lawsuit was filed. *See* Exhibit 4, Sarah Stevenson Oct. 31, 2013, Memo; Exhibit 5, E-mail from Mr. Slade to Matt Gilhousen, et al., Oct. 25, 2013; *see also* Appellees' Petition for Panel Rehearing and/or Request for *En Banc* Determination at 15 (Defendants assert

that it was not until October 2013 that it was "even suggested a permit or lease would be required."). In fact, as discussed below, not even Defendants seemed to know what the extent of excavation would be, or what excavation actually occurred.

On one hand, Defendants complain they had no idea 'til the day the United States filed suit that any theory existed regarding the need for a lease for mining hard rock minerals. On the other hand, Defendants contend they only moved forward with their plans upon receipt of their counsel's solid, detailed legal analysis that they were not mining and so no lease was needed. Both cannot be true, but Defendants urge both, depending upon what suits their current litigative strategy.

3. Defendants' self-serving twist on the laches defense – a last ditch effort to escape the law of the case they explicitly invited at the Tenth Circuit – is nonsensical.

Defendants now claim that a laches-style defense should be allowed because the argument for laches was based not on the passage of time between excavation and filing of suit but on the failure of the United States to "advise clearly a mining lease was required." Dkt. 229 at 14. In other words, they contend the Tenth Circuit was wrong to measure delay from the start of excavation and should have measured it from the time the United States might have been able to clearly advise Defendants. To the extent the laches argument Defendants now wish to pursue differs from the one they previously pursued, even after briefing at the Tenth Circuit was closed, Defendants should be foreclosed from advancing a newly evolved theory on the same facts. The time to argue laches (or not) is long past.

In their Response to the United States' Motion for a Preliminary Injunction (Dkt. 17 at 27), Defendants stated the United States was imposing "ever-changing legal requirements of which they did not timely advise Osage Wind," and included a summary of communications from 2008 to filing to make their point (*Id.* at 11-12). Defendants' argument has remained consistent since they first filed pleadings before Judge Payne, and it has been consistently rejected.

Most importantly, Defendants fail to apprise this Court that they presented the Tenth Circuit with exactly the same argument. After receiving the Tenth Circuit decision, Defendant' petitioned that a rehearing be granted, in part, because, while the United States timely brought suit after commencement of excavation, construction had begun a year earlier. Appellees' Petition for Panel Rehearing and/or Request for *En Banc* Determination at 14, United States v. Osage Wind, LLC, No. 15-5121 (10th Cir. Oct. 2, 2017), Doc. No. 01019880078. The Tenth Circuit unanimously denied this petition. Order, United States v. Osage Wind, LLC, No. 15-5121 (10th Cir. Oct. 17, 2017) Doc No. 01019886563. The Tenth Circuit panel was satisfied it understood the laches argument and made the right decision.

Defendants' argument that Plaintiff should have made these detailed explanations to them well before they entered into expensive contracts and obligations is ludicrous. As has become apparent, Defendants did not even know how they would excavate and had to use dynamite to blast many more sites than anticipated. *See* Exhibit 6, EGPNA May 28, 2012 Change Order. They also sent out frantic messages to field operators about how to crush, locate and balance the rocks encountered in

response to the BIA and OMC's objections. *See* Exhibit 7, E-mail of Sep. 29, 2014, from Joan Heredia to Giuseppe DiMarzio. Defendants own expert noted discrepancies in measurements of the holes and Defendants' astonishing lack of records, which has resulted in uncertainty to this day. *See* Exhibit 8, Expert Opinion of John Pfahl at ¶ 47 ("The size and associated volume of each excavation remains uncertain."). Defendants' expert reported that the excavation declaration made to this Court in 2014 "is significantly deeper than shown on the drawings." *Id.* at ¶ 49.

Of course, the United States could not know about commitments being made between private parties. Even if Plaintiffs were clairvoyant, there simply is no reason to charge them with knowledge that the parties to the contract intended to achieve illegal means to erect the wind farm. Defendants had, as Aaron Weigel pointed out in his June 29, 2021, deposition, set about getting numerous permits from federal and local authorities. There was no reason to think Defendants would suddenly decide they had complied with enough regulations and would comply with no more.

Defendants argue they are entitled to assert delay as an equitable remedy because the United States should intuit the precise point when a multi-national corporation is about to ink agreements and make investments that could run afoul of publicly available regulations. Defendants repeatedly admit they did not believe a lease was required because they were not going to sell or remove minerals. Dkt. 229 at 7. Defendants argued this definition of mining from the inception of this case all the way up to the Tenth Circuit. Regardless of whether Plaintiff or the OMC told Defendants a lease was required, the fact is that Defendants did not believe their

activities constituted mining. Certainly, by the time the United States brought suit and filed a detailed motion for legal and injunctive relief, the theory was fully and completely explained. Yet, Defendants did not capitulate or alter their behavior.

Defendants essentially assert they would have abandoned their entire argument merely upon Plaintiffs' statement explaining relevant case law and regulations. The fact is, for at least a year before suit was filed, Defendants held fast to their legal position as to mining despite Plaintiff and the OMC's objections. The Tenth Circuit leaves no question but that Defendants must obtain a lease; yet, to this day, no effort has been made to obtain one. This course of conduct hardly suggests Defendants merely lacked firm guidance but were eager to comply once fully informed.

4. Defendants cite inapposite, well-worn and previously considered cases.

As with previous briefing filed by Defendants, the instant motion relies on the *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982) to support their arguments. *Jicarilla* is quickly distinguishable as the defendants there had already procured leases for their activities. Further, the Court there found unreasonable delay in bringing suit not because the lease sales were concluded in September 1972 and the case was brought in April 1976, but because during the lease sales, "the law was unclear as to applicability of NEPA to the approval of lease sales by the BIA. In November 1972, however, this court held that NEPA was applicable to Government approval of a 99-year lease of Indian lands in New Mexico." *Id*. at 1338. The delay in *Jicarilla* was not the between the leases and the suit's commencement, but between the ruling concerning the applicability of NEPA and the commencement of the suit

challenging and requesting cancellation of the leases due to application of NEPA. *Id*. In other words, once there was case law that would affect the leases obtained in 1972, a delay of three years before filing suit to challenge the same was unreasonable.

Here, there is no such law. As did Ms. Stevenson in her 2013 memorandum, the Tenth Circuit found the regulations governing Osage mineral resources ambiguous and made a determination, utilizing the Indian canon of construction, as to the definition of "mineral development." *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1081 (10th Cir. 2017). Of course, the Indian canon of construction had been applied to the OME by this Court decades earlier and should have come as no surprise to Defendants and their legal counsel. *Milsap v. Andrus*, 717 F.2d 1326 (10th Cir. 1983). The mineral development identified here by the Tenth Circuit is not limited to the removal and sale, as argued by Defendants. Instead, the mineral development was the sorting and crushing to provide structural support. As this is a case regarding regulations not previously the subject of litigation, *Jicarilla* would not apply so as to permit delay-based equitable defenses.

Defendants cite three additional cases to support their delay-based defense arguments. Again, these cases are all easily distinguishable from this matter. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Oneida Indian Nation originally held homeland consisting of 6,000,000 acres in New York. However, due to treaties and various Federal Government policies, by 1805 the Oneida Indian Nation no longer possessed parcels of land as a tribal entity. Beginning in 1951, the Oneida Indian Nation pursued various claims in various courts for deprivation of

their homeland. In 2000, the Oneida Nation sought not only damages but recovery of land they once possessed. The Court permitted equitable, delay-based defenses based on the span of time (200 years) and the long-standing control exercised over the former homeland by New York State. Similarly, in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 267–68 (2d Cir. 2005), the Court permitted the application of laches to a claim that accrued 200 years prior. Finally, Defendants cite a third case that stands for the same proposition as the others. In *Shinnecock Indian Nation v. N.Y.*, No. 05-CV-2887 TCP, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006), aff'd, 628 F. App'x 54 (2d Cir. 2015), the Court permitted disposal of the suit based on equitable defenses as the Shinnecock Indian Nation brought the action more than 140 years after the actions giving rise occurred.

It is perplexing that Defendants believe these cases have persuasive authority here in consideration of the facts of the case. The OME has consistently been under the federal trust umbrella, and the OMC consistently exercises its sovereign control over the same. This is not a case where more than one hundred years have passed, and a new claim has been submitted against Defendants. Instead, as the Tenth Circuit noted, "in October 2013, Osage Wind initiated site preparation and road construction, and by September 2014, excavation work for the planned wind turbines began." Dkt. 78 at 6. The United States then filed suit in November 2014. *Id.* at 7. Even a cursory review of the facts of the cases on which Defendants rely reveals their inapplicability to the case at bar – two months is not comparable to 140 or 200 years.

Finally, Defendants yet again attack the interpretation of *Davilla v. Enable Midstream Partners L.P.,* 913 F.3d 959 (10th Cir. 2019). Dkt. 229 at 9, 12. Plaintiff has submitted briefing concerning Defendants' previous interpretation arguments and, for brevity's sake, incorporates its previous briefing by reference. Dkt. 224.

5. Defendants ignore the specific and important federal policy concerning Indian estates and trust obligations.

Defendants particularly take issue with this Court's "Objection Order" because the Court rejected Defendants' self-serving analogies to other cases where "pre-litigation conduct" was considered. Dkt. 229 at 4, 8. Defendants seem intent to ignore the unique character of Indian tribal sovereignty and the Congressional treatment of the OME, in particular.

As this Court clearly stated, "recitations of the general principles of equity - that do not contend with the strong federal policy in favor of vindicating Indian law claims - do not persuade the court that it must consider the United States and OMC's past conduct to determine the propriety of equitable relief." Dkt. 226 at 10. The public policy and Congressional will evidenced here by the history of the Osage Allotment Act and creation of specific regulatory provisions is qualitatively different than the patent law dispute Defendants raise as support. Dkt. 229 at 14.

This Court has considered the impact of the strong public policy embodied in federal Indian statutes and regulations. In *Schafer, Tr. of Wayne Penn Schafer Separate Prop. Tr. Established October 5, 1982 v. Centerpoint Energy Oklahoma Gas*, No. 17-CV-365-GKF-FHM, 2018 WL 10140171 (N.D. Okla. May 21, 2018), an alleged trespasser

asserted the affirmative defenses of waiver, estoppel, laches, and unclean hands. This Court concluded that, when Mr. Schafer held the property as an Osage Allottee, the doctrine of laches would not apply to his claim to recover his real property. *Id*. at *8. In fact, this Court held that "affirmative defenses" would "adversely affect" an Indian allottee "without authorization by federal statute or the Secretary of the Interior." *Id*. As expressed in *Schafer*, Congress has prescribed a specific way in which the OME may be leased. 25 C.F.R. § 211. The OME is inalienable and cannot be sold; rather it is leased by negotiation with the OMC and the Secretary of the Interior's approval. To allow a trespasser to determine when and if he will make use of minerals, without a lease, would fly in the face of century-old federal policy.

In *Shafer*, the Court cited no less than Supreme Court precedent (*Ewert v. Bluejacket*, 259 U.S. 129 (1922). In that case, while a special assistant to the United States Attorney General, Mr. Ewert bid for and ultimately personally acquired the land in question from adults and minors. The Secretary of the Interior approved the conveyance, but a separate statute forbade Ewert from purchasing Indian lands while maintaining his position with the Attorney General's office. While seven years elapsed before the challenge was brought, laches could not be applied "to bar the rights of Indian wards in lands subject to statutory restrictions." *Id*. at 138. Here, Defendants did not bother to pay for or enter into a semblance of the lease that is statutorily required. They should not be able to wholly thwart the will of Congress.

III. Conclusion

"A motion to reconsider . . . gives the court the opportunity to correct manifest errors of law or fact and to review newly discovered evidence." *Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1483 (D. Kan. 1994), aff'd, 43 F.3d 1484 (10th Cir. 1994). "A motion to reconsider is proper when the court has obviously misapprehended a party's position, the facts or the law, or has decided issues outside of those presented in the original motion." *Id.* "A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed." *Id.*

In their Motion, Defendants do not clarify what manifest errors of law exist or point to any newly discovered evidence.[3] Instead, they continue to rely on the same cases this Court has already reviewed and determined to be inapplicable. Defendants continue to make the same arguments that have been made for several briefing cycles under guise of new arguments, yet somehow assert that reframing their arguments is permissible and should result in the Court's grant of additional discovery despite the fact that the orders Defendants challenge have governed this matter for months.

Though Defendants allege the Court misapprehended their position, it is clear from their arguments that no such thing occurred. Five months have passed, and

[3] Despite Defendants' citation of their own expert's deposition (Dkt. 229-1) as evidence the United States believes "pre-suit communications" are relevant, Defendants are the ones who dictate the contours of their own experts' proposed testimony. It would be unjust to allow Defendants to offer expert opinion on wholly immaterial matters and then use the fact that the deposition mentioned these matters to bootstrap its admissibility.

Defendants are recycling the same unsuccessful arguments, hoping for a better result. In reviewing the Judgment on Pleadings Order, which is the true challenge of Defendants' Motion, the Court discusses each point Defendants raised. For example, in their Motion, Defendants allege the Court failed to address that their affirmative defenses are applicable either under incorporation of state law or under the federal court's equity jurisprudence. Dkt. 229 at 8. However, in the Judgment on Pleadings Order, the Court specifically devotes analysis to state law defenses *and* federal law defenses. Dkt. 219 at 5-11.

Defendants do not even attempt to dress up the arguments previously rejected by this Court. They essentially copy and paste their previous briefing. It is burdensome to keep responding to arguments already rejected by this Court. For the reasoning the Court applied in its Judgment on Pleadings Order and Discovery Orders, in addition to the legal analysis submitted herein and in previous briefings incorporated herein, Plaintiff respectfully requests the Court deny Defendants' Motion to Reconsider.

Respectfully submitted,

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