THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) UNITED STATES OF AMERICA, Plaintiff, (2) OSAGE MINERALS COUNCIL, Intervenor-Plaintiff, v. (1) OSAGE WIND, LLC; (2) ENEL KANSAS, LLC; and (3) ENEL GREEN POWER NORTH AMERICA, INC., Defendants.	)	Case No. 14-CV-704-GKF-JFJ

INTERVENOR-PLAINTIFF OSAGE MINERALS COUNCIL'S REPLY IN SUPPORT OF THE OMC'S MOTION FOR SUMMARY JUDGMENT, DKT. 294

I. INTRODUCTION

Intervenor-Plaintiff Osage Minerals Council ("OMC") files this reply brief in further support of the OMC's Motion for Summary Judgment, Dkt. 294 ("OMC Mot."). None of the arguments offered in Defendants Osage Wind, LLC ("Osage Wind"), Enel Kansas, LLC ("Enel KS"), and Enel Green Power North America, Inc.'s ("EGNPA" and collectively, "Defendants") Brief in Opposition supports the denial of the OMC's Motion. *See* Dkt. 324 ("Defs.' Opp'n").

II. STATEMENT OF UNDISPUTED FACTS

None of Defendants' responses to the OMC's Statement of Undisputed Facts ("OMC SUF") give rise to a material dispute sufficient to preclude granting the OMC's Motion. Because Defendants' "disputes" are either (1) misapplications of the law to undisputed facts,[1] (2) immaterial tangents,[2] or (3) mischaracterizations of the facts and/or the OMC's statements, Defendants' responses to the OMC SUF ("RSUF") cannot shield them from summary judgment.

For instance, Defendants go to great lengths to demonstrate that they were in constant communication with counsel, RSUF ¶¶ 9, 10, 11, 38, 40, but provide no evidence that they gave a *full* disclosure of the relevant facts to counsel *before* the drafting of the October 2014 memo sent to the Bureau of Indian Affairs, much less before excavation began, to establish they reasonably relied on their counsel's advice. *See United States v. Wenger*, 427 F.3d 840, 853 (10th Cir. 2005). There are numerous other strawmen to knock down, but as a last example, Defendants continue to defend their corporate structure from their own corporate separateness objections by repeatedly clarifying what certain entities do and do not own despite the OMC

[1] For example, Defendants' RSUF ¶ 5 is purely related to their incorrect interpretation of "mining" under 25 C.F.R. § 214.7 and their refusal to accept the Tenth Circuit's decision.

[2] Perhaps the best example of this is RSUF ¶ 12, which purports to respond to the OMC's quotation of a sentence from Defendants' "detailed legal analysis" with irrelevant discussion regarding correspondence with and among the OMC and BIA.

requesting summary judgment on joint and several liability. *See, e.g.*, RSUF ¶¶ 16-18, 20-22, 25, 29, 31, 44. In sum, while Defendants have written quite a bit in response to the OMC SUF on a range of issues, the material facts themselves are undisputed, and, as set forth in more detail below, they support this Court granting the OMC's Motion.

Finally, Defendants raise various evidentiary objections to ¶¶ 12, 15, 16, 21, 22, 26, 39, and 49 of the OMC SUF. The bulk of their objections mischaracterize the OMC's attempt to streamline motion practice for the Court by incorporating parallel briefing as the OMC "cit[ing] its own statements," RSUF ¶ 15, when it is clear the OMC was citing to the evidence/documents/deposition testimony cited therein, and *not* the OMC's own legal arguments. To the extent Defendants are not clear as to what evidence supports the OMC's statements, the OMC provides them, again, here, despite having provided them previously.[3]

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[3] 15. Enel KS and EGPNA employees and executives decided how the Osage Wind Farm would be constructed—not TradeWind and certainly not Osage Wind. *See* Letter Agreement, Ex. 1, OSAGE WIND-021240-41; Freeman Tr., Ex. 2, 21:4-7, 118:23-24, 119:10-13; Dkt. 285-22, OW-021426; Dkt. 285-23, OW-18399-403; Dkt. 285-24, IEA-00227119-21; Dkt. 285-25, HOOPER-0005202; Dkt. 285-26, OW-019901; Dkt. 285-18, EGPNA-000011.

16. As early as 2006, EGPNA negotiated an agreement with TradeWind by which Enel agreed to fund TradeWind's project development of wind farms, and in return, EGPNA had the first right of refusal to purchase, construct, and own projects that TradeWind had developed. Dkt. 285, 16-17. Freeman Tr., Ex. 2, 18:17-19:1, 19:6-21:1, 106:16-23; Gilhousen Tr., Ex. 3, 15:4-17, 17:24-18:4; Dkt. 294-7, 222:13-14; Dkt. 285-20, 88:18-20; Enel Kansas LLC Limited Liability Company Agreement Ex. 4, OW-041255-57; Letter Agreement, Ex. 1, OW-021240 (quoting the November 21, 2013 Osage Project Loan Agreement § 3.5, not produced).

21. In 2013 and 2014, Osage Wind owned the assets that constituted the Osage Wind Farm, but Osage Wind itself is just a corporate shell used by EGPNA and Enel KS to own and construct the wind farm, as Osage Wind has no employees of its own and makes no business decisions separate and apart from those made by Executives at EGPNA and/or Enel KS. Third Amended and Restated Limited Liability Company Operating Agreement of Osage Wind, LLC ("Osage Wind Operating Agreement"), Ex. 5, OW-041270; Sept. 17, 2014 Membership Interest Purchase Agreement ("2014 MIPA"), Ex. 6, OW-021119; Freeman Tr., Ex. 2, 70:20-22; Dkt. 285-20, 38:18-21; Dkt. 316-2, 25:11-19; Dkt. 189-2, ¶ 9.

22. EGPNA fully funded TradeWind's purchase of the Osage Wind Farm through the purchase of all of the membership interests in Osage Wind, LLC, and without EGPNA's funding, TradeWind would not have been able to make this purchase. *See* Aug. 22, 2013 Membership Interest Purchase Agreement ("2013 MIPA"), Ex. 7, OW-021248; Enel KS LLC Limited Liability Company Agreement, Ex. 4 , OW-041255; Freeman Tr., Ex. 2, 106:16-20; Gilhousen Tr., Ex. 3, 15:8-17; Dkt. 294-7, 222:13-14.

III. RESPONSE TO DEFENDANTS' ADDITIONAL STATEMENTS OF UNDISPUTED FACTS[4]

1. Undisputed and not material. The Tenth Circuit concluded that whether Defendants sold or did not sell the materials is irrelevant here. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017) (rejecting Defendants' "proposed commercialization requirement" because the Osage Act's reference to the word sale "does not mean that 'mining' only occurs when the extracted minerals are being sold. Rather it means simply that surface estate owners cannot sell what does not belong to them.").

2. Disputed and not material. Whether Defendants moved or used minerals at any location other than the turbine site is not at issue here. *Osage Wind, LLC*, 871 F.3d at 1081 (concluding that "relocations" of Osage minerals "are not at issue here.").

3. Undisputed and not material. Defendants continue to use crushed Osage minerals "to add structural support to the large wind turbines installed deep in the ground," *Osage Wind, LLC*, 871 F.3d at 1087, specifically so their turbines will remain standing and in operation. Dkt. 294-4, 28:4-23; Dkt. 294-3, 151:19-152:6; Dkt. 294-19, 69:13-20.

4. Disputed in part. Defendants mischaracterize Mr. Pike's statement.

5. Disputed and not material to the OMC's Motion, Dkt. 294. Mr. Freas acknowledged that he knew of no evidence that his valuation is the price the OMC was or is willing to receive in exchange for the minerals the Osage Nation owns. Dkt. 293-7, 95:02-97:20.

6. Disputed and not material. Mr. Pfahl's valuation is immaterial because, in calculating his valuation for the minerals Defendants unlawfully took, he "did not specifically contemplate [] the sovereign status of the OMC," Dkt. 293-6 (Pfahl Tr.) at 153:7-17, and furthermore, he does not know whether the OMC actually owns the Osage Mineral Estate. *Id.* at 117:9-10.

7. Disputed. The turbines block access to significant portions of the Osage Mineral Estate, Dkt. 293-5 at 103:13-104:6, and but for Defendants' ongoing trespass, the OMC would be able to issue leases for these minerals that generate revenue. Dkt. 294-2, Waller Decl. ¶¶ 40-43.

8. Disputed and not material to the OMC's Motion, Dkt. 294. Defendants' own expert testified that Defendants' counsel informed him that Defendants implemented a 500 foot setback "associated with the wind towers themselves." Dkt. 294-21 (Pfahl Tr.) 18:08-12.

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26. EGPNA became the formal construction manager for the Osage Wind Farm as of August 19, 2014, through a Construction Management Agreement that made EGPNA responsible for "obtaining . . . all necessary Permits[] in connection with the construction of the Project . . . ." Dkt. 285-18, EGPNA-000011.

39. Defendants had begun rock crushing, rock blasting, and using dynamite on the Osage Mineral Estate by September 25, 2014. Dkt. 285-19, OW-018666; Dkt. 285-27, OW-19900.2

[4] To the extent that Defendants' Statements of Additional Undisputed Facts in their Opposition to the OMC's Motion are identical to the Statements of Undisputed Facts Defendants offered in their own Motion for Summary Judgment, Dkt. 297, the OMC incorporates its responses from Dkt. 316.

9. Disputed that Osage Wind is the only party in this litigation that will be financially impacted by the issuance of permanent injunctive relief. Osage Wind has generated $103,876,000 in revenues and paid $236,857,000 in cash distributions to investors, $233,312,000 of which have gone "To Enel." Defs.' Opp'n Ex. 26, Att. C, Ex. 8, OW-041687.

10. Undisputed that Defendants have exploited the Osage Mineral Estate ("OME") to the benefit of Shidler Public Schools and Woodland Public Schools, substituting their judgment for the OMC's regarding how the Osage Mineral Estate should be administered and developed, and in so doing usurping the OMC's sovereign powers in contravention of Osage and federal law. *See* Osage Nation Const. art. XV, § 4; Act of June 24, 1938, ch. 654, § 3, 52 Stat. 1035.

11. Undisputed.

12. Undisputed that Defendants have exploited the Osage Mineral Estate to the benefit of certain non-Osage surface estate owners in Osage County, substituting their judgment for the OMC's regarding how the OME should be administered and developed, and in so doing usurping the OMC's sovereign powers in contravention of Osage and federal law. *See* Osage Nation Const. art. XV, § 4; Act of June 24, 1938, ch. 654, § 3, 52 Stat. 1035.

IV. ARGUMENT

A. The OMC is Entitled to Judgment on Counts I and II

Defendants argue that the OMC's claims for declaratory judgment should be denied because the Tenth Circuit has conclusively found that Defendants' unlawful use of Osage minerals "ended years earlier." Defs.' Opp'n 24. The Tenth Circuit, however, did not conclude that Defendants stopped using Osage minerals. Furthermore, declaratory judgment will settle a dispute that affects the behavior of Defendants since, despite the Tenth Circuit's ruling that Defendants' use of Osage minerals requires a lease, Defendants have refused to obtain a lease for their ongoing use of Osage minerals. OMC SUF ¶¶ 5-6, 48; *see Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1009-1110 (10th Cir. 2010) (concluding that declaratory judgment is proper if it settles "some dispute which affects the behavior of the defendant toward the plaintiff."). It appears that, short of injunctive relief, the issuance of declaratory judgment on Counts I and II is likely the only way to ensure Defendants eventually comply with the Tenth Circuit's conclusion that they cannot take advantage of Osage minerals without a lease.

B. The OMC is Entitled to Summary Judgment on its Claim for Continuing Trespass

Defendants' only argument in response to the OMC's Motion for summary judgment on continuing trespass is the fanciful claim that the OMC did not plead facts related to Defendants' ongoing use of Osage minerals, *see* Defs.' Opp'n 14, but, as the OMC has noted before, the OMC alleges that Defendants "continue to use these minerals to reinforce the concrete turbine foundations." Dkt. 164, ¶ 4; *see also* Dkt. 316, 8-9 (listing numerous paragraphs containing references to Defendants' continued use of Osage minerals). Further, Defendants' assertion that the wind turbines themselves have not engaged in a "trespass" merely because they receive "passive support . . . from underlying rock and soil," Defs.' Opp'n 15, was thoroughly rejected by the Tenth Circuit when the Court concluded that Defendants engaged in unlawful mining because they "sorted and then crushed the minerals and *used them* as backfill *to support its wind turbine structures*." *Osage Wind, LLC*, 871 F.3d at 1090 (emphasis added). The OMC is entitled to judgment on its claims for trespass and continuing trespass.

C. The OMC Has Demonstrated it Will Suffer Irreparable Harm

Defendants state that the OMC cannot claim "it suffered irreparable harm when deprived of the asserted right to 'say no'" to Defendants' trespass because "every plaintiff with a trespass claim must have been deprived of the right to 'say no' to that offense." Defs.' Opp'n 15 (citations omitted). But the OMC is not "every plaintiff." The OMC is a regulatory agency within a sovereign Tribal Nation, the Osage Nation. OMC SUF ¶¶ 1-2. And this is not a case where a company has trespassed on an individual landowner's property. This is a case where a company has trespassed on an Indian trust asset that Congress placed into trust for the benefit of a Tribal Nation, *see* Dkt. 219-7 ("Congress has dictated that [any] leases [to mine the Estate] be 'for the *best interest* of the Osage Tribe of Indians.'") (quoting Pub. L. No. 70-919, 45 Stat.

1478, 1479 (1929)), and allowing Defendants to evade the OMC's regulatory authority creates irreparable harm. *See Tennessee Valley Auth. v. Jones*, 199 F. Supp. 3d 1198, 1205 (E.D. Tenn. 2016), *aff'd,* 692 F. App'x 224 (6th Cir. 2017) ("allowing parties like Defendants to disregard TVA's statutory authority under 26a would result in irreparable harm."). The absence of injunctive relief invites other bad actors to "mimic [Defendants'] disrespect," and "[t]he resulting harm would be severe." *Id.* Indeed, awarding relief other than ejectment "would be tantamount to a forced sale of [the OMC's] statutory permitting discretion." *Id.* at 1205-1206. There is no question that Defendants' continued disregard for the OMC's authority constitutes "significant interference with tribal self-government." *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003).[5]

D. The Balance of Harms is in the OMC's Favor

Defendants argue that the balance of harms tips in their favor because "the OMC has not shown removal of the Project would prevent ***any*** injury . . . ." Defs.' Opp'n 17 (emphasis in original). The OMC, however, has clearly demonstrated that "Defendants' ongoing trespass and open defiance of the OMC's authority over the Osage Mineral Estate threatens to undermine and diminish the sovereignty of the Osage Nation." Dkt. 294-1, 13; *see also id.* at 13-16. Defendants' belief that this is not an actual injury only underscores the irreparable harm their trespass and flagrant disregard of the Osage Nation's sovereignty continues to create. Moreover, Defendants' argument that the cost to remove the Project outweighs the harm the OMC will suffer does not preclude injunctive relief since "these costs are entirely the result of their 'act now, ask for forgiveness later' approach." *Tennessee Valley Auth.*, 199 F. Supp. 3d at 1206. That is, "rather

[5] Defendants challenge the authorities the OMC relies on its Motion on the basis that they each "involved an injunction against ongoing interference by state governments with laws passed by Tribal governments." Defs.' Opp'n 15. However, nothing in the cited caselaw concludes that Tribal Nations cannot demonstrate irreparable harm absent State interference.

than applying for a permit and then appealing any denial, Defendants chose to build the structures anyway" and forced the United States and the OMC to bring suit to enforce compliance. *Id.* The harms clearly tip in the OMC's favor.[6]

E. Injunctive Relief Will Serve the Public Interest

The OMC's "silence" regarding the litany of items Defendants believe compel a decision *against* injunctive relief is not "astonishing," as none of them, under governing law, demonstrate that injunctive relief will *not* serve the public interest. *See* Defs.' Opp'n 17. In this case, "Congress has dictated that [any] leases [to mine the Estate] be 'for the *best interest* of the Osage Tribe of Indians.'" Dkt. 219-7 (quoting Pub. L. No. 70-919, 45 Stat. 1478, 1479 (1929)). Accordingly, "[t]he public interest is served by demonstrating that flagrant disregard for [the OMC's] regulatory authority will not be tolerated and by permitting [the OMC], a public agency tasked with protecting the public interest, to determine how best to use the" property at issue, specifically the Osage Mineral Estate. *Tennessee Valley Auth.*, 199 F. Supp. 3d at 1206.[7]

F. Hazel Has Not Proposed "Hold Up" Damages

Defendants assert that the OMC's reliance on Mr. Hazel's Expert Report is nothing more than a "speculative 'hold up' value" based "on the misguided view that the Project could not lawfully exist without a mining lease."[8] Defs.' Opp'n 18. But the Tenth Circuit concluded that

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[6] Defendants mischaracterize the OMC's citations to caselaw where courts consider the financial impacts on all defendants and non-party parents. *See* Defs.' Opp'n 16-17. Ultimately, in weighing the harms, the Court must consider the financial impacts on *all three* Defendants, as opposed to the *one* Defendant whose financial status Defendants deem most helpful to them in opposing injunctive relief.

[7] This Court's determination in a separate litigation that "an injunction against the Wind Farm would adversely affect the public interest," Defs.' Opp'n 17 (quoting *Osage Nation ex rel. Osage Mins. Council,* No. 11-CV-643-GKF-PJC, 2011 WL 6371384, at *11 (N.D. Okla. Dec. 20, 2011)), is not determinative because the OMC's sovereign authority to regulate the Osage Mineral Estate was not at issue, nor was Defendants' violation of 25 C.F.R. § 214.7. *See Osage Wind, LLC*, 871 F.3d at 1087.

[8] Defendants cite no authority and provide no explanation for how Hazel's valuation constitutes "hold up" damages, but "hold up" seems to be a term used in patent litigation. This, of course, is not a patent case, but rather, relates to a continuing trespass on and unlawful use of Indian trust property.

Defendants' use of Osage "minerals for the purpose of backfilling and stabilization" requires a mining lease. *Osage Wind, LLC*, 871 F.3d at 1092. The surface estate is less valuable than the Osage Mineral Estate, Dkt. 294-1, OMC SUF ¶ 50, and because it would not be reasonable to assume that the OMC "would [] negotiate something less than what the surface owners got . . . ." Hazel Tr., Ex. 9, 153: 12-16, the surface leases represent "the most direct comparable proxy for amounts that Osage Wind itself was willing and able to pay" to obtain the lawful right to own and operate the Osage Wind Farm. Hazel Report, Ex. 10, 7. This is not a "hold up" valuation.[9]

G. No Factual Disputes Preclude Denying Defendants Their Good Faith Defense

There are no disputed, material facts regarding Defendants' lack of good faith that preclude this Court from granting summary judgment in favor of the OMC. Defendants claim that proving Defendants' trespass was committed in bad faith will be "an impossible burden for the OMC to meet at trial," Defs.' Opp'n 19, but as the sovereign owner of Indian trust property, the law does not place the burden on the OMC. *See United States v. Wyoming*, 331 U.S. 440, 458 (1947) ("It is also clear that when suit is brought for the value of minerals wrongfully removed from the plaintiff's land, and the trespass and conversion are established, *the burden of pleading and proving good faith is on the defendant*.") (emphasis added) (citations omitted).[10] Defendants have not met their burden.

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[9] The fact that Mr. Hazel's expert report is unsworn does not preclude this Court's consideration of it on summary judgment, as Mr. Hazel's "proffered testimony would be otherwise admissible during trial." *Beaumont Pres. Partners, LLC v. Int'l Catastrophe Ins. Managers, LLC*, No. 1:10-CV-548, 2011 WL 6707287, at *12 (E.D. Tex. Oct. 6, 2011), *report and recommendation adopted*, No. 1:10-CV-548, 2011 WL 6709920 (E.D. Tex. Dec. 21, 2011).

[10] Applying Oklahoma law to place the burden on the OMC, as Defendants ask the Court to do, would frustrate federal law's "strong interest in the vindication of Indian land claims." Dkt. 264, 20 n.8. Moreover, there is a need for nationwide uniformity when it comes to how damages are to be calculated for trespass to tribal trust property, again supporting the application of federal law under *Davilla*. *See id.* at 972. Furthermore, damages for a mineral trespass that have not been reduced by the amount of the defendant's costs are only considered exemplary if the defendant conferred some benefit on the plaintiff. *Greer v. Stanolind Oil & Gas Co.*, 200 F.2d 920, 923 (10th Cir. 1952). Here, no such benefit on the OMC

Defendants assert that they "made diligent efforts to understand and comply with applicable law, including engaging outside counsel (Modrall) expert in Indian law to provide legal advice regarding mining lease issues." Defs.' Opp'n 19. And while this has been their narrative all along, EGPNA's Board of Directors approved and funded a transaction that explicitly excluded obtaining a permit from the OMC from the list of permits that the Osage Wind Farm Project would obtain *two full months before* their attorneys gave them their first draft of the legal analysis. OMC SUF ¶¶ 31-36. Making your mind up before receiving your attorney's advice does not constitute reliance. Defendants *do* assert that Bill Price relied on their attorneys' advice in October 2014, when Defendants "made the decision to resume rock crushing" following the United States' clear instruction to stop. Defs.' Opp'n 20. The problem with this assertion, however, is that Modrall Sperling's initial analysis in October of 2013 makes *no* mention of rock crushing or dynamite. *See* Dkt. 294-5. When Defendants decided to send their attorneys' memo to the United States, they *added* language about rock crushing. *See* Dkt. 17-4, 5. But *no other version* of Modrall Sperling's legal analysis mentions, or even considers, the fact that Defendants will be engaged in rock crushing and/or dynamite.[11] OMC SUF ¶ 40. Ultimately, in order to rely on legal advice, the advice must have been given prior to the defendant's action. *See, e.g.*, *United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *United States v. Polytarides*, 584 F.2d 1350, 1352-53 (4th Cir. 1978). Because Defendants commenced dynamiting and rock crushing *before* they obtained "advice" from their attorneys that doing so

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or the Osage Nation has been alleged, and none was ever conferred. Defendants are, therefore, not entitled to a reduction of any damages awarded regardless of whether they acted in good faith.

[11] Defendants claim that they "received legal advice from Modrall in formal memoranda and also by email and phone." Defs.' Opp'n 23 (citing RSUF ¶ 9). However, *none* of the evidence cited in support of RSUF ¶ 9 discusses updating the initial legal analysis Modrall Sperling undertook to consider whether it would be permissible to crush Osage minerals without a permit; instead, the memo was never updated and Defendants simply claim to have been advised that dynamiting and rock crushing were permissible without a lease. *See also* RSUF ¶¶ 38, 42 (same).

without a lease would be permissible, they cannot, as a matter of law, claim to have legally relied on it. *See id.*[12] The OMC is entitled to judgment on Defendants' good faith defense.

H. The OMC is Entitled to Judgment on its Claim for Joint and Several Liability

Defendants offer no argument—or even a statement—in response to the OMC's Motion for Summary Judgment on the OMC's claims that all three Defendants are jointly and severally liable. OMC Mot. 19 In its Motion, the OMC argued that all three Defendants "have engaged in 'joint enterprise and a mutual agency' such that divisibility of causation is not possible." *Id.* at 21 (quoting *Cayuga Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 66, 73 (N.D.N.Y. 1999)). Having failed to even offer a one sentence response, it is clear that the OMC is entitled to judgment on this issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 332 n.3 (1986) ("Summary judgment should be granted if the nonmoving party fails to respond").[13]

[12] Defendants' arguments that the OMC is not entitled to attorneys' fees are unavailing. The Supreme Court has ruled that even considering the traditional American rule which disfavors an award of attorneys' fees absent statutory authorization, "in the exercise of their equitable powers, [a court] may award attorneys' fees *when the interest of justice so require*." *Hall v.* Cole, 412 U.S. 1, 5 (1973) (emphasis added). Further, the Tenth Circuit has ruled that a court has inherent authority to sanction "bad-faith" litigation conduct as an "exception to the traditional American Rule of disallowing attorneys' fee awards." *Kornfeld v. Kornfeld*, 393 F. App'x 575, 577 (10th Cir. 2010). Here, in addition to their pre-litigation bad faith conduct, Defendants have litigated this case in open defiance of the Tenth Circuit's conclusion that Defendants' use of Osage "minerals for the purpose of backfilling and stabilization" requires them to obtain a lease approved by the OMC.

[13] Defendants fail to demonstrate there are any factual disputes regarding Enel KS's actual involvement in Defendants' unlawful use of Osage minerals. For instance, Defendants offer no material evidence to dispute the fact that, under the parties' governing contracts, Osage Wind was prohibited from applying for a mining lease from the OMC without Enel KS's consent, and Enel KS never gave that consent. *See* Dkt. 294-1, OMC SUF ¶¶ 23-24; RSUF ¶¶ 23-24. Defendants admit that Enel KS had "certain approval rights regarding construction-related matters" for the Osage Wind Farm. ¶ RSUF 27. Further, under Osage Wind's LLC Agreement, Enel KS was responsible for "enforcing, and supervising the performance . . . of [EGPNA] under the Construction Management Agreement," among other things. Ex. 11 (Fourth Amended and Restated Osage Wind LLC Agreement), § 8.2(a) at OSAGE WIND-41339.

V. CONCLUSION

For the reasons stated above, the OMC respectfully requests that the Court grant the OMC's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2021, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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