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**

The United States' Reply in Support of its Motion for Summary Judgment (Dkt. 300)

In support of its Motion for Summary Judgment (Dkt. 300), the United States objects to Defendants' Response (Dkt. 321) as follows:

Defendants' continued distortion of the Tenth Circuit's controlling opinion, *U.S. v. Osage Wind, LLC,* 871 F.3d 1078 (10th Cir. 2017) (Appellate Decision), exposes their resolve to frame that decision as if it is "settled that the presence of the Project requires no 'mining' lease and is not a trespass of any kind." Dkt. 321 at 6; *Contra Osage Wind, LLC*, 871 F.3d at 1093 ("Osage Wind was required to procure a lease under 25 C.F.R. § 214.7[.]"); *Id.* at 1081-82 ("On the merits, we hold that Osage Wind's extraction, sorting, crushing, and use of minerals as part of its excavation work constituted 'mineral development,' thereby requiring a federally approved lease which Osage Wind failed to obtain.").[1] Defendants baselessly claim the United States has no answer for the self-serving, recently revised $260 million dollars in potential "harm" Defendants claim. However, they avoid addressing the various put options designed to shift liability from the lowest level affiliate, Osage Wind, LLC, up the corporate food chain to the ultimate guarantor with the deepest pockets: their multinational parent corporation and the *largest energy utility in the world*, Enel S.p.A.[2]

Defendants do agree to a convenient subset of realities: "Insofar as the Tenth Circuit held crushing rock for backfill required a mining lease, Osage Wind and EGPNA do not oppose summary judgment as to liability (only) on Plaintiff's trespass and conversion claims." Dkt. 321 at 6. Still, Defendants remain defiant that Enel Kansas has no liability.

[1] Bent on chipping away at the Appellate Decision's clear holding, Defendants have persisted with this argument loop for years. As with their Partial Motion for Summary Judgment, their Response again asks for reconsideration of that Decision.

[2] *Enel – The World's Largest Energy Utility*, < https://www.yahoo.com/now/enel-world-largest-energy-utility-131227477.html> (Jul. 4, 2021) (revenues of 63 million Euro in 2020).

I. Defendants' Response to Plaintiff's Statement of Undisputed Material Facts.

At the outset of this section (Dkt. 321 at 7 n.2), Defendants request the Court strike Exhibits 7-26 from the Motion, as they are not "set forth in concise, numbered paragraphs" as required by LCvR56(b), citing *Goodly v. Check-6 Inc.,* 2018 WL 4092015, at *1 (N.D. Okla. Aug. 1, 2018).[3] However, Fed. R. Civ. P. 56 requires the movant show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "In accordance with [Rule] 56," the United States sought "judgment as a matter of law on the issues of conversion, trespass, and continuing trespass" as well as an award of damages and the legal remedy of ejectment. Dkt. 300 at 31-32. With the law of the case settled, the few facts necessary to support the judgment sought were clearly set out in the United States' Statement of Undisputed Facts. *Id.* at 8-10.

The Court is not required to search the record for evidence to support the United States' Motion, but the United States has not asked this of the parties or the Court. The United States provided pinpoint citations to the record to more fully examine its arguments and to anticipate Defendants' counter-arguments, which often veer into irrelevant or unrelated evidence. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

Defendants also request the Court strike Exhibit 8 to the Motion, the Expert Report of Steven Hazel, as "[u]nsworn expert reports are not competent to be considered on a motion

[3] In *Goodly,* the Court confronted a situation where many facts discussed by the plaintiffs had not been set out in either a Statement (or Supplemental Statement) of Uncontested Facts. The Court noted the plaintiff's "failure to comply with LCvR 56.1(b) makes it difficult for a respondent to identify and dispute a movant's factual assertions." *Goodly* at *1. Here, Defendants do not even allege any difficulty in identifying and disputing Plaintiff's relevant, factual assertions.

for summary judgment." Dkt. 321 at 7 n.2 (citing *Lawrence v. City of Owasso*, 2014 WL 693443, at *5 (N.D. Okla. Feb. 21, 2014)). In *Lawrence,* the Court cited *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1462-63 (D. Colo. 1997) in support of this ruling. Defendants fail to note that, **on this precise point**, *Sofford* was overruled by a subsequent case as "wrong as a matter of current federal law": the approach to unsworn expert reports espoused by Defendants "was abandoned some years ago in the federal system." *Pertile v. General Motors, LLC,* No. 15-CV-518, 2017 WL 4237870, at *2 (D. Colo. Sept. 22, 2017); *see* Fed. R. Civ. P. 56, Advisory Committee Notes to 2010 Amendment, Subdivision (c) ("The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to [it] is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record."). According to current federal law, the Court may consider Mr. Hazel's expert report. As the only expert who read the whole Tenth Circuit opinion and intends to faithfully apply its finding that a lease was required, the Court *should* consider Mr. Hazel's report.

- 1-3. Defendants do not dispute the first two facts, and the objection to No. 3 is addressed above.

- 4. Defendants dispute this fact alleging "25% of the material excavated for each foundation was not used as backfill, and was instead left on the surface." Dkt. 321 at 7. Defendants rely on Mr. Moskaluk's Declaration, given on their behalf. This Declaration states, "The contractor records the volume of rock crushed and the rock is then stored at the site. After foundations are built and cured, the crushed rock and soil is returned to the hole from which it came." Dkt. 17-1 at 15(a)(ii). Despite Defendants' recent characterization of Mr. Moskaluk's statement as simply a misunderstanding or error, their legal counsel drafted this Declaration and have filed pleadings relying on it. *See* Dkt. 341 at 1-3. Defendants now also argue excavated OME was not used other than for backfill or foundational support. Dkt. 321 at 8. However, the OME was used for erosion control (Dkt. 300-12 at 103:22-104:9) and insulation connector lines (Dkt. 300-3 at 145:23-146:8; 146:20-147:21).

- 4-6. Defendants incorrectly read the Appellate Decision as ruling that excavation without crushing is not mining. The Decision listed multiple activities that, coupled with excavation, constitute mining:

> Osage Wind sorted and then crushed the minerals and **used** them as backfill to support its wind turbine structures. . . There is simply no sense in which [] "mineral development" means only the removal of dirt without **some further manipulation**, commercialization, **or** offsite relocation of it . . . Osage Wind did not merely dig holes in the ground - it went further. It *sorted* [and] *crushed* the rocks into smaller pieces, and then ***exploited*** the crushed rocks as structural support for each wind turbine.

Osage Wind, LLC, 871 F.3d at 1090-91 (bolded emphases added). Thus, "some further manipulation" includes sorting, crushing, or using/exploiting.

- 6. Defendants insist "no crushing occurred [for the collector system] and Plaintiff cites no evidence showing otherwise." *Contra* n.6 below.

- 7. Defendants dispute they believed they had an obligation to obtain a mining lease under Part 214.7. However, three months before this suit was filed, lead counsel (Mr. Slade), noted how his firm's current and prior memos warn that "the surface owner may be obligated to reimburse the mineral estate owner for the value of minerals rendered inaccessible[.]" Dkt. 300-10. Defendants try to minimize their admission that "the disposal of excavated rocks and import of back filling material from outside the County was a more expensive solution." Dkt. 300-4 at 4. This reasoning underlies Defendants' bad faith: importing backfill from outside was more expensive and would bolster the Osage Mineral's Council's (OMC) position on mining, so Defendants made the business (and economical) decision to use onsite OME backfill rather than risk supporting the OMC's position - putting financial interests over regulatory compliance). Cost, not legality seems decisive. Dkt. 300-8 at 176:5-18; Dkt. 321-12 ("[B]ased on the conclusion that no lease or permit is required and the extreme cost of deferring operations, Osage Wind is continuing [construction].").

II. Plaintiff's responses to Defendants' Statement of Additional Material Facts (SAMF).

1. *Undisputed and immaterial.* Dkt. 319 at 7 (¶ 9).

2. *Disputed*. *Id.* at 7 (¶ 6).

3. *Undisputed and immaterial*. *Id.* at 7 (¶ 11).

4. *Undisputed and immaterial*. *Id.*

5. *Disputed*. Dkt. 319 at 8 (¶ 14).

6. *Disputed*. *Id.* at 8 (¶ 15).

7. *Disputed.* Mr. Pfahl's speculation is belied by Defense counsel, Mr. Slade, who, pre-suit, noted multiple legal memos warned "the surface owner may be obligated to reimburse the mineral estate owner for the value of minerals rendered inaccessible[.]" Dkt. 300-10.

8. *Disputed*. Defendants' purported expert witnesses confirmed there was a 500-foot setback. Wind flow is irrelevant, as this case concerns mining. Oddly, Defendants' own internal memo contradicts their experts and asserts a 90-foot mining setback. Dkt. 300, Exh. 7 (filed under seal at Dkt. 299); Dkt. 321, Exh. 29 at ¶¶ 4, 6-7 (filed under seal at Dkt. 322).

9. *Disputed*. The claimed $259 million harm is unvetted, self-serving, and unreliable. Defendants' referenced "tax equity agreement" shows they, as affiliates of Enel S.p.A., are subject to various put options and other liability shifting mechanisms. *See* Dkt. 333. This figure also only addresses an alleged worst-case scenario, ignoring other forms of relief.[4]

10. *Undisputed and immaterial.* Defendants want credit for paying their local, ad valorem taxes for their Project that remains an illegal, continuing trespass. Defendants' tax equity model estimates $15.5M in federal and $2.5M in state production tax credits that will be credited in 2021. Dkt. 324, Exh. 26 (Attach. C to Pike Decl. at 190; filed under seal at Dkt. 325). In that context, the $2.1M in local taxes paid is less than 12% of the tax credits earned in 2021, resulting in an estimated $15.9M net tax gain for the Project after local taxes in 2021. Defendants further usurp Osage Nation headright holders' ability to support their own communities in the amount of the lost rental revenue income they are not receiving from the mining lease Defendants failed to secure for their past and ongoing regulated activities.

[4] E.g., awarding the OMC lost rental revenue for prior and some future years, then ordering decommissioning and removal short of the full 45-year period.

11. *Disputed in part*. Complete and instant removal of the entire Project is not the only form of injunctive relief available to the Court. *See* n.4 below. Based on the lost rental revenue figure of up to $26 million dollars outlined by Mr. Hazel, the Osage Nation could create multiple jobs, or otherwise surpass the Project's economic benefit. Dkt. 300 at 17-18.

12. *Disputed in part*. Again, other forms of injunctive relief are available to the Court, short of a complete and instant removal of the entire Project. *See* n.4 below.

III. The United States is entitled to summary judgment on its continuing trespass claim.

A. Defendants' tunnel vision on *crushing* ignores the 10th Circuit's mining definition: further mineral manipulation by sorting, crushing, or use/exploitation.[5]

To be clear, the excavated OME Defendants converted remains in *use* to this day, as Defendants continue to *exploit* it in a number of ways throughout the Project (backfill, structural support, insulation, and erosion control). Thus, Defendants' trespass continues.

B. Defendants cannot restrict Plaintiff's continuing trespass claim by equating it to the mere presence (existence) of the Project or its ancillary structures.

Trying to support their flawed argument, Defendants seize on the words used in the Motion. Dkt. 321 at 12. However, putting Defendants' illegal mining actions beyond excavation back into context, the sorting, crushing, and use/exploitation of OME as backfill, structural support, insultation, and erosion control constitute a continuing trespass of the OME to this day. The sorting, crushing, and ongoing OME exploitation allow the Project to continue its operations and will simply never be the mere encountering, displacing, or disrupting of the OME (i.e. excavation) Defendants try to frame it as.

C. Defendants again raise their inapplicable argument that they have "the right to use empty holes and surfaces exposed by excavation." Dkt. 321 at 13.

[5] *Osage Wind, LLC*, 871 F.3d at 1090-91.

Plaintiff previously discredited the line of cited cases (*Ellis, Sunray Oil* and *O'Brien*):

> The case at hand does not involve the construction of turbine foundations and ancillary structures **within existing earthen pits or depleted natural gas reservoirs**[, but instead] Defendants' unauthorized creation of earthen pits within the OME and the subsequent unsanctioned development and exploitation of the excavated minerals to support installation of the turbine foundations and ancillary structures. . . Defendants fail to acknowledge later caselaw, expressly addressing the *Ellis* holding, calling into question the applicability of the general rule in certain circumstances that exist in this case . . . Defendants' arguments concerning natural caverns and the American Rule does not apply, where Congress has statutorily reserved a mineral estate.

Dkt. 319 at 23-24 (bolded emphasis added). For the same reasons, this argument fails.

D. Much to Defendants' chagrin, the First Amended Complaint (FAC), as pled, covers the continuing trespass of Defendants' turbines and ancillary structures.

The excavation and "mak[ing] use of minerals" and "insertion and placement of materials or structures" in the OME establishes a continuing trespass, encompassing Defendants' turbines, transmission lines, collector systems, and buildings. Dkt. 20 at ¶¶ 53, 57. Defendants boldly (and falsely) claim "Plaintiff presents no evidence that excavated rock was crushed for backfill in connection with any such 'ancillary infrastructure.'" Dkt. 321 at 14. The evidence directly controverts this misrepresentation.[6]

E. Defendants' "passive" support description also fails to negate the ongoing tort.

Defendants relabel their continuing trespass as *passive support* by likening it to cherry-picked terms from the Appellate Decision, including "encounter," implicate," "disrupt," and "displace." Dkt. 321 at 15. These terms wholly miss the mark. As explained above,

[6] Osage Wind engaged in the excavation and construction of "foundations for the wind turbines **and associated buildings and structures and trenching for cables**. . . Rock from the excavations and trenching comes out in pieces of varying size and shapes. To return the rock to the excavation as backfill . . . [t]he rock is crushed and placed immediately next to the site from which it was excavated. . . No rock, sand or soil from any excavation is used for any purpose other than to backfill the excavation from which it came." Dkt. 28-1 at 9 (Modrall Memo; emphasis added); Dkt. 4-1 at 4 (EGPNA Responsive Comments to OCC).

beyond excavation, Defendants active mining occurred through their sorting, crushing and ongoing use/exploitation. The fact that Defendants opted to excavate by blasting 82 out of the 84 turbine locations is telling and definitely *not* passive. Dkt. 293-2 at 2. Defendants' public policy parade of horribles[7] has been addressed and overruled (i.e. the initial District Court decision discussing "basements, house foundations, septic tanks, and football fields." Dkt. 44 at 17). Each hypothetical structure Defendants offer would have to be *individually analyzed* to determine if excavation surpassed the 5,000 cubic yard de minimis exception, coupled with further manipulation (e.g. sorting, crushing, or ongoing use/exploitation).

F. Defendants designate the "buffer zone" around the turbines as "alleged," concluding it is not a trespass, despite statements of their experts and engineers.

Despite Defendants' contention to the contrary, the United States preserved this continuing trespass claim in its FAC. Dkt. 20 at ¶¶ 53, 57. Both Defendants' purported experts endorsed a 500-foot mining setback and Defendants' in-house engineers acknowledged it (and then revised it to 90-feet). *Supra*, Responses to Defendants' SAMF at 8. Defendants point to the dismissal of an "almost identical trespass claim 'premised on a *de facto* no build zone.'" Dkt. 321 at 17 (citing *Walker v. Apex Wind Constr., LLC,* 2015 WL 3686729, at *2 n.3 (W.D. Okla. June 12, 2015). *Walker* is patently distinguishable as it addressed an anticipatory trespass claim premised on expected ice throw and mechanical failures, based only on speculation and conjecture. *Id.* at *2-3. Compare to the instant case, where the Tenth Circuit ruled a lease was required and Defendants now concede trespass and conversion. *Supra;* Dkt. 321 at 6.

[7] "[E]very home, [] pool, [] subdivision, apartment building, ranch, office building, shopping center, and courthouse" in Osage County would be a continuing trespass. Dkt. 321 at 15.

IV. Plaintiff is entitled to summary judgment on equitable and legal ejectment.

A. Plaintiff has satisfied the requirements for a permanent injunction.

Unlike *Davilla*, the instant case concerns Defendants' bad faith avoidance of federal mining regulations only applicable in Osage County, Oklahoma, within the Osage Reservation and its OME. First, irreparable harm will be suffered absent an injunction.[8] The only method of legally severing minerals from the OME is by the Osage Nation (through the OMC) exercising its exclusive right to self-govern in the form of negotiating a mining lease. By circumventing the lease requirements of 25 C.F.R. § 214.7, Defendants robbed the OMC its ability to self-govern, nullifying its sovereignty. Second, Defendants cannot identify evidence that tips the scales of harm in their favor. *Supra*, Responses to Defendants' SAMF at 9. Defendants made a bad business decision – knowingly proceeding without a mining lease – that will result in negative consequences, which are not the courts' duty to deflect from them. *Central Valley Chrysler-Jeep, Inc. v. Golstene*, 563 F.Supp.2d 1158, 1169 (E.D. Cal. 2008). Third, Defendants lack a compelling public interest to preclude injunction. *Supra,* Responses to Defendants' SAMF at 9-12. Further, Defendants' self-serving description of their illegal actions as an "ordinary private trespass" is glib, ignoring taxpayer and OMC's resources consumed by years of litigation. Dkt. 321 at 20.

B. Defendants' collective alarm aside, the legal remedy of ejectment exists.

First, legal ejectment (p. 12, ¶ 5) and equitable ejectment (p. 13, ¶ 8) were separately preserved in the FAC. Dkt. 20. Defendants' ignorance of legal ejectment is not a defense.

[8] The harm caused by Defendants' continuing trespass against the *in situ* minerals is irreparable absent removal of the turbines and ancillary structures, unless a Part 214.7 lease is executed by the parties (satisfying Congressional intent and tribal sovereignty) and subsequently entered by the Court, resolving the claims at issue. *See* Dkt. 319 at 25-27.

Second, *Davilla* addressed equitable ejectment via a permanent injunction and did not overrule prior Supreme Court, Tenth Circuit, or Oklahoma cases ordering legal ejectment as a remedy. Third, Defendants are currently occupying and using the OME they illegally (i) severed (and are using as backfill) and (ii) made inaccessible adjacent to the backfill, as admitted by Defendants' purported experts and engineers. Dkt. 319 at 20-23; S*upra,* discussion of Defendants' "alleged" buffer zone. Here, Defendants literally buried the OME evidence, rendering it inaccessible to the OMC and leaving Defendants in sole occupancy.

V. Damages for Defendants' trespass can be awarded now without trial.

First, Defendants fail to refute Plaintiffs' lost rental value. Mr. Pfahl performed a minerals valuation, compared with that of Mr. Freas, and may address the claim for conversion. Ms. Centera is not qualified to dispute Mr. Hazel's damages valuation for trespass, the methodology of which she actually endorsed. Dkt. 336 at 2-5, 10. Second, royalty value to the OMC is how Plaintiff's conversion claim may be calculated at trial, as damages for conversion are not at issue in the Motion at bar and Defendants have admitted liability for that claim. Third, Plaintiff met its burden of establishing Defendants' bad faith: Defendants did not "extensively consult[]" with the BIA, but desperately scrambled at the last minute to salvage bad business decisions citing three calls and two emails over a few weeks. Dkt. 321 at 30. The "consult[ation]" consisted of Defendants repeatedly disagreeing with the Plaintiffs' analysis and refusing to stop excavating activities. Defendants would charge the OME owner with a duty to successfully convince an invader a proposed or ongoing trespass was illegal – effectively turning the tort of trespass on its head.

The United States respectfully requests the Court grant the relief requested in its pending Motion (Dkt. 300 at 31-32) and for any other relief germane to its pending claims.

Respectfully submitted,

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