

U.S. v. Osage Wind, LLC: Mining Does Not Mean What You Think It Means

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"Inconceivable!" That, of course, is Vizzini's repeated exclamation of Princess Bride fame. But perhaps just as memorable is Inigo Montoya's quizical response: "You keep using that word. I do not think it means what you think it means."

A renewable-energy company doubtless had the same thought when the federal government sued it on the theory that by digging holes on Indian land in which to plant its wind turbines, the company had engaged in "mining," thus necessitating that the company obtain a federally approved mineral lease with the Indian tribe. Intuitively, that seems wrong. Yet the U.S. Court of Appeals for the 10th Circuit recently agreed with the government in the case *U.S. v. Osage Wind* and held that the word mining in federal regulations governing mineral de-

velopment on tribal lands includes not only extracting minerals for sale but also acting upon extracted minerals to exploit the minerals themselves. That holding has broad implications for companies in the extractive industry.

BACKGROUND

A federal regulation, 25 C.F.R. section 214.7, says that before an entity can conduct mining activities within the mineral estate of the Osage Nation Indian tribe, the entity must first enter into a mineral lease with the tribe that has been approved by the federal government. Another regulation, 25 C.F.R. section 211.3, defines mining to mean the "science, technique, and business of mineral development."

In September 2014, Osage Wind began excavation work to install 84 wind turbines on a wind farm sitting atop the tribe's mineral estate. To create the turbines' foundations, Osage Wind dug large holes, which involved extracting soil, sand and rock. Osage Wind sorted the extracted rocks into large



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and small rocks and crushed the small rocks so they would be small enough to use for backfilling the holes. Osage Wind compacted the crushed rocks into the excavated site after pouring the foundation, and it placed the larger rocks next to the holes from which they came. All of this added structural support to the wind turbines.

Three months after these excavations began, the U.S. government sued Osage Wind in the Northern District

of Oklahoma, seeking an injunction to halt the excavation work, and damages. The government argued that the excavation work constituted mining that required a federally approved mineral lease with the tribe. The trial court disagreed, concluding that the excavation work did not count as mining and thus no lease was required. The tribe then appealed to the 10th Circuit.

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The court concluded that Osage Wind's excavation work constituted mining within the meaning of section 211.3. Specifically, the court held that an entity engages in mining under section 211.3 whenever the entity removes minerals to sell them or to relocate them offsite. As relevant here, the court also held that an entity engages in mining under section 211.3 whenever the entity acts upon the minerals "to exploit the minerals themselves." And under this definition, Osage Wind's excavation work counted as mining because Osage Wind had sorted and crushed the excavated rocks to use them as structural support for the wind turbines.

Although its definition of mining is quite expansive, the court recognized two limits that will give companies in the extractive industry some relief. First, mining does not include "merely encountering or incidentally disrupting mineral materials." For example, one does not engage in mining simply by removing dirt. You are safe to dig a hole for a basement or swimming pool because those activities would create only an incidental disruption to the mineral estate. Second, the regulation at issue, section 211.3, contains a de minimis exception for common-variety minerals: "Provided, when com-

mon minerals are 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." Those common minerals are sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt. This exception did not apply to Osage Wind, however, because the court considered the wind-turbine development to be a single integrated project, and the aggregate amount of rock removed during the project from all 84 holes exceeded 5,000 cubic yards.

The 10th Circuit's ruling may not be the last word on this issue. Osage Wind has filed a petition for a writ of certiorari with the U.S. Supreme Court, asking the court to review the 10th Circuit's decision. The Osage Minerals Council opposed the petition, and the court invited the Office of the Solicitor General to weigh in. The Office of the Solicitor General likely will submit its views this fall after the new Supreme Court term begins, and we anticipate that the court will rule on the petition by the end of this year.

IMPLICATIONS

Osage Wind has implications stretching beyond its particular facts; it has consequences for mineral development on Indian land and for the larger mining industry in general, and it creates new challenges and potential liabilities for both existing and future

projects on tribal lands. Here are four key takeaways:

First, developers should approach new projects on Indian land with particular diligence. The case suggests that both the federal government and the courts will carefully scrutinize developers' activities on tribal lands. The critical facts in Osage Wind involved the nitty-gritty details of Osage Wind's operations — i.e., sorting large and small rocks, crushing the small ones so they could be used for backfilling the holes, and using the larger rocks for additional structural support for the turbines.

Second, developers need to be particularly sensitive to activities that may affect the tribe's underlying mineral estate. For example, developers should look carefully at earth-moving activities within their rights-of-way and easements, particularly because Osage Wind's holding extends beyond the exploitation of traditional energy-producing minerals such as oil, gas and coal; the holding applies broadly to the exploitation of any minerals, including common minerals such as sand and gravel. If a developer thinks its activities might fall within Osage Wind's definition of mining, it should either ensure that it has all required regulatory approvals or consider an alternative that doesn't implicate the tribe's mineral estate — e.g., using off-site materials for structural support.

Third, the case serves as a reminder that courts interpret ambiguous regulations in favor of the tribes. The court rested its holding, in part, on the Indian canon of interpretation, which provides that "ambiguity in laws designed to favor the Indians ought to be liberally construed in the Indians' favor." The court stated that "the regulations at issue here are designed to protect Indian mineral resources and 'maximize [Indians]' best economic interests," and that what counts as mining under section 211.3 is ambiguous. The court thus concluded that the Indian canon of interpretation counseled in favor of an interpretation of the regulations in a light more favorable to Osage Nation. That logic will apply equally to any ambiguous regulation governing mineral development on tribal lands.

Fourth, as global policy shifts toward renewable energy, the role of Indian tribes as landowners will continue to increase. Developers should accordingly take heed of the Osage Wind decision and reach out to Indian tribes before, during and after potential development projects. Better communication and coordination between developers and tribes may help avoid regulatory surprises like Osage Wind down the road. •

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