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Loyalties and Royalties: The Osage Nation's Energy Sovereignty Plan and Wind Farm Opposition

Summer L. Carmack

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**Loyalties and Royalties: The Osage Nation’s Energy Sovereignty
Plan and Wind Farm Opposition**

Summer L. Carmack*

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* Candidate for J.D. 2019, Alexander Blewett III School of Law at the University of Montana. The author extends thanks to Professors Monte Mills and Samuel Panarella for their advice and critique on this article.

I. INTRODUCTION

In 2017, after years of opposition to a wind farm development on lands within the Osage Nation's reservation in present-day northeastern Oklahoma, the Osage Minerals Council ("OMC" or "Council") prevailed over its opponent in a decision issued by the United States Court of Appeals for the Tenth Circuit in *United States v. Osage Wind, LLC*.¹ The respondents in that case, the single-purpose limited liability company, Osage Wind, LLC ("Osage Wind"), subsequently filed a petition for certiorari to the United States Supreme Court, asking the Court to review certain jurisdictional and canonical questions raised by the Tenth Circuit's decision. An amicus brief was later filed in the petition's docket by the Solicitor General,² who is often called upon in questions of Indian law to provide the federal government's expertise and opinion on the matter at hand.³ The Supreme Court denied Osage Wind's petition on January 7, 2019.

Although the Court ultimately chose to deny Osage Wind's petition, it nevertheless seems prudent to conduct an analysis of the Osage Nation's history of oil and gas development, and OMC's resistance to any alternative energy development that could threaten its oil and gas assets. Ultimately, this paper seeks to inform renewable energy companies about the importance of understanding the trust relationship between the federal government and Indian nations, to address Indian nations' concerns over renewable energy development projects through consultation, and to help provide an understanding of what energy sovereignty can mean for Indian nations and their economies. Often, energy sovereignty involves Indian nations making their own decisions about which resources they use to promote economic development.

1. 871 F.3d 1078 (10th Cir. 2017), *petition for cert. filed* (March 7, 2018).

2. Brief for the United States as Amicus Curiae, Osage Wind, LLC v. Osage Minerals Council, [https://www.supremecourt.gov/DocketPDF/17/17-1237/74102/20181204150140415_17-1237 Osage Wind AC Pet.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1237/74102/20181204150140415_17-1237%20Osage%20Wind%20AC%20Pet.pdf) (U.S. Dec. 4, 2018) (No. 17-1237).

3. *Calls for the Views of the Solicitor General: An Obscure but Important Part of Supreme Court Practice*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2016-2017/july-august-2017/calls-for-the-views-of-the-solicitor-general/ (Aug. 25, 2017).

Part II provides necessary background information about the history of the Osage Nation after contact and briefly chronicles events leading up to and following the discovery of oil under its reservation lands. This historical context, including a brief examination of mismanagement and poor accounting practices on the part of the Bureau of Indian Affairs (“BIA”), gives insight into OMC’s opposition to recent renewable energy development within its reservation boundaries. The Osage Nation’s vast mineral estate, the funds it generates for individuals with oil and gas interests, and the United States’ trust responsibility to protect those assets all contribute to the historical context needed to understand OMC’s clashes with renewable energy development companies.

Part III examines the Osage Nation and OMC’s opposition to renewable energy development, including efforts to guard religious and spiritual interests, economic interests, and cultural interests, as well as the litigious history between Osage Wind, the United States as trustee of the Osage Nation’s mineral estate, and the Council. The most recent decision in the dispute, *United States v. Osage Wind, LLC*, is a direct example of the Osage Nation’s attempt to protect its interests. This case resulted in a broader meaning of the term “mineral development” as applicable when deciding whether an entity or individual is required to obtain a federally-approved mining lease from the OMC prior to constructing turbines within reservation boundaries. The parties’ briefs in the subsequent certiorari petition are also examined in Part III.

The information in Parts II and III provides background to the discussion in Part IV, which briefly highlights the importance of meaningful dialogue with Indian nations when developing a renewable energy project within tribal reservation boundaries— taking into account individual tribal cultures and values— and how the Tenth Circuit’s decision in *Osage Wind* could affect renewable energy developers seeking to generate energy on tribal lands.

II. THE RICHEST PEOPLE IN THE WORLD: THE HISTORY OF THE OSAGE NATION AFTER CONTACT

Before discussing the Osage Nation’s renewable energy opposition, it is important to provide the necessary historical background surrounding the Osage Nation’s mineral estate. This historical context adds perspective to the Osage Nation’s protection of its assets and other justifications for OMC’s opposition to wind farm development.

A. *Discovery of Oil and Severance of the Estate: Osage Allotment Act*

Many factors contribute to the Osage Nation's opposition to renewable energy development on its lands and tracing the Nation's history from contact to present day provides insight into those extenuating circumstances. The Osage Nation's ancestral lands were primarily located throughout present-day Oklahoma, Kansas, Arkansas, Missouri, and Illinois.⁴ In 1872, Congress, on behalf of the Osage, purchased land in Oklahoma with "so much of the proceeds . . . as were necessary" from the sale of lands in present-day Kansas ceded by the Osage in 1870.⁵ As such, the Osage Nation bought its own reservation, and was the only tribe to do so.⁶ After large oil deposits were discovered on these acquired lands decades later,⁷ the United States issued the first oil lease on the Osage reservation to Henry Foster on March 16, 1896 for a period of ten years.⁸

When the Osage Allotment Act (the "Osage Act") was passed in 1906, the surface estate of the reservation land was severed from the mineral estate and divided into allotments.⁹ No single Osage member was given ownership over a portion of the mineral estate in the Osage Act; rather, the United States holds the entire mineral estate in trust for the

4. See *Ancestral Map*, THE OSAGE NATION, <https://www.osagenation-nsn.gov/who-we-are/historic-preservation/ancestral-map> (last visited March 24, 2018).

5. Act of June 5, 1872, Ch. 310, 17 Stat. 228.

6. Final Evaluation Report: BIA Needs Sweeping Changes to Manage the Osage Nation's Energy Resources, Office of the Inspector General, Report No. CR-EV-BIA-0002-2013, at 45 (Dep't of Interior Oct. 20, 2014), <https://www.doi.gov/sites/doiioig.gov/files/CR-EV-BIA-0002-2013Public1.pdf> [hereinafter Inspector General Final Report, *Sweeping Changes*].

7. DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* 6 (2017).

8. Inspector General Final Report, *Sweeping Changes*, *supra* note 6, at 45; *News: Did You Know?* THE OSAGE NATION, <https://www.osagenation-nsn.gov/news-events/news/did-you-know> (last visited March 24, 2018).

9. Act of June 28, 1906, Ch. 3572, 34 Stat. 539, 539–45 [hereinafter, Osage Act]. Because the Osage land in Oklahoma was purchased in accordance with the 1870 treaty, the Osage Nation's lands were excluded from the General Allotment Act of 1887 and were only allotted after agreement by the Osage Nation in 1906. *Oklahoma Indian Tribe Education Guide*, OKLAHOMA STATE DEP'T OF EDUCATION, at 3, http://sde.ok.gov/sde/sites/ok.gov.sde/files/documents/files/Tribesof_OK_Education%20Guide_Osage_Nation.pdf (last visited March 24, 2018).

Osage Nation.¹⁰ Those Osage members whose names were listed on the tribal roll as recorded with the Osage Agency¹¹ at the time of the Osage Act were each given a “headright” share of the royalty revenues from the mineral estate.¹² A single headright was given to each of the 2,229 Osage members listed on the roll,¹³ and those headright shares “can only be inherited.”¹⁴ Presently, of the original 2,229 headrights owned by Osage members under the Osage Act, most Osage descendants do not own headrights, and receive no portion of the royalties payments, while others have multiple headrights or fractionalized interests in many different headrights; some headrights are owned by non-Osage peoples.¹⁵ The Osage Act, in § 4, set up a trust account for the Osage Nation, which holds all the trust funds of the tribe, including royalties paid on its oil and gas leases.¹⁶ The Osage trust account also includes those funds leftover from

10. Osage Act, *supra* note 9, at § 4, 34 Stat. at 544. The Osage Act originally contained a twenty-five-year expiration date on the United States’ trustee status over the Osage mineral estate. However, that expiration date was ultimately eliminated in 1978, and the United States’ trusteeship continues “in perpetuity.” *Fletcher v. United States*, 153 F. Supp. 3d 1352, 1357 (N.D. Okla. 2015) (quoting Act of Oct. 21, 1978, Pub. L. No. 95-496, § 2(a), 92 Stat. 1660).

11. The Osage Agency is headed by a Superintendent and operates within the Eastern Oklahoma Regional Office of the Bureau of Indian Affairs. Regional Offices are responsible for administering program services to agencies located within their region. *See* Indian Affairs, *Regional Offices*, BIA U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/regional-offices> (last visited March 24, 2018).

12. Osage Act, *supra* note 9, § 3, 34 Stat. at 543–44; *see also* Inspector General Final Report, *Sweeping Changes*, *supra* note 6, at 3, 45.

13. Louise Red Corn, *\$380 Million Expected in Federal Osage Trust Case Settlement*, TULSA WORLD (Aug. 28, 2011), http://www.tulsaworld.com/archives/million-expected-in-federal-osage-trust-case-settlement/article_13da2ffb-e7b8-57b2-b0a5-5f56511c991f.html [hereinafter, Louise Red Corn, *\$380 Million*].

14. Alex Tallichief Skibine, *The Cautionary Tale of the Osage Indian Nation Attempt to Survive its Wealth*, 9 KAN. J.L. & PUB. POL’Y 815, 817 (1999); *see also* Louise Red Corn, *\$380 Million*, *supra* note 13 (“In 1978, the U.S. Congress made it illegal to permanently transfer headrights from an Osage to any non-Osage person or entity.”).

15. *Fletcher v. United States*, 153 F.Supp.3d 1354, 1357 (N.D. Okla. 2015) (quoting COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 311 (Nell Jessup Newton et al. eds. 2005)).

16. Osage Act, *supra* note 9, at § 4, 34 Stat. at 544; *see also* *Osage Nation v. United States*, 57 Fed. Cl. 392, 393 (2003).

the sale of present-day Kansas land and subsequent purchase of the Osage reservation.¹⁷ The mineral royalties in the Osage trust account, along with accrued interest and land payments, are distributed quarterly to those individuals with headright shares on a pro rata division basis.¹⁸ Individual Indian Money Accounts are trust accounts for Osage tribal members who have a headright interest or receive income from an individual trust or restricted asset.¹⁹

It was headrights and the abundance of oil underneath the Osage lands that led to the Osage being described “as the richest people in the world.”²⁰ In an 1899 letter to the Governor of Oklahoma, the United States Indian Agent assigned to the Osage Nation stated:

They not only own 1,400,000 acres of land but have to their credit in the United States Treasury nearly \$9,000,000. From the interest on this fund they are paid by the agent \$200 per capita, per annum, in quarterly installments. In fact, they receive so much money that they do but little work and employ white people to do their farming and other work for them.²¹

While many Osage members enjoyed the wealth that oil discovery afforded them, others, particularly non-Indians, expressed jealousy over the Osages’ new luxurious lifestyle. Newspaper articles written about the Osage provide evidence of this envy, stating, “We have set up an Indian nobility in the United States, with rare privileges . . . They scorn work, live

17. *Osage Nation*, 57 Fed. Cl. at 393 (citing Treaty with the Osage Indians, U.S.-Osage Tribe, art. 1, Sept. 29, 1865, 14 Stat. 687).

18. Osage Act, *supra* note 9, at § 4, 34 Stat. at 544.

19. 25 C.F.R. § 115.002 (2014) (“As used in this part: Account holder means a tribe or a person who owns the funds in a tribal or Individual Indian Money (IIM) account that is maintained by the Secretary. Account mean a record of trust funds that is maintained by the Secretary for the benefit of a tribe or a person.”).

20. Letter from William J. Pollock, U.S. Indian Agent, to C.M. Barnes, Governor of Okla., *Annual Reports of the Dep’t of the Interior for the Fiscal Year Ended June 30, 1899: Miscellaneous Reports, Part II* 739 (Oct. 1, 1899).

21. *Id.*

in villages, and enjoy all the frivolities and dissipations.”²² Acts of violence against those Osage members with interests in headright shares became commonplace.²³ Author David Grann quoted Osage historian Louis F. Burns as saying, “I don’t know of a single Osage family which didn’t lose at least one family member because of the headrights.”²⁴

The passage of the Osage Act in 1906 led to the promulgation of regulations applicable only to the Osage Nation.²⁵ As such, 25 C.F.R. part 214 is titled “Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas.” Another applicable regulation, 25 C.F.R. part 226, is titled “Leasing of Osage Reservation Lands for Oil and Gas Mining,” and allows OMC, on behalf of the Osage Nation, to enter into oil and gas mining leases with approval from the Secretary of the Interior.²⁶ OMC has its own colorful history in relation to the Osage Nation. In 2006, the Osage Nation reformed its government, and adopted a Constitution allowing membership and voting rights to all Osage, not just those with headright shares.²⁷ Since the Osage Constitution was passed, disagreement over whether the Osage Nation and all its members, or OMC and its headrights holders, own the Osage mineral estate.²⁸

B. *Mismanagement and Poor Accounting Practices of BIA*

To illustrate the importance the Osage Nation places on protecting its assets, a brief analysis of the Osage Nation’s, and other Indian nations’,

22. *An Indian Nobility*, THE MORNING PRESS (Santa Barbara, CA), Dec. 10, 1898, at 4, <https://cdnc.ucr.edu/?a=d&d=MP18981210.2.20&srpos=1&e=-----en--20--1--txt-txIN-an+indian+nobility-----1>.

23. *See generally* GRANN, *supra* note 7.

24. *Id.* at 283.

25. Inspector General Final Report, *Sweeping Changes*, *supra* note 6, at 45. *See also* Osage Act, *supra* note 9, at § 3, 34 Stat. at 544 (“ . . . and leases for all oil, gas, and other minerals . . . may be made by the Osage tribe . . . with the approval of the Secretary of the Interior, and under such rules and regulations as he [or she] may prescribe.”).

26. Osage Act, *supra* note 9, at § 3, 34 Stat. at 543.

27. Shannon Shaw Duty, *Osage Minerals Council Rescinds Resolution to Sue the Osage Nation*, OSAGE NEWS (Nov. 17, 2017), <http://osagenews.org/en/article/2017/11/17/osage-minerals-council-rescinds-resolution-sue-osage-nation/>.

28. *Id.*

attempts to hold the BIA accountable for its mismanagement of tribal trust assets is essential. Prior to and following the passage of the Osage Act in 1906, there have been accusations of mismanagement of trust accounts of various Indian nations on the part of the Department of the Interior (“DOI”),²⁹ its Secretaries,³⁰ the BIA,³¹ and the Commissioners of Indian Affairs.³² In a 1915 report to Congress, the Joint Commission to Investigate Indian Affairs provided:

29. *Oversight Hearing on Indian Trust Management Practices in the Department of the Interior, Joint Hearing Before the Comm. on Indian Affairs and the S. Comm. on Energy and Nat. Res.*, 106th Cong. 39–40 (1999) [hereinafter, *Oversight Hearing on Indian Trust Management Practices*] (statement of Paul Homan, Homan & Associates) (“When the Department of the Interior can no longer be trusted—and I share this view—to keep and produce trust records which are conditions precedent to the proper administration of its trust responsibilities to Indian beneficiaries, it is time to consider alternatives to the Department’s future management of these important trust activities.”).

30. John F. Fialka, *Babbitt, Rubin are Cited for Contempt by Judge in Indian Trust-Fund Case*, THE WALL STREET JOURNAL (Feb. 23, 1999, 12:01 AM ET), <https://www.wsj.com/articles/SB919706523326337500>. This article discusses U.S. District Judge Royce Lamberth’s decision to cite Secretary of Interior Bruce Babbitt and Secretary of Treasury Robert Rubin for contempt of court, “for repeatedly failing to produce records in a case involving American Indian trust funds.” *Id.* The article quotes Judge Lamberth’s “blistering” opinion: “Secretary Babbitt’s ‘inattention to detail and wholesale delegation of authority to individuals . . . may cause him future problems with this court if the government misconduct continues.’” *Id.* (internal citations omitted).

31. *See Oversight Hearing on Indian Trust Management Practices, supra* note 29, at 1–2 (statement of Sen. Ben Nighthorse Campbell) (“I would like to direct your attention to the photographs around the hearing room They came from a 1993 report on the Bureau of Indian Affairs’ recordkeeping procedures and were taken at a number of different BIA offices. These photographs show trust fund documents mixed with all kinds of other documents to be kept by the field offices They’re water damaged, kept in trash bags, disintegrating boxes, next to paint cans, mop buckets, street signs, mice droppings on them, and so on.”); Office of the Inspector General, *Audit Report: Accounting Controls Over Tribal Trust Funds, Bureau of Indian Affairs*, U.S. DEP’T OF THE INTERIOR, i (Sept. 29, 1983), <https://www.doi.gov/sites/doi.gov/files/T-0066.pdf> (“[T]he Bureau has five systems involved in trust fund accounting, which is four too many.”); Joint Comm’n to Investigate Indian Affairs, *Report of the Joint Commission to Investigate Indian Affairs*, H.R. Doc. 1669, at 4 (1915).

32. Comm. on Expenditures in the Interior Dep’t, *Report in the Matter of the Investigation of the Indian Bureau*, H.R. Rep. No. 1279, at 4 (1913) (discussing

It appears that Congress has heretofore enacted laws requiring the payment to the Osage Indians . . . enormous funds derived from royalties and otherwise. This has resulted in the grossest frauds and extortions. The evidence shows that it is the universal practice of white persons who loan money to the Osage Indians to charge usurious rates of interest, ranging from 40 per cent per annum to as high, in at least one instance, as 10,220 per cent.³³

In October 2011, the United States and the Osage Nation entered into a settlement agreement for \$380 million, ending more than a decade of litigation regarding mismanagement and poor accounting of the Osage trust accounts on the part of the United States.³⁴ The Osage Nation brought two suits in the U.S. Court of Federal Claims in 1999 and 2000, which “included numerous motions, extensive discovery, many rulings, and two trials over [twelve] years.”³⁵ The Court had previously awarded the Osage roughly \$331 million in two judgments for claims asserted by the Tribe between 1972 and 2000.³⁶ The Osage Nation’s continued desire to protect the assets and revenues yielded from its mineral estate and land holdings is evidenced by repeated assertions and claims—made by Osage

the removal of Comm’r of Indian Affairs Robert G. Valentine, the investigation revealed “to a large extent moneys appropriated for the Indian service have been illegally, improperly, and extravagantly expended under Mr. Valentine’s administration.”).

33. Joint Comm’n to Investigate Indian Affairs, *Report of the Joint Commission to Investigate Indian Affairs*, H.R. Doc. 1669, at 8 (1915).

34. Justice News, *United States and Osage Tribe Announce \$380 Million Settlement of Tribal Trust Lawsuit*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/opa/pr/united-states-and-osage-tribe-announce-380-million-settlement-tribal-trust-lawsuit> (October 21, 2011).

35. *Id.*

36. *Id.*

officials and others in congressional hearings,³⁷ reports,³⁸ and lawsuits³⁹—that the United States was mismanaging tribal trust accounts for decades.

III. WIND FARM OPPOSITION: OSAGE NATION'S ASSERTION OF SOVEREIGNTY AND PROTECTION OF INTERESTS

The exercise of energy sovereignty by the Osage, and protection of assets from competition, stems from a history and tradition of fighting

37. See *Oversight Hearing on Indian Trust Management Practices*, *supra* note 29, at 37 (statement of Charles Tillman, Chief, Osage Nation) (“I’ve come here to ask you and this committee to help us, the tribes out there in the west, to help us solve these [trust fund] problems. Somebody has got to bird-dog these people and stand over them and make them do what’s right. That’s all we’re asking here—to do what is right.”).

38. Report to the Comm. on Indian Affairs: BIA’s Tribal Trust Fund Account Reconciliation Results, U.S. General Accounting Office, Report No. B-266127, at 4–5 (GAO May 3, 1996), <https://www.gao.gov/assets/230/222488.pdf> (“Although BIA identified about 20,000 boxes of accounting documents and lease records and spent about 5 years attempting to reconcile tribal trust accounts, sufficient records were not available to fully reconcile the accounts. For example, BIA’s reconciliation contractor verified 218,531 of tribes’ noninvestment receipt and disbursement transactions totaling \$15.3 billion, or 86 percent, of the \$17.7 billion in transactions that were recorded in the general ledger. However, due to missing records, the contractor was not able to verify 32,901 of these transactions totaling \$2.4 billion (gross). In addition, BIA was not able to determine the total amount of receipts and disbursements that should have been recorded and had no reconciliation procedure to address the completeness of accounting records.”).

39. *Osage Nation of Indians v. United States*, 119 Ct. Cl. 592, 667 (1951) (“In view of the facts and circumstances disclosed by the record and the historical facts of which we take judicial notice, relating to the fair value of the lands in question, we are of the opinion that the finding of the [Indian Claims] Commission that the fair value of the lands was not in excess of the sum of \$300,000 paid therefor, is not supported by substantial evidence. We are further of the opinion that the price of 34 cents an acre paid was unconscionable consideration for such lands.”); *Osage Nation v. United States*, 57 Fed. Cl. 392, 393–94 (2003) (“Plaintiff further contends that defendant ‘has exercised involuntary, pervasive management and complete control over the mineral assets of the Osage,’ but has ‘never rendered to [plaintiff] an accounting . . . of the Osage assets held by [defendant].’” (internal citations omitted)); *Osage Nation v. United States*, 66 Fed. Cl. 244, 253 (2005) (ordering the federal government to turn over certain documents in discovery which concerned mismanagement of trust funds).

for the productive use of the Osage mineral estate and guarding of the royalties and financial stability it provides. The following section gives guidance on present-day actions the Osage Nation, and OMC, have taken to protect the Nation's stake in oil and gas production.

A. Religious, Economic, and Health Concerns and the Osage Nation's Wind Farm Opposition

The Osage Nation's current Principal Chief, Geoffrey Standing Bear, has cited many reasons for the Osage opposition to wind farm development within its reservation boundaries. Chief Standing Bear's reasons include spiritual, economic, health, and quality of life concerns, as well the impact industrial wind farms could have on natural habitats and wildlife.⁴⁰ In an article written for the Oklahoma newspaper *Tulsa World*, Chief Standing Bear made a case for why the Osage Nation was against the wind farm constructed by Osage Wind.⁴¹ As to spiritual and religious concerns, the Osage Chief stated that "suffice it to say the horizon is a very important spiritual element for the Osage."⁴² The Osage believe that a clear, unobstructed view of the horizon is essential, because "the horizon is a sacred place where the gates of heaven are open at sunrise and sunset."⁴³ Another article quotes Chief Standing Bear as asserting that "[r]oughly 14,000 [oil] wells still dot the landscape. And no, they aren't exactly beautiful And yes, they have undoubtedly caused some pollution. But nothing compares to the 'scenic blight' of nearly 100 gigantic wind turbines towering above the prairie."⁴⁴

Chief Standing Bear's stated health concerns included unreferenced "[s]tudies show[ing] wind farms may cause problems such

40. Geoffrey M. Standing Bear, *Business Viewpoint with Osage Chief Standing Bear: Wind Farms Cause Cultural, Economic Damage*, TULSA WORLD (April 22, 2017), http://www.tulsaworld.com/business/businessviewpoint/business-viewpoint-with-osage-chief-standing-bear-wind-farms-cause/article_b18980bb-d5c3-5f7d-aaf4-7fe1a20ef36c.html [hereinafter, Standing Bear, *Business Viewpoint*].

41. *Id.*

42. *Id.*

43. *Id.*

44. Michael Overall, *Osage Nation Prays for the End of Wind Developments*, TULSA WORLD (July 12, 2015), http://www.tulsaworld.com/news/local/osage-nation-prays-for-the-end-of-wind-developments/article_278a9e60-9446-5451-aec3-4610c11fc4fa.html.

as dizziness, hearing issues, nausea, stress, heart issues, sleep deprivation, vertigo, and other complications.”⁴⁵ Blaming these health concerns on the wind turbines’ “infrasound emissions,” Chief Standing Bear suggested that the turbines’ effects were more onerous than mere inconvenience and unattractiveness.⁴⁶

The Osage Nation’s economic concerns about industrial wind farm development center around the wind farms’ supposed lack of financial sustainability without Oklahoma tax credits.⁴⁷ While those tax credits previously enjoyed a sunset date of January 1, 2021,⁴⁸ Chief Standing Bear has praised Oklahoma Governor Mary Fallin and members of the Oklahoma legislature for the passage of HB 2298, a bill that moved up the expiration date of the wind farm facilities’ tax credits to July 1, 2017.⁴⁹ Under HB 2298, those wind farms that wished to qualify for the zero-emissions tax credit were required to be fully operational by the revised July 1, 2017 date.⁵⁰ However, the Oklahoma legislature introduced a bill in February of 2018 to end the credit entirely.⁵¹ The author of the bill, Representative Bobby Cleveland, stated it was vital to end the tax credit for wind farms because “[t]he government is not [the wind farms’] sugar daddy, no matter how hard the wind industry may wish.”⁵² According to Osage Chief Standing Bear, those tax credits are subsidizing wind companies, “most of which are not Oklahoma-based and

45. Standing Bear, *Business Viewpoint*, *supra* note 40.

46. *Id.* For an article discussing the origins of the belief that infrasound emissions are dangerous, see Philip Jaekl, *Why People Believe Low-Frequency Sound is Dangerous*, THE ATLANTIC (June 19, 2017), <https://www.theatlantic.com/science/archive/2017/06/wind-turbine-syndrome/530694/>.

47. Standing Bear, *Business Viewpoint*, *supra* note 40.

48. Paul Monies, *Oklahoma Governor Signs Bills to End Wind Incentive, Airfield Loophole*, NEWS OK (Apr. 18, 2017), <http://newsok.com/article/5545841> [hereinafter, Paul Monies, *Oklahoma Governor Signs Bills*].

49. Standing Bear, *Business Viewpoint*, *supra* note 40.

50. An Act Relating to Income Tax Credits, H.R. 2298, 56th Leg., 1st Sess. § 1(A)(1) (Okla. 2017).

51. An Act Relating to Revenue and Taxation, H.B. 2908, 56th Leg., 2d Reg. Sess. (Okla. 2018).

52. Joy Hampton, *Bill Would Eliminate Renewable Energy Credit*, THE NORMAN TRANSCRIPT (Jan. 19, 2018), http://www.normantranscript.com/news/government/bill-would-eliminate-renewable-energy-credit/article_32a233f5-a094-5a0b-8cf5-aa209028a039.html.

at least one is not even U.S.-based.”⁵³ Others opposing wind farm developments have called for a production tax on wind generation, “similar to that levied on oil and natural gas development, to ensure [Oklahoma] does not continue enriching [oil and gas] competitors at the expense of its taxpayers.”⁵⁴ A recent study by the Oklahoma Policy Institute found that while wind industry subsidies have risen over the last several years, the wind subsidies “pale in comparison to those [subsidies] the state provides to oil and gas producers.”⁵⁵ This fact illustrates the situation many renewable energy developers face when attempting to penetrate the Oklahoma energy market, which often favors oil and gas interests.

Regardless of the end of Oklahoma’s wind energy subsidies, the legislative findings in the Oklahoma Wind Energy Act have remained intact: “(1) Oklahoma’s wind energy resources are an important asset for the continued economic growth of the state and for the provision of clean and renewable power to both the people of the state and the nation as a whole;” and “(2) Promotion of the development of wind energy resources is important to the economic growth of the state.”⁵⁶ Also intact are Oklahoma’s tax credit incentives for “utility-scale solar, geothermal, and other zero-emissions technologies until Jan. 1, 2021.”⁵⁷ Despite efforts to propagate negative press about Oklahoma’s wind energy market, recent data ranks Oklahoma as the second-highest state in the nation for wind capacity.⁵⁸

53. Standing Bear, *Business Viewpoint*, *supra* note 40.

54. Paul Monies, *Oklahoma Governor Signs Bills*, *supra* note 48 (quoting Cliff Branan, executive director for the Windfall Coalition).

55. David Blatt, *Oklahoma’s Wind Subsidies are Dwarfed by Subsidies to the Oil and Gas Industry*, OKLAHOMA POLICY INSTITUTE (Feb. 14, 2017), <https://okpolicy.org/oklahomas-wind-subsidies-dwarfed-subsidies-oil-gas-industry/>.

56. 17 Okla. Stat. Ann. tit. 17, § 160.12(1)-(2) (West 2018). Interestingly, the third legislative finding holds that “[t]he prudent development of wind energy resources requires addressing the relationship of the needs of wind energy developers with those of the mineral estate owners who have the historical right to make reasonable use of the surface estate.” *Id.*

57. Paul Monies, *Oklahoma Governor Signs Bills*, *supra* note 48.

58. Jack Money, *Oklahoma Moves Into No. 2 Spot for Wind Power Capacity in the Nation*, *Association Says*, NEWS OK (Jan. 1, 2018), <https://newsok.com/article/5581518/oklahoma-moves-into-no.-2-spot-for-wind-power-capacity-in-the-nation-association-says>.

These policies and practices show that, notwithstanding the Osage Nation's expressed concerns about the economic stability of wind energy investments, the state of Oklahoma is still committed to the development of renewable energy. A brief outline of the wind farm industry in Oklahoma, coupled with stated Osage Nation concerns, provides further evidence of the Nation's varied approach to its opposition of wind farm development. Additionally, it shows the power of oil and gas industry interests in Oklahoma compared to renewable energy developers.

B. Protecting Oil and Gas Interests: Osage Nation Wind Farm Opposition

Conspicuously absent from Chief Standing Bear's list of objections to wind farm development was the protection of the Osage Nation's oil and gas interests. However, OMC Chairman Everett Waller has made clear it is not the nature of wind projects and renewable energy that has created the Osage Nation's opposition to wind farm development.⁵⁹ Rather, Waller says, "I have a job as chairman of the Minerals Council to protect my shareholders. This is a business. We're in the oil business."⁶⁰ Restated, it seems Waller has nothing personally against wind energy development, except the interference that development could have on Osage oil and gas assets. This statement shows where the Osage loyalties (and royalties) lie: protection of its oil and gas assets and the headright holders who benefit from them.

1. Osage Wind I

OMC's commitment to the protection of its oil and gas assets and the Osage mineral estate's headright owners was apparent in the Osage Nation's 2011 lawsuit against Wind Capital Group, LLC. In *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC*,⁶¹ the Tribe sought a permanent injunction against the construction of a 94-turbine

59. Joe Wertz, *Why Oklahoma's Wind Energy Future Could be Shaped by Osage County*, STATE IMPACT (July 24, 2014, 6:15 AM), <https://stateimpact.npr.org/oklahoma/2014/07/24/why-oklahomas-wind-energy-future-could-be-shaped-by-osage-county/>.

60. *Id.*

61. 2011 WL 6371384 (N.D. Okla. 2011) [hereinafter *Osage Wind I*].

wind farm by the Wind Capital Group, LLC, and its subsidiary, Osage Wind (collectively, “Wind Capital Group”), on privately-owned surface lands within the Osage Nation’s reservation boundaries.⁶² Seven landowners leased approximately 8,500 acres of surface estate to Wind Capital Group for a wind farm development that was originally scheduled to begin in November of 2011.⁶³

The Osage Nation contended the construction of the wind farm would obstruct oil and gas lessees’ access to the mineral estate.⁶⁴ Citing 25 C.F.R. § 226.19, the Osage Nation argued that installation of “94 turbines, underground collection lines running between turbines and to a substation, one overhead transmission line, two permanent meteorological towers, and a network of access roads”⁶⁵ would block oil and gas lessees’ legal right to access surface lands “as may be reasonable for operations and marketing.”⁶⁶ The construction of the wind farm on the Osage Nation’s lands was scheduled to take nine to twelve months to complete.⁶⁷

The district court organized its findings of fact into four sections corresponding to the four elements a plaintiff must prove in order to receive a permanent injunction.⁶⁸ The district court ultimately disagreed with the Osage Nation’s contentions and cited the Tribe’s lack of evidence showing there would be an “actual or potential conflict” between the construction of the wind farm and the oil and gas lessees’ access to the mineral estate.⁶⁹ Also of concern for the court was the harm a permanent injunction could have on surface owners who leased their land to Wind Capital Group, with expectations of receiving payments on those leases throughout their twenty-year duration.⁷⁰ In its conclusions, the court ultimately held “[t]he mere *possibility* that a dispute might arise in the

62. *Id.* at *1, *2.

63. *Id.* at *1.

64. *Id.* at *1, *2.

65. *Id.* at *1.

66. 25 C.F.R. § 226.19 (2014).

67. *Osage Wind I*, 2011 WL at *2.

68. *Id.* at *1 n. 1 (“[T]o prevail on its request for a permanent injunction, the Tribe must prove (1) success on the merits; (2) irreparable harm; (3) the harm to the Tribe outweighs the harm the injunction would cause the defendants; and (4) the injunction would not adversely affect the public interest.”).

69. *Id.*

70. *Id.*

future [was] insufficient to merit an injunction of the Wind Farm's construction and operation."⁷¹

While litigation was ongoing in 2011 with Wind Capital Group, OMC continued with sales of mineral leases, as authorized in 25 C.F.R. § 226.2.⁷² In February of 2011, OMC sold a total of 12,480 acres in leases for \$913,150.⁷³ The majority of the acreage and payments were for oil and gas leases, with 12,320 acres leased for \$910,400. The remainder of those leases concerned solely oil, with 160 acres leased for \$2,750.⁷⁴ For the fiscal years of 2010 and 2011, the oil and gas royalties generated a combined \$224 million.⁷⁵

After the court issued its ruling in December 2011, the Wind Capital Group released a statement emphasizing the company's willingness to work with the Osage Nation to create economic development opportunities for all residing in Osage County, because "the development of energy sources above and beneath the surface lands of Osage County can co-exist."⁷⁶ Then-Principal Chief John Red Eagle's post-ruling statement was not as conciliatory. His concern mainly centered around detrimental effects the ruling could have on headright holders and the Nation's assets because of the "significant impact on the individual incomes of those who receive oil and gas royalties in Osage County" and the "adverse impact on the tribe's ability to develop its mineral estate."⁷⁷ The next major litigation between the parties is detailed below.

71. *Id.* at *9 (emphasis in original).

72. *Minerals Council has Another Lucrative Lease Sale*, OSAGE NEWS (Feb. 24, 2011), <http://www.osagenews.org/en/article/2011/02/24/minerals-council-has-another-lucrative-lease-sale/>.

73. *Id.*

74. *Id.*

75. Inspector General Final Report, *Sweeping Changes*, *supra* note 6, at 3.

76. Benny Polacca, *Federal Judge Rules Against Osage Nation in Wind Farm Fight*, OSAGE NEWS (Dec. 16, 2011), <http://www.osagenews.org/en/article/2011/12/16/federal-judge-rules-against-osage-nation-wind-farm-fight/>.

77. *Id.*

2. *Osage Wind II*

*United States v. Osage Wind, LLC*⁷⁸ documents the Osage Nation's continued efforts to inhibit development of a wind farm within its reservation boundaries. After the ruling in *Osage Nation ex rel. Osage Minerals Council* in late 2011, Osage Wind began site preparation for the wind farm construction in October 2013, and began the excavating groundwork necessary to construct the wind turbines in September 2014.⁷⁹ Upon commencement of the excavation work, the United States, acting as trustee on behalf of the Osage Nation, filed suit against Osage Wind in November 2014 in federal district court.⁸⁰ The United States sought to enjoin the company from conducting its excavation activities because of Osage Wind's failure to obtain a tribally-issued, federally-approved mining lease under 25 C.F.R. § 214.7.⁸¹ The United States and Osage Nation contended that the excavation work for the wind turbines' cement foundations constituted "mining" under 25 C.F.R. § 211.3⁸² because Osage Wind extracted "soil, sand and rock of varying sizes . . . of a common mineral variety."⁸³ The violation of leasing requirements, the United States argued, occurred when Osage Wind sorted the excavated rock pieces by size, crushed the pieces smaller than three feet, and then packed those crushed pieces back into the hole after the pouring of foundations "measuring ten feet deep and up to 60 feet in diameter."⁸⁴ Soon after the United States filed suit, however, the excavation work for the wind turbines was completed, with the cement foundations for each turbine poured.⁸⁵

78. 871 F.3d 1078 (10th Cir. 2017) [hereinafter *Osage Wind II*].

79. *Id.* at 1083.

80. *Id.*

81. *Id.* See *United States v. Osage Wind, LLC*, 2015 WL 5775378, *2 (N.D. Okla. 2015).

82. 25 C.F.R. § 211.3 defines "mining" as "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, and enterprise is considered "mining" only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year."

83. *Osage Wind II*, 871 F.3d at 1083.

84. *Id.*

85. *Id.* at 1083–84.

The United States then withdrew its initial injunction request against Osage Wind, and chose to amend its complaint to request damages because the failure to obtain a mining lease constituted “unauthorized extraction of reserved minerals.”⁸⁶ The district court disagreed with the United States’ contentions, and issued a summary judgment award to Osage Wind because “the definition of mining *necessarily* involves the commercialization of mineral materials, i.e., the sale of minerals,” and Osage Wind did not commercialize the minerals it extracted to build its turbines’ foundations.⁸⁷ The United States did not inform OMC that it did not plan to appeal the district court judgment until the final day of the 60-day appeal deadline, so OMC was forced to file both a motion to intervene and, within minutes, a notice of appeal on the last permissible day.⁸⁸ The district court then denied the motion to intervene, citing a lack of jurisdiction because of the merits appeal.⁸⁹ OMC appealed the district court’s denial of the motion to intervene, leaving the United States Court of Appeals for the Tenth Circuit to decide two threshold issues— OMC’s right to appeal and Osage Wind’s *res judicata* defense— along with one merits issue, the meaning of “mineral development” as referenced in the definition of “mining” in 25 C.F.R. § 211.3.⁹⁰

The Tenth Circuit initially dealt with the two threshold issues raised by Osage Wind.⁹¹ First, although OMC was not formally a party to the underlying lawsuit, its interests had been protected by the United States, acting as its trustee.⁹² The Tenth Circuit held that OMC qualified as “would-be appellants” with a “sufficiently ‘unique interest’” in the underlying suit,⁹³ bringing it within the narrow exception to the general rule that only those who are originally, or properly become, parties in an underlying suit may appeal a judgment.⁹⁴ Because it held that OMC had properly appealed the district court judgment, the Tenth Circuit dismissed

86. *Id.* at 1084.

87. *Id.* at 1089 (emphasis in original).

88. *Id.* at 1084.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Plain v. Murphy Family Farms*, 296 F.3d 975, 979 (10th Cir. 2002)).

94. *Id.* (citing *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)).

as moot the question of whether OMC's motion to intervene in the district court was proper.⁹⁵

The second threshold issue addressed by the Tenth Circuit was whether Osage Wind had, after raising the affirmative defense of res judicata, met its burden of proving that OMC could have raised its "mineral development" argument in its 2011 suit, *Osage Nation ex rel. Osage Minerals Council*.⁹⁶ OMC argued its claims would not have been ripe during the 2011 lawsuit because the extent of Osage Wind's excavation activities were unknown at that time.⁹⁷ The court agreed with OMC, and held its claims were not precluded by the res judicata doctrine.⁹⁸

The Tenth Circuit then moved to the merits issue: whether Osage Wind's extraction, arranging by size, crushing, and back-filling activities constituted "mineral development" under 25 C.F.R. § 211.3's definition of mining, therefore requiring a federally-approved lease from OMC.⁹⁹ The court applied an Indian law judicial canon of construction¹⁰⁰ to its interpretative and textual analysis of § 211.3.¹⁰¹ Because the purpose of 25 C.F.R. part 211 was to protect Indian mineral owners who lease their interests for development, and to ensure that those resources "will be developed in a manner that maximizes [the Indian mineral owner's] best economic interests and minimizes any adverse environmental [or cultural] impacts,"¹⁰² the court felt it was appropriate to adopt a reading of § 211.3 that favored the Osage Nation, "liberally constru[ing]" the regulation in OMC's favor.¹⁰³ The Tenth Circuit ultimately held as too narrow the

95. *Id.*

96. *Id.* at 1086–87.

97. *Id.* at 1087.

98. *Id.*

99. *Id.*

100. "The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians, and that all ambiguities are to be resolved in their favor. Additionally, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 113–14 (Nell Jessup Newton et al. eds., 2012) [hereinafter, COHEN'S HANDBOOK].

101. *Osage Wind II*, 871 F.3d at 1090.

102. 25 C.F.R. § 211.1 (2018).

103. *Osage Wind II*, 871 F.3d at 1090.

district court's ruling that "mineral development" under 25 C.F.R. § 211.3 must be done for commercial purposes in order to trigger the need for a mining lease from OMC.¹⁰⁴

While litigation in *United States v. Osage Wind, LLC* spanned from 2014 to the present, the mineral estate continued to generate vast royalties paid to Osage headright holders. In a 2014 report, the Office of the Inspector General published issues with the BIA's (and the underlying Osage Agency's) mismanagement of the Osage Nation's oil and gas resources.¹⁰⁵ According to this report, as of 2014, the Osage Nation had 4,453 oil and gas leases with close to 14,500 producing wells, with expectations of another 7,500 wells to be drilled between the fiscal years 2012 and 2027.¹⁰⁶ The estimated royalties generated by the Osage Nation's oil and gas leases during this time frame is \$13.6 billion.¹⁰⁷ The latest quarterly report, posted by OMC in June 2017, revealed the total revenue for the second quarter of 2017 (the months of April to June) was more than \$8.2 million dollars, with each headright holder's payment totaling \$3,945 for the second quarter.¹⁰⁸

The Tenth Circuit's decision to reverse and remand the suit in *United States v. Osage Wind, LLC* made it possible for OMC to pursue damages against Osage Wind for its failure to obtain a federally-approved mining lease.¹⁰⁹ Osage Wind subsequently filed a petition for certiorari to the United States Supreme Court on March 2, 2018.¹¹⁰

104. *Id.* at 1092.

105. Inspector General Final Report, *Sweeping Changes*, *supra* note 6, at 1.

106. *Id.* at 3.

107. *Id.*

108. Third Osage Minerals Council, *Quarterly Report—June 2017*, OSAGE MINERALS COUNCIL NEWSLETTER, Summer 2017, at 2.

109. Lenzy Krehbiel-Burton, *Wind Companies Appeal to U.S. Supreme Court after 10th Circuit Rules in Favor of the Osage*, OSAGE NEWS (March 13, 2018), <http://www.osagenews.org/en/article/2018/03/13/wind-companies-appeal-us-supreme-court-after-10th-circuit-rules-favor-osage/>.

110. Petition for a Writ of Certiorari, *Osage Wind, LLC v. United States*, https://www.supremecourt.gov/DocketPDF/17/171237/37360/20180302123736247_Petition%20for%20a%20Writ%20of%20Certiorari.pdf (U.S. March 2, 2018) (No. 17-1237).

3. *Moving Forward: Petition for Certiorari*

In its petition to the Supreme Court, Osage Wind¹¹¹ presented two questions for resolution: (1) whether the Tenth Circuit’s jurisdiction over the appeal filed by OMC was correct, given that OMC was not a party in the district court proceedings; and (2) whether invocation of an Indian law canon of construction overrode the plain language and congressional intent behind 25 C.F.R. § 211.3 and deprived the surface landowners of property rights.¹¹² The following is a summary of these arguments, and an analysis of their propriety when applied in light of recognized federal Indian law norms.

As to the first question, Osage Wind cited the circuit split among federal courts of appeals over to how to best deal with entities appealing a district court decision where those entities were not parties to the underlying suit.¹¹³ Citing “a lack of uniformity that the federal system should not tolerate,” Osage Wind urged the Supreme Court to grant its petition in order to determine the best among the varying rules applied when deciding whether appeal by a nonparty is allowed.¹¹⁴ Osage Wind was critical of the Tenth Circuit’s rule, asserting its holding “encourages free-riders with an interest in litigation to sit back and rely on the efforts of other litigants rather than taking advantage of the tool provided by the Federal Rules: intervention.”¹¹⁵ In support of its argument, Osage Wind separated the split circuit courts’ rules into two categories, those that expand the court’s jurisdiction beyond the limits of other circuit courts, and those that do not.¹¹⁶

111. *Id.* at ii. (“Petitioner Osage Wind, LLC is owned in part by Osage Wind Holdings, LLC, which is in turn owned by EFS Osage Wind, LLC and by petitioner Enel Kansas, LLC. Enel Kansas, LLC is a wholly owned subsidiary of petitioner Enel Green Power North America, which is in turn a wholly owned subsidiary of Enel Green Power, S.p.A., which is itself a wholly owned subsidiary of Enel S.p.A. In addition, JPM Capital Corporation, Dortmund, LLC, and Antrim Corp. each owns 10% or more of petitioner Osage Wind, LLC’s membership interests.”)

112. *Id.* at i.

113. *Id.* at 10.

114. *Id.*

115. *Id.*

116. *Id.* at 11 (“Put another way: some circuits have interpreted their own jurisdiction to be broader than that exercised by other circuits.”).

Osage Wind outlined the different approaches used by circuit courts in determining whether to permit nonparty appeals, referring to the “strict standard” of the First, Seventh, and D.C. Circuits,¹¹⁷ and the “more permissive” balancing-test approaches only used in “exceptional circumstances” by the Third, Fourth, Fifth, Eighth, and Ninth Circuits.¹¹⁸ In its petition, Osage Wind characterized the Tenth Circuit standard as a “relatively permissive” one, without outlining its requirements.¹¹⁹ In its decision below, the Tenth Circuit made a point to “emphasize the limited nature of [its] decision,” and held that OMC fit into the narrow exception allowing nonparty appeal because it demonstrated both “a *particularized* and *significant* stake” in the proceedings, and showed “cause for why [OMC] did not or could not intervene in the proceedings below.”¹²⁰ By ignoring this detail in their petition, Osage Wind ignores the limited, unique circumstances in which the Tenth Circuit allows nonparty appeals.¹²¹ The United States brought suit on behalf of OMC in district court, first to enjoin and later to seek damages from Osage Wind for failure to secure a mining lease before beginning its excavation work.¹²² Those mining leases are issued by OMC, and then approved by the Secretary of the Interior.¹²³ The amicus brief filed by the Solicitor General disagreed with Osage Wind’s contentions regarding a circuit split in need of Supreme Court resolution, and asserted “[t]here is no conflict in the courts of appeals on whether a nonparty may appeal under th[e] unique facts” present in OMC’s claims below.¹²⁴

Noticeably absent from Osage Wind’s petition was an examination of the relationship between the United States and the Osage Nation, and acknowledgment of the Nation’s ownership of the mineral

117. *Id.* at 13–15.

118. *Id.* at 15–17.

119. *Id.* at 17.

120. *Osage Wind II*, 871 F.3d 1078, 1086 (10th Cir. 2017) (emphasis added).

121. *Id.*

122. *Id.* at 1083.

123. *Id.* at 1082–83 (citing 25 C.F.R. § 214.7).

124. Brief for the United States as Amicus Curiae at 7, *Osage Wind, LLC v. Osage Minerals Council*, https://www.supremecourt.gov/DocketPDF/17/17-1237/74102/20181204150140415_17-1237%20Osage%20Wind%20AC%20Pet.pdf (U.S. Dec. 4, 2018) (No. 17-1237).

interest the United States brought suit to protect.¹²⁵ The Tenth Circuit found OMC's ownership to be the particularized and significant stake needed to permit OMC to appeal the district court judgment.¹²⁶ Osage Wind, in its petition, characterized the Osage Nation's participation in the lower court proceedings as nonexistent until the Nation appealed to the Tenth Circuit.¹²⁷ This contention displays a fundamental lack of understanding of the unique relationship between the United States and Indian nations, and the trust responsibility between the two.¹²⁸

Osage Wind's second argument concerned the Tenth Circuit's application of an Indian law canon of construction, which Osage Wind said was applied "[i]n conflict" with the Supreme Court and other circuit court decisions.¹²⁹ After characterizing the Tenth Circuit's application of an Indian canon to federal regulations as a means of "providing maximum financial benefit" to the Osage Nation, Osage Wind contended the more appropriate use of the canons was to determine congressional intent.¹³⁰ According to Osage Wind, Indian law canons do not permit courts to circumvent federal statutes and regulations in order to bestow benefits upon Indian tribes.¹³¹ Instead, the canons are more appropriately used to "avoid construing federal treaties and statutes to inadvertently diminish tribal sovereignty and rights, not to *expand* the rights of a tribe."¹³² Osage Wind asserted that the Tenth Circuit found nonexistent ambiguity in 25 C.F.R. § 211.3's definition of "mining," and too narrowly focused on that

125. *See id.*

126. *Osage Wind II*, 871 F.3d at 1086.

127. Petition for a Writ of Certiorari, *Osage Wind, LLC v. United States*, at 2, 11, https://www.supremecourt.gov/DocketPDF/17/171237/37360/20180302123736247_Petition%20for%20a%20Writ%20of%20Certiorari.pdf (U.S. March 2, 2018) (No. 17-1237).

128. *See, e.g., HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) ("The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction." (citations omitted)).

129. Petition for a Writ of Certiorari, *Osage Wind, LLC v. United States*, at 2, 11, https://www.supremecourt.gov/DocketPDF/17/171237/37360/20180302123736247_Petition%20for%20a%20Writ%20of%20Certiorari.pdf (U.S. March 2, 2018) (No. 17-1237).

130. *Id.* at 23–24.

131. *Id.* at 26.

132. *Id.* (emphasis in original).

single regulation, rather than the entire regulatory scheme applicable to the Osage Nation's mining leases.¹³³

There are several flaws apparent in Osage Wind's arguments. First, 25 C.F.R. § 211.1 describes the purpose and scope of the regulations at issue, providing that the "regulations are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that *maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development.*"¹³⁴ Rather than applying the Indian canons to interpret the regulations in a manner which "provides maximum financial benefit" to the Osage Nation, the Tenth Circuit likely derived any notions of protecting the financial interests of the Osage from the applicable regulations and the statutory mandate by which those regulations were promulgated.¹³⁵ Moreover, if these regulations intended to exclude Osage mining leases issued for non-oil and gas development purposes, the BIA could have included Part 214 ("Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas") in its exclusions listed in § 211.1(e).¹³⁶

According to Osage Wind, in interpreting 25 C.F.R. § 211.3, the Tenth Circuit erred by initially applying an Indian law canon to the regulation's mining definition, instead of first "inquir[ing] as to the best reading of the regulatory definition, in light of the statutory provisions the regulation implements."¹³⁷ However, Osage Wind gave no support for its position that the Tenth Circuit's analysis was disordered, other than characterizing the Tenth Circuit's application of the Indian canon as "a departure" from the Supreme Court and other circuit courts' use of the

133. *Id.* at 25 (citing 25 C.F.R. § 214.10 (royalty payable on "minerals marketed")).

134. 25 C.F.R. § 211.1(a) (emphasis added).

135. Act of May 11, 1938, Pub. L. No. 75-506, § 2, 52 Stat. 347, 347-48.

136. 25 C.F.R. § 211.1(e) ("The regulations in this part do not apply to leasing and development governed by regulations in 25 C.F.R. parts 213 (Members of the Five Civilized Tribes of Oklahoma), 226 [Leasing of Osage Reservation Lands for Oil and Gas Mining], or 227 (Wind River Reservation).").

137. Petition for a Writ of Certiorari, *Osage Wind, LLC v. United States*, at 23, https://www.supremecourt.gov/DocketPDF/17/171237/37360/20180302123736247_Petition%20for%20a%20Writ%20of%20Certiorari.pdf (U.S. March 2, 2018) (No. 17-1237).

canon.¹³⁸ Again, the Solicitor General disagreed with Osage Wind's assertions regarding a circuit split, this time in Indian canon application: "[Osage Wind's] contention that the [Tenth Circuit] created a circuit split by applying the Indian canon to interpret [DOI]'s regulations does not withstand scrutiny and presents no question of exceptional importance."¹³⁹ Legislative history, subsequent committee reports, bill sponsor or drafter statements, deliberation, or other extrinsic evidence to determine congressional intent are—like the Indian canons—helpful tools employed by courts for statutory interpretation where ambiguity is found.¹⁴⁰ Those tools' utilization is not generally subject to a mandated hierarchy.¹⁴¹ However, the U.S. Supreme Court has specifically acknowledged the distinctive nature of statutory interpretation where Indian law is involved, recognizing "that the standard principles of statutory construction do not have their usual force in cases involving Indian law."¹⁴²

Osage Wind's lack of understanding of the trust responsibility between the United States and the Osage Nation is evident by its failure to properly consult with the Osage Nation before commencing the development of its wind farm. Additionally, Osage Wind, LLC was formed by Enel Green North America, and the project "Osage Wind" takes its name from the tribe who ultimately opposes it. This cultural

138. *Id.*

139. Brief for the United States as Amicus Curiae at 8, *Osage Wind, LLC v. Osage Minerals Council*, https://www.supremecourt.gov/DocketPDF/17/17-1237/74102/20181204150140415_17-1237%20Osage%20Wind%20AC%20Pet.pdf (U.S. Dec. 4, 2018) (No. 17-1237).

140. See, e.g., Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 824 (2010) ("Legislative history has long been a tool that courts have used . . . to search for indications of congressional intent.").

141. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 3 (2003) (quoting Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1201 (tentative ed. 1958), reprinted in Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.")).

142. COHEN'S HANDBOOK, *supra* note 100, at 113 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

appropriation further indicates the company's deficient awareness of acceptable practices when pursuing development on Indian nations' lands.

IV. IMPORTANCE OF TRIBAL CONSULTATION AND ENERGY SOVEREIGNTY

In his recent book chronicling the Osage Nation's oil history, and the crimes committed against the Osage people in pursuit of that oil and its revenues, author David Grann was urged to visit the area in Pawhuska, Oklahoma, where Osage Wind's turbines tower over the landscape.¹⁴³ Grann quoted OMC second Chairwoman Kathryn Red Corn,¹⁴⁴ who asked whether he noticed the turbines on his drive.¹⁴⁵ She asked, "Did you see them?" and then exclaimed, "This company came in here and put them up without our permission."¹⁴⁶

This statement shows the lack of dialogue between Osage Wind and the Osage Nation prior to and throughout the wind farm's construction, and it illustrates the importance of meaningful consultation with Indian nations when developing a renewable energy project within tribal reservation boundaries.

The economic development potential in renewable energy investment is high for many tribes,¹⁴⁷ and a number of tribes have successfully implemented a range of renewable energy projects in hopes of providing sustainable, long-term economic development.¹⁴⁸ In a 2017 session of the National Tribal Energy Summit, U.S. Senator Tom Udall described the potential benefits renewable energy projects could bring to Indian nations:

143. GRANN, *supra* note 7, at 277.

144. *Minerals Council*, THE OSAGE NATION, <https://www.osagenation-nsn.gov/who-we-are/minerals-council> (last visited May 7, 2018).

145. GRANN, *supra* note 7, at 277.

146. *Id.*

147. *Indian Energy and Economic Development: Renewable and Distributed Generation*, BIA U.S. DEP'T OF INTERIOR, <https://www.bia.gov/as-ia/ieed/division-energy-and-mineral-development/renewable-energy> (last visited Dec. 8, 2018).

148. *See Energy Department Selects 11 Tribal Communities to Deploy Energy Efficiency and Renewable Energy Technologies*, U.S. DEP'T OF ENERGY (March 18, 2015), <https://www.energy.gov/articles/energy-department-selects-11-tribal-communities-deploy-energy-efficiency-and-renewable>.

The Department of Energy estimates that wind power from tribal lands could satisfy 32 percent of the total U.S. electricity demand. And solar production from Indian lands could generate enough energy to power the country two times over . . . Not only does this mean tribal energy independence. It also means economic growth. Tribes can produce and sell energy. It means stronger, more diversified economies. And it means lots of good paying jobs.¹⁴⁹

With the development potential high for tribes and the need for electricity generation ever-expanding, the question then comes to renewable energy investors, and how their companies can expand the renewable energy market while supporting tribal energy sovereignty through meaningful consultation. For example, when discussing the facts of the case relevant to the public interest in *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC*, the district court mentioned employment and revenue data that would be generated by the wind farm's construction, including "250 construction employees and 10-12 permanent employees," and a projection of "\$20 million dollars in local tax revenues over 20 years."¹⁵⁰

The federal government promulgates tribal consultation policies as a framework to guide its employees, Bureaus, and Offices on the government's obligation to maintain effective communication with Indian tribes, and receive tribal input on actions that could affect them.¹⁵¹ These policies were outlined for executive departments and federal agencies first by Executive Order 13,175,¹⁵² and later by a Presidential Memorandum, which "charged [the agencies] with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of

149. Mark Wolf *Renewable Energy Can be Key to Tribal Energy Development*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 3, 2017), <http://www.ncsl.org/blog/2017/05/03/renewable-energy-can-be-key-to-tribal-energy-development.aspx>.

150. *Osage Wind I*, 2011 WL at *6.

151. Tribal Consultation, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 75,879 (Nov. 9, 2009).

152. Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

federal policies that have tribal implications,” and by making those agencies “responsible for strengthening the government-to-government relationship between the United States and Indian tribes.”¹⁵³ Under this Memorandum, each agency was required to submit its own implementation strategy of the consultation policies and directives, and then subsequently submit progress reports on the status of those directives.¹⁵⁴ Each Department’s consultation policy and procedures can be found on their respective webpages.¹⁵⁵

While Osage Wind is a private company and not subject to the implementation of federal tribal consultation policies, these policies could still provide initial guidance on how to best involve Indian nations when pursuing development opportunities in Indian country. For example, the Department of Energy mandates that its representatives and contractors “provid[e] for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process.”¹⁵⁶ To be certain, these consultation policies and procedures are grounded in recognizing the trust responsibility between the federal government and Indian nations;¹⁵⁷ however, were renewable energy companies to adopt their own consultation guidelines in dealing with Indian nations, they

153. Tribal Consultation, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. at 75,879-75,880.

154. *Id.*

155. See, e.g., Office of Environmental Management, *American Indian Policy and Relevant DOE and Executive Orders*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/em/services/communication-engagement/em-tribal-programs-indian-country/american-indian-policy-and> (last visited May 3, 2018); *Tribal Consultation Policy*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/tribes/Tribal-Consultation-Policy> (last visited May 3, 2018); *Tribal Consultation*, U.S. DEP’T OF HEALTH & HUMAN SERVICES, <https://www.hhs.gov/about/agencies/iea/tribal-affairs/consultation/index.html> (last visited May 3, 2018).

156. *American Indian Tribal Government Interactions and Policy*, U.S. DEP’T OF ENERGY, DOE O 144.1, 9 (Nov. 6, 2009).

157. *Id.* at Attachment 2, 2 (“The most important doctrine derived from this [government-to-government] relationship is the trust responsibility of the United States to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federally recognized and reserved rights.”).

could potentially avoid protracted and expensive litigation of the type seen in *United States v. Osage Wind, LLC*. Importantly, it is up to Indian nations to individually determine what meaningful dialogue means to them, and whether engagement in consultation fits within their individual tribe's nation building.

It could be argued that the Osage Nation's opposition to wind farm development was less about inadequate consultation, and more about the protection of its oil and gas assets. However, as the trend toward renewable energy development continues to grow, so does the number of Indian nations seeking to diversify their economies by investing in renewable energy projects.¹⁵⁸

The potential in renewable energy investment for Indian nations is an exciting prospect. Unlike gaming, which often relies upon proximity to urban populations,¹⁵⁹ or mineral and timber development, which can only be pursued if those resources are available to a tribe, renewable energy development can be pursued by considerably more Indian nations.¹⁶⁰ Simply put, the sun shines and the wind blows almost everywhere. Tribes could use these renewable resources as a base for their economic infrastructure, creating jobs, diversifying their economies, and making steps toward energy independence and assertions of sovereignty

158. Sarah M. Stevenson & Walter E. Stern, *Wind Energy: Challenged Under Federal Regulations, but More Native American Nations Appear to be Embracing its Development*, MODRALL SPERLING (Feb. 24, 2016), https://www.modrall.com/2016/02/24/wind-energy-challenged-under-federal-regulations-but-more-native-american-nations-appear-to-be-embracing-its-development/#_edn2 ("Modrall Sperling is one of the law firms representing Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. in [*United States v. Osage Wind, LLC*]").

159. Barbara Wells *Native Americans Can't Always Cash in on Casinos*, THE GUARDIAN (Aug. 9, 2010, 10:00 AM EDT) ("Since the [Indian Gaming Regulatory Act], tribal gaming on some reservations has flourished where tribes have been lucky enough to be located near densely populated areas.").

160. See Indian Energy and Economic Development, *Renewable Energy*, U.S. DEP'T OF THE INTERIOR, <https://www.bia.gov/as-ia/ieed/division-energy-and-mineral-development/renewable-energy> (last visited Apr. 30, 2018) ("For example, of the 325 American Indian reservations, more than 150 have the resource capacity needed to sustain a 1 to 25 megawatt renewable and/or natural gas power generation facility.").

over their land and resources.¹⁶¹ “It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”¹⁶² Companies who wish to work with tribes to develop renewable energy projects must come to the bargaining table with this understanding, so that both parties may benefit to the fullest extent from their relationship.

V. CONCLUSION

The purpose of this paper is to provide background information and historical context to the Osage Nation’s decades-long opposition to a wind farm development within its reservation boundaries. By offering a realistic view of the Osage’s oil and gas interests, and not a romanticized view of Indian nations as protectors of land, it becomes apparent that energy sovereignty often means deciding what type of energy source may provide an economic anchor. Understanding the inherent sovereignty that Indian nations possess, cultural preferences, and their need for energy independence, can help renewable energy companies seeking to assist tribes in developing their renewable energy resources.

161. For information about how the federal government is assisting tribes who are interested in exploring renewable energy development, *see id.*

162. *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 162, 167 (1973).