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DIGGING DEEPER TO PROTECT TRIBAL PROPERTY INTERESTS: *UNITED STATES v. OSAGE WIND, LLC*

Allison B. Christian*

I. Introduction

“If the first reading does not produce a result in favor of the Indians, you should read the document again. And once again – with an inventive mind.”¹ These words, spoken by Indian law scholar Charles F. Wilkinson, reflect the established notion that laws passed for the benefit of Indian tribes should be “liberally construed.”² If any ambiguities remain in the law, they should be resolved in favor of the Indian tribes.³ This view is embedded in the Indian canons of construction,⁴ and these tools of statutory interpretation have proven useful for courts faced with Indian law dilemmas.⁵ Could it be possible, however, for courts to abuse these tools to create ambiguity in the law where it does not exist? The Tenth Circuit was recently criticized for doing just that.

In *United States v. Osage Wind, LLC*, the Tenth Circuit relied on the Indian canons of construction to unanimously hold that a wind developer’s excavation practices “constituted ‘mining’ under the pertinent federal regulations.”⁶ Because the developer’s actions constituted mining, the court held that the developer should have obtained a mineral lease from the subsurface estate owner, the Osage Nation (“the Tribe”).⁷ Importantly, however, because the Tribe pursued damages instead of an injunction, the

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1. David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 39 (1999) (quoting Indian law scholar Charles F. Wilkinson).

2. *Id.* at 42.

3. *Id.*

4. Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioners at 3-4, *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017) (No. 17-1237), 2018 WL 1666871, at *3-4.

5. *Id.*

6. 871 F.3d 1078, 1081 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

7. *Id.*

wind farm operates in full force in Osage County, Oklahoma, producing enough power for 45,000 homes.⁸

Although members of the wind industry have criticized the Tenth Circuit for relying too heavily on the Indian canons of construction⁹ in *United States v. Osage Wind, LLC*, the court struck an ideal balance between the rights of surface owners and the interests of Indian mineral owners. The Supreme Court's denial of the wind developer's petition for a writ of certiorari in January of 2019 implicitly supports the view that the Tenth Circuit was correct in reaching its holding.¹⁰

This Note assesses *United States v. Osage Wind, LLC* and its effects by considering two points of analysis: (1) whether the court correctly used the canons to protect the Tribe's property rights to find the backfill constituted real property belonging to the Tribe; and (2) how the implications of the ruling will apply to future projects. Part II provides the legal and factual background behind the Tenth Circuit decision. Part III discusses the holding and the court's rationale, and Part IV analyzes how the Tenth Circuit protected the Tribe's property rights. Part V evaluates the effects of this decision on developers and surface owners, while Part VI concludes the discussion and reiterates the significance of this decision for Indian tribes and the wind industry.

II. Background

A. Legal Landscape

The United States Congress established a reservation for the Osage Nation in 1872 by granting the Tribe a tract of land in Osage County, Oklahoma.¹¹ After negotiations with the Tribe, Congress severed the Osage Nation's surface estate from the mineral estate in 1906 through the Osage Act.¹² The Act allotted the surface estate to individual tribal members,¹³ and each Osage member on the 1906 roll received over 650 acres of land.¹⁴ The

8. *Another Indian Law Case in Limbo as High Court Turns to Trump Again*, INDIANZ.COM (May 14, 2018), <https://www.indianz.com/News/2018/05/14/another-indian-law-case-in-limbo-as-high.asp>.

9. Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioner, *supra* note 4, at 10.

10. *Osage Wind*, 871 F.3d 1078.

11. *Id.* at 1082 (citing Act of June 5, 1872, ch. 310, 17 Stat. 228).

12. *Id.* (citing Act of June 28, 1906, ch. 3572, §§ 2–3, 34 Stat. 539, 540–44).

13. *Id.* (citing Act of June 28, 1906, § 2, 34 Stat. at 540–43).

14. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07, at 315 (Nell Jessup Newton et al. eds., 2005).

mineral estate, however, was held in trust for the benefit of the Tribe.¹⁵ Tribal members on the 1906 roll and their heirs received “headrights,” which granted them the right to obtain income from the mineral estate.¹⁶ Today, the Osage Nation is the beneficial owner of the 1.47 million acre mineral estate.¹⁷

Despite the Tribe’s retention of the mineral estate, the Act included a special provision regarding surface owners that remains intact today. The provision states that “except as herein provided, [each surface owner] shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States.”¹⁸ Although it seems commonplace, this provision ensures that surface owners retain full property rights to the land.

Additionally, there is another player in the equation: the federal government. Although the Tribe retains the mineral rights, the federal government still holds a stake in the land. The Osage Act reserved the mineral estate for the benefit of the Tribe, but the Act appointed the United States as the legal trustee of the estate.¹⁹ The Osage Nation may issue mineral leases for “all oil, gas, and other minerals,” but this power is subject to the Secretary of the Interior’s approval.²⁰ Indeed, “no mining . . . for any of said mineral or minerals shall be permitted . . . without the written consent of the Secretary of the Interior.”²¹ This provision of the Osage Act illustrates Congress’s intent to “maintain control over the more valuable resources to prevent their improvident depletion by individual trib[al] members.”²² The federal government’s continued presence in tribal affairs is unfortunately an all-too-familiar feeling for tribes. Although tribes are sovereign nations, the federal government often finds a way to maintain an active role in tribal affairs, sometimes for perceived good, but other times, for ill.

15. *Osage Wind*, 871 F.3d at 1082 (citing Act of June 28, 1906, § 3, 34 Stat. at 543–44).

16. *Id.*

17. *Frequently Asked Questions*, OSAGE NATION, <https://www.osagenation-nsn.gov/who-we-are/minerals-council/frequently-asked-questions> (last visited Feb. 13, 2019).

18. Act of June 28, 1906, § 2, 34 Stat. at 542. Critics of the Tenth Circuit’s decision in *Osage Wind*, such as the American Wind Energy Association, would later seize on this provision, arguing that the court had infringed on the statutorily protected rights of surface estate owners in Osage County. See Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioner, *supra* note 4, at 10.

19. *Osage Wind*, 871 F.3d at 1082.

20. *Id.*

21. Act of June 28, 1906, § 2, 34 Stat. at 543–44.

22. *Millsap v. Andrus*, 717 F.2d 1326, 1328 (10th Cir. 1983).

Through its constitution, the Osage Nation created the Osage Minerals Council and gave the council the authority to develop the mineral estate and make decisions regarding daily operations.²³ Presently, the Osage Minerals Council consists of eight tribal members elected to serve as the governing body for the mineral estate.²⁴

The federal government continually remains involved. The Department of the Interior (DOI) has the power to make rules regarding tribal minerals.²⁵ The DOI controls federal lands and plays an important role in formulating energy policy where resources involve the development of mineral rights on public lands.²⁶ The DOI has exercised its rulemaking power and enacted rules governing mineral leases on tribal lands. One rule at issue in *United States v. Osage Wind, LLC* was 25 C.F.R. § 211.3, which regulates the development of Indian mineral resources and sets forth the definition of “mining.”²⁷ Under 25 C.F.R. § 211.3, mining is defined 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.”²⁸

Although that definition initially appears fairly broad, not all activities constitute mining. For instance, moving small amounts of materials does not fall within the parameters of the definition.²⁹ If excavation activities use less than 5000 cubic yards per year of “sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt,” the actions are not considered mining.³⁰ This distinction is important because under a different federal regulation—25 C.F.R. § 214.7—the DOI requires a mineral lease for actions that constitute mining.³¹ This provision expressly states that “[n]o mining or work of any nature will be permitted upon any tract of land until a lease covering such tract . . . [is] approved by the Secretary of the

23. *Minerals Council*, OSAGE NATION, <https://www.osagenation-nsn.gov/who-we-are/minerals-council> (last visited Sept. 28, 2018).

24. Press Release, Fredericks Peebles & Morgan LLP, Osage Minerals Council Prevails in Supreme Court in Case Which Determines That Enel Wind Farm Must Obtain a Minerals Lease (Jan. 7, 2019) (on file with author).

25. *Osage Wind*, 871 F.3d at 1082.

26. JOEL B. EISEN ET AL., ENERGY, ECONOMICS, AND THE ENVIRONMENT 19 (4th ed. 2015).

27. *Osage Wind*, 871 F.3d at 1082.

28. 25 C.F.R. § 211.3 (2016) (emphasis added), *quoted in Osage Wind*, 871 F.3d at 1082.

29. 25 C.F.R. § 211.3.

30. *Id.*

31. *Osage Wind*, 871 F.3d at 1082 (citing 25 C.F.R. § 214.7 (2011)).

Interior and delivered to the lessee.”³² As noted, a mineral lease is not required if activities fall within the DOI exception for small amounts of common materials.³³ The Tenth Circuit was forced to closely examine and analyze each of these DOI regulations to reach its holding.

Beyond its application of the DOI regulations, the Tenth Circuit relied heavily on the Indian canons of construction. These canons allow courts, in certain contexts, to interpret statutes and treaties in favor of Indian tribes.³⁴ As a matter of practical application, the canons should be used only where “the plain text of the document is unclear.”³⁵ In line with this limiting principle, the Supreme Court, along with other lower courts, has held that the canons should not be used if there is no ambiguity in the law.³⁶ The canons, though often referred to generally, consist of three discrete notions of interpretation.³⁷ The first canon provides that terms should be liberally

32. 25 C.F.R. § 214.7, *quoted in Osage Wind*, 871 F.3d at 1082.

33. 25 C.F.R. § 211.3 (“[W]hen sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt is 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.”).

34. *Tenth Circuit Takes Expansive View of the Definition of the Term “Mining,” Holding Wind Farm Project Needs Permit Prior to Commencement of Excavation in Tribal Mineral Estate*, NAT’L LAW REV. (Mar. 1, 2018), <https://www.natlawreview.com/article/tenth-circuit-takes-expansive-view-definition-term-mining-holding-wind-farm-project> [hereinafter *Tenth Circuit Takes Expansive View of the Term “Mining”*].

35. Barbara Moschovidis, Note, *Osage Nation v. Irby: The Tenth Circuit Disregards Legal Precedent to Strip Osage County of Its Reservation Status*, 36 AM. INDIAN L. REV. 189, 194 (2011-2012); *see also* *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”); *Alaska Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918) (“[S]tatutes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (“If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.”); *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983) (“If there were any doubt as to the congressional meaning of ‘other minerals,’ that rule mandates that it be read as incorporating the broad definition”).

36. *See South Carolina v. Catawaba Indian Tribe*, 476 U.S. 498, 506 (1986) (“The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist”); *Penobscot Nation v. Mills*, 861 F.3d 324, 329 n.3 (1st Cir. 2017) (stating that “it would be an error of law to apply the [Indian] canon” where “the plain meaning” of statutory text leaves “no ambiguities to resolve in favor of” a tribe); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014) (noting that a court may not invoke a canon to find “ambiguities that do not exist”).

37. Blurton, *supra* note 1, at 42.

construed in the light most favorable to the Indian tribes.³⁸ The second requires courts to resolve textual ambiguity in favor of the Indian tribes.³⁹ The third canon instructs courts to interpret terms as the Indian tribes would have understood them at the time.⁴⁰

The Tenth Circuit in *United States v. Osage Wind, LLC*⁴¹ utilized the canons, the DOI's regulations, and applicable tribal law to reach its holding after a wind developer sought to build a wind farm on land in Osage County, Oklahoma. Because the Osage Nation retained the mineral estate, 25 C.F.R. §§ 211.3 and 214.7 were especially important in the court's analysis concerning the litigation between the wind developer and the Tribe. The court used the canons of construction to further clarify these regulations.

B. Background of the Case

Their vast, undeveloped, rural acreage makes tribal lands a prime choice for wind developers searching for property on which to build new wind farms.⁴² In the United States, many wind farms are located in the Midwest because of the region's "stronger and more reliable" airflow⁴³ and abundance of Indian reservations. Additionally, much of Indian Country is located in areas that are beneficial for energy transmission and transportation.⁴⁴ Taking all of these considerations in sum, tribal lands offer wind developers an appealing portfolio of benefits that are often hard to pass up.

Osage Wind, LLC⁴⁵ ("Osage Wind"), a developer, caught wind of these potential benefits and leased more than 8000 acres from surface owners in

38. *Id.*

39. *Id.*

40. *Id.*

41. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1082 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

42. See Bethany C. Sullivan, Note, *Changing Winds: Reconfiguring the Legal Framework for Renewable-Energy Development in Indian Country*, 52 ARIZ. L. REV. 823, 825 (2010) (discussing why tribal lands are well-suited for wind projects).

43. Kayla J. Cawood, Note, *The Potential for Production: Regulating Oklahoma's Wind Estate and Encouraging Sustainable Wind Energy Development*, 41 OKLA. CITY U. L. REV. 201, 204 (2016).

44. Sullivan, *supra* note 42, at 826.

45. *Osage Wind*, 871 F.3d at 1081 n.1 (explaining that Osage Wind, LLC is wholly owned by Defendant Enel Kansas, LLC, which is wholly owned by Defendant Enel Green Power North America, Inc.).

Osage County, Oklahoma, to build a commercial operation.⁴⁶ After learning of the wind developer's plans, the United States and the Osage Minerals Council filed suit in 2011 (the 2011 lawsuit) in an attempt to halt construction.⁴⁷ The Tribe and the federal government feared that Osage Wind's plans would restrict access to the mineral estate and impede the Tribe's mineral production.⁴⁸ At trial, however, the court ruled in favor of the wind developer because the Tribe lacked evidence that its mineral lessees had plans to use the mineral estate in a way that conflicted with the wind developer's construction plans.⁴⁹ Despite the challenges brought by the 2011 lawsuit, the wind developer was allowed to proceed with the Osage County project.

Three years after the 2011 lawsuit, Osage Wind began the excavation work required to construct concrete foundations for the wind turbines.⁵⁰ During the construction process, Osage Wind dug large holes and extracted rock from the ground.⁵¹ Specifically, Osage Wind dug holes ten feet deep and sixty feet wide and filled them with cement.⁵² Next, Osage Wind crushed the small extracted rocks and used them as backfill around the concrete foundations.⁵³ The larger rocks were left on the surface, next to the construction sites.⁵⁴

Two months after Osage Wind began excavation, the United States filed suit on behalf of the Tribe, seeking an injunction to stop the excavation process.⁵⁵ The United States claimed the wind developer's actions constituted "mining" as defined by 25 C.F.R. § 211.3, which requires a mineral lease from the Osage Nation.⁵⁶ After learning that Osage Wind had already begun excavation, the United States amended its complaint to seek damages instead of an injunction.⁵⁷

The district court was not persuaded by the United States' argument, and it accordingly granted summary judgment for the wind developer.⁵⁸ In

46. *Id.* at 1083.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1084.

reaching its holding, the district court concluded that Osage Wind's actions did not fall within the DOI's definition of mining, meaning the developer was not required to obtain a mineral lease from the Tribe.⁵⁹ The district court rationalized its holding by establishing that minerals must be "commercialized" to constitute mining under 25 C.F.R. § 211.3.⁶⁰ According to the district court, mining encompasses only activities with a "commercial mineral development purpose" and not activities that "incidentally encounter[] minerals in connection with surface construction activities."⁶¹

On the last day to appeal the district court's decision, the United States informed the Tribe that it would not appeal.⁶² Rushed by the quick deadline, the Osage Minerals Council (OMC) immediately filed a motion to intervene as a matter of right and a notice of appeal.⁶³ As later shown by the Tenth Circuit's holding⁶⁴ and the Supreme Court's denial of a petition for a writ of certiorari, the OMC's efforts were vital in protecting the Tribe's property interest.⁶⁵

Nevertheless, at the Tenth Circuit, the question before the court was whether "a large-scale excavation project . . . constituted 'mining' under the pertinent federal regulations that address mineral development on Indian land."⁶⁶

III. Discussion of the Case

On appeal, the Tenth Circuit addressed two procedural issues before reaching the merits of the case.⁶⁷ First, the court found that the OMC's appeal was proper even though the council was not formally joined to the lower court proceedings.⁶⁸ In addition, the court found that the OMC's

59. *Id.*

60. *Id.* at 1089.

61. Brief for the United States as Amicus Curiae at 4, *Osage Wind*, 871 F.3d 1078 (No. 17-1237), 2018 WL 6382961, at *4.

62. *Osage Wind*, 871 F.3d at 1084.

63. *Id.*

64. *Another Indian Law Case in Limbo as High Court Turns to Trump Again*, *supra* note 8.

65. *Osage Wind*, 871 F.3d 1078.

66. *Id.* at 1081.

67. *Id.* at 1084.

68. *Id.*

claim was not barred by *res judicata* via the 2011 lawsuit because the claim was not ripe for review in 2011.⁶⁹

After discussing the procedural claims, the Tenth Circuit addressed whether Osage Wind's actions could be considered mining under 25 C.F.R. § 211.3.⁷⁰ As a means of providing context, the court began its analysis by discussing the wind developer's specific activities before addressing the federal regulations. Osage Wind began the excavation process by "remov[ing] rock sediment and soil from the ground, creating large holes into which it could pour a cement foundation."⁷¹ The wind developer then "sorted the extracted rock . . . into small and large pieces, and then crushed the smaller pieces so they would be the proper size for backfilling the holes."⁷² Once this process was complete, Osage Wind put the "bigger rock pieces adjacent to the backfilled excavation sites."⁷³ These steps allowed Osage Wind to add "structural support" to the turbine foundations.⁷⁴

After providing factual context, the Tenth Circuit examined the district court's commercialization requirement.⁷⁵ Because the text of 25 C.F.R. § 211.3 does not mention the term "commercialization," the appellate court dismissed the district court's requirement.⁷⁶ Unpersuaded by the court's logic, the Tenth Circuit instead focused on the phrase "mineral development" under the § 211.3 definition of mining, as opposed to commercialization, to analyze Osage Wind's actions.⁷⁷

To decide whether or not Osage Wind's actions constituted mineral development, the court turned to the Indian canons of construction for help with deciphering the phrase.⁷⁸ The Tenth Circuit acknowledged prior precedent, stating it was "cognizant of the long-established principle that ambiguity in laws designed to favor the Indians ought 'to be liberally construed' in the Indians' favor."⁷⁹ The Indian canons of construction apply when regulations and laws are enacted for the purpose of advancing tribal interests. Here, the DOI's regulations were promulgated to "protect Indian

69. *Id.*

70. *Id.*

71. *Id.* at 1087.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1089.

76. *Id.*

77. *Id.* at 1090.

78. *Id.*

79. *Id.* (citations omitted).

mineral resources and ‘maximize [Indians’] best economic interests.’⁸⁰ Thus, because the regulations were passed for the benefit of the Indian tribes, the Tenth Circuit properly relied on the canons to reach its conclusion.

Applying the canons directly to 25 C.F.R. § 211.3, the text of the regulation states mining “includ[es] but [is] not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals.”⁸¹ The Tenth Circuit honed in on the phrase “directed to severance and treatment of minerals,” finding that this phrase requires “acting upon the minerals to exploit [them].”⁸² Applying this interpretation to the facts of the case, the Tenth Circuit determined that Osage Wind “act[ed] upon the minerals to exploit [them]” when the developer crushed the small rocks to make backfill.⁸³ The court found the developer’s crushing activities to be of great importance. While merely displacing the minerals during digging would have likely produced a different outcome, crushing the rocks and using the materials as support constituted mineral development.⁸⁴ The canons of construction helped the court adopt this broad definition of mining by allowing it to construe 25 C.F.R. § 211.3 in the light most favorable to the Osage Nation.⁸⁵ Under this rationale, Osage Wind should have obtained a mineral lease from the Tribe before beginning development.⁸⁶

Though the Tenth Circuit’s definition of mining was broad, it was not without limits. The court made sure to note that “merely encountering or incidentally disrupting mineral materials” does not fall within the definition of mining nor would it trigger a requirement for a mineral lease from the Tribe.⁸⁷ As such, “the simple removal of dirt” would be excluded from the lease requirement.⁸⁸ Interestingly, however, the Tenth Circuit’s inclusion of the disclaimer that the wind developer’s actions did “not fit nicely with traditional notions of ‘mining’ as [the] term is commonly understood” acknowledges that its decision was unconventional.⁸⁹

80. *Id.* (citing 25 C.F.R. § 211.1 (2016)).

81. 25 C.F.R. § 211.3, *quoted in Osage Wind*, 871 F.3d at 1091.

82. *Osage Wind*, 871 F.3d at 1091.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1092.

87. *Id.*

88. *Id.*

89. *Id.*

After the Tenth Circuit ruled for the Tribe, Osage Wind petitioned the Supreme Court for a writ of certiorari.⁹⁰ The two questions on petition for writ of certiorari were:

(1) [w]hether the court of appeals had jurisdiction over the appeal filed by a nonparty when the nonparty did not participate in any capacity in the district court proceedings; . . . (2) whether the Tenth Circuit improperly invoked the Indian canon of construction to deprive surface-estate owners who are members or successors-in-interest to Indian tribe members of important property rights by overriding clear regulatory language for the express purpose of favoring the economic interests of an Indian tribe without examining congressional intent.⁹¹

In May of 2018, the Supreme Court asked the Office of the Solicitor General to submit briefing in the case.⁹² Seven months later, the Solicitor General filed an amicus brief expressing the views of the United States.⁹³ This brief urged the Court to deny the petition, despite the fact that two earlier amici briefs urged the Court to grant it.⁹⁴ The brief commented specifically on the fact that Osage Wind had not identified a circuit court conflict that warranted review regarding the DOI regulations—because one did not exist.⁹⁵ The Solicitor General stated that the Supreme Court “should follow its usual ‘practice of waiting for a conflict to develop’” before addressing this matter.⁹⁶

90. Petition for a Writ of Certiorari at i, *Osage Wind*, 871 F.3d 1078 (No. 17-1237), 2018 WL 1182776, at *i.

91. *Id.*

92. Lenzy Krehbiel-Burton, *U.S. Supreme Court Invites Solicitor General to Submit Brief in Osage Wind Case*, OSAGE NEWS (May 14, 2018), <http://www.osagenews.org/en/article/2018/05/14/us-supreme-court-invites-solicitor-general-to-submit-brief-in-osage-wind-case/>.

93. *Osage Wind, LLC v. Osage Mineral Council*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/osage-wind-llc-v-osage-mineral-council/> (last visited Jan. 12, 2019).

94. Lenzy Krehbiel-Burton, *SCOTUS Declines to Hear Osage Wind Case*, OSAGE NEWS (Jan. 7, 2019), <http://www.osagenews.org/en/article/2019/01/07/scotus-declines-hear-osage-wind-case/> [hereinafter *SCOTUS Declines to Hear Osage Wind Case*] (stating that the American Wind Energy Association and Osage County Farm Bureau submitted amicus briefs encouraging the Court to grant the petition).

95. Brief for the United States as Amicus Curiae, *supra* note 61, at 17.

96. *Id.* at 18.

Shortly thereafter, on January 7, 2019, the Supreme Court denied the petition for a writ of certiorari.⁹⁷ The Supreme Court's action leaves the Tenth Circuit's holding in place.⁹⁸ Consequently, the Osage Nation will likely be in a position to collect damages caused by the wind developer's mining activities.⁹⁹

IV. Analysis

The Tenth Circuit properly held for the Osage Nation and protected the Tribe's property interests. Furthermore, although indirectly, the Supreme Court's denial of a writ of certiorari affirms this conclusion. The Tenth Circuit was correct in relying on the Indian canons of construction because the phrase "mineral development" within the DOI's definition of mining was ambiguous. It required more than a superficial analysis to determine what actions fall into this characterization. The court correctly protected the Tribe's property interest because the rocks that Osage Wind used for backfilling the construction site belonged to the Osage Nation. For future projects, the Tenth Circuit's ruling serves to remind developers to familiarize themselves with the relevant permitting and leasing requirements—and undergo appropriate discussions and gain approvals—*before* beginning a wind project on tribal land.

A. The Use of the Indian Canons of Construction

The court's use of the Indian canons of construction was appropriate here because the phrase "mineral development" needed further clarification. The Indian canons of construction allow courts to read statutes and treaties in favor of Indian tribes,¹⁰⁰ but there are qualifications to their application. The canons are typically used where a tribe is "a party to a treaty or statute passed by Congress."¹⁰¹ Courts originally used the canons to compensate for unequal bargaining power between Indian tribes and the federal government at the time that many of the statutes and treaties were enacted.¹⁰² The purpose of these canons, however, has shifted over time. The canons are now used to illustrate the fiduciary relationship between the federal government and Indian tribes.¹⁰³ Initially, the canons only applied to

97. *Osage Wind, LLC v. Osage Mineral Council*, 139 S. Ct. 784 (2019) (mem.).

98. Press Release, Fredericks Peebles & Morgan LLP, *supra* note 24.

99. *SCOTUS Declines to Hear Osage Wind Case*, *supra* note 94.

100. *Tenth Circuit Takes Expansive View of the Term "Mining"*, *supra* note 34.

101. Moschovidis, *supra* note 35, at 193.

102. *Id.*

103. Blurton, *supra* note 1, at 41.

treaties,¹⁰⁴ but the Supreme Court later established that the canons applied to federal statutes through its holding in *Choate v. Trapp*.¹⁰⁵

Before discussing the ambiguity of the regulation, it is important to ascertain whether the canons should have been invoked based on the *purpose* of the regulations. The Department of the Interior promulgated 25 C.F.R. §§ 211.3 and 214.7 to “protect [tribal] mineral resources and ‘maximize [the] [Indians]’ best economic interests.”¹⁰⁶ Because the regulations were created to benefit the Tribe, the Tenth Circuit was well within its limits to rely on the canons.

As a practical matter, the canons apply only when the text of a statute or treaty is ambiguous.¹⁰⁷ Charles F. Wilkinson, an Indian law scholar and professor, once commented that “[i]f Indians are involved, you should . . . read [the] laws with a *heavy bias* in favor of . . . tribal prerogatives.”¹⁰⁸ If Indian rights are created or expanded, courts should read the text of the regulation broadly.¹⁰⁹ Alternatively, if a party is attempting to limit a tribe’s rights, courts should read the text narrowly in favor of the tribe.¹¹⁰

There are some circumstances in which the Indian canons of construction do not apply. For instance, the canons should not be used in litigation where one party is a tribe and the other party consists of a group of tribal members.¹¹¹ In this scenario, the canons are of no value because there are tribal members on both sides of the litigation. In *United States v. Osage Wind, LLC*,¹¹² however, the litigation involved a private non-Indian wind developer and an Indian tribe. Further, the canons should not be used where the text of the statute or regulation is easily understood. Numerous courts have held that the canons should be used “*only* when the plain text of [the] document is unclear.”¹¹³

Addressing the ambiguity of 25 C.F.R. § 211.3, the canons proved crucial to determine whether Osage Wind’s actions could be classified as

104. *Id.* at 42.

105. *Id.*

106. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.) (citing 25 C.F.R. § 211.1 (2016)).

107. *See id.*

108. Blurton, *supra* note 1, at 39 (emphasis added).

109. Appellant’s Opening Brief at 33, *United States v. Wind Farm, LLC*, 871 F.3d 1078 (10th Cir. 2017) (Nos. 15-5121, 16-5022), 2016 WL 2347320, at *33 (citations omitted).

110. *Id.*

111. Blurton, *supra* note 1, at 46 (citing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976)).

112. 871 F.3d 1078 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

113. Moschovidis, *supra* note 35, at 194 (emphasis added).

mineral development within the definition of mining. On one hand, “mining” is arguably clear. Critics of the Tenth Circuit’s decision state that mining is plainly defined as “the process of extracting from the earth the rough ore or mineral; that is, the act or business of making mines or working them.”¹¹⁴ To the layperson, mining is generally understood and unambiguous. Most would likely agree with the Merriam-Webster definition of mining, which states that mining is “the process or business of working mines.”¹¹⁵ It is hard to imagine that Osage Wind’s actions constituted mining under commonly accepted terms. Still, although mining may seem clear, the phrase “mineral development” is not as black and white.

The text of the regulation provides important insight. The regulation notes that “mineral development” “*includ[es], but [is] not limited to:* opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals.”¹¹⁶ The words “including, but not limited to” are crucial.¹¹⁷ The regulation provides a list of examples, but the list is not exhaustive. Although the list provides guidance, the list does not include the actions that Osage Wind took when building the concrete foundations. The list does not state anything about digging holes, excavating ground, or crushing rock to use as backfill. Because these actions are not enumerated, and thus not clearly included or excluded, the Tenth Circuit properly relied on the canons to determine whether Osage Wind’s actions constituted “mineral development.” Taking the phrase in a literal sense, Osage Wind “developed” the minerals when they excavated the rock and crushed the smaller rocks for backfill. Consequently, the Tenth Circuit’s holding is supported by a practical understanding of the text.

Although both parties have valid arguments about the ambiguity of “mining” and “mineral development” under 25 C.F.R. § 211.3, the court appropriately relied on the canons to further define the terms. The phrase “including, but not limited to” required the court to look further to make its determination that Osage Wind developed the Tribe’s minerals. Ultimately,

114. Motion for Leave to File and Brief of Amici Curiae in Support of Petitioners by Osage County Farm Bureau, Inc. et al. at 13–14, *Osage Wind*, 871 F.3d 1078 (No. 17-1237), 2018 WL 1666863, at *13–14 (citing 58 C.J.S. *Mines and Minerals* § 4 (Westlaw, Mar. 2018 update)).

115. *Mining*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mining> (last visited Feb. 13, 2019).

116. 25 C.F.R. § 211.3 (2018) (emphasis added), *quoted in Osage Wind*, 871 F.3d at 1082.

117. *Osage Wind*, 871 F.3d at 1082.

under 25 C.F.R. § 211.3, Osage Wind acted upon the Tribe's resources without a mineral lease.

B. The Tribe's Real Property

By holding for the Tribe, the Tenth Circuit protected the Tribe's property interests because the backfill materials belonged to the Osage Nation. The Osage Nation holds title to the mineral estate under the Osage Act. With title, the Tribe has the choice to develop—or abstain from developing—its mineral resources.¹¹⁸ The Osage Nation also has the ability to control the mining activities that affect the subsurface estate, even if they take place on the surface.¹¹⁹

The property rights to the minerals are based on the “notion[] that property consists not of things, but of legal relationships.”¹²⁰ The relationships do not focus on the objects themselves; the focus is instead on the parties involved in the legal transaction.¹²¹ Traditionally, under the *ad coelum* doctrine, whoever owned the soil owned “to the sky and to the depths.”¹²² This doctrine, however, has been modified by modern property concepts affecting the transfer, removal, and use of such property interests.¹²³ Specifically in this case, the Osage Nation's traditional property rights were altered when its mineral rights were severed from the surface rights. After the Osage Act, the Tribe's property rights stemmed from the legal relationship created from the severance. Since the time of severance, the Tribe has held title to the subsurface estate.

Understanding the role that tribes play in the ownership of minerals and natural resources has not always been easy.¹²⁴ For instance, in an 1873 Supreme Court case, the Court held that timber cut on tribal lands belonged to the federal government instead of the Tribe.¹²⁵ Although the land itself belonged to the Tribe, the Court viewed the cut timber as the property of the federal government.¹²⁶ The Court's ruling in this case illustrates the attitude the federal government had toward tribal property ownership during that time.

118. Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 544–45 (1994).

119. *Id.* at 545.

120. Cawood, *supra* note 43, at 211.

121. *Id.*

122. EISEN ET AL., *supra* note 26, at 10 & n.2.

123. *Id.*

124. *See* Royster, *supra* note 118, at 546.

125. *Id.*

126. *Id.*

The Court's view eventually began to change. Specifically related to subsurface estates, the DOI and Congress began to formally recognize tribes as owners of subsurface estates in the 1900s; the Supreme Court followed suit in 1938.¹²⁷ The Court recognized the subsurface minerals were "constituent elements of the land itself" belonging to the Indian tribes.¹²⁸ This shift in view of tribal property ownership is noteworthy as it applies to the present case.

In the context of the Osage Nation, the Osage Act formally recognizes that all subsurface minerals are the Tribe's property.¹²⁹ The phrase "all minerals" encompasses rights to the "rocks, gravel, oil, gas, and other minerals."¹³⁰ Because "all minerals" expressly includes "rocks," the rocks in the present case belonged to the Osage Nation. Osage Wind effectively took the Tribe's property and used it for its own gain without permission from the Tribe. By using the rocks for backfill, the wind developers "trespassed on the Osage mineral estate, in violation of law[,] . . . caus[ing] damage . . . [and placing] a continuing trespass [that] diminishes . . . the use and enjoyment of the mineral estate."¹³¹

It is hard to believe that a sophisticated wind developer had no notice that the Osage Nation held title to the mineral estate; the developer should have known that all of the minerals therein belonged to the Tribe. Osage Wind's use of the Tribe's rock for backfill denied the Osage Nation a property right that every other property owner enjoys.¹³² This property right—preventing someone from taking and using another's property without permission or payment—is fundamental.¹³³

The Tenth Circuit's holding recognizes that the Tribe was deprived of this right and illustrates a balance between the interests of wind developers and the protection of tribal property rights. The Supreme Court's recent denial of the petition for writ of certiorari implicitly reinforces the notion that the Tribe was the rightful owner of its minerals. After the Supreme Court's denial, the Tribe commented that they were "pleased that the United States has left in place the Tenth Circuit decision that the OMC, like

127. *Id.* at 546–47.

128. *Id.* at 547 (citing *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938)).

129. Response in Opposition to Petition for Writ of Certiorari at 6, *United States v. Osage Wind, LLC*, 871 F.3d 1081 (2017) (No. 17-1237), 2018 WL 1705593 at *6.

130. *Id.* at 7.

131. *Another Indian Law Case in Limbo as High Court Turns to Trump Again*, *supra* note 8.

132. Response in Opposition to Petition for Writ of Certiorari, *supra* note 129, at 4.

133. *Id.* at 2.

other property owners, has the right to obtain compensation for use of its land.”¹³⁴

C. *This Requirement in Practice*

In practice, it is reasonable to expect developers to communicate with Indian tribes to satisfy proper leasing requirements before beginning excavation work. If Osage Wind had fulfilled this expectation, it would have respected the Osage Nation’s property rights while avoiding this litigation and all of its attendant costs. As a general matter, Indian tribes play a unique role in creating “innovative approaches” in the development of renewable energy solutions because of their sovereignty and available resources.¹³⁵ Wind developers should recognize this and communicate with Indian tribes in order to foster workable relationships in the future.

Numerous wind industry groups have stressed the importance of fully investigating leasing and regulatory requirements before beginning the development of a new wind project. The American Wind Energy Association (AWEA) has stated that a developer should consider certain factors before beginning a project, including “the amount of wind in a given area, *land rights, government permits*, transmitting the energy generated, a buyer for the energy, and financing for the project.”¹³⁶ On its website, the AWEA makes clear that the wind industry is “carefully regulated” and that land rights and government permits should be investigated in the planning phases before construction.¹³⁷

Another wind industry proponent, *Windustry.org*, supports the guidance outlined by the AWEA and recommends that developers familiarize themselves with “*securing permits* and . . . financing.”¹³⁸ It is further recommended that developers meet with permitting authorities to discuss requirements and applications.¹³⁹ Both of these consumer-friendly websites explicitly mention the importance of securing permits and becoming familiar with land rights. *Windustry.org* also provides developers with a start-to-finish guide for beginning new projects, discussing the permitting

134. Press Release, Fredericks Peebles & Morgan LLP, *supra* note 24.

135. Sullivan, *supra* note 42, at 826.

136. Cawood, *supra* note 43, at 222 (emphasis added).

137. *Project Development*, AWEA, <https://www.awea.org/policy-and-issues/project-development> (last visited Jan. 6, 2018).

138. Lisa Daniels, *Community Wind Toolbox Chapter 2: Development Overview and Checklist*, WINDUSTRY (Jan. 16, 2008), http://www.windustry.org/community_wind_toolbox-2-development-overview-and-checklist (emphasis added).

139. *Id.*

process at length.¹⁴⁰ These resources make it easy for developers to identify their requirements and satisfy them before entering the construction phases of development.

Therefore, it is not far-fetched to expect wind developers to become acquainted with the permitting and leasing requirements when planning a new project. Because of the Osage Nation's sovereignty and individual government, Osage Wind should have had a heightened awareness of the need to investigate the Tribe's requirements and satisfy them before beginning construction. Both the AWEA and *Windustry.org* provide the basic level of care that developers should satisfy when planning new projects—merely securing the necessary permits. If Osage Wind did its due diligence in investigating the Tribe's requirements and communicating with tribal leaders, it is quite likely that *United States v. Osage Wind, LLC*¹⁴¹ never would have happened. Going forward, this case reiterates that wind developers, arguably the experts in the wind industry, must investigate, research, and satisfy their requirements before beginning construction.

The Osage Nation's attorney, Jeffrey Rasmussen, commented on Osage Wind's actions and lack of due diligence before beginning the project.¹⁴² Rasmussen noted that Osage Wind "didn't have the Minerals Council's consent . . . and now they've invested millions of dollars when it's fairly obvious they needed a lease."¹⁴³ Rasmussen cautioned other developers to "be careful . . . because [they] don't want to get in the situation these guys are in."¹⁴⁴

By serving as an example of the consequences of proceeding without a lease, this case will hopefully eliminate similar problems with developers in the future. The Tenth Circuit's ruling signals that courts will likely be unsympathetic if a developer does not conduct proper diligence before beginning a project.¹⁴⁵ This lack of sympathy is especially true where tribal

140. Lisa Daniels, *Community Wind Toolbox Chapter 6: Permitting Basics*, WINDUSTRY (Dec. 15, 2007), http://www.windustry.org/community_wind_toolbox_6_permitting_basics.

141. 871 F.3d 1078 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

142. Kyle Hinchey, *Appeals Court Reverses Judge's Decision Allowing Wind Developers to Dig on Osage Land*, TULSA WORLD (Sept. 18, 2017), https://www.tulsaworld.com/news/courts/appeals-court-reverses-judge-s-decision-allowing-wind-developers-to/article_2a6eab9f-0a8c-5c72-aa02-caee53f8e14a.html.

143. *Id.*

144. *Id.*

145. WilmerHale, *Court Holds Project Construction Constitutes "Mining" on Tribal Lands*, JDSUPRA (Sept. 27, 2017), <https://www.jdsupra.com/legalnews/court-holds-project-construction-84462/>.

lands are involved.¹⁴⁶ Legal requirements are everchanging; accordingly, developers should be extremely proactive in ascertaining their requirements in the planning phases of production.¹⁴⁷

D. Minimal Implications

After the Tenth Circuit's decision, questions began to circulate regarding how far the Indian canons of construction could stretch and what implications would come from this ruling. The American Wind Energy Association attacked the ruling as affecting the rights of surface owners and affecting wind developers wanting to build new projects on tribal lands.¹⁴⁸ As a whole, however, the implications from *United States v. Osage Wind, LLC*¹⁴⁹ are minimal. The Tenth Circuit's decision will serve only to protect tribal property interests and remind wind developers of their duties and obligations. The day-to-day life of surface owners and wind developers will remain largely unaffected, and the economic benefit of wind projects will likely remain unstifled.

Although criticized by some, the holding in *United States v. Osage Wind, LLC*¹⁵⁰ will have "little to no effect" on surface owners in Osage County and beyond.¹⁵¹ Osage Wind specifically criticized the Tenth Circuit's holding in its Response to Opposition to Petition for Writ of Certiorari, stating that the canons of construction are improper where they are "invoked to expand the rights of a tribe by judicial fiat, particularly when that is accomplished at the expense of private land owners by adopting 'a contorted construction' of clear text."¹⁵² Thus, to dispel any related criticisms, it is important to address how this case will affect surface owners.

The DOI's *de minimis* exception to the mining requirement outlined in 25 C.F.R. § 211.3 will encompass most surface activities.¹⁵³ The *de minimis*

146. *Id.*

147. *Id.*; see also Summer L. Carmack, *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017), PUB. LAND & RES. L. REV. (CASE SUMMARIES) 1, 6–7 (2017-2018), <https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=1570&context=plrlr>.

148. Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioner, *supra* note 4, at 10.

149. 871 F.3d 1078 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

150. *Id.*

151. Response in Opposition to Petition for Writ of Certiorari, *supra* note 129, at 27.

152. Andrew Westney, *Wind Farm Cos. Tell Justices Feds Wrong on Tribal Appeal*, LAW360 (Dec. 19, 2018), <https://www.law360.com/articles/1113138/wind-farm-cos-tell-justices-feds-wrong-on-tribal-appeal>.

153. 25 C.F.R. § 211.3 (2016).

exception does not require a mineral lease if the excavation is of common materials less than 5000 cubic yards per year.¹⁵⁴ This exception encompasses most “simple removal[s] of dirt.”¹⁵⁵ In fact, the Tenth Circuit specifically noted that “building a basement or swimming pool necessarily involves digging a hole in the ground, displacing rock and soil in the process,”¹⁵⁶ but these actions are protected by the *de minimis* exception. If a certain activity falls within this exception—and most will—surface owners need not obtain a mineral lease from the Tribe. This exception serves to reassure surface owners that they will continue to maintain “virtually uninhibited use of their land[.]”¹⁵⁷

Rebuking the Tenth Circuit decision, the American Wind Energy Association argued that the holding conflicted with the Osage Act.¹⁵⁸ In practice, this holding actually goes hand-in-hand with the Act. As stated previously, the Osage Act references the free use “of the surface estate.”¹⁵⁹ Under the Tenth Circuit’s holding, surface owners still retain free use of the surface estate and maintain their property rights, which are the same as every other landowner.¹⁶⁰ Surface owners may reside, work, camp, picnic, graze, and take part in all other related activities that landowners enjoy on their property. These actions are not unsettled by this decision.

Even if a surface owner wanted to develop and excavate his land beyond what is appropriate under the *de minimis* exception, he could likely still do so by obtaining a mineral lease from the Tribe. In enacting both the mineral lease requirement and the *de minimis* exception, the federal government attempted to balance the rights of both the surface owner and the Osage Nation. Requiring a surface owner to obtain a lease from the Tribe for the excavation of large amounts of minerals illustrates respect for tribal property rights.

The rationale behind the mineral lease requirement for large amounts of minerals is simple: developing minerals in large quantities goes beyond the basic use of the surface estate and can negatively impact the Indian tribe’s

154. Response in Opposition to Petition for Writ of Certiorari, *supra* note 129, at 27.

155. *Id.*

156. United States v. Osage Wind, LLC, 871 F.3d 1078, 1092 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

157. Response in Opposition to Petition for Writ of Certiorari, *supra* note 129, at 27.

158. Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioner, *supra* note 4, at 5, 10.

159. Response in Opposition to Petition for Writ of Certiorari, *supra* note 129, at 27.

160. Appellant’s Reply Brief at 22, United States v. Osage Wind, LLC, 871 F.3d 1081 (2017) (Nos. 16-5022, 15-5121), 2016 WL 3922731 at *22.

mineral resources.¹⁶¹ Therefore, it is logical for a surface owner planning a large project to ask the Tribe for permission before beginning construction. The application and approval of a mineral lease ensures that both involved parties are afforded proper respect. Since surface owners can still ask the Tribe for permission, their rights are largely unaffected by this ruling.

In the present case, Osage Wind's actions fell outside of the *de minimis* exception because the Tenth Circuit viewed the wind farm as a "single integrated project unified by proximity of time, space, and purpose," which allowed the court to view the eighty-four holes in the aggregate.¹⁶² This fact-specific interpretation is unlikely to restrict the future activities of surface owners or their lessees who may dig holes or build smaller structures on the surface.¹⁶³

Along with the unchanged surface rights, the Osage Nation's right to the mineral estate also remains unchanged. This ruling does not provide the Osage Minerals Council, the Osage Nation, or the Bureau of Indian Affairs with any right or power that the individual entities did not already have by holding title to the mineral estate.¹⁶⁴ This holding provides an excellent example of judicial interpretation aimed at striking a balance between the rights of each party.

E. Outside the Tenth Circuit

The outcome of *United States v. Osage Wind, LLC*¹⁶⁵ ensures that tribal property rights are protected within the Tenth Circuit and in other states across the nation. When asked about the effects of this case, Osage Minerals Council Chairman Everett Waller stated that this case is a "substantial victory for tribes, and more generally for mineral property rights owners."¹⁶⁶ This quote demonstrates that this holding reaches beyond merely the Osage Nation.

The Tenth Circuit is comprised of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, and this holding is binding on federal courts within this jurisdiction.¹⁶⁷ The effect of the Tenth Circuit's holding, however, is not limited to tribal wind dealings within this specific

161. *Id.*

162. Brief for the United States as Amicus Curiae, *supra* note 61, at 18–19.

163. *Id.* at 19.

164. Appellant's Reply Brief, *supra* note 160, at 22.

165. 871 F.3d 1078.

166. Press Release, Fredericks Peebles & Morgan LLP, *supra* note 24.

167. WilmerHale, *supra* note 145 (defining the Tenth Circuit as Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming).

jurisdiction. In fact, this holding could affect tribal land outside of the Tenth Circuit, land managed by the government, and industries other than wind.

There are substantial Indian lands in other states, including California, Arizona, Washington, and Montana.¹⁶⁸ Moreover, Indian tribes are the third largest owners of mineral resources in the United States.¹⁶⁹ Because wind projects are so common on tribal lands, it is likely that this factual situation could arise in other jurisdictions.¹⁷⁰ This holding will serve as persuasive evidence and provide an example of how to address these issues in courts in other jurisdictions analyzing similar factual scenarios.

Beyond just tribal interests, this holding could also protect land where the federal government manages the surface estate. Today, the federal government manages the mineral estate of approximately 755 million acres of land in the United States.¹⁷¹ The American Wind Energy Association, taking note of this, stated that the Tenth Circuit's ruling "could also be extended to activities outside of tribal land, thus requiring a lease for any activity that involves the digging of holes on land where the Federal government manages the mineral estate."¹⁷² Although 25 C.F.R. §§ 211.3 and 214.7 apply specifically to tribal lands, these regulations are similar to other federal regulations.¹⁷³ In the future, courts may look to this holding to determine whether related actions on federally managed lands would require a mineral lease, thus protecting these lands.¹⁷⁴ Any holding that improves early communication between parties whose interests may or may not converge is bound to improve outcomes on both procedural and substantive levels.

This ruling could also affect industries beyond the wind industry working within tribal or federal lands. For instance, the regulation "at issue . . . has general application to all leases and permits for the development of tribal mineral resources, including oil and gas, coal, geothermal, and solid minerals."¹⁷⁵ It is natural to assume that this holding could apply to these other energy industries. Because of its persuasive

168. *Id.*

169. Royster, *supra* note 118, at 542–43.

170. WilmerHale, *supra* note 145.

171. Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioner, *supra* note 4, at 9–10.

172. *Id.* at 9.

173. *Id.*

174. *Id.*

175. WilmerHale, *supra* note 145.

nature, *United States v. Osage Wind, LLC*¹⁷⁶ will promote unity and consistency in other jurisdictions addressing tribal wind issues, federally managed lands, and related issues in other energy contexts.

F. Economic Benefit from Wind Projects

Indian tribes depend on wind projects for economic gain and energy goal attainment. Indian nations feel immense benefit from wind developments because these projects create new jobs and stimulate the economy.¹⁷⁷ Likewise, implementing wind energy projects allows Indian tribes to diversify their energy portfolios and meet their clean energy goals.¹⁷⁸ From an economic standpoint, the Tenth Circuit's holding has been criticized as a potential hindrance to tribal economies and the abilities of tribes to meet their clean energy goals. Although critics pit tribal economic interests and tribal property interests against each other, these needs can peacefully coexist if balanced correctly. The Tenth Circuit illustrated this by harmonizing these interests with its holding in *United States v. Osage Wind, LLC*.¹⁷⁹

From an economic standpoint, the development of wind projects on tribal lands is particularly beneficial for Indian tribes.¹⁸⁰ Many reservations suffer economically, often struggling to provide core services for tribal members.¹⁸¹ For instance, it is common for reservations to “lack adequate health care, housing, and law enforcement services.”¹⁸² Wind energy serves as a solution to these struggles by providing an economic boost to these communities. Wind energy stimulates tribal economies because wind developers pay property owners for their resources.¹⁸³ Further, these projects bring with them the potential for the creation of new jobs.¹⁸⁴ In Oklahoma alone, tribal projects created more than 8000 jobs in 2017.¹⁸⁵ Further, developers brought money and revenue into the state by investing more than six billion dollars in Oklahoma during the first decade of wind

176. 871 F.3d 1078 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (mem.) (2019).

177. *See* Sullivan, *supra* note 42, at 825–26.

178. *Id.*

179. 871 F.3d 1078 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019) (mem.).

180. *See* Sullivan, *supra* note 42, at 826–27.

181. *Id.*

182. *Id.* at 826.

183. *See id.* at 826–27.

184. *Id.*

185. *Wind Energy in Oklahoma*, AM. WIND ENERGY ASS'N, <https://www.awea.org/Awea/media/Resources/StateFactSheets/Oklahoma.pdf> (last visited Nov. 1, 2018).

energy alone.¹⁸⁶ Wind energy projects are crucial to revitalizing tribal communities and creating new waves of opportunity. But while all of this is true, property rights are equally important, particularly given the autonomy, self-determination, and sovereignty that the right to defining, balancing, and evaluating them upholds.

The American Wind Energy Association feared that this ruling, if left in place, would hinder wind developments on tribal lands because developers would fear that working with tribes would lead to similar costly litigation and intensive permitting requirements.¹⁸⁷ Ironically, though, even though they are both proponents of the wind industry, Osage Wind argued the opposite—stating that the Tenth Circuit misapplied the Indian canons of construction by focusing too heavily on maximizing economic gain for the Tribe.¹⁸⁸ Despite being proponents of the wind industry, Osage Wind's argument directly contradicts the AWEA's argument regarding economic development. Nonetheless, economic effects will likely be minimal.

While a slight possibility exists that this case will deter some wind developers from working with Indian tribes, this trivial risk is not enough to outweigh the immense benefits that stem from this holding. Because tribal lands are so highly sought after by wind developers due to their portfolio of benefits, it is not likely that this ruling—which simply reminds developers to act proactively during the planning process—will deter them from working with tribes altogether. Were that the case, there would never have been any tribal/non-tribal partnerships within Indian Country, a supposition that modern realities bely. Further, any future surface estate lessee planning to build a wind farm could presumably avoid a similar result by purchasing backfill material and importing it to the construction site as opposed to using the tribe's minerals.¹⁸⁹

Like many tough questions involving allegedly competing rights, the interests here required a balancing act. The Tenth Circuit properly balanced

186. KYLE D. DEAN & RUSSELL R. EVANS, ECON. IMPACT GROUP, THE STATEWIDE ECONOMIC IMPACT OF WIND ENERGY DEVELOPMENT IN OKLAHOMA: AN INPUT-OUTPUT ANALYSIS BY PARTS EXAMINATION 4 (2014), <http://windcoalition.org/wp-content/uploads/2014/09/Oklahoma-Wind-Study-FINAL-26-March-20141.pdf>.

187. Brief Amicus Curiae of the American Wind Energy Association in Support of Petitioner, *supra* note 4, at 10.

188. Westney, *supra* note 152 (citations omitted) (stating that the court interpreted the Department of the Interior's regulations "for the purpose of maximizing economic gain to an Indian tribe, not for its intended purpose of construing ambiguous statutory text").

189. Brief for the United States as Amicus Curiae, *supra* note 61, at 18.

the Tribe's property interests with the Tribe's interests in stimulating economic growth.

V. Conclusion

Although some have criticized *United States v. Osage Wind, LLC*,¹⁹⁰ the Tenth Circuit correctly relied on the Indian canons of construction to protect the Osage Nation's real property interests from infringement by Osage Wind. From a policy perspective, it is logical to expect wind developers in the future to investigate and research their requirements before beginning construction—especially where tribes are involved. The implications from this case on surface owners will be minimal because of the carved-out exception for smaller projects. This case provides a template for when it is proper to apply the Indian canons of construction in similar factual scenarios that arise throughout the United States. The Tenth Circuit's holding properly balanced the interests of both parties and allows for future protection of tribal property interests.

190. See Westney, *supra* note 152.