

“MINING” ON INDIAN LAND: IT’S NOT WHAT YOU THINK

I.	Introduction	547
II.	Background	548
	A. Overview of the Osage Act and its Implications on Mining Operations.....	549
	B. Factual Background of Osage Wind	550
	1. Previous Litigation	550
	2. Osage Wind’s (Mining?) Operations.....	551
	C. OMC Had Standing to Appeal and Res Judicata Did Not Bar Its Claims.	552
	D. Osage Wind’s Crushing and Repurposing of the Minerals Constituted Mineral Development.....	553
	1. The Tenth Circuit Interpreted § 211.3 Broadly and In Favor of the Tribe.	553
	2. Crushing and Repurposing Minerals Constitutes “Mineral Development.”	555
III.	Analysis.....	555
	A. The Tenth Circuit Allowed OMC to Intervene Due to the Council’s Unique Interest in the Outcome of the Case.....	556
	B. The Tenth Circuit’s Application of OMC’s Interpretation of “Mineral Development” is Consistent with Indian Canons of Construction	557
	C. The Tenth Circuit’s Definition of Mining in Indian Country may have Widespread Effects on the Energy Industry	558
	D. Osage Wind Has Appealed to the United States Supreme Court	560
IV.	Conclusion	561

I. INTRODUCTION

On September 18, 2017, the Court of Appeals for the Tenth Circuit held that wind farm projects could qualify as “mining” in the momentous case *United States v. Osage Wind, LLC (U.S. v. Osage Wind)*.¹ This ruling expands the traditional definition of “mining” in Indian country, so that it now includes not only traditional excavation for commercial purposes, but also any incidental – though necessary – excavation on wind farm lands, including the grinding of rocks to create

1. *United States v. Osage Wind, L.L.C.*, 871 F.3d 1078, 1092 (10th Cir. 2017).

turbine platforms.² By expanding the definition, the Tenth Circuit's ruling creates extra regulatory layers for wind farm developers in Indian country, where such projects may now require approval not only from the land-owner, but also now from the tribe affiliated with the land and the Secretary of the Department of the Interior.³ Osage Wind, LLC (Osage Wind), seeking to avoid damages for its actions in developing a wind farm on Indian land, has appealed this ruling to the United States Supreme Court which, if it upholds the decision, could mean every wind farm development in Indian country across the United States could require these additional approvals.⁴ With Indian country capable of producing one-half of United States energy consumption via wind farm development, this decision may have significant implications for wind projects across the country, arguably hindering the recent increase in development of renewable resources, but also giving tribes more control over their traditionally occupied lands.⁵

The court's holding relies upon long-established Indian canons of construction.⁶ Although courts are not required to utilize the Indian canons of construction, attorneys must recognize their existence and account for their potential consequences.⁷ Part II of this note discusses the background of the case, including the Indian canons of construction, the court's rationale in finding that mineral extraction does not require a commercialization element to qualify as "mining" because the text of the regulation itself has no such language.⁸ While Part II discusses the factual and procedural background, Part III analyzes the reasoning of the court as well as the future implications that this ruling may have on the energy industry.

II. BACKGROUND

In *U.S. v. Osage Wind*, the United States Court of Appeals for the Tenth Circuit held that the definition of "mining" on Indian land is not limited to the commercial extraction of minerals, but also includes changing the form of the minerals so they may be used for another purpose.⁹ Absent reversal by the United States

2. *Id.* "Indian country" is defined as "(a) all land within the limits of any Indian reservation . . . (b) all dependent Indian communities . . . and (c) all Indian allotments." 18 U.S.C. 1151 (1949).

3. 25 C.F.R. § 214.7 (2017).

4. *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017), *petition for cert. filed*, (U.S. Mar. 2, 2018) (No. 17-1237). Although the court's holding in this case is limited to development on Osage land, the Indian Mineral Leasing Act of 1938 also requires approval from the Secretary of the Interior for mining leases on unallotted Indian land. 25 U.S.C. § 396a; *see discussion infra* Section III.C.

5. Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 229 (2008).

6. Indian canons of construction are judicial interpretation tools that suggest statutes and treaties should be construed liberally in favor of the tribes. *See discussion infra* Section III.B.

7. *DeCoteau v. District Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975) (holding that, although an Indian canon of construction should be given "the broadest possible scope, . . . it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.").

8. *Osage Wind*, 871 F.3d at 1089. Without any further qualification of the term "mining," the regulation merely states "No mining or work of any nature will be permitted upon any tract of land until a lease covering such tract shall have been approved by the secretary of the Interior and delivered to the lessee." 25 C.F.R. § 214.7.

9. *Osage Wind*, 871 F.3d at 1092.

Supreme Court, this ruling will undoubtedly impact how energy companies seek to develop renewable energy on Indian land, as nearly all wind farm projects require digging and pouring cement footings to support the massive wind turbines.

A. *Overview of the Osage Act and its Implications on Mining Operations*

Congress established the Osage Nation Indian reservation in 1872.¹⁰ Thereafter, Oklahoma incorporated the territory occupied by the Osage Tribe as Osage County.¹¹ In 1906, Congress passed the Osage Act (Osage Act or the Act) which severed the mineral and surface estate of the entire Osage County.¹² The Osage Act distributed the surface estate in parcels of freely alienable land to individual tribal members in a distribution process known as “allotment.”¹³ Interestingly, the Act did not allot the mineral estate to individual tribal members.¹⁴ Instead, it reserved the severed mineral estate in a trust for the benefit of the tribe and assigned the United States Government as the trustee.¹⁵ The Act granted the Osage Nation the power to issue leases through its tribal council with the approval of the Secretary of the Interior for all oil, gas, and other minerals covered by selections and divisions of land.¹⁶ Further, the Act provided that any mining or prospecting activities require written consent of the Secretary of the Interior.¹⁷

Title 25, section 211.3 of the Code of Federal Regulations 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.”¹⁸ The statute further provides that activity is considered “‘mining’ only if extraction exceeds 5,000 cubic yards in a single year.”¹⁹ Before such mining operations may begin, however, the Secretary of the Interior must approve and deliver a lease to the operator.²⁰ Therefore, if Osage Wind’s activities on the Osage mineral estate qualified as “mining”, then it would need to secure a lease from the Osage Nation and written consent from the Department of Interior before beginning its operations.²¹

10. Act of June 5, 1872, ch. 310, 17 Stat. 228.

11. Okla. Const., art. XVII, § 8.

12. Act of June 28, 1906, ch. 3572, 34 Stat. 539, §§ 2-3 [hereinafter Osage Act].

13. *Id.* § 2.

14. *Id.* § 3.

15. *Id.*; see also *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm’n*, 597 F. Supp. 2d 1250, 1256 (N.D. Okla. 2009) (noting that “[the] Act retained certain small tracts for tribal use and occupancy and reserved the minerals underlying Osage County for the Nation.”).

16. Osage Act, *supra* note 12, § 3; see also *Logan v. Andrus*, 640 F.2d 269, 270 (10th Cir. 1981) (noting that the Act does not limit the authority of the officers therein named to mineral administration or any other specific function).

17. Osage Act, *supra* note 12, § 3.

18. 25 C.F.R. § 211.3.

19. *Id.*

20. *Id.* § 214.7.

21. *Osage Wind*, 871 F.3d at 1092.

B. *Factual Background of Osage Wind*

Osage Wind is a wholly-owned subsidiary of TradeWind Energy, Inc., one of the largest wind and solar development companies in the United States.²² Based in Lenexa, Kansas, TradeWind develops renewable energy projects for utility companies, private consumers, and commercial customers by providing services such as “site assessment, land leasing, wind measurement and analysis, contracting, financing, equipment procurement, and project completion and maintenance services for land owners.”²³ TradeWind is also a wholly-owned subsidiary of Enel Kansas, LLC, a subsidiary of the Enel Group, a multinational energy company owned primarily by the Italian Ministry of Economy and Finance.²⁴ Enel Group generates power from a variety of sustainable energy sources including hydroelectric, wind, geothermal, solar, and thermoelectric sources.²⁵ Enel claims that nearly half of all energy generated by Enel results in zero carbon dioxide emissions, including all twenty-five of their wind projects in the United States.²⁶

In 2010, Osage Wind leased surface rights to approximately 8,400 acres of privately owned land in Osage County, Oklahoma, to use as the location of a commercial wind farm.²⁷ This location was an ideal choice for the company, as the flat plains throughout most of the Osage reservation boast excellent wind resource potential.²⁸ To build their wind farm, Osage Wind planned to construct eighty-four wind turbines, anchored to the ground by concrete-reinforced foundations.²⁹ The company’s plan also included constructing underground electrical lines that connect the turbines to a substation also located within the county.³⁰

1. Previous Litigation

In October 2011, the Osage Minerals Council (OMC) filed a lawsuit against Osage Wind in the District Court for the Northern District of Oklahoma to prevent company from constructing its wind farm.³¹ The OMC, formerly known as the Osage Tribal Council, is composed of eight members of the tribe (elected by the mineral royalty interest holders) and is charged with the administration, protection,

22. *About Us*, TRADEWIND ENERGY, INC, <https://tradewindenergy.com/about-us/> (last visited Sep. 9, 2018).

23. *Company Overview of TradeWind Energy, Inc.*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=30945375> (last visited Sep. 8, 2018).

24. *Id.*; *Who We Are*, ENEL, <https://www.enel.com/aboutus/who-we-are> (last visited Sep. 8, 2018).

25. *Who We Are*, *supra* note 24.

26. *Id.*; *see also Where We Are*, ENEL GREEN POWER, https://www.enelgreenpower.com/where-we-are?topic=wind&status=operation&status=construction&status=managed&plant_name=&continent=AMERICA&nation=United+States (last visited Sep. 8, 2018).

27. *Osage Wind*, 871 F.3d at 1083.

28. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *Unlocking Our Nation’s Wind Potential* (May 19, 2015).

29. *Osage Wind*, 871 F.3d at 1083.

30. *Id.*

31. *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC*, 2011 WL 6371384, *1, (N.D. Okla.).

and development of the Osage Mineral Estate in accordance with the Osage Act.³² The OMC has the exclusive power to consider and approve leases and other forms of development of the Osage Mineral Estate.³³

In its brief, the OMC stated that the underground work would obstruct the Tribe's right to use the surface as may be reasonable to develop the oil and gas reserves on the property, including exploring, severing, capturing, and producing oil and gas.³⁴ At issue was 25 C.F.R. § 226.19, which entitles mineral lessee's to "the right to use so much of the surface of the land within the Osage Mineral Estate as may be reasonable for operations and marketing [of oil and gas]."³⁵

The district court dismissed the case, finding that the Tribe produced no evidence showing that Osage Wind's operations would or could interfere with any mineral lessees' operations.³⁶ Further, the court found that in similar cases, the mineral owner must show that the landowner has acted in a way that prevents the lessee from being able to access its existing oil and gas facilities.³⁷ Notably, in the 2011 litigation, OMC did *not* claim that Osage Wind's activities on the surface estate constituted "mining" under 25 C.F.R. § 211.3, which would have required a lease and the written consent of the Secretary of the Interior pursuant to 25 C.F.R. § 214.7.³⁸

2. Osage Wind's (Mining?) Operations

Nearly two years later and after the first lawsuit concluded, Osage Wind began construction of the wind farm by commencing excavation operations in September of 2014.³⁹ As indicated in its court-reviewed plans, the company dug holes to accommodate the large cement footings necessary to support the massive turbines.⁴⁰ The excavation involved removing soil, sand, and rocks, including limestone and dolomite.⁴¹ The company pulverized rocks smaller than three feet, returning them to the holes after pouring the cement foundation.⁴²

In November 2014, the United States filed for an injunction to stop the excavation, claiming the activity constituted "mining" under 25 C.F.R. § 211.3. This designation, if correct, required a mineral lease pursuant to 25 C.F.R. § 214.7.⁴³

32. Const. of the Osage Nation, art. XV, §§ 3-4.

33. *Id.* § 4.

34. Plaintiff's Trial Brief at 6-7, Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC (N.D. Okla. 2011) (No. 11-CV-643-GKF-PJC).

35. *Osage Nation*, 2011 WL 6371384, at *5-6; 25 C.F.R. § 226.19. In oil and gas law, the accommodation doctrine provides that the mineral estate is dominant over the surface estate, who must accommodate the reasonable usage of the surface estate by the mineral estate to recover minerals. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971).

36. *Osage Nation*, 2011 WL 6371384, at *9.

37. *Id.* at *6.

38. *Osage Wind*, 871 F.3d at 1083.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Osage Wind*, 871 F.3d at 1083.

After discovering Osage Wind's excavations had already concluded, the United States withdrew its request for injunctive relief and amended its complaint, seeking damages for the alleged "unauthorized extraction of reserved minerals."⁴⁴

On September 30, 2015, the District Court for the Northern District of Oklahoma awarded summary judgment to Osage Wind, holding that its excavation activities did not constitute "mining" under § 211.3.⁴⁵ On the final day of the appeal deadline, OMC – not the United States – filed a motion to intervene in the action.⁴⁶ Immediately thereafter, OMC filed notice that it was appealing the summary judgment order against the government to the United States Court of Appeals for the Tenth Circuit.⁴⁷

C. OMC Had Standing to Appeal and Res Judicata Did Not Bar Its Claims.

Before it could address the principal issue on appeal, the court first had to rule on two threshold issues: (1) whether OMC had the right to appeal; and (2) whether res judicata barred OMC's claims.

First, Osage Wind argued that OMC had no standing to appeal, because it was not a party to the original suit had not properly joined in the action.⁴⁸ The court disagreed, however, citing the United States Supreme Court's opinion in *Devlin v. Scardelletti (Devlin)*.⁴⁹ In *Devlin*, the Supreme Court held that unnamed parties belonging to an affected class that have timely objected to a settlement have the power to bring an appeal "without first intervening" in the underlying suit.⁵⁰ Although *Devlin* was only concerned with class action suits, the Court of Appeals for the Tenth Circuit extended its reasoning in its previous holding in *Plain v. Murphy Family Farms (Plain)*.⁵¹ There, the court held that nonnamed parties that prove a "unique interest" in a matter may also intervene in a suit.⁵²

The Tenth Circuit agreed with OMC's argument that the United States had been representing OMC's interests throughout the litigation.⁵³ Therefore, even though OMC did not intervene until *after* it learned that the United States did not plan to appeal, the court found that OMC could still do so because of the unique-interest exception.⁵⁴

Next, Osage Wind asserted that OMC did not assert this claim in the previous litigation even though it could have, and that the doctrine of res judicata precluded

44. *Id.* at 1083-84.

45. *Id.* at 1084.

46. *Id.*

47. *Id.*

48. *Osage Wind*, 871 F.3d at 1084 (citing *Martino v. Ortiz*, 484 U.S. 301, 304 (1998)).

49. *Id.* at 1084.

50. *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (emphasis in original).

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

52. *Osage Wind*, 871 F.3d at 1085 (citing *Plain*, 296 F.3d at 979-80).

53. *Id.* at 1085.

54. *Id.*

its claim.⁵⁵ The court disagreed, finding that Osage Wind had the burden of persuasion, and that it had failed to adequately explain how OMC's claim would have been ripe during the previous litigation.⁵⁶ The court reasoned that, at that stage, OMC did not know the full scale of the planned excavation.⁵⁷ Therefore, OMC could not have known that Osage Wind's plans would violate 25 C.F.R. § 214.7.⁵⁸ As Osage Wind failed its burden to prove its affirmative defense, the court held that *res judicata* did not apply to OMC's claim in the present case.⁵⁹

D. Osage Wind's Crushing and Repurposing of the Minerals Constituted Mineral Development

Having addressed the threshold issues, the court moved on to the primary issue on appeal: Did Osage Wind's excavations constitute "mining" under 25 C.F.R. § 211.3?⁶⁰ The court first stated that its analysis did not depend on deference to agency determinations (such as those made by the Department of Interior) before turning to an in-depth analysis of the disputed regulation.⁶¹ The court reasoned that under the standard illustrated in *Skidmore v. Swift & Co.*, a court should only defer to an informal agency position "to the extent that it is thoroughly considered and well-reasoned, or otherwise manifests certain qualities that gives it the 'power to persuade.'"⁶² Here, the court found no evidence in the record to support the informal agency position that a so-called "Sandy Soil Lease" was required, thus, the court did not defer to the agency.⁶³

1. The Tenth Circuit Interpreted § 211.3 Broadly and In Favor of the Tribe.

The court began by clarifying the significance of the "de minimis exception."⁶⁴ It explained that excavation may be considered "mining" only if the extraction exceeds 5,000 cubic yards in a single year.⁶⁵ Because the extraction made by Osage Wind was over 5,000 cubic yards, the court found that it satisfied this

55. *Id.* at 1086; *see also* Wilkes v. Wyoming Dep't Div. of Emp't of Labor Standards, 314 F.3d 501, 503-04 (10th Cir. 2002) ("Under *res judicata*, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action.") (emphasis in original).

56. *Osage Wind*, 871 F.3d at 1087.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Osage Wind*, 871 F.3d at 1087. The Bureau of Indian Affairs (a division of the Department of Interior) has taken the informal position that a specific lease, known as a "Sandy Soil Lease," should be required for proposed roadwork that may disrupt the mineral estate. Letter from Robin Phillips, Superintendent, Bureau of Indian Affairs, to Francesco Venturini, President, Enel Green Power North American, Inc. (Oct. 9, 2014) (on file with the Energy Law Journal).

62. *Osage Wind*, 871 F.3d at 1088 (quoting 323 U.S. 134 (1944)).

63. *Id.* at 1088.

64. *Id.* at 1089.

65. *Id.*

threshold requirement.⁶⁶ In so finding, the court dismissed OMC's interpretation that this provision "establishes a separate definition of "mining" for common-variety minerals."⁶⁷ To the contrary, the court reasoned that the statute merely exempted from the definition of "mining" lower-volume extractions of common-variety minerals.⁶⁸

Next, the court addressed the trial court's reasoning that, by definition, mining "*necessarily* involved the commercialization of mineral materials, i.e., the sale of minerals."⁶⁹ The court found that, while mining "certainly *includes*" the commercial extraction and offsite relocation of the minerals, the district court was overly restrictive in applying "mineral development" only to those contexts.⁷⁰ Osage Wind argued that the Osage Act itself only included the commercial sale of minerals, because, while the Act permitted owners of the surface lands to sell their land, it expressly excluded "the *sale* of the oil gas, coal, or other minerals."⁷¹ The court disagreed with this argument. It found, instead, that this language only meant the surface owners cannot sell what they do not own (in this case, the mineral estate).⁷² Therefore, if Osage Wind's excavation deprived OMC of its mineral estate, then its activities would constitute "mining" under the statute.

After finding that mining does not require commercial extraction and relocation of the minerals offsite, the court identified the precise activity at issue: Osage Wind crushing the minerals and using them as backfill.⁷³ The court again looked closely at the language of "the science, technique, and business of *mineral development*" in an attempt to classify Osage Wind's actions.⁷⁴ A later part of the regulation provided the court some interpretive assistance: "mining 'include[es] but [is] not limited to: opencast work, underground work, and in-situ leaching *directed to severance and treatment of minerals.*'"⁷⁵ The court reasoned that each example of mineral development in the statute involved using minerals for some advantageous purpose, because each item involved an activity "directed to severance and treatment of minerals."⁷⁶ Additionally, the court found that under "long-established principle[s]" courts must interpret ambiguity in laws to favor Indian

66. *Id.*

67. *Osage Wind*, 871 F.3d at 1089 (citing 25 C.F.R. § 211.3).

68. *Id.*

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

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

71. *Id.* at 1090 (citing Osage Act, § 2 (emphasis added by the court)).

72. *Osage Wind*, 871 F.3d at 1090.

73. *Id.*

74. *Id.* at 1091 (citing 25 C.F.R. § 211.3 (emphasis added by the court)).

75. *Id.* at 1090-91 (citing 25 C.F.R. § 211.3 (emphasis added by the court)).

76. *Id.* at 1091. The court construed the latter portion of the sentence to qualify the activities listed prior, in accordance with Antonin Scalia & Bryan A. Garner, *READING LAW: INTERPRETATION OF LEGAL TEXTS* 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series.").

Tribes.⁷⁷ Because it benefitted the Tribe to define mineral development as including any exploitative mineral use, the court adopted this broader definition.⁷⁸

2. Crushing and Repurposing Minerals Constitutes “Mineral Development.”

The court next found that Osage Wind partook in mineral development when it “acted upon the minerals by altering their natural size and shape in order to take advantage of them for a structural purpose.”⁷⁹ The court noted that, although such activity does not fit within the “traditional notions of ‘mining,’” it does fit within the definition of “mineral development” under section 211.3.⁸⁰ The court concluded that Osage Wind was required to procure a lease along with written consent of the Secretary of the Interior under title 25 C.F.R. § 214.⁸¹ Osage Wind did not obtain any such lease; therefore, the Tenth Circuit found that the trial court had erred in granting Osage Wind summary judgment.⁸² Accordingly, the court reversed and remanded the district court’s order granting summary judgment.⁸³ At this time, the district court has refrained from issuing another ruling, likely due to the unknown status of the appeal to the Supreme Court.⁸⁴ The court also denied petitions by Osage Wind for rehearing and for rehearing *en banc*.⁸⁵ However, the case is still pending at the circuit court, as the court has yet to issue the mandate, likely due to the unknown status of the appeal to the Supreme Court.⁸⁶

III. ANALYSIS

The Court of Appeals for the Tenth Circuit significantly expanded what activities constitute “mining” under title 25 C.F.R. § 211.3.⁸⁷ It did so by defining mineral development as any activity that alters the “size and shape” of minerals for structural purposes, rather than for the commercialization of minerals as was previously the case.⁸⁸ The court even recognized that this definition of mining was significantly different than the traditional understanding of the word.⁸⁹ Nevertheless, the court justified its ruling by applying long-standing canons of construction which hold that courts should interpret ambiguity in laws to favor Indian Tribes.⁹⁰

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

78. *Id.*

79. *Id.* at 1091-1092.

80. *Id.* at 1092.

81. *Id.*

82. *Osage Wind*, 871 F.3d at 1093.

83. *Id.*

84. *United States v. Osage Wind, LLC*, No. 14-CV-704-JHP-JFJ (N.D. Okla. 2015).

85. *United States v. Osage Wind, LLC*, No. 15-5121 (10th Cir. 2015) (order denying petition for rehearing and denying petition for rehearing *en banc*).

86. *United States v. Osage Wind, LLC*, No. 14-CV-704-JHP-JFJ (N.D. Okla. 2015).

87. *Osage Wind*, 871 F.3d at 1091-92 (10th Cir. 2017).

88. *Id.* at 1091-92.

89. *Id.* at 1092.

90. *Id.* at 1090.

A. *The Tenth Circuit Allowed OMC to Intervene Due to the Council's Unique Interest in the Outcome of the Case*

Despite Osage Wind's objections, the Tenth Circuit held that OMC had standing to appeal, even though OMC was not a party to the initial proceeding.⁹¹ The Federal Rules of Appellate Procedure state that, in a civil suit, an appeal may be timely filed by "any party."⁹² But because OMC was not a party to the original suit, Osage Wind argued that its notice of appeal was improper.⁹³ In *Devlin*, however, the Supreme Court held that nonnamed class members may bring an appeal without intervening in the underlying suit.⁹⁴ The Court reasoned that barring such parties from intervening would preclude nonnamed class members from preserving their own settlement interests, and thus barring them from bringing an appeal could likewise deprive them of the ability to do so.⁹⁵ Further, the Court noted that it has never restricted the right to appeal to those parties who are named in the original litigation.⁹⁶

The Tenth Circuit has a long history of allowing intervening parties to appeal. In *Plain*, the court expanded the *Devlin* rationale from class action suits to any unnamed party that can prove a "unique interest."⁹⁷ In *Plain*, the court reasoned that nonparties may be likened to unnamed members of a class if they have a unique interest in the outcome of the suit, similar to what an unnamed member of a class might have in a class action.⁹⁸ The Supreme Court of the United States has similarly followed this unique-interest exception. For example, in *Blossom v. Milwaukee & Chicago R. Co.*, the Supreme Court allowed a prospective buyer of a foreclosure to appeal a decision made in the action, even though he was not a named party in the original foreclosure action.⁹⁹ Similarly, in *Hinckley v. Gilman, C & S.R. Co.*, the Court allowed the receiver of a foreclosure suit to appeal, even though he was not a named party in the original suit.¹⁰⁰ Therefore, if a party can prove they have a unique-interest in the litigation, they may nevertheless join in an appeal, whether or not they were a party to the original lawsuit.

The Tenth Circuit reasoned that OMC's interest qualified for the unique-interest exception because the Osage Nation owned a particular and significant interest in the mineral estate at issue.¹⁰¹ To qualify for the unique interest exception, the Tenth Circuit requires that a party have more than a mere general interest in

91. *Id.* at 1084.

92. Fed. R. Civ. P. 4(a)(1)(B).

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

94. *Devlin*, 536 U.S. at 14.

95. *Id.* at 10.

96. *Id.* at 7.

97. *Plain*, 296 F.3d at 979.

98. *Id.* at 979-80.

99. 68 U.S. 655, 656 (1863).

100. 94 U.S. 467, 469 (1877).

101. *Osage Wind*, 871 F.3d at 1086.

exercising a legal right to qualify for the unique interest exception.¹⁰² An interested party must show that it has a particular and significant interest in the appeal, and must demonstrate why it did not intervene in the prior proceedings.¹⁰³ Because the OMC was able to show they had a unique-interest in the outcome of the suit, the Tenth Circuit allowed them to intervene in the appeal.

B. The Tenth Circuit's Application of OMC's Interpretation of "Mineral Development" is Consistent with Indian Canons of Construction

The Tenth Circuit did not give deference to Bureau of Land Management (BLM) interpretations.¹⁰⁴ The OMC directed the court to the preamble to the final rule that adopted 43 C.F.R. § 3601.71 – a completely unrelated regulation to the one at issue in the case – and an internal BLM memorandum stating:

Any separation or alteration of the various constituents of the material, through methods such as screening or crushing, constitutes a mineral use of the materials and requires a contract or permit. Furthermore, any use of the materials in a construction project, such as . . . building foundations . . . also constitutes a mineral use of the materials – even if the material was not altered in any way – and also requires a contract or permit.¹⁰⁵

The OMC argued that the court should show deference because the BLM regulations would have normally required a permit for a surface owner to engage in more than “minimal personal use of federally reserved mineral materials.”¹⁰⁶ The court disagreed, concluding that this regulation applies only to public lands and expressly excludes lands held for the benefits of Indians.¹⁰⁷

However, when the court examined 25 C.F.R. § 211.3, it found the language of “mineral development” to be ambiguous.¹⁰⁸ As such, it applied the long-standing principle that ambiguities in laws meant to benefit Indian Tribes should be construed in the Tribe’s favor.¹⁰⁹ The court reasoned that “[w]ithout question” the regulations at issue in this case were created to protect the Indian’s mineral resources and economic interests.¹¹⁰ Therefore, when presented with two conflicting interpretations of the rule, and where one interpretation clearly favored the Tribe, the court chose the interpretation that favored the Tribe.¹¹¹

102. *Id.*

103. *Id.*

104. *Id.* at 1088.

105. *Id.*; see also Bureau of Land Management, Unauthorized Use of Mineral Materials on Split Estate Lands, Instruction Memorandum No. 2014-084 (Apr. 23, 2014).

106. *Osage Wind*, 871 F.3d at 1088 (quoting Mineral Materials Disposal; Sales; Free Use 66 Fed. Reg. 58892, 58894 (Nov. 23, 2001)).

107. *Id.* at 1088.

108. *Id.* at 1090.

109. *Id.*; see also *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983) (citing *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (“statutes passed for the benefit of dependent Indian tribes are to be liberally construed with doubtful expressions being resolved in favor of the Indians.”)).

110. *Osage Wind*, 871 F.3d at 1090.

111. *Id.* at 1092.

The United States Supreme Court first formally recognized this canon of construction in *Alaska Pacific Fisheries v. United States*.¹¹² There, the Court held that statutes created to benefit tribes should be liberally construed and that courts should resolve any “doubtful expressions” in favor of the tribe.¹¹³ This concept dates back to the 19th century when, in *Worcester v. Georgia*, the Supreme Court held that the language used in treaties with the tribes should never be construed to their prejudice due to their severely disadvantaged bargaining power.¹¹⁴ In a subsequent case, the Court further applied this principle, reasoning that, when the United States drew up treaties with the tribes, many of them had no written language, and that courts must, therefore, construe treaties as the tribes would have understood them.¹¹⁵

C. The Tenth Circuit’s Definition of Mining in Indian Country may have Widespread Effects on the Energy Industry

Although the Tenth Circuit’s decision has provided an expansive definition of mining, it recognized two limitations that offer some relief to the industry. First, the court distinguished exploiting minerals (mining) from “merely encountering or disrupting” minerals (not mining).¹¹⁶ For example, the Tenth Circuit would not consider it mining when a person simply digs a hole and does not reuse the dirt for another purpose, as these activities create an *incidental disruption* to the minerals.¹¹⁷ Second, the court found that the de minimis exception protects any activities that do not exceed 5,000 cubic yards in a given year, so long as the minerals are of common-variety, including sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt.¹¹⁸ Nevertheless, *U.S. v. Osage Wind* may have far-reaching implications for energy projects, creating potential challenges and liabilities for both existing and future projects on Indian land.

Despite the court’s well-reasoned findings, critics of the opinion are quick to identify the additional delays and financial obligations that this ruling will place on developers of projects on Indian land.¹¹⁹ The Indian Mineral Leasing Act of 1938 provides that “unallotted lands within any Indian reservation or lands owned by any tribe . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes”¹²⁰ As is the case with the regulation at issue in *U.S. v. Osage Wind*, the language of the statute does not define mining.¹²¹ Thus, while

112. 248 U.S. at 89.

113. *Id.* (citing *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).

114. 31 U.S. 515, 582 (1832).

115. *Jones v. Meehan*, 175 U.S. 1, 10-11 (1915).

116. *Osage Wind*, 871 F.3d at 1092.

117. Jessica Black Livingston et al., *Mining Does Not Mean What You Think It Means: United States v. Osage Wind, LLC*, HOGAN LOVELLS (Nov. 15, 2017).

118. 25 C.F.R. § 211.3.

119. Whitney Jones Roy et al., *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*, ABA ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSLETTER (Dec. 2017).

120. 25 U.S.C. § 396a (1938).

121. *Id.*; 25 C.F.R. 214.7.

the holding of the Tenth Circuit may currently be limited to developments on Osage land, a similar argument could easily be put forth regarding development on any unallotted Indian reservation. If a court adopts the rationale of Tenth Circuit in *U.S. v. Osage Wind*, these developers would be forced to obtain a mining permit should they plan to use the minerals in the same manner as Osage Wind.

As this case makes clear, developers will have to pay particularly close attention to the extent of their excavation operations when considering projects on Indian land. This case is illustrative of the fact that the government (and the courts) will examine developer actions on Indian lands down to a nearly microscopic level. Further, these developers will need to be particularly well informed of the company's activities which may disturb the tribe's mineral estate. For example, developers should be wary of any earth-moving activities within their rights-of-way and easements.¹²²

The outcome of this case may dissuade energy companies from seeking renewable energy projects on Indian land. While Indian land comprises only 2% of U.S. land, it contains an estimated 5% of all renewable energy resources.¹²³ There are three primary benefits to developing a wind project on Indian land: (1) the vast supply of resources; (2) the ability to avoid many (though as shown by this case – not all) bureaucratic delays associated with projects off Indian land; and (3) the tax incentives involved with employing Native American workers.¹²⁴

First, this environment is ideal for harnessing the power of the wind.¹²⁵ Much of Indian land features a combination of extraordinary wind potential combined with millions of acres of unobstructed land.¹²⁶ In fact, just twenty-three Indian tribes have the potential to generate more than 300 gigawatts of energy, equal to roughly half of total U.S. energy consumption.¹²⁷ Some reservations in New Mexico have even been referred to as “the Saudi Arabia of Renewables.”¹²⁸

Second, because tribes are recognized as sovereign entities, they can avoid many onerous zoning regulations required under state law.¹²⁹ As a result, federal courts are largely reluctant to restrict the authority of tribes to regulate their own land.¹³⁰ In the past, this approach by the courts has been appealing to potential investors for wind energy projects on Indian land, but after this case, investors

122. Livingston et al., *supra* note 117. Based on the court's holding, it appears that developers may be able to avoid this issue entirely by utilizing off-site materials rather than those found within the leased land.

123. *Developing Clean Energy Projects on Tribal Lands*, U.S. DEP'T OF ENERGY – OFFICE OF INDIAN ENERGY, at 3 (Apr. 2013).

124. Crystal D. Masterson, Comment, *Wind-Energy Ventures in Indian Country: Fashioning a Functional Paradigm*, 34 AM. INDIAN L. REV. 317, 326-30 (2010).

125. Patrick M. Garry, Candice J. Spurlin, & Derek A. Nelsen, *Wind Energy in Indian Country: A Study of the Challenges and Opportunities Facing South Dakota Tribes*, 54 S.D. L. REV. 448, 450 (2009).

126. *Id.*

127. Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 229 (2008).

128. Kevin L. Shaw & Richard D. Deutsch, *Wind Power and Other Renewable Energy Projects: The New Wave of Power Project Development on Indian Lands*, ROCKY MOUNTAIN MINERAL L. FOUNDATION (2005).

129. Masterson, *supra* note 124, at 328.

130. *Id.*

may be less likely to dismiss the potential problem of government involvement so quickly.¹³¹

Third, energy companies are drawn to projects on Indian land due to the “Indian employment credit” of the Internal Revenue Code, 26 U.S.C. § 45A.¹³² This tax provision awards the company a 20% tax break for total wages paid plus health insurance costs paid to any employee who is an enrolled member of an Indian tribe or the spouse of an enrolled member of an Indian tribe.¹³³ Though the credit imposes limitations, they are not likely to burden wind energy employees, as many potential employees from tribes should meet the criteria for this credit.¹³⁴ Such incentives have significantly encouraged energy companies to seek out wind projects on Indian land.¹³⁵

D. Osage Wind Has Appealed to the United States Supreme Court

Despite the Tenth Circuit’s reversal of the district court’s ruling, it appears that this debate will continue to the Supreme Court of the United States. On December 27, 2017, Osage Wind filed an application to extend the time to file a petition for a writ of certiorari.¹³⁶ The next day, Justice Sotomayor granted the application, extending the time to file until March 2, 2018.¹³⁷ On the last day of this extended deadline, Osage Wind filed a petition for a writ of certiorari with the Supreme Court. In its petition, Osage Wind objects to the Tenth Circuit’s application of the “unique interest” exception, arguing that the Supreme Court made it clear in *Devlin* that the exception would not be extended to a nonnamed class member who had not “objected in a timely manner to approval of the settlement at the fairness hearing.”¹³⁸ It further points out that while the Tenth Circuit adopted the construction it thought would most benefit the Osage Nation, it did not consider what impact this interpretation would have on individual Indian owners of the allotted lands in Osage County and their successors.¹³⁹ Although the briefs of the parties were distributed for conference of May 10, 2018, the Supreme Court has yet to decide if they will hear the case.¹⁴⁰ After the May 10 conference, the Court invited the Solicitor General to file a brief in the case expressing the views

131. *Id.*

132. 26 U.S.C.A. § 45A (2015).

133. *Id.* There are some limitations to this credit, including that total wages eligible are capped at \$20,000 per employee, employees may not own 5% or more of the business, and the business must not be involved in the conduct of gaming or located in a building that houses such activities. *Id.*

134. Masterson, *supra* note 124, at 330.

135. *Id.*

136. *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017), *petition for cert. filed*, (U.S. Mar. 2, 2018) (No. 17-1237).

137. *Id.*

138. *Petition for a Writ of Certiorari, Osage Wind, LLC v. United States*, No. 17-1237, 22-23 (filed Mar. 02, 2018).

139. *Id.* at 23.

140. *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017), *petition for cert. filed*, (U.S. Mar. 2, 2018) (No. 17-1237).

of the United States.¹⁴¹ As of the date of this publication, the Solicitor General has not filed its brief.¹⁴²

IV. CONCLUSION

Without a doubt, the holding of the Tenth Circuit has reshaped the definition of "mining" as applied to development on tribal land. Although this issue has not been definitively resolved, if the Supreme Court upholds the ruling of the Tenth Circuit, it may have widespread impacts on renewable resource development on Indian land. While the court's holding only requires developers to obtain a mining lease with the written consent of the Secretary of the Interior for mineral development on Osage land, it likely won't be long before the same rationale is applied to all unallotted Indian land. Therefore, developers of renewable energy should pay close attention to how they plan to develop the land to avoid the same type of regulatory issues that have plagued the development of the Osage Wind project.

Christopher J. Gnaedig*

141. *Id.*

142. *Id.*

* Christopher J. Gnaedig is a third-year law student at the University of Tulsa College of Law and plans to work in energy law in Tulsa after graduation. He is a native Tulsan, graduating from the University of Tulsa with a B.S.B.A. in Business Administration. The author would like to thank Professor Robert Butkin, Professor Judith Royster, and the student editors of the Energy Law Journal for their help and support.