No. 17-1237

In The
Supreme Court of the United States

OSAGE WIND, LLC; ENEL KANSAS, LLC; and
ENEL GREEN POWER NORTH AMERICA, INC.,

Petitioners,

v.

UNITED STATES and OSAGE MINERALS COUNCIL,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case deals with two correct, narrow, and fact-specific decisions of the Tenth Circuit within the niche field of Federal Indian law. There is no disagreement between the circuits on the law applicable to either of those questions, and the Tenth Circuit's decision is a correct application of law to the very unique facts presented to it in the case. This is plainly not a case for which this Court should grant a writ of certiorari.

Petitioners attempt to manufacture a "split in the circuits" by proposing broad advisory questions of law far beyond the facts of this case and then claiming that there is a split in the circuits on that broad level. Their claim of a split in the circuits on those broad questions is vastly overstated, and they substantially misstate the Tenth Circuit's decisions in order to support their assertion that the Tenth Circuit is out of step; but more important for current purposes, the present case simply does not present either of the legal issues that Petitioners have framed, and does not present any issue for which a writ of certiorari should issue.

The first issue which Petitioners present is whether an Indian tribe can intervene on appeal in a case that the *United States brought as the Tribe's trustee*. Here the trustee lost in the district court and then, on the very day that a notice of appeal was due, the trustee informed the trust beneficiary that it was not going to appeal the decision adverse to the Tribe. The issue that the trustee had lost on would have been devastating to the Tribe: the district court had erroneously held that, for the mineral estate that is owned by the Osage

Minerals Council (OMC or the Tribe), the OMC did not have the right that every other property owner in this country has to prevent a large commercial enterprise from permanently taking and using the OMC's real property without permission and without paying for the use of the property. The district court had held that as long as the large commercial enterprise was not itself selling the OMC's property, it could use that property without compensation. That decisions (the very one that Petitioners hope to have this Court reinstate) is, of course, contrary to basic property law. Within hours of the United States informing the Tribe that the United States was going to abandon the case after losing it in the district court, the OMC first moved to intervene in the district court;[1] and then filed its notice of appeal on the day that notices of appeal were due.

Petitioners' framing of the first issue, and the whole of their argument in support of their petition for certiorari on that issue, are based upon their legally unsupported attempt to separate that issue from the

[1] OMC's motion to intervene in the district court presents an alternative basis for the Tribe's appeal on the merits, and further complexity to the current petition, complexity which Petitioners have failed to address. The district court denied OMC's motion to intervene on a non-merits basis, holding that the filing of the notice of appeal ousted it of authority to decide the motion to intervene. The OMC then appealed from denial of its motion to intervene in the district court as an alternative path to a merits decision. The Tenth Circuit then consolidated OMC's two appeals. Because the Tenth Circuit held that the OMC could appeal, it declined to decide the appeal on OMC's alternative argument based upon its well-founded motion to intervene in the district court.

narrow applicable Indian trustee/beneficiary context. After separating it from the applicable facts, Petitioners then suggest this Court should use this case to provide a broad advisory decision or treatise on when various other non-parties can appeal. The case obviously presents no such opportunity. Instead, the Tenth Circuit *expressly* limited its decision to the completely unique facts of this matter, specific to the trust relationship between the United States and the tribal entity, and more specifically to the facts that the United States had expressly brought the underlying suit in its capacity as the OMC's trustee but that the United States, on the very day that a notice of appeal was due, notified the OMC that it would not appeal on behalf of the tribal entity after it had achieved a major loss for the trust beneficiary. Under these facts – the facts of this case and the facts to which the Tenth Circuit expressly limited its holding – this Court's precedents and the precedents of every circuit would permit the OMC to appeal.

In fact, Petitioners themselves, in the Tenth Circuit, argued that the Tenth Circuit's decision should turn on the specific and unique facts of this case. And Petitioners' argument below was wholly based upon their contention that the Tenth Circuit's precedents from *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008) and other cases provided the correct multi-factor legal standard. Petitioners argued that when the Tenth Circuit applied that legal standard to the specific facts of this case the tribal entity should not be able to appeal in its capacity

as beneficiary. It is only now, based upon their knowledge of the factors that guide this Court's decisions on petitions for writs of certiorari, that Petitioners, for the first time, claim they disagree with the Tenth Circuit's precedents and attempt to manufacture a conflict between the Tenth Circuit and other circuits.

In this regard, they were right below, and are wrong now. The first issue is specific to the facts of this case.

Petitioners' second issue presented is even more limited in scope than its first. Wind Farm, LLC, Enel Kansas LLC, and Enel Green Power North America, Inc. (hereinafter collectively "Wind Farm"), a large commercial enterprise, excavated, crushed, and used OMC's real property without OMC's permission. When it did so, Wind Farm was well aware that the federal interpretation of the specific federal regulations at issue here required Wind Farm to obtain a lease from the OMC for a project of this large size and nature. It was also well aware that the OMC's mineral estate is the dominant estate, and the surface estate is the subservient estate. Wind Farm got a lease from the non-Indian owner of the subservient estate, but foolishly decided to proceed with construction without obtaining a lease from the Indian entity. Instead it would just use the Tribe's property without paying.

For their second question presented, Petitioners ask this Court to grant certiorari to review their claim that the federal regulations at issue unambiguously

give them that authority to take, crush, and use very substantial amounts of the OMC's property without compensation.

The decision below correctly applies the agency's understanding and the well-established Indian canons of construction to interpret an ambiguous term. The term is not further defined or clarified by the Osage Act or its underlying regulations. Application of the Indian canons of construction was proper in light of the underlying regulations' clear intent to "protect Indian mineral resources and maximize [Indians] best economic interests." Pet. App. 21a (citing 25 C.F.R. § 211.1) (internal quotation marks omitted).

Even in applying the Indian canons of construction the decision is narrowly drawn and has minimal effect on surface estate holders. Under the decision "owners of the surface estate retain virtually uninhibited use of their lands". *Id.* at 26a. Outside of extreme removal and use of common minerals it is unlikely that a surface estate holder will be affected by the underlying decision. For the regulation at issue to trigger a surface estate holder would be required to do more than simply remove and replace dirt. The underlying regulation requires the removal of more than 5,000 cubic yards of common minerals, and not simply dirt, and the subsequent development of the minerals. The Petitioners' claimed fears of wide spread disruption of

surface estate holder rights is unfounded and wholly dependent on ignoring large swaths of the Tenth Circuit's decision.

STATEMENT OF THE CASE

Petitioners' statement of the case omits most of the pertinent facts and procedural history. A complete statement of the relevant facts and procedural history reveals that the questions Petitioners seek to present are simply not presented by the facts of this matter.

This lawsuit arises from the failure of Wind Farm, LLC, Enel Kansas LLC, and Enel Green Power North America, Inc. (hereinafter collectively "Wind Farm") to obtain a lease approved by either the Department of Interior or by the Osage Minerals Council ("OMC") prior to the removal and/or use of more than 60,000 cubic yards of common minerals from the Osage Mineral Estate.

The Osage Act states that *all* of the minerals are the property of the Osage Tribe (now the OMC). Ch. 3572, 34 Stat. 539. In implementing regulations, the United States excepted uses below 5,000 cubic yards from leasing requirements.[2] That exception more than covers any foundation for a house or other building.

[2] 5,000 cubic yards is 135,000 cubic feet, or a ten foot deep foundation for slightly more than three high school basketball courts.

But Wind Farm's very large project, over 60,000 cubic yards, far exceeds that amount.

Wind Farm leased surface rights to approximately 8,400 acres of lands in Osage County, Oklahoma. While the surface estates are owned in fee by private citizens, the OMC is the beneficial owner of the subsurface estate, with the United States owning the subsurface rights in trust for the OMC. Included within the OMC's subsurface rights are the rights to rocks, gravel, oil, gas, and other minerals. 10th Cir. Jt. App. 512. Wind Farm did not obtain a lease of subsurface rights approved by OMC or the United States, nor did it seek or obtain a federal permit for its activities.

On the land for which it only held a surface lease, Wind Farm began to excavate for and then construct large concrete foundations for eighty-four wind turbines, and to construct underground collection lines, an overhead transmission line, two permanent meteorological towers, and a network of access roads (the "Project"). 10th Cir. Jt. App. 55-59 ¶¶ 3, 5, 9. Each wind turbine's foundation requires a large area to be excavated, measuring approximately 10 feet deep and 50 to 60 feet in diameter. 10th Cir. Jt. App. 58, ¶15.a. For each of these concrete foundations, Wind Farm excavated approximately 19,440 cubic feet (720 cubic yards) of dirt, sand, gravel, limestone, and other common minerals, so it excavated a total of 1,632,959 cubic feet (60,480 cubic yards) for all eighty-four foundations. *Id.* Rocks larger than three feet long were removed from the subsurface and placed on the surface near the foundation hole. *Id.* Minerals smaller than

three feet were crushed to approximately three inches. *Id.* After each foundation was poured and cured, Wind Farm used the OMC's minerals that Wind Farm had excavated and crushed, which were approximately 75% of the materials excavated or 45,630 cubic yards, for backfill and compacting.[3] *Id.* Wind Farm's use of these 45,630 cubic yards of common minerals as backfill allowed Wind Farm to forego the expense of purchasing backfill.

Wind Farm itself estimates that the surface "footprint" of the Project is approximately 126 acres, spread across 8,400 acres. 10th Cir. Jt. App. 56 ¶9.[4] The record does not show how many acres of common minerals are now inaccessible. It would be between the footprint and the total acres,[5] and going down to a depth which also is not established.

In what appears to simply be misguided penny-pinching, Wind Farm decided that it would obtain leases of the surface rights for 8,400 acres of land, but that it would neither seek nor obtain leases for the

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[3] Only the rocks smaller than 3 feet were used to complete the backfill. 10th Cir. Jt. App. 58, ¶15.

[4] Wind Farm did not define what it meant by the conclusory reference to the "footprint," and its own map of the Project would seem to indicate that the amount of the subsurface which it would claim is now inaccessible is far more than the 1.5% which it claims is the surface "footprint." 10th Cir. Jt. App. 64.

[5] The record shows that Wind Farm expects a setback from the bases of the structures, but the record does not contain the distance of such setback. OMC believes the setback requirements would exponentially increase the amount of minerals that it can no longer access beyond those directly under the bases.

subsurface minerals from the OMC. It would simply take the Tribe's subsurface minerals and use them without payment. To attempt to escape the requirement that it comply with the federal regulations or otherwise pay the OMC for the use of the land and minerals, Wind Farm claimed that it did not need to enter into a lease or other contract with the OMC because it was only *using*, not *selling*, the OMC's minerals, and that it therefore fell within a loophole in the federal regulations at 25 C.F.R. Part 214, and could excavate and use OMC minerals without compensation.

REASONS FOR DENYING THE PETITION

I. This Court Should Deny Petitioners' First Question Presented.

The decision below, holding that OMC was properly a party to the merits appeal, is not in conflict with any decisions of this Court or of any Circuit. It is instead an application of the same rule and exception that all of the circuits apply, and application of that limited exception to the particular circumstances of this case.

Those particular circumstances arise from the trust relationship between the United States and the OMC. The 1906 Osage Act allotted the Osage Tribe's surface estate, while reserving the mineral estate for the benefit of the Tribe. Act of June 28, 1906, Ch. 3572, 34 Stat. 539. Those minerals are held in trust by the United States. *Id.*; *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010). The Osage Act recognizes the

OMC's authority to manage the mineral estate by providing that "all leases for all oil, gas, or other minerals covered by the lands . . . may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe." Osage Act at § 3.

In Oklahoma, the surface estate is subservient to the dominant mineral estate. *Dulaney v. Okla. State Dep't of Health*, 868 P.2d 676, 680 (Okla. 1993).

A. The Decision Below Does Not Conflict with Prior Opinions of This Court.

Petitioners assert that the Tenth Circuit's decision conflicts with the "clear message" of this Court's decisions on non-party appeals, *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) and *Devlin v. Scardelletti*, 36 U.S. 1 (2002). In actuality, the Tenth Circuit started its discussion with *Marino* and *Devlin*, and then applied those cases to the very unique facts of this case. The Tenth Circuit noted that *Marino* and *Devlin* show that there is a general rule that non-parties cannot appeal, but that specific facts of an individual case can bring the matter within a narrow exception to the general rule. Even Petitioners admit that all of the circuits agree on these two points: the general rule, and a limited exception. Petition at 13-14.

The Tenth Circuit then discussed why the facts of this case bring it within that limited exception. App.

10a. The Tenth Circuit itself explained that its decision was narrow and fact specific.

> OMC's interest here is particularized and significant because the Osage Nation *owns* the beneficial interest in the mineral estate at issue. Further, OMC did not intervene below because the United States was adequately representing its interests all along, and OMC could not have intervened as of right earlier because it only discovered in the very last moments that the United States was not going to appeal. In these unique circumstances, we permit OMC to go forward with this appeal.

App. at 12a (emphasis in original).

Moreover, Petitioners themselves, below, argued that the Tenth Circuit should apply its own precedents to the unique and specific facts here. App. 11a. That was a wise strategic choice because, if anything, the Tenth Circuit precedents were more favorable to Petitioners than the decisions from most other circuits.[6] Petitioners discussed at length *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008) and attempted to analogize Petitioners' very different facts to *Kempthorne*. The Tenth Circuit then applied the very same law that Petitioners had cited to the facts of this case. As Supreme Court Rule 10 states,

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[6] Although they are seeking a writ of certiorari from a Tenth Circuit decision, Petitioners' first issue presented seems to be based on an assertion that the Second Circuit is out of step, and then Petitioners, without basis, assert that the Tenth Circuit and Second Circuit are in lockstep. They are not.

this Court will rarely consider petitions seeking to challenge application of a properly stated rule to the facts of a case.

This is plainly not the type of case that this Court should grant certiorari. While Petitioners' lawyers get high marks for the quality of their attempt to persuade this Court that there is a conflict, this case does not present a vehicle for resolving any alleged conflict.

In *Marino*, this Court explained that the general rule is that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino*, 484 U.S. at 304. This Court elaborated on this point in *Devlin*, explaining that *Marino* did *not* restrict the right to appeal to only named parties. *Devlin*, 36 U.S. at 10. In doing so, this Court cited multiple prior Supreme Court cases which discuss various contexts in which it had permitted non-party appeals and the Court explained that:

> [w]hat is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal at the approval of a settlement when they have objected at a fairness hearing.

Id.

When the United States brings a case to protect a tribal trust asset, as it did here, generally "the United States' actions as their representative will bind the

Tribes to any judgment." *Arizona v. California*, 460 U.S. 605, 615 (1983); *Heckman v. United States*, 224 U.S. 413, 445 (1912) ("the decree will bind not only the United States, but the Indians whom it represents in the litigation"). The district court's decision in this case would bind OMC.

Perhaps forgetting their own prior discussion of this issue in prior briefs, Petitioners themselves made the point below that the OMC would be bound by any decision against the United States. For example, in opposing OMC's motion to intervene in the district court proceedings in this matter, Wind Farm premised its argument upon the fact that the United States brought suit in its capacity as OMC's trustee, and that therefore the OMC would be bound by the final decision in this matter. D.Ct. Dkt. 54 at ¶2. *See also* D.Ct. Dkt. 26 (Wind Farm argues that because the United States brought suit as OMC's trustee, the OMC's prior litigation against Wind Farm was binding as res judicata on the United States).[7] At that point Wind Farm, albeit inexplicably, expected to win, to prevail in taking and using OMC's property without paying for that

[7] Osage Wind wisely chose not to petition for Supreme Court review on that argument. Osage Wind's argument to the District Court was that because the United States was bringing suit based upon its unique trust relationship with the OMC, the United States should not be able to bring a claim which OMC did not bring in prior litigation. The district court rejected Osage Wind's argument, and Osage Wind's legal argument was unsupported by the specific facts of this case, i.e. the claim brought by the United States did not arise until well after the prior litigation had ended.

property, and in that context it was making the point that OMC would be bound by the United States, as the OMC's trustee, losing the case.

The Tenth Circuit Court of Appeals' decision does not conflict with the holding or the "message" of *Devlin* that, in Petitioners' words, "a nonparty with an interest in existing litigation may not appeal a final judgment if it did not participate (or at least attempt to participate) in the district court proceedings." *Petition for a Writ of Certiorari* at 22. As the Tenth Circuit explained, OMC did attempt to participate as soon as the United States informed the OMC that it would no longer represent the OMC's interests. The Tenth Circuit expressly noted that its decision was based upon the fact that the reason the OMC had not sought to intervene earlier was "because the United States, as trustee for the mineral estate, was representing OMC's interests all along." *United States v. Osage Wind*, 871 F.3d 1078, 1085 (10th Cir. 2017). As the Tenth Circuit noted, the OMC could not have intervened of right earlier because "Rule 24 bars intervention of right while the movant's interests are protected by an existing party." *Id*. "When the government informed OMC on the final day of the appeal deadline that it would not appeal, OMC acted quickly: it immediately submitted an intervention motion and then, minutes later, filed a notice of appeal from the underlying lawsuit." *Id*. at 1084. Thus, OMC participated or attempted to participate in the district court proceedings.

Petitioners had sought to create, and now want this Court to create, a procedural Catch-22. OMC cannot

intervene while the United States is adequately representing the OMC's real property interests in the United States' capacity as OMC's trustee, but then OMC cannot move to intervene or appeal when the United States decides to abandon its trust beneficiary on the day that an appeal is due.

There is, obviously, nothing in this Court's precedents which would have required the Tenth Circuit to render such an unjust result. In fact, this Court has rejected that type of argument in a closely analogous context. In *United Airlines v. McDonald*, 432 U.S. 385 (1997), this Court held that McDonald should be permitted to intervene after a judgment had been issued. United Airlines had claimed that it would have been prejudiced because "it was unfairly surprised when, after having settled the case with all of the original and intervening plaintiffs it nonetheless faced an appeal." 432 U.S. at 393 n. 14. This Court flatly rejected United Airlines' claim of prejudice, noting that "there is no reason to believe that in that short period of time [three weeks passed between the judgment and the intervention motion], United discarded evidence or was otherwise prejudiced." *Id*. The Court then held that the flight attendant had a right to intervene. *Id*. at 396.

For the foregoing reasons, the Tenth Circuit's holding that OMC was properly a party to appeal the district court's decision on the merits was not contrary to decisions by this Court.

B. The Decision Below Does Not Conflict with Any Decision of Another Court of Appeals and is Not an Issue Which Warrants Determination by This Court.

This case does not conflict with any decision of the courts of appeals. Moreover, while OMC contends there is no substantial conflict in the circuits, even if there were a conflict, this case would not be the appropriate vehicle to resolve any differences. At issue in this case is whether a beneficiary can appeal a district court decision when its trustee declines to appeal. Even more specifically, this case involves whether a tribal entity can appeal a district court decision when its trustee, the United States, who brought the case to protect tribal trust property, declines to appeal. The circuit courts are not split on this narrow issue.

Petitioners broadly frame the issue as "the circumstances in which a nonparty may appeal a district court judgment that *arguably affects the nonparty's interests*." *Petition for a Writ of Certiorari* at 13 (emphasis added). Again, it appears that Petitioners have forgotten that their own prior argument was that because the United States was litigating as the OMC's trustee the OMC would be bound by the United States loss.

Petitioners then assert that the courts of appeals are deeply and intractably divided on the issue, and that this Court should grant the *Petition* in order to resolve the circuit split. First, this framing misconstrues

the issue. In its *Petition*, Wind Farm does not assert that the Tenth Circuit Court of Appeals incorrectly held that OMC had an interest that would be affected by the district court decision.

Instead, Wind Farm argues that, under the facts of this case, other circuits would have decided that OMC did not timely seek to intervene. Wind Farm posits that "[i]f OMC believed that its interests might be determined by the outcome of the United States' suit against petitioners, it should have moved to intervene before judgment was entered against the United States," and that its failure to do so would likely have been fatal to its attempt to appeal in the First, Seventh, or D.C. Circuits. *Id*. at 15. None of the cases Wind Farm cites from those circuits, however, hold that a beneficiary represented by a trustee must intervene while the trustee still adequately represents the beneficiary's interests. Thus, those cases do not conflict with the Tenth Circuit Court of Appeals' holding that OMC acted properly in seeking to intervene and filing a notice of appeal as soon as it realized its trustee was not adequately representing its interests. *E.g.*, *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (holding that "a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because the 'potential inadequacy of representation came into existence only at the appellate stage.' ").

Wind Farm next asserts that the courts of appeals for the Third, Fourth, Fifth, Eighth and Ninth Circuits would have decided this case differently because OMC

did not participate in the district court proceedings. That is an incorrect reading of the decisions in those circuits (and if it were correct, it would place those circuits in conflict with this Court's own decisions). But much more simply, OMC did participate in the proceedings via its trustee and by filing a motion to intervene as soon as the United States informed the trust beneficiary that the trustee, after having lost on OMC's behalf, was no longer going to prosecute the matter. Moreover, OMC could not have intervened as of right under Rule 24(a) until the United States declined to appeal because, until that point, its trustee was adequately representing its interests, a situation which the cases cited by Petitioners do not address. None of the cases cited by Petitioners involve the present factual scenario. That is no doubt why Petitioners attempt to divorce this case from its unique trustee/beneficiary context and the other specific facts which informed the Tenth Circuit's narrow decision.

Most importantly, while the circuit courts use different words or perhaps analyses to determine when a non-party can appeal, this case is not the appropriate vehicle to resolve those differences. Even if we were to label the OMC (a party that sought to intervene and then appealed from the procedural-based denial of its motion to intervene) as a "non-party," this case centers on whether a beneficiary can appeal a district court decision when its trustee declines to appeal. When a trustee litigates on behalf of a beneficiary, the analysis of the beneficiary's interest in the proceedings is straightforward – the beneficiary necessarily has an

interest in the litigation and is generally bound by the decision. *Kerrison v. Stewart*, 93 U.S. 155, 160 (1876); *Chicago R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 620 (1926).

None of the cases cited by Petitioners held that a non-party beneficiary could not appeal a lower court decision. Moreover, the OMC is unaware of any circuit split on the narrow issue of how involved a non-party beneficiary must be to appeal a lower court decision. In sum, if this Court accepts certiorari on this issue, it will not be addressing a significant issue that has the circuit courts deeply and intractably divided.

This issue will be particularly narrow because this Court cannot analyze the propriety of OMC's appeal without considering the unique fiduciary relationship between the United States and Indian beneficiaries. The United States' ability to represent Indians in all suits at law and in equity is codified at 25 U.S.C. § 175. The United States' representation of Indian interests "traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty." *Heckman v. United States*, 224 U.S. 413, 445 (1912). In fact, "[t]here can be no more complete representation than that on the part of the United States in acting on behalf of these dependents." *Heckman*, 224 U.S. at 445. Because the United States brought this case under 25 U.S.C. § 175 in order to protect a tribal trust asset, and OMC appealed after its trustee declined to appeal an adverse decision, this case presents a unique fact

scenario that raises questions of Federal Indian law. This Court would have to address the unique issue of whether a non-party tribal entity can appeal a district court decision when its trustee, the United States, who brought the case to protect tribal trust property, declines to appeal. A circuit court has never previously addressed this issue.

For the foregoing reasons, this issue is not one that this Court should exercise its discretion to review.

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to *preserve uniformity of decision among the intermediate courts of appeal*.

Taft, C.J., in Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., Ser. 33, at 2 (1922). Here, the decision below to allow OMC to appeal is "bound up in the facts of the particular case." *Izumi Seimitsu Kogyo Kaisha v. U.S. Phillips Corp*., 510 U.S. 27, 33 (1933) (addressing motions to intervene). Because the United States and OMC's trust relationship heavily influences this case, "it is unlikely that any new principle of law would be enunciated" that would

resolve the circuit court's slightly differing analyses regarding proper non-party appeals. *See id*.

Finally, Petitioners cry that the Tenth Circuit Court of Appeals' decision "rewards, rather than discourages, free riders who closely monitor a case in which they have an interest, but exert none of their own time, effort, or money to try to protect that interest," is meritless. Laws such as 25 U.S.C. § 175 specifically allow trustees to bring cases on behalf of beneficiaries. That is one of the benefits of being a trust beneficiary, and sadly is one that the United States often fails to provide its tribal beneficiaries. Requiring beneficiaries to exert their own time, effort, and money to protect an interest that is already being represented by a trustee would be nonsensical. The Tenth Circuit Court of Appeals properly held that there was no need for OMC to act until it realized the United States was not going to appeal.

II. Certiorari is Unnecessary as the Tenth Circuit Properly Applied the Canons of Construction for a Fact Specific Matter

The second issue that Petitioners seek to present in this case literally could not be much narrower. The United States has adopted regulations which provide that use of more than 5,000 cubic yards of the OMC's minerals requires a lease. There is no dispute that OMC owns the minerals. The mineral estate is split from the surface estate and there is no dispute that the mineral estate is the dominant estate. *E.g.*, *Dulaney v.*

Okla. State Dep't of Health, 868 P.2d 676, 680 (Okla. 1993). Anyone who bought the surface estate did so with record knowledge that it was buying a surface estate which was subservient to the OMC's ownership of all minerals under that surface.

5,000 cubic yards is a lot. It is far more than anyone in Osage County would excavate for a building or virtually anything other than a large scale windfarm. While Petitioners attempt to equate their large commercial enterprise with projects by local farmers or home-owners, the United States, through its own regulations, has already exempted those types of activities. Petitioners' parade of horribles is precluded by the regulations and the United States interpretation of those regulations.

The second issue that Petitioners seek to present also could not be much less interesting to this Court. It is undisputed that the OMC owns the large volume of minerals that Petitioners decided to extract and then crush and use for their own commercial purposes.

Displaying its true colors in the district court and even in the Tenth Circuit, Wind Farm complained that OMC was seeking the authority to "veto" Wind Farm's use of OMC's minerals. The right that OMC asserted and that the Tenth Circuit recognized is the firmly established right which all landowners, even if they are Indians, have. It is nearly inexplicable that Wind Farm comes to this Court and asserts that it should not have needed to negotiate a fair compensation to OMC, the owner of the mineral estate, for the large scale

commercial use of OMC's minerals. The Osage Mineral Estate is held in trust by the United States on behalf of the Osage Tribe and is administered for the Tribe by the OMC. The decision to sell or lease property or to exclude someone from entering property are rights of any land owner. The Tenth Circuit's application of Section 214 to Wind Farm's activities did not provide the OMC or the BIA any right or power that it did not already possess as the owner of the Osage Mineral Estate.

As the facts of this matter demonstrate, when Wind Farm was dealing with non-Indian property owners, it did negotiate a lease. But even though the United States informed it that it would also need a lease from the OMC, Wind Farm decided to assert a 19th century position that it could use the OMC's land and minerals without paying for them. The decision to lease property rests with the property owner. The property rights of the United States and its trust beneficiary deserve the same respect. Wind Farm's attempt to get this Court to use one of the few slots on its merits calendar to rescue Wind Farm from its error is without the slightest merit.

Facing an ambiguous regulation, the Tenth Circuit, in accordance with centuries' worth of jurisprudence, correctly applied the United States' reasonable solution to the problem and the Indian canons of construction regarding a fact scenario and set of affected persons which covers a single county in Oklahoma. Application of the United States' interpretation and those canons correctly resulted in the Tenth Circuit holding

that the statutes and regulations specific to the Osage Reservation required Wind Farm to obtain a lease for its large scale commercial development. The decision clarified the regulation resulting in protection of the Tribe's mineral rights while largely preserving the rights of surface estate holders. In most scenarios, the decision allows "surface owners [to] retain virtually uninhibited use of their lands. Pet. App. 26a. The Court should reject the Petition as there is a distinct lack of circuit conflicts nor is there any foreseeable negative impact on either Osage County surface estate holders or some wider group of surface estate holders.

A. The Indian Canons of Construction Clarify Section 211.3's Mining Definition

At its core, the underlying litigation revolves around whether the United States correctly determined that the removal, crushing, and reuse of far more than 5,000 cubic yards of common minerals by Wind Farm constituted mining as defined by 25 C.F.R. § 211.3. More specifically, did that removal, sorting, crushing, and reuse of minerals fits under the umbrella of "mineral development?" However, neither the Osage Act, its regulations, nor the Part 211 regulations explore, define, or otherwise clarify "the outer limit of what it means to develop minerals." Pet. App. 22a. This ambiguity, in accordance with the canons of construction, must be resolved, with a liberal interpretation in favor of the OMC, *id.* at 21a (citing *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983); *Chickasaw*

Nation v. United States, 534 U.S. 84, 93-94 (2001); *Alaska Pac. Fisheries v. United States*, 238 U.S. 78, 89 (1918), and with the United States' own "reasonable solution to that problem," *id.* at 25a.

Wind Farm's contention that there is a "clear regulatory text" is a red herring designed to distract from the mining discussion and create a requirement, contrary to basic property law, that Wind Farm can take and use OMC's property for commercial purposes as long as it does not sell OMC's property. 25 C.F.R. § 211.3 provided no support for its argument that the OMC's property rights are not violated so long as Wind Farm only uses, not sells, OMC's property.

Realizing this, Wind Farm turned to "other provisions that contemplate the sale of minerals." *Id.* at 19a. However, Section 214.10(d) actually supports the OMC's and the United States' position rather than Wind Farm's. Section 214.10(d) identifies the royalty rate and method of royalty valuation for payments owed to the Osage headright owners for the use of their minerals. As Wind Farm correctly noted, the value of the minerals for royalty purposes is determined by the value "at the nearest shipping point of all ores, metals, or minerals marketed." 25 C.F.R. § 214.10(d). Contrary to Wind Farm's interpretation of this section, this is a standard royalty clause known as a "market value," and is the only way to calculate royalties when the mineral is never actually sold to a third party, as in this case. Had the Secretary foregone the market value clause for an "amount realized" or a "gross proceeds" clause where a lessor receives royalty based on the

lessee's actual contract price, Wind Farm would have been correct. However, the Secretary chose to use a market value clause so that royalties could be ascertained from situations such as this one, wherein the minerals are not actually sold in the market, but are instead used by the lessee.

Neither the Osage Act nor its regulation § 214.10 provide any guidance or clarification of the term "mineral development." Exposing their status as red herrings, neither provision deals with the actual action of mining.

25 C.F.R. § 214.10, a regulatory rule of the Osage Act, concerns royalty rates and contains no discussion of what constitutes mining. To wit, the regulation requires payment of a ten percent (10%) royalty rate on minerals marketed. However, "this royalty clause does not purport to limit the definition of 'mining' in § 211.3 to an operation that produces mineral destined for the market, rather it merely proves that 'marketed' minerals are subject to a 10-percent royalty." Pet. App. 19a-20a.

Wind Farm argued to the Tenth Circuit that the Osage Act and the regulations were unambiguous. The Tenth Circuit rejected that argument. Wind Farm now asks this Court to grant certiorari to review the Tenth Circuit's decision rejecting Wind Farm's claim that the Osage Act is unambiguous. This Court should reject Wind Farm's request.

B. Surface Owners, Regardless of Location, are Largely Unaffected by the Ruling

The underlying decision by its own terms will have little to no effect on the legal rights of Osage County surface owners. Section 211.3 has a de minimis exception that exempts any removal of less than 5,000 cubic yards of common minerals. *Id.* at 18a. Accordingly, "owners of the surface estate retain virtually uninhibited use of their lands." *Id.* at 26a.

Furthermore, even if a surface owner did go beyond the de minimis exception, the decision is unlikely to have a detrimental effect. The decision leaves undisturbed the notion that "the simple removal of dirt does not constitute mining." *Id.* at 23a (citing 53A Am. Jur. 2d Mines and Minerals § 14). Mineral development requires more than simple removal of dirt. *Id.* As such, a surface owner would only be affected by this decision if (1) it removed more than 5,000 cubic yards of common minerals and not simply dirt, (2) as part of a commercial business or enterprise. In such an unlikely event it is a reasonable conclusion "that *development* of such minerals goes beyond mere use of the surface estate and implicates the mineral estate reserved to the Osage Nation." *Id.* (emphasis original).

Individual tribal members who are both surface estate owners and headright owners receive benefits from the underlying decision.[8] As discussed above,

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[8] At the conclusion of their petition, Petitioners include an unexplained throw-away argument that the Indian canons of construction do not apply because there are Indians on both sides of

surface owners in general are not affected by this decision. However, for headright owners the decision serves to preserve their mineral rights and provide them economic opportunities to lease common minerals. Conversely, if Wind Farm's interpretation were allowed it would deprive the headright owners of economic opportunity all in the name of an unfounded fear of interfering with surface owner rights. The underlying decision serves to protect surface owners' rights while also maximizing the economic opportunities of headright owners.

CONCLUSION

Giving credit where it is due, OMC applauds Petitioners' attorney for making a wholly meritless petition for certiorari seem, on superficial first reading, like it was presenting something of substance. But the reality is that the Petition is weaker than nearly any that come to this Court. There is no conflict in decisions. There is no issue of broad significance. All there is is the age-old story of a non-Indian with monetary resources attempting to take an Indian Tribe's property without having to pay for it. The Tenth Circuit

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this matter. There are not. Petitioners are not Indians, nor are the surface owners who leased their surface rights to Petitioners. The regulations at issue were adopted to protect the property rights of the OMC, not to protect Osage Wind's desire to take and use OMC property without paying for it.

correctly rejected that attempt. OMC asks this Court to do the same.

Respectfully submitted,

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