No. 17-1237

In the Supreme Court of the United States

OSAGE WIND, LLC, ET AL., PETITIONERS

v.

OSAGE MINERALS COUNCIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether respondent, an instrumentality of the Osage Nation (Tribe) that never became a formal party to the district court proceedings, can nevertheless prosecute an appeal from the district court's judgment, where respondent's interest in those proceedings was represented by the United States acting as trustee for the Tribe's mineral resources and where the district court's judgment would bind the Tribe.

2. Whether the court of appeals erred in concluding, based on application of the Indian canon of construction, that by removing rocks, crushing them, and returning the crushed rocks to the hole from which they were removed, petitioners engaged in "mining" as defined in the Indian mineral leasing regulations of the Department of the Interior. 25 C.F.R. 211.3, 214.7.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Osage Act (1906 Act), ch. 3572, 34 Stat. 539, severed the surface lands from the subsurface mineral estate in Osage County, Oklahoma. § 2, 34 Stat. 543. The surface lands were allotted to individual members of the Osage Nation, a federally recognized Indian tribe (the Tribe). *Id.* at 540; see 79 Fed. Reg. 4748, 4752 (Jan. 29, 2014). Surface owners could sell their allotments (subject to restrictions), and they were granted "the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein." § 7, 34 Stat. 545.

By contrast, "the oil, gas, coal, or other minerals" beneath the surface were "reserved to the [T]ribe." § 2, 34 Stat. 543.[1] The United States is the legal trustee of the Osage mineral estate, while the Tribe holds the beneficial interest. Pet. App. 3a. The 1906 Act authorized the Tribe to lease the subsurface minerals to others, but only "with the approval of the Secretary of the Interior." § 2, 34 Stat. 543. "[N]o mining" of Osage minerals is permitted "without the written consent of the Secretary of the Interior." *Id.* at 543-544.

b. Regulations of the Department of the Interior (Interior) governing the leasing of Osage minerals other than oil and gas appear at 25 C.F.R. Part 214.[2] Under those regulations, when the Tribe negotiates a lease for use of the mineral estate, the lease is forwarded to Interior. 25 C.F.R. 214.2. Until Interior approves the lease, "[n]o mining or work of any nature will be permitted upon any tract of land." 25 C.F.R. 214.7. The Osage-specific regulations do not define the term "mining." Interior's general regulations governing the leasing of Indian lands for mineral development, however, define "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." 25 C.F.R. 211.3. The regulation further provides

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[1] The 1906 Act reserved the subsurface minerals to the Tribe for 25 years. § 2, 34 Stat. 543. Subsequent statutes have extended the reserved status of the mineral resource in perpetuity. See Act of Mar. 2, 1929, ch. 493, 45 Stat. 1478-1479; Act of June 24, 1938, ch. 645, 52 Stat. 1035; Act of Oct. 21, 1978, Pub. L. No. 95-496, 92 Stat. 1660.

[2] The regulations governing oil and gas leasing appear at 25 C.F.R. Part 226.

that in circumstances where the subject mineral is "sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt," "an enterprise is considered 'mining' only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year." *Ibid.*

2. a. In 2010, petitioners leased surface-use rights to approximately 8400 acres of land in Osage County for the purpose of building a wind farm. Pet. App. 5a. Petitioners did not obtain a lease from the Tribe to conduct any mining of the minerals underlying those lands. *Id.* at 5a-6a. In 2014, petitioners began building cement foundations in holes ten feet deep and 60 feet wide to support wind turbines at the site. *Id.* at 6a. To make room for the foundations, petitioners first removed soil, sand, and rock. *Ibid.* After pouring the cement foundation into the resulting holes, petitioners crushed the smaller-sized rock and returned it to the holes surrounding the foundations. *Ibid.* Petitioners left the larger rocks sitting on the surface next to the holes. *Ibid.*

b. After petitioners began excavation work, the United States filed suit against petitioners, claiming that their extraction, crushing, and use of minerals to construct the wind farm constituted "mining" of sand, rock, and gravel under Interior's regulation, which required a mineral lease under 25 C.F.R. 214.7. Pet. App. 6a-7a, 37a. Although the Tribe did not join the suit as a plaintiff, the United States explicitly brought the suit "in its capacity as trustee of the Osage minerals estate, as well as to enforce compliance with federal law." Compl. 3; see Pet. App. 33a. After discovering that petitioners had completed the excavation in late November 2014, the United States withdrew its request for in-

junctive relief and filed an amended complaint for damages based on the alleged unauthorized extraction of minerals. Pet. App. 6a-7a.

The district court granted summary judgment for petitioners. Pet. App. 27a-49a. The court concluded that the term "mining," as used in the regulations, does not extend to activities of "an entity that incidentally encounters minerals in connection with surface construction activities," but instead encompasses only activities having "a commercial mineral development purpose." *Id.* at 37a-38a. Because petitioners had only "excavated holes to build foundations and then replaced the minerals or left them on the surface," their activities did not constitute the commercial development of minerals and thus did not fall within the regulatory definition. *Id.* at 48a.

The district court declined to defer to Interior's litigation position regarding the meaning of the term "mining," which the court deemed an unreasonable reading of the regulation. Pet. App. 48a-49a. The court also declined to adopt a broader definition of the term "mining" based on the interpretive canon that laws passed for the benefit of Indian tribes should be "liberally construed with doubtful expression being resolved in favor of the Indians." *Id.* at 49a (citation omitted). In the court's view, the regulations at issue contained "[no] such doubtful expression." *Ibid.* (citation and internal quotation marks omitted).

c. On the final day of the 60-day period in which to file a notice of appeal, the Tribe learned that the United States had decided not to appeal. Pet. App. 7a. That day, respondent Osage Minerals Council, an independent agency of the Tribe, see Const. of Osage Nation Art. XV, § 4, https://osage.nation.codes/Constitution/15,

filed a motion to intervene in the district court. Pet. App. 7a. Minutes later, it filed a notice of appeal. *Ibid.* The court denied respondent's motion to intervene on the ground that the filing of the notice of appeal deprived the court of jurisdiction to grant the intervention motion. *Id.* at 7a-8a. Respondent filed a separate notice of appeal from the denial of the intervention motion. *Ibid.*

3. The court of appeals consolidated respondent's appeals and reversed. Pet. App. 1a-26a.

a. The court of appeals determined that respondent could appeal the district court's judgment. Pet. App. 8a-13a. The court of appeals acknowledged that "[i]t is black-letter law generally that 'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.'" *Id.* at 8a (quoting *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1998) (per curiam)). But the court recognized "an exception to this rule for would-be appellants that have a sufficiently unique interest in the subject matter of the case." *Id.* at 8a-9a (citation and internal quotation marks omitted). The court grounded that exception in *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002), where this Court held that nonnamed class members could appeal a settlement that prejudiced their interests without first intervening in the district court, "because a contrary rule 'would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them.'" Pet. App. 9a (quoting *Devlin*, 536 U.S. at 10).

Likewise, here, the court of appeals reasoned, the district court's decision allowed petitioners to utilize the Tribe's mineral estate without obtaining a lease, and that judgment is binding on the Tribe. Pet. App. 10a. The court of appeals acknowledged that respondent "did not attempt to intervene below until the eleventh

hour," but it did not consider that dispositive. *Id.* at 10a-11a. The court reasoned that respondent had attempted to become involved in the case as soon as it learned that the United States would not appeal, and that respondent could not have intervened as of right earlier in the proceedings because its interests were adequately represented by the United States acting as trustee. *Ibid.* (citing Fed. R. Civ. P. 24(a)(2)). "In these unique circumstances," the court concluded, respondent could maintain an appeal. *Id.* at 12a. The court emphasized "the limited nature" of its holding. *Ibid.* In order to invoke the *Devlin* exception, the court explained, an "interested person must have a particularized and significant stake in the appeal, and must further demonstrate cause for why he did not or could not intervene in the proceedings below." *Ibid.*

Because the court of appeals held that respondent could prosecute the appeal, the court deemed it unnecessary to determine whether the district court should have granted respondent's motion to intervene. Pet. App. 12a-13a. The court dismissed respondent's appeal from the denial of that motion as moot. *Id.* at 13a.

b. On the merits, the court of appeals reversed. Pet. App. 14a-26a. The court concluded that petitioners had engaged in "mining" within the meaning of 25 C.F.R. 211.3, and therefore required a federally approved lease from respondent. Pet. App. 24a-25a. In considering whether the definition of "mining" encompassed the particular actions taken by petitioners, the court 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." *Id.* at 21a (citation and internal quotation marks omitted). The court noted that Interior's general regulations governing

leasing of Indian lands for mineral development define "mining" as "the science, technique, and business of mineral development," and acknowledged that the definition could reasonably be read as limited to "the commercialization of minerals." *Id.* at 22a-23a (citation and emphasis omitted). But because the court perceived some ambiguity in the phrase "mineral development," it concluded that "the Indian canon of interpretation tilts our hand toward a construction more favorable to [respondent]." *Id.* at 23a. The court accordingly "adopt[ed] the broader definition" of "mineral development" that "includes acting upon minerals to exploit the minerals themselves." *Ibid.* In the court's view, petitioners had engaged in "mineral development" (and thus "mining") when they removed soil and rock to make room for the turbine foundations and "*sorted* the rocks, *crushed* the rocks into smaller pieces, and then *exploited* the crushed rocks as structural support for each wind turbine." *Id.* at 24a; see *id.* at 24a-25a.

DISCUSSION

The court of appeals properly allowed respondent to appeal the district court's judgment. In general, only parties may appeal an adverse judgment, but this Court has recognized an exception for certain nonparties bound by the judgment. Respondent, an instrumentality of an Indian tribe whose interests were represented in the district court by the United States as its trustee and who sought to appeal a binding decision regarding the Tribe's own property, satisfies that narrow exception. There is no conflict in the courts of appeals on whether a nonparty may appeal under those unique facts.

The court of appeals' interpretation of the word "mining" in Interior's regulations governing mineral leases on Indian lands likewise does not warrant this

Court's review. Petitioners have identified no circuit conflict on the meaning of Interior's Osage-specific mining regulations or its general regulations governing leasing for mineral development, and the court's analysis of petitioner's excavation activities is fact-specific. Petitioners' contention that the court created a circuit split by applying the Indian canon to interpret Interior's regulations does not withstand scrutiny and presents no question of exceptional importance.

I. ON THE PARTICULAR FACTS OF THIS CASE, RESPONDENT COULD PROPERLY APPEAL WITHOUT FIRST BECOMING A PARTY IN THE DISTRICT COURT

A. 1. a. As a general rule, "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Devlin* v. *Scardelletti*, 536 U.S. 1, 7 (2002) (quoting *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1998) (per curiam)). But that rule, while controlling in the mine-run of cases, is not without exception. *Id.* at 8. Rejecting the arguments of the United States, see U.S. Br. at 13-27, *Devlin*, *supra* (No. 01-417), this Court recognized an exception in *Devlin*. The Court held that "nonnamed class members" who would be bound by the settlement of a class action and who, despite their nonparty status, "objected in a timely manner to approval of the settlement" before the district court had "the power to bring an appeal without first intervening." 536 U.S. at 14.

Although the nonnamed class members in *Devlin* had never become parties in the district court, the Court explained that they nevertheless were "parties to the proceedings in the sense of being bound by the settlement." 536 U.S. at 10. "It is this feature of class action litigation," the Court explained, "that requires that

class members be allowed to appeal." *Ibid.* To hold otherwise "would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court." *Ibid.* In rejecting the suggestion that nonnamed class members should be required to intervene before they appeal, the Court noted "the ease with which nonnamed class members who have objected at the fairness hearing could [have] intervene[d] for purposes of appeal." *Id.* at 12.

b. On the particular facts of this case, the court of appeals correctly held that respondent could appeal without first becoming a party. It is well-established that when the United States brings a suit in its capacity as a trustee holding a real property interest for the benefit of an Indian tribe, the tribe is bound by any decision regarding the scope of the tribe's property right, regardless of whether the tribe intervenes. See *Heckman* v. *United States*, 224 U.S. 413, 445-446 (1912); see also *Nevada* v. *United States*, 463 U.S. 110, 134 (1983). Thus, the district court's determination that petitioners could conduct excavation activities without obtaining a mineral lease was binding on the Tribe. Respondent's objections to that view were aired in the district court, first by the United States as the Tribe's trustee and then by respondent itself in filing a motion to intervene. See Pet. App. 6a-8a, 10a-11a. On these facts, precluding respondent from filing an appeal would "deprive" the Tribe "of [its] power to preserve [its] own interests" by appealing a binding adverse judgment, despite the Tribe's objections to the judgment having been presented to the district court. *Devlin*, 536 U.S. at 10. That is precisely the outcome this Court rejected in *Devlin.*

2. No other court of appeals has addressed whether a nonparty Indian tribe may appeal in its federal trustee's place, see p. 12, *infra*, but allowing an appeal here is consistent with federal courts' treatment of nonparties in analogous circumstances. Specifically, where the federal government brings a civil enforcement suit to vindicate the alleged injuries to particular individuals outside the tribal trust context, courts of appeals regularly allow those individuals to take an appeal to protect their own interests.

First, where the Secretary of Labor sued trustees of a retirement plan for violating the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, the Fourth Circuit permitted a nonparty participant in the retirement plan to appeal in the government's absence, even though the plan participant "was not a party to the proceedings below and did not seek to intervene on appeal in a timely fashion." *Kenny* v. *Quigg*, 820 F.2d 665, 667 (1987). The court of appeals did not directly address whether the plan participant *could have* intervened in the district court, but the court's observation that the participant "had a direct financial interest" in the challenged transaction suggests that she could have. *Id.* at 668; cf. Fed. R. Civ. P. 24(a)(2).

Second, where the Securities and Exchange Commission sues an entity that has allegedly injured investors, nonparty investors are generally allowed to appeal to assert their own interests in any plan for distributing the defendant's assets among investors. *E.g.*, *SEC* v. *Enterprise Trust Co.*, 559 F.3d 649, 651 (7th Cir. 2009); *Official Comm. of Unsecured Creditors of WorldCom, Inc.* v. *SEC*, 467 F.3d 73, 77-78 (2d Cir. 2006); *SEC* v. *Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 665 (6th Cir. 2001); *SEC* v. *Forex Asset Mgmt. LLC*, 242 F.3d

325, 328-330 (5th Cir. 2001); see also, *e.g.*, *Commodity Futures Trading Comm'n* v. *Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113-1114 (9th Cir. 1999) (permitting individual investor, a nonparty, to appeal asset-distribution plan in suit brought by federal government for violations of Commodity Exchange Act, 7 U.S.C. 1 *et seq.*). In so ruling, the Second Circuit observed that the investors had "declined to intervene in the SEC's action," *Official Comm. of Unsecured Creditors*, 467 F.3d at 77, and the Fifth Circuit similarly observed that the investors did not "seek to intervene in accordance with Rule 24," *Forex Asset Mgmt. LLC*, 242 F.3d at 329. This despite the fact that injured investors have been allowed to intervene in SEC enforcement actions in the district courts. *E.g.*, *SEC* v. *Black*, 163 F.3d 188, 195-196 (3d Cir. 1998).

Third, when the Equal Employment Opportunity Commission (EEOC) settles a discrimination suit brought on behalf of individual employees, an employee who objected to that settlement is generally permitted to appeal, even where the employee did not formally become a party in the district court. *E.g.*, *Binker* v. *Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992); *EEOC* v. *Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir.), cert. denied, 498 U.S. 815 (1990). Again, this is despite the fact that individuals on whose behalf the EEOC files suit are generally able to intervene in that suit. *E.g.*, *EEOC* v. *West La. Health Servs., Inc.*, 959 F.2d 1277, 1279 (5th Cir. 1992).[3]

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[3] Relatedly, at least one court of appeals has held that where an individual relator brings a *qui tam* action under the False Claims Act, 31 U.S.C. 3729 *et seq.*, the United States may appeal from an adverse judgment, even where it declined to become a party to the district court proceedings. See, *e.g.*, *Searcy* v. *Philips Elec. N. Am. Corp.*, 117 F.3d 154, 156-158 (5th Cir. 1997).

In each situation described above, the nonparty appellants had a concrete and particularized interest in the underlying litigation that would be affected by a judgment to which they would be bound. See, *e.g.*, *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 494-495 (3d Cir. 1990) (Alito, J.) (individual employees bound by judgment obtained by EEOC on their behalf). The same is true for the Tribe here. See p. 9, *supra*. So long as this Court recognizes exceptions to the general rule that non-parties may not appeal (as in *Devlin*), respondent may invoke such an exception here.

B. Contrary to petitioners' assertion (Pet. 13-20), there is no split in authority on the particular question presented here—that is, whether an Indian tribe may appeal a judgment entered against the United States in its capacity as trustee of the tribe's property. No other court of appeals has addressed that question, and the parties do not contend otherwise. Petitioners nevertheless maintain that the courts of appeals apply different tests to determine whether a nonparty can maintain an appeal. Any tension among the circuits does not warrant further review because respondent's appeal was proper under any circuit's approach.

Petitioners contend (Pet. 13-15) that while the courts of appeals generally recognize an exception to the rule against nonparty appeals where the nonparty has a sufficient interest in the district court's judgment, the courts vary in how strong an interest is required. The Second Circuit, for example, requires only that the nonparty be able to allege an "interest affected" by the judgment below, Pet. 17 (quoting, *e.g.*, *Official Comm. of Unsecured Creditors of WorldCom*, 467 F.3d at 78), while the Seventh and D.C. Circuits allow nonparty ap-

peals in circumstances where the appeal would likely result in a binding determination of the nonparty's rights, Pet. 14-15 (citing, *e.g.*, *In re Trans Union Corp. Privacy Litig.*, 664 F.3d 1081, 1084 (7th Cir. 2011); *Defenders of Wildlife* v. *Perciasepe*, 714 F.3d 1317, 1328 (D.C. Cir. 2013)); see also *AAL High Yield Bond Fund* v. *Deloitte & Touche LLP*, 361 F.3d 1305, 1309-1310 (11th Cir. 2004) (denying nonparty appeal where nonparty not bound by decision below). Any such conflict is not implicated here. There is no question that the judgment entered against the United States was binding on the Tribe, and respondent's appeal would therefore satisfy the applicable standard even in those circuits that allow only nonparties bound by the judgment to appeal.[4]

Petitioners further contend (Pet. 15-17) that the circuits vary in whether they require the nonparty to have participated in the district court proceedings in some manner short of becoming a party, with the Third, Fourth, Fifth, Eighth, and Ninth Circuits expressly articulating such a requirement. Pet. 15-16 (citing *Northview Motors, Inc.* v. *Chrysler Motors Corp.*, 186 F.3d 346, 349 (3d Cir. 1999); *Doe* v. *Public Citizen*, 749 F.3d 246, 259 (4th Cir. 2014); *Sanchez* v. *R.G.L.*, 761 F.3d 495, 502 (5th Cir. 2014); *Curtis* v. *City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993); *Pan Am. World Airways, Inc.*, 897 F.2d at 1504). Additionally, petitioners contend (*ibid.*), the Third, Fifth, and Ninth Circuits all consider whether the equities favor appeal.

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[4] Petitioners contend (Pet. 13-14) that the First Circuit prohibits nonparties who had an opportunity to intervene in the district court from filing an appeal. Petitioners rely primarily on a pre-*Devlin* case, see *Microsystems Software, Inc.* v. *Scandinavia Online AB*, 226 F.3d 35 (2000), and the First Circuit has since recognized that there are exceptions to that general rule, see Pet. 13-14.

Whatever disparities those varying standards could produce in a hypothetical case, the differences are immaterial here. Petitioners contend (Pet. 16-17) that respondent could not have appealed in those circuits that require nonparty participation in the lower court proceedings. But petitioners ignore that throughout the district court proceedings, respondent was represented by the United States, as trustee, acting on its behalf. See Pet. App. 10a-11a; cf. *Heckman*, 224 U.S. at 444 ("There can be no more complete representation" of a tribe's interests in trust property "than that on the part of the United States in acting on behalf of these dependents."). Although respondent did not enter an appearance in its own right before the district court entered judgment, its participation was not necessary, given that it would have raised the same arguments that its federal trustee was already making. See Pet. App. 6a-8a. When the United States declined to appeal, respondent immediately moved to intervene. *Ibid.* In this way, respondent's conduct was equivalent to that of the nonparty appellants in the EEOC cases discussed above (p. 11, *supra*), who filed objections in the district court upon learning that the EEOC was planning to settle their cases on terms that the nonparties did not support. The sole difference is that, here, the positions of the government and respondent diverged only after the district court entered judgment and the United States decided not to appeal.

For largely the same reasons, equitable considerations favor allowing respondent to appeal. The approaches of the United States and respondent were aligned until the United States decided not to appeal, which occurred on the final day of the 60-day period in

which to file a notice of appeal. Pet. App. 10a-11a. Before that, the United States adequately represented the Tribe's interest in the litigation—meaning that respondent would not have been entitled to intervene as of right. *Ibid.*; see Fed. R. Civ. P. 24(a)(2) (permitting intervention as of right for anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, *unless existing parties adequately represent that interest*") (emphasis added). Although the United States takes seriously this Court's admonition that "the better practice" for a nonparty whose interests are at issue in a lawsuit is to intervene, *Marino*, 484 U.S. at 304, on these unique facts, respondent's failure to become a party before the district court entered judgment should not prevent it from pursuing an appeal of a judgment that determines the Tribe's property rights and binds the Tribe.

The court of appeals' decision on the specific facts here does not implicate any circuit conflict on the standard for nonparty appeals, and the tribal-trust context in which this case arises would make this case a poor vehicle in which to address any conflict on more general standards for nonparty appeals.[5]

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[5] The unresolved question whether the district court erred in denying respondent's motion to intervene presents an additional reason to deny review. See Pet. App. 12a-13a (dismissing respondent's appeal of the court's order denying the intervention motion as moot). If the motion to intervene had been granted, respondent would have been entitled to appeal as a party on that basis. *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980). Thus, even if this Court were to grant the petition for a writ of certiorari and reverse on the first question, that decision would have no practical effect if on remand the court of appeals were to determine that intervention should have

II. THE COURT OF APPEALS' CONCLUSION THAT PETITIONERS' EXCAVATION ACTIVITIES CONSTITUTED "MINING" THAT REQUIRED A FEDERALLY APPROVED LEASE FROM RESPONDENT DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners' second question presented concerns the court of appeals' interpretation of the word "mining" in Interior's regulations governing mineral leases on Indian lands. Neither the court's interpretation of those regulations nor its application of the Indian canon of construction to reach the conclusion that petitioners' particular excavation activities constituted "mining" presents any question of exceptional importance that would warrant this Court's review.

A. The Osage Act prohibits "mining" of Osage minerals without the Secretary's written consent, § 2, 34 Stat. 543, and Interior's Osage-specific regulations implementing the statute prohibit "mining or work of any nature" until a mineral lease is approved by Interior, 25 C.F.R. 214.7. Interior's Osage-specific regulations do not define "mining," but that term is defined in Interior's general Indian mineral leasing regulations 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." 25 C.F.R. 211.3.

In the district court, the United States presented Interior's view that the excavation work petitioners performed when constructing the foundations for their wind turbines constituted "mining" of sand, rock, and

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been permitted. Cf. *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring) (recognizing that "prudential considerations disfavor[] the exercise of the Court's certiorari power" where a ruling in petitioner's favor would have no practical impact on case).

gravel under Interior's general Indian mineral leasing regulations, see 25 C.F.R. 211.3; that the Osage-specific regulations should be read in a similar manner; and that petitioners therefore needed to obtain a federally approved lease from respondent under 25 C.F.R. 214.7. The United States declined to appeal the district court's rejection of that position, and therefore did not present Interior's interpretation to the court of appeals. On respondent's appeal, however, the court of appeals concluded that petitioners had engaged in "mining" under Interior's regulations and thus were required to obtain a federally approved lease. Pet. App. 24a-25a. The court interpreted the phrase "mineral development" in the general Indian mining regulation to "include[] acting upon the minerals in order to exploit the minerals themselves," *id.* at 23a, and the court thus concluded that petitioners had engaged in "mining" when they removed soil and rock to make room for the turbine foundations and "*sorted* the rocks, *crushed* the rocks into smaller pieces, and then *exploited* the crushed rocks as structural support for each wind turbine." *Id.* at 24a; see *id.* 24a-25a.

Petitioners do not contend that the court of appeals' reading of the term "mining" in Interior's regulations to cover petitioners' activities here warrants this Court's attention, and for good reason. Petitioners have identified no circuit conflict concerning Interior's regulations governing leasing of the Osage mineral estate, 25 C.F.R. 214.7, or Interior's general regulations governing the leasing of Indian lands for mineral development, 25 C.F.R. 211.3, and none exists. If other courts should address this issue in the future and a circuit conflict were to develop, this Court could determine at that time whether review was warranted. But until that time, this

Court should follow its usual "practice of waiting for a conflict to develop." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984).

Moreover, this case arises in a factual context in which petitioners, the lessees of a surface owner, excavated to a depth necessary for a concededly valid surface use. See Pet. App. 23a ("We agree with [petitioners]" that "the simple removal of dirt does not constitute mining.") (citation omitted). The court of appeals' conclusion that petitioners' activities constituted "mining" turned on the further fact that petitioners not only removed minerals to lay the wind turbines' foundations, but also sorted and crushed the rocks and then used the crushed rocks as structural support for the wind turbines. *Id.* at 23a-24a. In the court's view, if petitioners had only removed the minerals by digging holes, but without crushing the minerals and using them for structural support, that would not constitute "mining." *Id.* at 24a ("The problem here is that [petitioners] did not merely dig holes in the ground—[they] went further" by crushing the rocks and using them for structural support.). Any future lessee proposing to develop a wind farm could presumably avoid that result by purchasing and importing fill material, rather than crushing and using the excavated minerals for that purpose.

Furthermore, Interior's general regulations exempt from the definition of "mining" projects involving less than 5000 cubic yards of common minerals like sand, soil, and rock—meaning that only large projects would actually require a mineral lease. 25 C.F.R. 211.3. Petitioners' excavation activities fell outside of that safe harbor only because the court of appeals concluded that the wind farm was "a single integrated project unified

by proximity of time, space, and purpose," and it therefore aggregated the rock removed from each of the 84 holes. Pet. App. 19a n.9, 28a. The court's interpretation of Interior's regulations is therefore unlikely to restrict the activities of surface estate owners or their lessees who temporarily dig out and then return minerals, or build less extensive structures on the surface.

B. Implicitly acknowledging that the issue whether the particular excavation activities at issue in this case constituted "mining" under Interior's regulations is not worthy of this Court's attention, petitioners contend (Pet. 23-29) that the court of appeals' decision creates a circuit conflict concerning the application of the interpretive canon that laws passed for the benefit of Indian tribes should be construed in the tribes' favor. Petitioners' attempt to identify a circuit conflict on that issue does not withstand scrutiny.

First, petitioners contend (Pet. 24-26) that the court of appeals improperly invoked the Indian canon to construe Interior's regulations in favor of respondent even though the regulations would otherwise clearly support petitioners. See, *e.g.*, Pet. 25 (arguing that the court "invoked the canon to *disregard* clear regulatory text—and for the express purpose of maximizing financial gain to an Indian tribe"). But that is not what the court did. The court invoked the Indian canon only after concluding that Interior's regulatory definition of "mining" was ambiguous. Thus, the court expressly relied on what it stated to be the "long-established principle that ambiguity in laws designed to favor the Indians ought to be liberally construed in the Indians' favor," Pet. App. 21a (citation and internal quotation marks omitted), and stated that it would adopt the interpretation

that favors the Tribe "to the extent there is doubt concerning [the] scope" of the definition of "mining" in 25 C.F.R. 211.3, Pet. App. 21a. It was only after the court found ambiguity in the phrase "mineral development" in that regulatory definition that it applied the Indian canon to construe the regulation in favor of respondent. *Id.* at 23a. Petitioners' assertion (Pet. 24-25) of a conflict with decisions of this Court and other courts holding that the Indian canon cannot be applied to unambiguous statutes is therefore misguided.

Second, petitioners contend (Pet. 27-29) that the court of appeals erred by invoking the Indian canon because the 1906 Act that Interior's regulations implement was enacted not only to protect the Tribe's interest in the mineral estate, but also to secure the rights of surface-estate holders, who at the time were tribal members. Where there are Indian interests on both sides of a statutory construction question, petitioners argue (*ibid.*), the Indian canon cannot be applied to select one construction of the statute over another. Petitioners did not make that argument below, so it is understandable that the court did not analyze whether there were Indian interests on both sides concerning interpretation of Interior's regulations.[6] The court certainly did not reject the reasoning of other courts of appeals (see Pet. 28) holding that the Indian canon has no application where Indian interests would be advanced by both competing interpretations of a statute. Indeed, the Tenth Circuit had previously held that the Indian

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[6] In the court of appeals, petitioners argued only that the Indian canon cannot be applied to clear statutes or regulations; they did not argue that the canon should not be applied here because the 1906 Act benefitted both the Tribe's interest in the mineral estate and individual Indians' interest in surface allotments. See Pet. C.A. Br. 30.

canon is "inapplicable" where competing interpretations favor different Indian interests. See, *e.g.*, *Utah* v. *Babbitt*, 53 F.3d 1145, 1150 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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