

“I See Genocide”

The Struggles of the Ponca Nation to Reclaim Their City From Polluters

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“I See Genocide”

In September 2016, a reporter asked Mekasi Horinek how environmental contamination affected the future of the Ponca people. “I see genocide,” he responded, “I see my people dying every day. I have children, I have grandchildren. I think that if we stay here, we’ll die.”¹ As late as 2016, all 30 wells around the Ponca Nation reservation in Northern Oklahoma were leaking methane gas. Furthermore, nearly all Ponca homes are situated within five miles of a refinery which contains hydrochloric acid and hydrogen sulfide. “If a big earthquake opens up one of those wells or breaks a pipeline, everything in 12 miles will be killed,” Horinek warned, “That’s not only my community, but everybody in the community of Ponca City and the surrounding areas. We have to take care of mother earth.”² Horinek, a member of the Ponca Nation and coordinator of environmental advocacy group Bold Oklahoma, had just emerged on the victorious side of a four year court battle between the Ponca Alliance and Continental Carbon³—an international carbon black manufacturer. The lawsuit, filed in 2005, alleged over two decades of abuses by Concarb against the residents of Ponca City and cited spiking cancer rates, visible signs of pollution, a steady rise in asthma cases, and numerous other infractions against the Ponca people. In the final 2009 settlement, Concarb agreed to pay over \$10 million in damages, relocate eleven affected landowners, and commence construction on an \$110 million ‘green’ cogeneration facility to halt the spread of pollution from their facility in Ponca City.

Despite this apparent victory, Horinek alleges a continuation of abuse against his people, claiming that the municipal leaders of Ponca City and the corporate leaders at Concarb and ConocoPhillips are practicing blatant environmental racism when they place lower-income

¹ Mekasi Horinek, “Battling Pollution On Our Lands,” *Cultural Survival*, Sept. 2016.

² Mekasi Horinek, “Battling Pollution On Our Lands,” *Cultural Survival*, Sept. 2016.

³ Henceforth referred to as ‘Concarb’

neighborhoods and rule-breaking pollution sites in direct contact to one another.⁴ His evidence lies in the distant past, the memorable past, and the present—and his fears for the future are entirely justified. Since its founding, Ponca City has been a flashpoint of the adversarial relationship between resource extractors and Native peoples, as well as case study into how the U.S. government has consistently failed to carry out its own regulatory policies—even when the evidence of abuse is both glaring and tragic. This paper seeks to examine the ongoing case of pollution in Ponca City under two lights: first, as a study into the complex relationship between American Indians and oil extraction and refinement, and second, as a study into the failures by the Environmental Protection Agency (EPA) to enforce their own laws and statutes, even in dire scenarios, when major corporations are at fault. By examining these two apparently unrelated subjects, I hope to form a conclusion which should inform environmental scholarship in the future: that the struggles in Ponca City illustrate the usage of “alternative pathways” by Native Americans in order to preserve the health and of both their people and their environment.⁵

I will begin by focussing on the history of the Ponca before their relocation to Oklahoma, then on the first foundational backbone of this paper: the complex relationships between Native Americans and resource-extraction industries. After that, I will briefly elaborate on the history of Ponca City from its founding in 1893 to the first notable environmental court case in 1988; then, I will focus on the two main Ponca City litigation cases, which will be elaborated on in-depth; and finally, I will place these cases in the larger body of existing literature concerning the second foundational backbone of my paper: EPA enforcement problems.⁶ Finally, I will conclude by

⁴ Mekasi Horinek, "Battling Pollution On Our Lands: Mekasi Horinek."

⁵ For a definition of “alternative pathways,” see page 31.

⁶ I would like to acknowledge major areas of study in fields which could have bolstered this paper, but were left out due to space constraints. One of these is the study of zoning laws, and involves analyzing municipal, state, and federal statutes which have directly or indirectly placed marginalized

drawing connections between the two backbones and the two litigation cases, so as to examine the case for the usage of “alternative pathways” by Native Americans.

I. The Ponca Tribe of Nebraska

The Usni Ponca Tribe have a complex and debated history, which spans as far back as at least 1200. It is believed that in the centuries before European incursions into the continent, the Ponca and Omaha were part of one large tribe which was situated in the Ohio River Valley, east of the Mississippi.⁷ According to the Usni Ponca Cultural Director, the Ponca “lived in the Ohio River valley for years... [then] near Sioux Falls, South Dakota, from around 1200 to 1700... [then] in what is now known as Rapid City, near Big Horn Mountain, and a few other places in

communities in contact with harmful entities. By analyzing these laws alongside maps, censuses, testimonies, etc., conclusions could be drawn about a number things— especially how race and class are factors in environmental injustice. This could have been of immense help in the Ponca cases, but would have been incredibly time-consuming, and could have constituted their own paper. Zoning laws are acknowledged occasionally, but serve the purpose of explanation, rather than analysis.

Another field which has direct correlation to my paper is the study of the perceptions surrounding Native Americans and the environment. David Rich Lewis wrote an essay in 2010 titled “American Indian Environmental Relations” which analyses this issue in-depth. Essentially the field surrounds the study of how the media portrays Native Americans as ‘ecological stewards,’ and how this stereotype has both benefited tribes and detracted from their unique cultures. Mekasi Horinek actually willingly plays into this stereotype in his interview, as he acknowledges that he “definitely think[s] the media can help,” and goes on to employ ecological sound bites such as “we choose to keep using fossil fuels and keep draining mother earth of her lifeblood,” and “we have to protect mother earth” (Mekasi Horinek). By portraying themselves as ecological stewards rather than affected groups attempting to repair their way of living, tribes have found increased media attention and, as a result, increased outside support. The study of this process constitutes its own paper as well, and has therefore been omitted from my study.

I also have chosen to omit comparative studies which analyze how the EPA and federal government deal with similar cases (such as water issues or nuclear issues) outside of resource-extraction industries. There is an extensive literature on these subjects, but I did not feel that they added enough to this specific study to include. Finally, I have omitted broad studies of Native American environmental injustice, such as Jamie Vickery and Lori Hunter’s “Native Americans: Where in Environmental Justice Theory and Research?,” which examines the difficult nature behind defining tribal populations, analyzing the scale and form of environmental injustice, and placing Native Americans in this broader context. This would have been especially applicable in both cases, as the plaintiffs in both cases were made up of groups of Ponca and non-Ponca residents, who were all similarly affected by pollution. However, I felt that space constraints necessitated the omission of these analyses. There are countless other relatable studies which could have been factored into the research of this paper, but I hope that what I have included allows this essay to stand on its own merits.

⁷ “Ponca Tribe of Nebraska - History,” Accessed April 03, 2018.

South Dakota, Iowa and Nebraska. When we left the Sioux Falls area, we went to what is now known as Ponca, Nebraska, and then to Niobrara, Lynch, Verdel, etc.”⁸ Other sources argue that the Ponca, given their Siouan-speaking history, did not migrate West of the Mississippi until the Iroquois wars of the 17th Century.⁹ Although their early history is contested, the Ponca had unquestionably migrated to the mouth of the Niobrara River, along the upper Missouri, by 1701.

Smallpox ravaged the already meager numbers of the early Ponca, and by the time Lewis and Clark visited the tribe in 1804, it was estimated that only 200 remained.¹⁰ In 1817 the federal government signed a peace treaty with the Ponca, followed by a second treaty in 1825, which regulated trade and intertribal diplomacy. Over two decades later, in 1858, the Ponca signed away parts of their land to the Buchanan Administration in return for protection from hostile tribes and a permanent reservation home near their ancestral land at the mouth of the Niobrara in northernmost Nebraska.¹¹ A series of contradicting U.S. treaties forced the Ponca off their ancestral lands in 1868, when the U.S. included the Ponca reservation in the Great Sioux Reservation. The tribe remained close to the Niobrara until 1876, when the federal government called for the removal of several northern tribes to present-day Oklahoma. The Ponca were moved by force onto lands which proved unsuitable for agriculture, leading to outbreaks of malaria and starvation. Between 1877 and 1878, over a quarter of the Ponca succumbed to illness and hunger.¹² The deplorable conditions the Ponca faced in Oklahoma inspired Chief Standing Bear to carry his dying son five-hundred miles back to the mouth of the Niobrara, where he was

⁸ “Ponca Tribe of Nebraska - History.”

⁹ Willard H. Rollins, *The Osage: An Ethnohistorical Study of Hegemony on the Prairie-Plains*, (Columbia: University of Missouri Press, 1995,) 96-100.

¹⁰ “Ponca Tribe of Nebraska - History.”

¹¹ “US-Ponca Treaty of 1858,” *Digital Collections @ OKSTATE*, retrieved 9 May 2018.

¹² “Ponca Tribe of Nebraska - History.”

arrested and interned at Fort Omaha. With the aid of two lawyers, Standing Bear filed a *habeas corpus* suit, which eventually led to the landmark *Standing Bear v Crook* court case which declared Indians as “persons” in the eyes of the law.¹³ Three years later, the U.S. returned 26,236 acres of Knox County, Nebraska to the Ponca, and roughly half of the tribe migrated back to their ancestral home. The remaining Ponca formed the Ponca Tribe of Oklahoma, which remains a federally-recognized tribe to this day. The history of the early Ponca, while not directly relevant to the argument of this paper, demonstrates the trials and tribulations the Ponca historically faced due to consistent relocation. It is not surprising, then, that the Ponca Tribe of Oklahoma would fight to keep polluters off of their land, as will be later shown; and it is heartbreaking to discover that the Ponca City litigation cases were just another notch on the wall in the history of Ponca relocations. It is also important to point out that the Ponca had little-to-no contact with oil or the petroleum industry until almost four decades after their relocation to Oklahoma, and two decades after the formation of Ponca City.

II. Native Americans and the Petroleum Industry¹⁴

Since the discovery of oil several centuries ago by Native American tribes in modern-day Pennsylvania, American Indians have had a fluctuating and complex relationship with the

¹³ “Ponca Tribe of Nebraska - History.”

¹⁴ I would like to acknowledge some of the literature which defines the complex study of Native Americans, oil, and the environment. The central sources which help found the arguments in this paper are David Rich Lewis’s “Native Americans and the Environment,” in which the author examines various arenas in which American Indians must interact with the U.S. Government, private corporations, and the environment; Jamie Vickery and Lori Hunter’s “Native Americans: Where in Environmental Justice Theory and Research?,” in which the authors compile and analyze the plethora of civil cases between Native American entities (autonomous nations included) and environmental abusers; and David Grann’s *Killers of the Flower Moon*, in which the author details the struggle of the Osage people against oil drillers and exploiters at the turn of the 20th Century. Along with these seminal works on this subject, there are a plethora of other sources which form the foundational background for the research of Native Americans, the environment, and oil.

substance. After Americans began discovering other uses for crude oil in the 1850s, speculators began pouring into the area in what became known as the Pennsylvania oil rush. However, it would take another fifty years before Americans discovered the motherlode source of oil: Native American lands in the Southwest. In fact, it was a feat of historic irony that led to Native American ownership of oil-rich lands. In the process of relocating the various tribes of the American South and Southwest during the 1800s, the U.S. Government had pushed Native Americans onto less-and-less-fertile lands, so that white settlers would be able to develop farms on the now-abandoned swaths of arable land.¹⁵ By 1900, a vast conglomeration of tribes— which had once occupied areas from Florida to South Dakota— had been relocated to one of the country’s most desolate and infertile areas: modern-day Oklahoma. The rocky terrain in the north was inhospitable to most crops, and the vast plains of the south did not contain strong enough soil to sustain most agricultural pursuits. Thus, most Native American tribes, though angry and dismayed, felt some degree of security on this land— for why would white farmers and ranchers want this inhospitable terrain?¹⁶

It wasn’t until the turn of the century that one of America’s greatest historical ironies was discovered: the seemingly worthless land which the U.S. Government had legally given to Native Americans sat on top of one of the greatest oil reserves on the continent. No longer was the land worthless; rather it had become the priciest land in the country. Auctioneers and speculators poured into the recently-admitted Oklahoma via rail with high hopes of snatching land up and developing vast oil empires. Only one small roadblock stood in their way: they would have to purchase or rent the land from the autonomous tribes which owned it. Many

¹⁵ Recall that the Ponca were moved to lands unsuitable for agriculture in 1877.

¹⁶ David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI*, (New York: Vintage Books, 2018): 40-41.

tribes— chiefly the Osage— quickly realized the profitability of this fact. If they leased the land to drillers, they could negotiate contracts which would generate huge sums of money annually by charging both for land usage and for resource extraction mineral rights.

By the 1920s, tribes which were both resource-rich and intuitive had become enormously wealthy. At one point, 160-acre tracts of land were selling for as much as \$2,000,000, plus royalties. The Osage were speculated— with a high degree of probability— to be the wealthiest people per-capita in the entire world.¹⁷ Many owned multiple mansions and dozens of cars. The Ponca followed similar suit, though under the guidance of oil baron E.W. Marland. While the Ponca did not grow as rich as the Osage, the blossoming of Ponca City can indisputably be attributed to the vast amounts of cash being spent on oil-rich Ponca land. E.W. Marland's first well, in fact, was located on "Ranch 101," a private cattle ranch situated almost directly on the original Ponca burial grounds. Once penniless, the oilman had discovered an oil field so productive that a "new well generated 680 barrels in its first twenty-four hours."¹⁸ The Ponca, much like the Osage, had found their savior in oil— but they had also found their undoing.

In the years leading up to the Great Depression, white Americans were infuriated with the fact that the wealthiest population in the world were Native peoples in the American Plains. They petitioned the government to halt this trend, leading the Harding Administration to institute "draconian legislation controlling how [tribes such as] the Osage could spend their money."¹⁹ Suddenly, and without warning, the wealth which oil-rich tribes had become accustomed to dried up. Compounding this tragedy, the stock market crashed in 1929, the price of oil tanked, and the

¹⁷ David Grann, *Killers of the Flower Moon*, 75-77.

¹⁸ David Grann, *Killers of the Flower Moon*, 55.

¹⁹ This involved requiring a white intermediary to allocate spending money, while skimming a percentage of earnings off the top. (David Grann, *Killers of the Flower Moon*, 79).

productivity of tribal oil fields sharply decreased. Suddenly, the industry which had made many tribes unfathomably wealthy now spelled their doom. While the petroleum industry survived, and later flourished, the tribes whose land had been utilized were left in the dust. “Beginning as early as 1900 with the discovery of oil on Osage land, nonrenewable resource development has unleashed some of the most environmentally destructive forms of exploitation,” notes David Rich Lewis, “today, mine and drilling sites, roads and machinery, tailing piles, and settling ponds threaten tribal land, water, air, health, and lifestyles.”²⁰

No longer was oil extraction the profitable venture; now oil refinement dominated the landscape. Conoco, Sinclair, Dupont, Phillips Petroleum, Getty Oil, and countless others now populated oil towns such as Ponca City with refinement plants, which generated no benefits for the local tribes, while causing environmental abuses all the same. In fact, many tribes turned to these plants for employment— as was the case in Ponca City. A similar case can be found in the Aneth fields in Utah, in which oil companies have caused major damage to the environment and the Navajo population, while the royalty money which should have gone to the Navajo tribe has been appallingly mismanaged, leaving 75% of the 6,500 Navajo in the region without electricity or running water.²¹ Countless other cases— such as strip mining on Hopi land in Black Mesa or oil drilling on Inuit lands in Alaska— illuminate this disconnect between resource extractors and Native populations. In all these instances, tribes with rightful ownership of leasable land have been cheated or mismanaged out of their leasing profits, while they simultaneously incur the environmental injustices which accompany the lease. In the end, the petroleum industry has done immeasurable harm to the people whose land helped build it.

²⁰ David Rich Lewis, “Native Americans and the Environment: A Survey of Twentieth-Century Issues,” *American Indian Quarterly* 19, 3 (1995): 431.

²¹ David Rich Lewis, “Native Americans and the Environment,” 431.

This dramatic shift in the relationship between Native Americans and the petroleum industry spawned many of the problems which came to head in the 1980s-onward. Once the link between health problems and environmental waste became apparent, affected populations such as the Ponca began to weigh the costs and benefits of attacking their environmentally abusive employers. In the case of the Ponca, the benefits of suing became greater than the costs of possible job loss in 1988, leading to the civil suit that took down Conoco. Similarly, the benefits of halting the spread of carbon black became greater than the costs of potentially obliterating the Ponca City economy between 2002 and 2008, leading to the civil suit that took down Concarb. In the case of the Utah Navajo, the costs of air and water pollution were judged to outweigh the benefits of monthly oil royalties, and in 1994 the Navajo Nation Council “created its own Navajo Oil and Gas Company and imposed a moratorium on oil and gas drilling in Aneth, Utah.”²² Conversely, in the case of the Arizona Hopi— who were losing drastic amounts of water to the Peabody Coal Company’s slurry pipeline, but gaining roughly \$9 million in royalties annually—the costs did not outweigh enough the benefits to initiate civil suit, and (as late as 1994) the extent of their protests were vocal condemnations of Peabody Coal Company and the Arizona government.²³

III. A BRIEF HISTORY OF PONCA CITY

In 1893, President Benjamin Harrison’s administration had effectively forced the Cherokee to sell their land in the Cherokee Outlet (modern-day Oklahoma) for less than three

²² Despite this unique solution (and years of government petitioning,) some drilling still continues on Navajo land. (David Rich Lewis, “Native Americans and the Environment,” 431.)

²³ David Rich Lewis, “Native Americans and the Environment,” 432-3.

dollars per acre.²⁴ Simultaneously, droughts in arable Kansas and Nebraska, along with the major economic depression of 1893, led to the amassing of a diverse group of land-grabbers on the southern border of Kansas, ready to participate in what would soon become the Land Run of 1893. Meanwhile, the Ponca had been putting up opposition to the idea of turning “Indian Territory” into the 46th state of Oklahoma. In an effort to sway their convictions, the U.S. Government offered individual tribe members private reservation lands, and warned the Ponca that after these allotments were completed, the remaining land would be opened up to the amassing group of land-grabbers.²⁵ In the end, individual Ponca were either allotted private lands or purchased them; however, all communal Ponca lands were declared “surplus,” and were entered into the Land Run of 1893.

When the dust of the Land Run settled, tribe members with allotted and purchased lands had established New Ponca, thirty miles south of the Kansas border and in close proximity to the Arkansas River. Initially vying for dominance in the area with other towns, New Ponca became the premier Oklahoman city west of Tulsa upon the acquisition of the Atchison, Topeka, and Sante Fe Railway Station.²⁶ Much of the former Ponca communal lands were snatched by land-grabbers and ranchers, however some areas around the town were claimed as private reservations— a tactic which would hold vast importance as oilmen began purchasing swaths of land near New Ponca. In 1913 the town renamed itself Ponca City, and for the next quarter-century would be a vital stop in the cross-continental railroad.

²⁴ Gerhard Peters and John T. Woolley, “Benjamin Harrison: ‘Proclamation 296 - Prohibiting Grazing on Cherokee Strip Lands, Indian Territory,’ February 17, 1890,” *The American Presidency Project*, University of California.

²⁵ Dawes Act of 1887, U.S. Government.

²⁶ Louis Seymour Barnes, *Chronicles of Oklahoma*, 35th ed., vol 40, 1957.

In 1911— not long after the construction of the railroad through the city— a nearly-broke, middle-aged man by the name of E.W. Marland won a bid for a lease on Ponca land. After seven failed attempts at finding oil, Marland discovered a motherlode on Ranch 101 near the Ponca burial grounds just outside of the city. His first well became so profitable that by 1917 he was able to found Marland Oil Co.— a conglomerate spanning from Delaware to Oklahoma, and encompassing the three major components of the petroleum industry: drilling, refining, and transporting. By 1920, Marland Oil was estimated to have controlled 10% of the world's oil production, with its owner estimated to have been worth \$85 million.²⁷ However, Marland was not the only economic victor in this story. Like the neighboring Osage, the Ponca were able to steadily cash in on their mineral rights, leading the city into a golden age of growth and prosperity. Marland was deified as the city's wells and refinery brought untold riches back to the Ponca, and mansions sprung up across the once-barren town.²⁸ For the next decade, the 'Roaring Twenties' defined Ponca City, as each tribe member's mineral rights supplied them with enough money to purchase multiple cars, lavish homes, servants, and countless other amenities.

But all good things must come to an end, and in the late 1920s J.P. Morgan, Jr. successfully carried out a hostile takeover bid of Marland Oil Co. After merging the national powerhouse with Continental Oil Co., Morgan renamed the company Conoco Inc., while still preserving the headquarters in Ponca City.²⁹ By the end of the 1920s, the oil wells were beginning to dry up. Coupled with the Conoco merger and the Great Depression, profits rapidly

²⁷ John Joseph Mathews, *E.W. Marland: Life and Death of an Oil Man*, (Norman: University of Oklahoma Press,) 1951.

²⁸ Bobby D. Weaver, "Marland Oil Company," *The Encyclopedia of Oklahoma History and Culture*, Oklahoma Historical Society, 2009.

²⁹ Hugh Pickens, "The Marland Oil Refinery in Ponca City, Oklahoma," Researchandideas.com.

petered out at the end of the decade, and the exponential growth of Ponca City came to near-immediate halt. In a cruel twist of fate, the Ponca were now left with only one reasonable way to make a living: they would have to become employees of the refinery which their mineral profits had helped build. In 1949 the Conoco headquarters— the last source of high-value work in the city for the Ponca Tribe— moved to Houston, Texas.³⁰

Over the next three decades, the Ponca Tribe's prominence in the town declined, as did their general socioeconomic status. From its inception, the city had been split into districts where different ethnicities had settled— white settlers had set up households north of the downtown and tribe members had set up households south of downtown, near their traditional burial ground³¹ and the fresh-water spring which had helped sustain them in the early years of the city.³² As the relative size and wealth of the Ponca dwindled in relation to their white counterparts, the southside of Ponca City, which is sometimes referred to as the 'Circle Drive area,' became filled with a plethora of other underprivileged citizens. Soon, the lack of economic power in the south side of the city led the municipal government to carry out the will of its affluent northsiders without resistance. In the next decades, the Ponca City oil refinery, the Concarb Carbon Black facility, the municipal dump, and countless other undesirable fixtures of the city were zoned into the south side of town. After the demolition of the old Conoco headquarters, the refinery was surrounded by Ponca homes; meanwhile the carbon black facility was placed across the street from eleven Ponca families,³³ and the municipal dump was placed directly on top of the Ponca

³⁰ Pickens, "The Marland Oil Refinery."

³¹ The Ponca Tribal Cemetery was founded on the highest hill in Ponca City. Acquired as trust property in 1890, it houses the remains of "some of the tribe's earliest leaders who saw the move to Oklahoma Territory." (S.E. Ruckman, "Ponca City, Tribe at Odds over Landfill," Tulsa World.)

³² Mekasi Horinek, "Battling Pollution On Our Lands: Mekasi Horinek."

³³ Carbon black is a powdery black substance produced by the incomplete combustion of heavy petroleum products. It resembles black talcum powder and is used to reinforce rubber products such as

burial ground. By the 1980s, less than 10% of the city's population was Native American,³⁴ and this percentage was steadily declining as Ponca death rates began to skyrocket. Concerned Ponca tribe members began to research into the scourge of death which had slowly prevailed their community, and had begun to draw correlations between proximity to the refinery and cancer rates. Then, after a particularly rainy season in 1987, Ponca residents near the refinery began to notice a coppery-orange sludge seeping into their basements and onto the sidewalks. This discovery ignited a three-year court battle between the Ponca Tribe and Conoco Inc., which ended in a \$23 million settlement and the Conoco's repurchasing of nearly 400 affected homes.³⁵

IV. The First Crisis

1987

For many residents of the Circle Drive area, the spring solstice of 1987 was celebrated like most other years— with tame festivities and a small fireworks show. The previous year had been extraordinarily rainy, and all across the town ragweeds and cottonwoods were covering the town in the orange pollen of spring. Yet, while most of Ponca City went on with their lives, a few locals had become concerned with another orange substance covering parts of the town. During the spring rains of 1987, a reddish-orange sludge had begun seeping out of cracks in concrete basement floors and walls. While some rust stains were typical in area basements— they were unavoidable given the high water table near the Arkansas River— this new substance was

tires and as a coloring pigment in plastics and inks. It is possibly carcinogenic to humans and a probable cause of asthma and allergies.

³⁴ There are a number of reasons for this declining percentage, including above-average death rates, the influx of white homeowners, and the growing farming and industrial bases of the town. (Kay County, OK, 1980 U.S. Census, population by race, Ponca City.)

³⁵ "Conoco Treats Groundwater," *Tulsa World*, 28 Sept. 1990.

particularly concerning given its unpleasant odor and tar-like consistency. Citizens began filing formal complaints with the city, which first approved a \$1.4 million project “to eliminate flooding in west Ponca City neighborhoods,”³⁶ and then sent an inspector to a few “problem area basements and a creek east of the [Conoco] refinery.”³⁷ Although in retrospect these should have been warning signs, few considered these complaints as attributable to anything more than the previous rainy season bringing iron ore out of the ground.³⁸ 1987 went on to be called “the wettest year in Oklahoma history.”³⁹

1988 did not begin like any other year for residents of the Circle Drive Area. The previous year had seen over 18 inches of precipitation (compared to the average 11.5in/yr);⁴⁰ January had brought over 12 inches of snowfall, and the Ponca City water table was astonishingly high. Whereas only a few locals had complained of basement sludge in spring of 1987, dozens of area homeowners had now demanded that the Oklahoma EPA (OKEPA) and State Health Department (OSDH) send inspectors to their basements, which were “causing unpleasant fumes.”⁴¹ Coupled with Conoco representatives, these inspectors claimed that while the sludge and fumes were unpleasant, they were not harmful. Tom DeCola, a Conoco spokesperson, went as far as to claim that “it doesn’t look good, it doesn’t smell good, but you can stick your hand in it if you want to. I wouldn’t want to. But your hand won’t fall off and you won’t get leukemia.”⁴²

³⁶ “Ponca City Information - History - 1987,” Ponca City History.

³⁷ “Conoco Treats Groundwater,” *Tulsa World*, 28 Sept. 1990.

³⁸ Lisa Belkin, “Ponca City Journal; Oil Town Is Consumed by Sludge,” *The New York Times*, 12 May 1988.

³⁹ “Ponca City Information - History - 1987,” Ponca City History.

⁴⁰ “Weather History for KPNC - January, 1987,” Weather Underground- Ponca City Weather 1987-1988.

⁴¹ “Ponca City Information - History - 1988,” Ponca City History.

⁴² Lisa Belkin, “Ponca City Journal; Oil Town Is Consumed by Sludge.”

However, southside Ponca residents had noticed something peculiar about the situation. Since the 1960s, rates of cancer in Ponca tribal members had skyrocketed— especially in comparison to their northside counterparts. They had a suspicion that that orange sludge might be a physical manifestation of this glaringly localized cancer epidemic. Thus, in February 1988 the newly-formed Ponca City Toxic Concerned Citizens Committee announced that they had sponsored private lab samplings of the sludge. The results were striking. South Ponca City groundwater samples tested positive for fourteen different volatile organic compounds— also known as carcinogens. One sample of groundwater near the sludge “show[ed] benzene levels as high as 25,000 parts per billion... and 5,000 in at least one area home.”⁴³ EPA’s maximum allowable level was zero.

On February 28, 1988 the City Commission gave the City Attorney permission to buy two area homes with emergency funds.⁴⁴ Conoco agreed to begin a clean up plan, in which they would lower the area water table before autumn and institute a “bio-remediation program,” which would “use biological organisms... to try and degrade any of the petroleum contaminants.”⁴⁵ Meanwhile, the Toxic Concerned Citizens began petitioning the OSDH to perform health studies on families in contact with the carcinogenic groundwater. State response proved lacking, and in March, nearly 100 Ponca City residents caravaned to the State Capitol and camped out under Gov. Henry Bellmon’s window.⁴⁶ The caravaners demanded that the governor evacuate them from their homes and pay for relocation away from the refinery. Back in Ponca City, Conoco was forced to pay a \$250,000 fine to the EPA for failing to eliminate air pollutant

⁴³ Lisa Belkin, “Ponca City Journal; Oil Town Is Consumed by Sludge.”

⁴⁴ “Ponca City Information - History - 1988,” Ponca City History.

⁴⁵ Charles Jones, “Ponca City Pollution Remedies Examined,” *NewsOK.com*, *The Oklahoman*, 20 May 1988.

⁴⁶ Lisa Belkin, “Ponca City Journal; Oil Town Is Consumed by Sludge.”

emissions from the refinery.⁴⁷ Amazingly, this was completely unrelated to the groundwater issue.⁴⁸

As the year wore on, the issue appeared to be fading. In early April, a delegation from Ponca City carried a document with over 8,000 signatures to the Governor, which expressed support for the handling of the issue. Later that month, the northern residents of Ponca City formed "Poncans for Progress," and charged "that the protests [were] ruining the image of the town."⁴⁹ After about a two month lull in issue awareness, the issue was back in the news. Forty more southside protesters had pitched tents under the governor's mansion and demanded that the entire Circle Drive area be evacuated by Conoco at the price of \$50/sq acre. On April 25th, Conoco released a statement reiterating "its long-standing offer to provide and install free sump pumps⁵⁰ to residents in... [southside] Ponca City neighborhood homes," but maintained that the responsibility for groundwater contamination was not theirs.⁵¹ Over Memorial Day weekend, emergency vehicles discovered that a Conoco gas station was leaking thousands of gallons of pure gasoline every month into the drainage culvert.⁵²

Negotiations between Conoco and the affected homeowners remained at an impasse, as Conoco refused to admit responsibility. On September 24th, the Oil, Chemical, and Atomic Workers International Union (OCAW) staged a one-day picket outside the refinery. Media coverage of the issue exploded, with the *New York Times* running titles such as "Oil Town is

⁴⁷ *United States v. Conoco, Inc.*, No. 88-517A (Dept. of Justice, 18 ELR 10232 March 29, 1988).

⁴⁸ The final settlement was determined in August, with Conoco paying roughly \$1 million to meet CAA regulations.

⁴⁹ Lisa Belkin, "Ponca City Journal; Oil Town Is Consumed by Sludge."

⁵⁰ A sump pump is intended to lower the water table in crawl spaces and basements.

⁵¹ Tom DeCola, "Conoco Offers Free Sump Pumps," *NexisUni*, Advance-Lexis, PR Newswire, 25 April 1988.

⁵² "Ponca City Information - History - 1988," Ponca City History.

Consumed By Sludge” with passages such as “A creek runs through the Conoco plant and across the south side of town. It is oily orange, topped with a froth of beige and laced with black sediment. It used to border a schoolyard but the school was closed a decade ago after dozens of students fainted from a wave of fumes.”⁵³ But it was a *Washington Post* article, which ran in November, that brought the national spotlight to Ponca City. Penned by Michael Weisskopf, “Oil’s Superfund Loophole” tore into Conoco’s inability to admit responsibility for the contamination, and painted a stark picture of a town in crisis. Weisskopf blamed EPA and Congress for excluding petroleum and refinery waste from the federal Superfund program, CERCLA, and argued that without any stringent statutes holding oil companies accountable to their groundwater emissions, crises were springing up around the nation’s oil states.⁵⁴ For a brief moment, the crisis in Ponca City became a symbol for the flawed and rapidly developing state of environmental affairs under the Reagan Administration. Suddenly, southside Poncans became the unsung heroes of a nationwide struggle against environmental abusers.

If Ponca City had been fracturing along geographical lines before, “Oil’s Superfund Loophole” drove a wedge straight down South Avenue.⁵⁵ In November Carl Balcer, Mayor of Ponca City, wrote a response to the editor at the *Washington Post*. “It appears that almost all the information in... ‘Oil Superfund Loophole’ was obtained from people in the Circle Drive area,” Balcer complained, and “articles such as the one in The Post have intimidated some people from planning trips to our town. Our drinking water is tested regularly, and there has never been a

⁵³ Lisa Belkin, “Ponca City Journal; Oil Town Is Consumed by Sludge.”

⁵⁴ Michael Weisskopf, “Oil’s Superfund Loophole,” *The Washington Post*, WP Company, 07 Nov. 1988.

⁵⁵ In the 1980s, South Ave. could be called the informal line between the Circle Drive Area and Northside Ponca City. Today, it is essentially the southern border of the Ponca City residential area [see image 2.]

question about its quality. If the reporter had seen me while he was in Ponca City, perhaps he would have written an article that quoted facts rather than people's opinions. He might have even been able to provide a positive note to show what is being done."⁵⁶ Balcer was not reelected for another term, losing most of his vote in the Circle Drive area. His words echoed the divide between North and South Ponca City which had laid dormant for over a half-century.

On January 6th, 1989, Conoco and OCAW settled their 10-month dispute and Conoco announced that it would be installing computer-enhanced control equipment.⁵⁷ Southside Poncans were now on their own in their battle against Conoco. Their battle raged on behind the scenes until May 18th, when three Circle Drive area Poncans⁵⁸ filed class action civil suit against Conoco and Kerley Agricultural Chemical Co. ⁵⁹ The nature of the lawsuit allowed for the entirety of the Circle Drive area to sue and take part in negotiations if they desired.⁶⁰ By the time of filing, most area homes had already been abandoned due to the fumes, the "noxious sludge ooz[ing] into basements," and the "explosive air."⁶¹ Negotiations carried on until April 2, 1990, when Conoco announced that it would propose "a \$23 million settlement that would involve buying nearly 400 houses where residents say the groundwater was tainted with hydrocarbons."⁶²

⁵⁶ Carl Balcer, "No Serious Health Problem in Ponca City," *The Washington Post*, November 23, 1988.

⁵⁷ "Ponca City Information - History - 1989," *Ponca City History*.

⁵⁸ The lawsuit lists them as W. Mae Morgan, Mike A., and Patricia Gallagher.

⁵⁹ I cannot find any information on the filers nor Kerley Agricultural Chemical Co. outside of this article and the lawsuit. The suit alleges that Kerley's use of Conoco waste products is equally hazardous to the products' production; "Lawsuit Alleges Conoco Pollution in Ponca City," *NewsOK.com*, *The Oklahoman*, 18 May 1989.

⁶⁰ In fact, by the end of the case, approximately 8,000 residents had a claim in the suit, with only 79 Circle Drive residents opting out and 8 filing formal objections. (Ed Gofrey, "Conoco Offer In Ponca City Case OK'd," *NewsOK.com*, *The Oklahoman*, 04 July 1990).

⁶¹ According to multiple findings, some basement air near the refinery was actually flammable and explosive. ("Lawsuit Alleges Conoco Pollution in Ponca City.") For a similar case, see the water crisis in Flint, MI. (Sara Ganim and Linh Tran, "How Flint, Michigan's Tap Water Became Toxic.")

⁶² Farrell Kramer, "Conoco Offers to Buy 400 Properties to Settle Contamination Lawsuit," *Associated Press*, 2 Apr. 1990.

The agreement was called one of the largest relocation settlements ever in the United States, comparable to the evacuations of Love Canal, N.Y. and Times Beach, MO.⁶³ Conoco maintained its position that it had nothing to do with the contamination, and that it had agreed to relocation so as to "prevent future 'frivolous lawsuits.'"⁶⁴

In September, groundwater near the refinery showed no measurable level of pollutants after being run through Conoco's massive new treatment system.⁶⁵ Over seventy-five percent of area homeowners had agreed to sell their homes in the buyout, and about 2100 had signed claims seeking compensation from the settlement fund.⁶⁶ Without any help from the federal or state governments, southside Poncans had successfully used the court system to battle environmental pollution on their lands. But while these gains were impressive, the war over Ponca City zoning and pollution had just begun.

Transitional Years

Rather than delve in detail to the changes which Ponca City underwent in the years between the end of the Conoco case and the beginning of the Continental Carbon case, I have selected five illustrative newspaper quotes which demonstrate the negative repercussions of taking on a harmful industry and help explain why many Poncas had become employed at the Continental Carbon factory by 1995.

April 9th, 1991:

Just one year ago, Conoco announced an ambitious program of nine environmental initiatives, and today the company provided a report on significant progress made toward

⁶³ Farrell Kramer, "Conoco Offers to Buy 400 Properties to Settle Contamination Lawsuit."

⁶⁴ Ed Gofrey, "Conoco Offer In Ponca City Case OK'd."

⁶⁵ "Conoco Treats Groundwater," *Tulsa World*, 28 Sept. 1990.

⁶⁶ "Ponca City History," Ponca City Information - History - 1990.

implementing goals [such as] one-third reduction in toxic air emissions and hazardous solid wastes by 1993. Conoco is on track to meet or exceed this goal and many more.⁶⁷

January 18th, 1992:

Conoco Inc. disclosed plans Friday to restructure the maintenance operations at its Ponca City refinery, resulting in a reduction in the total number of employees... Conoco currently employs 729 workers at the refinery... in all, 3,900 are employed at the site."⁶⁸

June 5th, 1992:

Conoco is making an effort to safely dispose of all hazardous wastes... [they] are also creating a 'greenbelt' around their facility.⁶⁹

June 18th, 1993:

Conoco pulled [funding] of the the Ponca City Grand Prix... which is now cancelled.⁷⁰

August 17th, 1994:

Conoco Cuts 46 Jobs in Ponca City: Employment in Ponca City has been reduced from 3,998 to 2831.⁷¹

In May of 1995, Witco Corporation sold its subsidiary, Continental Carbon Company, to China Synthetic Rubber Corporation of Taipei, Taiwan. In 1991 Witco had spent \$25 million on a plant expansion in Ponca City— the improved plant could now output 225 million pounds of carbon black annually. As Conoco was phasing out over a third of its jobs at its Ponca City plant, many southside Poncans turned to the next logical employer: the carbon black plant down the street from Conoco [see image 2]. As early as 1993, Poncans had been filing complaints to the state government of a black soot covering the town, but it wasn't until the early-2000s that the

⁶⁷ Michael O'Connor, "Conoco Announces Nine Environmental Initiatives" *Southwest Newswire* (Houston), April 9, 1991.

⁶⁸ Mary Jo Nelson, "Conoco Planning To Restructure Plant Ponca City Work Force to Be Cut," *Daily Oklahoman* (Oklahoma City), January 18, 1992.

⁶⁹ Carl Balcer, "No Serious Health Problem in Ponca City."

⁷⁰ Scott Munn, "Falling Attendance, Conoco's Withdrawal Doom Ponca City Prix," *Daily Oklahoman* (Oklahoma City), June 18, 1993.

⁷¹ James Johnson, "Conoco Cuts 46 Jobs in Ponca City," *Daily Oklahoman* (Oklahoma City), August 17, 1994.

complaints reached into the hundreds. For most, the soot appeared to be the combination of Oklahoman dust and engine exhaust; but for a few of the more intuitive, the soot seemed to be emanating in a radius from the Concarb plant in the southside.

V. The Second Crisis

2001

Across the south side of the city and surrounding areas, residents were complaining of high allergy rates—to the point where some families kept their children inside when learning to ride bikes—as well as asthma afflictions, unnatural cancer rates, and property damage from the soot. As far as three miles from the plant, citizens were complaining of soot covering their homes, cars, and playgrounds—one rural couple even kept a salt shaker of the residue to show houseguests.⁷² Despite the increasing number of complaints, the state never initiated action to address the problem. After eight years of complaints, the Oklahoma Department of Environmental Quality (ODEQ) agreed to send inspectors to the plant, but informed the residents that they would physically have to see dust pour out of the facility to initiate a legal process.⁷³ At one point, inspectors actually stumbled upon uncovered piles of carbon black, with visible soot stains on the forest downwind, but refused to become involved.⁷⁴ In 2003 the ODEQ and OKEPA became overwhelmed with complaints of state inactivity and stopped sending inspectors. Even

⁷² These two sentences taken verbatim from a paper I wrote in 2017, see Douglas Fournet, "Carbon Black Pollution in Ponca City: A Case Study Into Alternative Pathways in Environmental Politics." Final Paper. University of Puget Sound, Spring 2017.

⁷³ This was in spite of the fact that many of the complaints specified visible dust emissions during the nighttime and on weekends, and the facility was only inspected on weekdays during work hours. (Howard Berkes, "Oklahoma Town Battles Powdery Carbon Pollution." *NCPA*. N.p., 7 Nov. 2011. Web. 24 Apr. 2017).

⁷⁴ Ronnie Greene and Howard Berkes, "Community Coated in Black Mist - until Citizens Fought Back," *Center for Public Integrity*, 19 May 2014.

after Ponca complaints reached D.C., the EPA refused to intervene, as the process was legally in the state's jurisdiction. "They're supposed to protect people," a southside resident recounted years later, "they're supposed to act on these violations of these bigger companies that put out this pollution, and right down to it, they didn't care, or something would have been done."⁷⁵ It was clear that, once again, the residents were on their own.

In reality, the battle between the Ponca and Concarb began in May of 2001, when Concarb locked out the 86 workers employed at their plant in Ponca City. The issue at hand was a debate between the leaders of Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) and the directors at Continental Carbon over the expiration of a three-year pact which allowed fair contracts to Ponca City workers. PACE argued that after the loss of over 600 Conoco jobs, Poncans deserved fair "wages and benefits... such as pension and health care."⁷⁶ In an extraordinary feat of international unity, PACE leaders met with the leaders of their Taiwanese Union counterpart, with the latter stating:

As you remain steadfast in your struggle to win a fair contract, you may do so knowing that you have the unwavering support of Taiwanese workers... We deplore the actions of the CRSB and the Koo family in permitting their American subsidiary to negotiate in bad faith and engage in union-busting.⁷⁷

The Ponca City Concarb lockout carried on for three-and-a-half years. It was during this time that southside Poncans had time to reflect on the deplorable environmental situation they were confronting. After a nearly decade-long struggle to clean up Conoco's act,⁷⁸ a new environmental

⁷⁵ Howard Berkes, "Oklahoma Town Battles Powdery Carbon Pollution," *NCPRI*, 7 Nov. 2011.

⁷⁶ "It's over Concarb, Union Look to Future minus Lockout," *Rubber and Plastics News*, December 13, 2004, 34th ed., sec. 10.

⁷⁷ Ernie Anderson, "Unions Launch International Campaign to End Lockout at Taiwanese-Owned Continental Carbon Facility in Ponca City, Oklahoma," *PR Newsire* (Ponca City), October 15, 2001.

⁷⁸ Conoco was actually forced by EPA on December 20, 2001 to pay \$110 million over eight years to reduce emissions at four plants— one of which being the Ponca City plant. ("Conoco, Inc. Refinery Civil Judicial Settlement." *EPA*. Environmental Protection Agency, 13 Oct. 2016.)

abuser had entered the arena. The dust coming off the carbon black plant was ugly, it covered everything [see image 3], and it indisputably caused breathing problems in families near the plant. For those who took part in the Conoco lawsuit, the carbon dust was the physical manifestation of the return of pollution to their town, and they were not prepared to stand by any longer.

On October 29th, 2002 the Ponca began attracting media attention when they organized a 'toxic tour' of "major industrial facilities adjoining tribal lands... in an effort to bring attention... to environmental injustices facing the Ponca people."⁷⁹ A diverse group of about 150 protesters walked from Standing Bear Memorial Park, next door to the Conoco crude oil refinery and filled with sickly-looking trees, to the waste and sewage treatment facility on the banks of the Arkansas River; to Ponca Iron, which had moved from northside Ponca City to southside after northsiders complained of environmental concerns; to the Concarb plant, which in January Ponca and PACE officials had discovered to be dumping chemical barrels and industrial waste in the adjacent woods; and finally to the Ponca Cemetery, which now sat adjacent to the municipal dump [see image 4].⁸⁰ "People shouldn't have to live with this kind of contamination," said Ron Sherrer, environmental director for the Ponca Tribe, "I hope today is the start of building a coalition to make an environment that is suitable for our children and grandchildren."⁸¹ Although the march did not garner much attention outside of the local news, it demonstrated the native dissatisfaction with the retrenchment in Ponca City. The Ponca viewed the city as their protected home and, with recent encroachments, now felt powerless in their own land.

⁷⁹ JoKay Dowell, "Poncas Join Chemical Workers to Protest Neighboring Pollution," *Indian Country Media Network*, 29 Oct. 2002.

⁸⁰ JoKay Dowell, "Poncas Join Chemical Workers to Protest Neighboring Pollution."

⁸¹ JoKay Dowell, "Poncas Join Chemical Workers to Protest Neighboring Pollution."

The aforementioned discovery of chemical waste in the unrestricted woods nearby the Concarb plant had put the company in an awkward position. Still in the middle of a lockout of their Ponca workers, the company struggled to keep a lid on the issue, and major clients such as Goodyear pulled out of their contracts.⁸² In November, both parties agreed to resume negotiations. However, these failed after Concarb refused to meet PACE health and safety standards.⁸³ The lockout continued until June 2004, when Concarb agreed to most of PACE's terms in order to end a weeklong hunger strike by three Ponca workers who had traveled to the parent company's HQ in Taipei.⁸⁴ Though the lockout had finally ended, the damage to Concarb's reputation was permanent— as was the Poncas' newfound devotion to righting the environmental wrongs. However, one major problem remained: as Conoco had steadily withdrawn from Ponca City, the city's economy had entrenched itself in one of its oldest employers: Concarb. Suing the corporation would be equivalent to shooting themselves in the foot, so most Poncas stayed silent.⁸⁵

September 5, 2004:

Ponca City sees a dark cloud in Continental Carbon plant: in recent weeks, tiny black particles have dusted everything. As complaints mount, the state [DEQ] has contemplated declaring an environmental emergency.⁸⁶

⁸² Brad Dawson, "Goodyear, Continental Carbon Trade Lawsuits," *Rubber & Plastics News*, May 26, 2003.

⁸³ Joe Kamalick, "Continental Carbon, Union Officials to Resume Talks," *Trusted Market Intelligence for the Global Chemical, Energy and Fertilizer Industries*, November 21, 2002.

⁸⁴ "Ponca City: 3 Workers End Strike in Taiwan," NewsOK.com, June 21, 2004.

⁸⁵ "Stone, the mayor at the time, said filing suit against a big employer was not politically popular with local industry. 'They didn't think we ought to sue or join in the lawsuit against one of our major employers,' Stone said. 'It didn't look like a real good thing to do politically but I felt we ought to answer the complaints of the citizens of the community who were being damaged.'" (Ronnie Greene and Howard Berkes, "Community Coated in Black Mist - until Citizens Fought Back").

⁸⁶ Tom Lindley, "Ponca City Sees a Dark Cloud in Continental Carbon Plant," NewsOK.com, September 05, 2004.

Concarb, still reeling from the hunger strike which had ended only three months before, followed the path Conoco had laid two decades before: they denied any guilt in the 'dust pollution' which afflicted Ponca City. "Ponca is important to us and our intention is to be there for a long time," said Concarb spokesperson Phil Cromer, "We are cleaning up (the dust), but it doesn't seem to behave like carbon black."⁸⁷

The real crux of the problem was twofold: the Concarb plant was indisputably emitting carbon black dust onto Ponca City, and the only houses nearby 'ground zero' were Bureau of Indian Affairs development houses from the 1970s— populated entirely with Ponca tribe members. In an effort to assuage a possible scandal, the ODEQ ordered the plant to perform \$1.66 million in upgrades. The plant stalled after only installing \$127,631 worth of upgrades and accruing \$25,437 in fines, so on January 24th, 2005— after over 700 complaints had been filed to ODEQ— the Ponca City Commission "voted unanimously to proceed with class action litigation against Continental Carbon."⁸⁸ On top of this, a coalition of farmers, union leaders, and Ponca tribespeople began filing individual lawsuits against Concarb and their parent company. Over the next four years, the aggrieved parties began consolidating their lawsuits, pushing Concarb towards generating a mass settlement plan.

The first settlement came in 2006, when Concarb paid Ponca City Hall \$400,000 and Ponca City residents \$8 million. A second settlement came in 2009, when Concarb paid out a \$10.5 million settlement in damages to the Tribe. A third case, which listed both Poncans and ConocoPhillips as defendants, was settled in 2007 for an undisclosed amount. A fourth case, brought by peripheral homeowners was settled in 2009 for \$800,000. In the end, the Ponca

⁸⁷ Tom Lindley, "Ponca City Sees a Dark Cloud in Continental Carbon Plant."

⁸⁸ "Ponca City Information - History - 2005." Ponca City History.

Nation received \$320,595, homeowners received amounts based on the amount of affected land, and the eleven homeowners adjacent to the plant were relocated at the cost of \$300,000 each.⁸⁹ Those homes were torn down, and in their absence only a field of grass remains [see image 5].

Two years after the final lawsuit ended, the EPA successfully sued Concarb for over \$100 million in damages for violating the Clean Air Act. From this, \$98 million went to upgrading three plants (including the Ponca City plant), \$550,000 went to Ponca City (similar payments were made to towns in Alabama and Texas), \$25,000 went to funding green projects, and \$650,000 went to the courts. In the end, the OKEPA and ODEQ had actually championed the cause of environmentalists in their crackdown on carbon black producers, using their inspection reports and legal teams to help take on Continental Carbon and their parent company.

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After she walked out of the courtroom, victorious in the 2009 lawsuit between the Ponca Tribe and Concarb, co-counsel Kalyn Free gave a statement which effectively summarizes the takeaways from both the 1988 and 2008 court cases:

The lesson for Indian Country to learn from this case is that no longer do we have to be the dumping ground for corporate America. Tribal lands that have been and are continuing to be polluted should be addressed through the legal system. When the federal and state governments turn a blind eye and refuse to regulate and prosecute polluters, then the tribes need to step up, unholster their guns, and go to court. But, tribes need experienced lawyers who are creative and determined to seek justice for Indian Country. And, they need to know that if they are a cash poor tribe, that there are entities and other tribes out there who are willing to lend a helping hand.⁹⁰

⁸⁹ Ronnie Greene and Howard Berkes, "Community Coated in Black Mist."

⁹⁰ Judi Clark, "Ponca Tribe, Oklahoma, Launches Legal Case against the Continental Carbon Company," *Lannan Foundation RSS*, 08 July 2015.

VI. EPA, Enforcement, and Environmental Injustice⁹¹

Recalling the interview with Mekasi Horinek which launched this paper, despite major victories against Concarb, there are still numerous counts of environmental injustice being passively carried out against southside Poncans and Ponca tribespeople. Addressing the Arkansas River, Horinek stated: "there have been no efforts to clean it up... we've had eight fishkills in the past four years and the EPA has done testing on the water, but they say they don't know where the pollution is coming from... I can pin the pollution directly to the fracking industry; I know that they drain water out of the river, putting waste water back in the river."⁹² When we examine the case of the Ponca, it has been helpful to fold their struggle into the greater struggle between Native Americans and the petroleum industry. However, this paper would be incomplete if it did not examine the abject failures on the part of the government institutions tasked with regulating environmental injustices. In similar manner to the situationalization which helped begin this paper, I will first examine the history of the EPA's failures in enforcement, then attempt to demonstrate how the confluence of this history and the history of Native Americans and oil generates a greater understanding of the relationships between Native Americans, the U.S. Government, and the environment.

⁹¹ Before ending this paper, I feel its is important to acknowledge the literature surrounding EPA enforcement struggles which I rely heavily on in this paper. The primary works I draw most of my research from are Joel Mintz's 1995 edition of *Enforcement at the EPA: High Stakes and Hard Choices*, in which the author outlines the process of developing EPA enforcement tactics from the 1970s-1990 (there is a later edition of this book with various edits and more chapters, but I found the earlier version more useful for my subject, as the work is less biased by the author's retrospective writing;) Christopher Klyza and David Sousa's "Wither We Are Tending: Interrogating the Retrenchment Narrative in U.S. Environmental Policy," in which the authors examine the concept of 'alternative pathways,' by which non-governmental entities can carry out regulation efforts; and a compilation of sources concerning the EPA's CERCLA Superfund program, which contained loopholes for the petroleum industry. Throughout all of these works, one message remains firm: the EPA has major problems with its enforcement of environmental regulations.

⁹² Mekasi Horinek, "Battling Pollution On Our Lands: Mekasi Horinek."

For a number of reasons, the EPA is ineffective in enforcing its own laws. If one treats Ponca City as a case study into EPA enforcement problems, one doesn't have to do much research to verify this claim. In fact, in both the Conoco and Concarb cases, it was neither the EPA nor the OKEPA (at least at first) who enforced environmental regulations; rather, it was the Ponca Tribe and fellow Ponca City residents who carried out the process of enforcement. In the end, the EPA only intervened after the Ponca successfully sued each abuser— in a sense tacking federal enforcement onto the successful civil cases carried out by the affected peoples.

In his book *Enforcement at the EPA: High Stakes and Hard Choices*, former EPA Chief Attorney Joel A. Mintz outlines one of the key reasons EPA has a dismal track record in oil regulation cases such as the one in Ponca City: “For most regulated enterprises, the risks of enforcement cases— including monetary penalties, mandatory pollution control measures that may be expensive... or, in some criminal cases, jail time— are very great.”⁹³ In essence, Mintz’s argument, which was written just after the first Ponca crisis in 1995, is that EPA’s first line of enforcement is essentially scare tactics. The reason why environmental laws such as the CAA are generally so effective is that most industries weight the costs of being sued and regulated as higher than the benefits of breaking environmental laws. Therefore, in cases where major abusers are breaking the law, the EPA has more time and resources to incur heavy punishments, so as to make an example to the respective industry. Meanwhile, EPA’s regulatory structure involves a vacillating power balance between state EPA regulation laws and national EPA regulation laws. Overwhelmingly, state and regional EPAs bear the brunt of enforcement efforts, as it is the most effective method of delegation. Thus, in cases such as the one in Ponca City, industries (i.e. oil)

⁹³ Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices*, 1st ed., (Austin: University of Texas Press, 1995), 15.

that have overwhelming power to fight environmental regulatory entities will not be regulated by state EPAs until it is absolutely necessary. Furthermore, in oil states such as Oklahoma, the petroleum industry has a firm grasp on all levels of government, and can use its entrenched position to stave off governmental court cases.⁹⁴

On top of this, even if other governmental organizations are taxed with regulating polluters, the bureaucratic structures of these organizations often slow the process to a halt. In the Ponca v. Concarb case, there were numerous reports that both OKEPA and ODEQ, despite being populated with anti-environmentalists, strove to litigate in favor of the Ponca as early as 2006.⁹⁵ However, the bureaucratic structures of these organizations, combined with the lack of resources to take on a multinational industrial powerhouse, prevented them from making any considerable process. "DEQ spent a considerable amount of time and resources investigating complaints regarding Continental Carbon, as reflected in our records," Skylar McElhaney, a spokeswoman for the agency, wrote in reply to questions from *iWatch News* and NPR.⁹⁶ However, as Howard Berkes and Ronnie Greene recall, "the DEQ's Ponca City office became literally overrun with complaints. And the state's own policies hampered efforts to curb the pollution: For many years, DEQ files show, the agency would bring a case only if its inspectors could witness with their own eyes the "fugitive dust" leaving the plant. Evidence of black dust found on residents' property was insufficient."⁹⁷ This is an example of state institutions and laws hampering EPA progress in regulating polluting industries.

⁹⁴ Adam Wilmoth, "Economists: Oklahoma Oil Industry Continues to Strengthen," NewsOK.com.

⁹⁵ In fact, Oklahoma was listed as one of the few states which led the crackdown on reckless carbon black emissions in the early 2000s (NPR, "EPA Settles With Ponca City Carbon Black Plant Owner Over Air Pollution," *NPR*, NPR.)

⁹⁶ Ronnie Greene and Howard Berkes, "Community Coated in Black Mist."

⁹⁷ Ronnie Greene and Howard Berkes, "Community Coated in Black Mist."

Furthermore, Reagan's EPA director Anne Gorsuch restructured the organization in 1981 so that different media would have to be regulated separately. This meant that the EPA Office of Enforcement, which once dealt holistically with regulatory issues, was now abolished, and air, water, ground, hazardous waste, etc., would have to be dealt with separately.⁹⁸ To understand why this change dealt such a major and lasting blow to EPA enforcement, examine the Ponca City case. What EPA media enforcement division would have acted on the Conoco case? The pollution from the refinery was a hazardous waste, but contaminated the groundwater, which resulted in poisoned basement air and surface-level contaminant sludge. Essentially a minimum of four different media were at play in this case, but the EPA would have to either deal with each separately or only deal with one. This is close to impossible, and the EPA would likely have simply ditched the case— as they did in Ponca City. This is simply another misshapen brick in the massive foundational structure of the EPA which inhibits meaningful enforcement in cases such as the Ponca City one.

The petroleum industry is a go-to example when scholars examine successful industry resistance to regulation, and Oklahoma is a state at the center of the petroleum industry's sphere of influence. Therefore, by examining the successful Ponca resistance to Conoco in Oklahoma, major insights can be found regarding ways to combat EPA regulation failures. This is a multi-step process: first, we must expand our knowledge of EPA failures vis-a-vis the petroleum industry (especially in the Ponca City case); next, we must examine the concept of "alternative pathways," and finally, we must use the study of Ponca City to tie these ideas together and discover useful connections.

⁹⁸ Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices*, 42-43.

Turning first to the EPA's petroleum regulation failures, we must combine the aforementioned background on EPA enforcement with specific petroleum failures. The CERCLA Superfund program is arguably the strongest example of this issue. Recall Michael Weisskopf's divisive 1988 article "Oil's Superfund Loophole:"

In the oil patch, all pollution is not equal. When Congress set up the Superfund in 1980, it exempted refinery wastes under pressure from the oil lobby... They argued that refinery wastes occur in low concentration and quickly break down in the environment, unlike the man-made chemicals... that are targeted by the Superfund. But refinery wastes that are exempt from Superfund protections include... [some of] the most toxic industrial debris, namely the neurotoxins xylene and toluene and the human carcinogen benzene.⁹⁹

In fact, Weisskopf's incendiary article was entirely accurate. The CERCLA Superfund program was set up by the EPA and Congress under the Carter Administration with the purpose of "cleaning up inactive hazardous waste disposal sites and providing a basis for emergency response when hazardous substances were released to the environment."¹⁰⁰ It allowed the EPA broad authority to take necessary action against illegal polluters, and provided lump sums (generated from legal payouts by the polluters) to affected community cleanups, relocations, and reimbursements. For CERCLA to take effect in an area, that site would have to be ranked above a certain hazard level, an inspector would have to report on the immediate necessity of action, and a certain number or type of hazardous substances would have to be present.¹⁰¹ However, like most EPA mandates, the program was founded on a series of loopholes for lobbying blocs. The largest lobby in this case was the petroleum lobby, and the CERCLA Superfund contained numerous sections which excluded petroleum waste byproducts from the hazardous substance list.

⁹⁹ Michael Weisskopf, "Oil's Superfund Loophole."

¹⁰⁰ Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices*, 17.

¹⁰¹ Joel A. Mintz, *Enforcement at the EPA: High Stakes and Hard Choices*, 18-19.

Given these loopholes, along with the countless existing failures in EPA enforcement protocol, the case in Ponca City becomes less astounding. No number of Ponca complaints to the federal EPA could trigger the enforcement of the CERCLA Superfund Program. This was because, despite OKEPA and EPA inspectors finding the carcinogenic compound benzene in area basements and groundwater, the benzene was exempt from CERCLA via a loophole. Even if the EPA launched a cleanup effort outside of the program, the process could have taken years—especially given the difficult nature of delegating responsibility between the State’s OKEPA and DEQ, the federal EPA, and Conoco, as well as between EPA media departments. Furthermore, Conoco was an international powerhouse at the time of the case, and the typical EPA ‘scare tactics’ discussed earlier would likely have had little effect on the company. The Ponca City plant was a key Conoco production plant, and a major source of revenue both for the city and the state. Therefore, it is not surprising that, on top of all of these regulatory hurdles, the state officials with the most power to regulate Conoco were reluctant to do so. "We never got into the mode of telling them, 'You must do this,'" state water resources board member Dave Dillon said, "States have limited resources. It's counterproductive to get into an adversarial role. As long as I see progress, I'm going to continue down the path of least resistance."¹⁰² Thus, it is clear that the massive pile of roadblocks to successful regulation, combined with existing state reluctance and CERCLA loopholes meant that neither the federal government nor the state government would intervene in Ponca City. This is a theme of EPA regulation—especially in cases dealing with the petroleum industry.

¹⁰² Michael Weisskopf, "Oil's Superfund Loophole."

VII. Alternative Pathways

In their recent article for *Political Science Quarterly*, David Sousa and Christopher Klyza contest and advance a thesis put forward by Judith Layzer which centers on the concept of “alternative pathways.” According to Layzer, these pathways, when employed by anti-environmentalists and conservatives, are “a more subtle strategy aimed at ensuring that laws are implemented and enforced in ways that reduce the stringency of federal environmental protection.”¹⁰³ In these cases, “alternative pathways” can take forms such as risk regulatory review, “balancing,” cost-benefit analyses, etc. However Klyza and Sousa modify and drastically expand on Layzer’s definition. According to these authors, “alternative pathways” have also been widely employed by groups fighting environmental battles primarily outside of the governmental arena. These “non legislative ‘policymaking pathways’ are... paths around [political] gridlock: appropriation riders, executive orders... and the courts,” and are being utilized to win small battles that set future precedents in favor of positive environmental change.¹⁰⁴ For instance, an executive order might be impermanent, but the statutes it sets in place might be too entrenched to reverse after the order is repealed. Similarly, if a court rules in favor of an environmental group, the verdict could be cited in similar future cases. Even if the pathway doesn’t impart a notable lasting change on the arena, such as in the Ponca City examples, it sets informal precedents for future mistreated groups that might possibly weight their cost-benefit analyses differently. Furthermore, the pathways themselves produce immediate positive change— such as the removal of groundwater contamination in Ponca City. In all of these ways,

¹⁰³ Judith Layzer, *Open for Business: Conservatives’ Opposition to Environmental Regulation* (Cambridge, MA: MIT Press, 2012), 5.

¹⁰⁴ Christopher McGrory Klyza and David Sousa, “‘...Whither We Are Tending’: Interrogating the Retrenchment Narrative in U.S. Environmental Policy,” 471-476.

“alternative pathways” can produce immediate and long-term positive changes both for the environment and the affected people.

By combining the failures of the EPA with tribal cost-benefit case studies such as those outlined on pages 8-9, the concept of “alternative pathways” takes tangible form. The Utah Navajo, for instance, were able to slow and halt polluting drilling sites on their lands without any active governmental intervention by forming their own oil and gas company and utilizing older federal statutes to place a moratorium on drilling in Aneth. Interestingly, the CERCLA program was formed in response to the protests of women in Love Canal, NY, who utilized “alternative pathways” such as hiring private health inspectors, abandoning then-expected household duties to picket, and holding EPA employees hostage for five hours in order to force the Carter Administration to declare a state of emergency and relocate 710 families.¹⁰⁵

Most importantly for this paper, the Ponca also employed “alternative pathways” in both the Conoco and Concarb cases. When the EPA, OKEPA, and ODEQ, all failed to meaningfully respond to southside residents’ petitions, the affected groups took first to the streets, then to the papers, then to the courts. All of these are extra-governmental arenas, and all eventually were met with success. After nearly a decade of vocal protests in each case, the media coverage surrounding the crises generated enough external support to bolster the Ponca’s bid for litigation. By painting the government as either blisteringly incompetent or willingly ignorant, southsiders and Ponca forced the EPA to sue both Conoco and Concarb in the years after the court cases ended (1991 for Conoco and 2009 and 2011 for Concarb.) On top of this, the affected groups secured compensation for historic ills, as well as incited meaningful environmental reforms in

¹⁰⁵ Sam Howe Verhovek, "After 10 Years, the Trauma of Love Canal Continues," *The New York Times*, August 05, 1988.

each polluting industry. Thus, they represent quintessential cases of success in employing “alternative pathways.”

Conclusion

On October 26, 2016, ground was broken on a ‘green’ \$110 million Continental Carbon cogeneration facility. “This [plant] will allow the company to be free from the grid,” stated Concarb President and CEO Dennis Hetu, “This is part of the plan for the company to be green.”¹⁰⁶ Despite this major stride towards environmentalism on the part of Concarb, Mekasi Horinek still felt there was much to do. “Environmental racism has been going on for many, many years in our area,” he alleged, “Ponca City zones everything to the south side of town, which is where the reservation is. The refinery, the carbon plant, the Ponca oil and waste facility, solid waste treatment plant the sewage plant, the dump, are all on the south side of town.”¹⁰⁷ Despite major victories in legal battles against Conoco and Continental Carbon, the Ponca were still stuck in the same system which had forced the battles in the first place— one in which dirty and hazardous facilities were zoned into direct contact with their homes. Even after two legal victories which led to paid relocation, the Ponca and their southside counterparts still find themselves in contact with polluting industries and are still victim to abnormal cancer and asthma rates. Horinek argues that while the trend towards popular environmentalism is an indisputable good, the concepts— such as carbon credits— which are being employed fail to address the environmental genocide happening at home. “They talk about... buying carbon credits and planting trees in Australia,” he

¹⁰⁶ “Ground Broken on ‘Green’ Plant by Continental Carbon in Ponca City,” *Oklahoma Energy Today*, Radio Oklahoma Network, 26 Oct. 2016.

¹⁰⁷ Mekasi Horinek, “Battling Pollution On Our Lands: Mekasi Horinek.”

lambasted, “which permits them to put out more pollution here in our country where we live... and it’s detrimental to my people.”¹⁰⁸

By analyzing the struggle of the Ponca through two different lenses— the relationship between Native Americans, Oil, and the Environment; and the failures of EPA enforcement— I hope to have demonstrated how the confluence of these two arenas have led to a concerted push towards ‘alternative pathways.’ In cases in which environmental racism or unjust zoning laws have hampered the health and progress of Native tribes, the afflicted parties have taken to the courts, to the press, and to the people to help resolve the issue when the government will not. In the utilization of these alternative pathways, tribal organizations have been staunch supporters of the environment and their own well-being, making them truly the unsung heroes of a massively flawed regulatory regime. Yet, despite their heroism in fighting on their own behalf and on behalf of the environment, they are still victims of the consequences of pollution. “I see genocide,” Mekasi Horinek stated, “I see my people dying every day. I think that if we stay here, we’ll die... The future depends on the decisions we make now.... We have to take care of mother earth.”¹⁰⁹

¹⁰⁸ Mekasi Horinek, "Battling Pollution On Our Lands: Mekasi Horinek."

¹⁰⁹ Mekasi Horinek, "Battling Pollution On Our Lands: Mekasi Horinek."

Image 1: Sludge

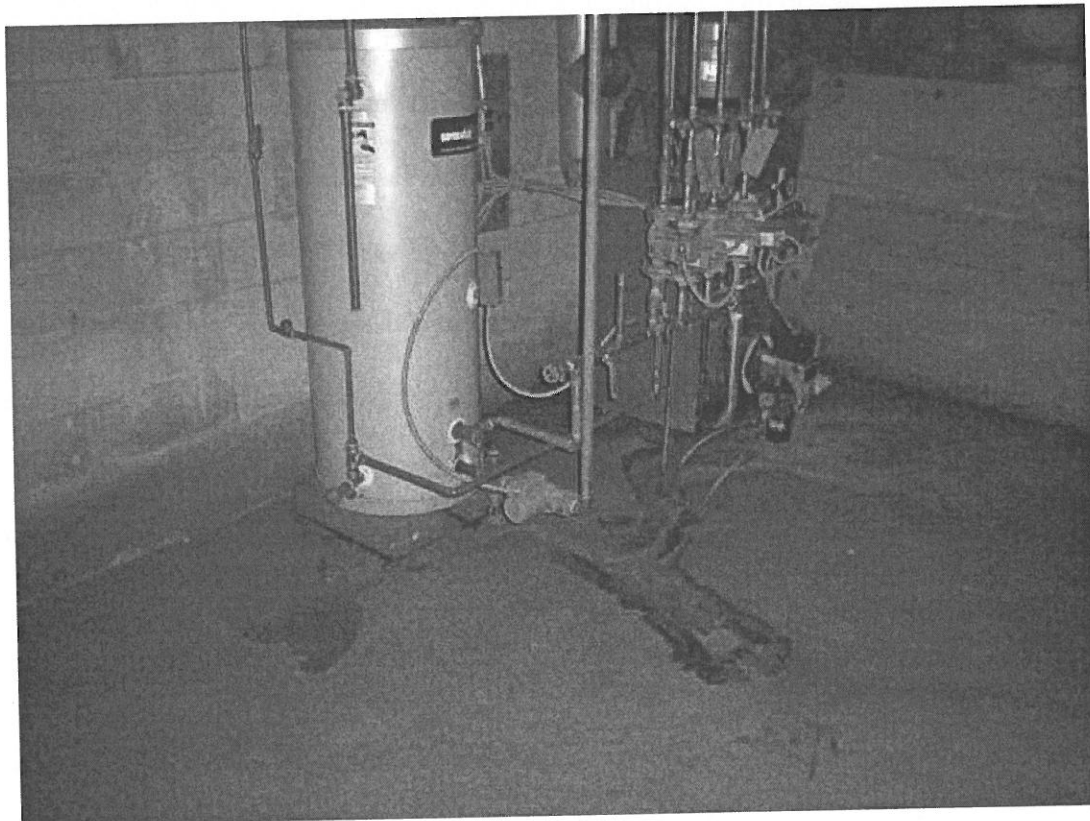


Image 2



Images 3A and 3B: Carbon Black Soot



Image 5: Continental Carbon pollution visible from aerial view. The homes torn down were located immediately to the left of the plant in the triangle-shaped patch of trees and grass. If you look closely, you can see the 11 former foundations and the driveways which used to attach to the homes.



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Image 2:

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Image 3A:

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Image 3B:

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Image 4:

Google maps -> Ponca City -> Municipal Dump

Image 5:

Google maps -> Ponca City -> Continental Carbon Plant