**Cape Wind and the Sacred Sunrise of the Wampanoag:**

**A Victory for Whom? Part II[[1]](#footnote-1)**

By Kathleen M. Saul

Abstract

 *Part I of this case explored the technical aspects of the Cape Wind project: the use of turbines to harness the power of the wind and generate electricity, the key factors for wind farm location, and some of the environmental, cultural, and policy issues specific to the construction of Cape Wind. It concluded by asking the question, “Despite tribal resistance to the development, can the outcome of the events surrounding this project be considered a victory for Native American rights?”*

 *Part II of the case begins many months later when it has become obvious that the initial optimism about the inclusion of Native Americans in the decision-making was very short-lived. After exploring the current status of the project, the case briefly demonstrates how existing Acts and legislation fail to protect Indian interests in situations like this one. The case concludes by asking readers to consider what types of actions might cause the government and perhaps even Cape Wind executives to reconsider the decision to build a wind farm in Nantucket Sound.*

Reassessing Cape Wind

 Rob sprawled on the couch, watching a ball game between two top rated teams. After about ten minutes it became obvious it would be no contest. Key players had been sidelined with injuries and the remaining players had lost their fighting spirit. He turned off the television and instead turned his attention toward his older sister.

 “Hey Linda,” he called. “I haven’t heard you talk about that wind farm in Massachusetts in a long time. You remember—the one you said was such a victory for Native Americans?”

 Linda didn’t say anything. She tried to ignore her brother and instead focus on her weaving.

 “Hey Linda . . .”

 “What?!” Linda called back, rather annoyed.

 “What happened to that wind farm?”

 Linda sighed and looked up. She knew from experience that the more she tried to ignore Rob, the more he would pester her. “It didn’t turn out like I believed it would.”

 She dropped her hands into her lap, then continued. “We—I—thought Secretary Salazar, the other government officials, and the companies involved listened, really listened, to the Wampanoag and were taking Native concerns into consideration in deciding whether or not to grant a permit for the wind farm. It seemed they understood the concerns about sacred sites and the impact the wind farm would have on traditional fishing grounds and an ancient burial site.” Linda paused. “I was wrong.”

 Rob could not believe his ears. His sister never admitted she was wrong. “You were *WRONG*?”

 “Well, not everyone listened and lots of people did not and do not understand. The Department of the Interior awarded Cape Wind its wind farm construction license despite all the opposition to it (Finucane, 2011). After the initial discussions that gave me such hope, Salazar asked the tribes to support the project. When they refused, he stopped consulting them (Toensing; April 6, 2011). The company behind Cape Wind then offered the tribes a lot of money—a millions dollars each--to drop their objections, but they would not. (Rob’s eyes grew wide.) For the tribes, it’s not about money or compensation. It’s about being a part of the decisions. It’s about history and rights and principles.

 “Cape Wind’s CEO, Jim Gordon, seems especially deaf to the concerns expressed about the project. In an interview on NPR he insinuated that the challenges were just nuisance tactics designed to delay and obstruct the start of construction (*Cape Wind Project Wins*). He expresses concerns about the environmental impact of mining and extracting coal, and the military intervention needed to protect oil supplies from the Middle East, but he downplays the impact of building 130 wind turbines will have on fishing grounds and the ecosystem of the Nantucket Sound. I appreciate that Mr. Gordon wants to help fight *global* climate change by working to reduce greenhouse gas emissions, but he needs to also consider the effect the wind farm will have *locally*.”

 Feeling herself grow tense, Linda took a deep breath. “Mr. Gordon claims the electricity from Cape Wind will be competitive with that from other renewable energy sources, but documents show that the Massachusetts Department of Public Utilities has agreed to pay 18.7 cents per kilowatt-hour (kWh) the first year, with a 3.5% increase each year for the life of the contract (Toensing; June 20, 2011). That’s over twice the nine cents per kWh residents paid last year and hardly could be considered competitive! (*US Court Revokes FAA Approval*). It’s also much more than the ten cents per kWh they could pay for electricity from on shore wind farms (Toensing; October 31, 2011).”

 Rob considered the numbers for a minute, then spoke. “Even I know the local people got a bad deal there!”

 Linda smiled. “The U.S. Department of Energy denied Cape Wind the loan guarantee they had hoped to use to finance the project.” Anticipating her brother’s next question, Linda added, “A loan guarantee means that the government (and U.S. taxpayers) will pay off loans the company has taken out for the project if the company goes belly up. Because wind farms and other renewable energy projects tend to be risky, the people lending the money want to make sure they will get paid back one way or another. That’s what a loan guarantee does. They demand the loan guarantee, or they will not lend the money.”

 “Oh,” said Rob.

 “People thought that might put an end to the project but then the Siemens company agreed to provide the financing (Wingfield, 2011).”

 “But you said ‘No loan guarantee, no money,’” interrupted Rob.

 “Right. But Siemens has other interests at stake. Siemens will be supplying the wind turbines for Cape Wind: they’ll make them in Denmark and ship them to Massachusetts (*Cape Wind Project Wins*). They want to see the project succeed and probably are willing to put their own money into it, even without the loan guarantee, to gain a foothold in the U.S. offshore turbine market (Wingfield, 2011).”

 “That sounds kind of fishy to me,” said Rob, his face looking pinched and his nose all wrinkled.

 Linda agreed. “But that’s the way people do business. One more thing. As a result of one of Mr. Gordon’s so-called ‘nuisance tactics,’ a Federal Appeals Court has put the brakes on the project for now. The Mashpee and Aquinnah Wampanoag tribes, the town of Barnstable, and the Alliance to Save Nantucket Sound had expressed concerns about the Federal Aviation Administration (the FAA) finding that the project presented no hazard to flights over the Sound (*US Court Revokes FAA Approval*). The Court has agreed. Even though Cape Wind has its construction license, it can’t begin that work until the FAA has re-examined the implications the field of 440-foot high turbines has for airplanes in the area. That may take up to two years.”

 “It sounds like Cape Wind is pretty much dead in the water,” exclaimed Rob, feeling rather proud of his clever choice of words. “Aren’t you happy about that?”

 “Well, yes and no,” replied Linda. “I’m not against wind power in general. I do think it’s important that this country wean itself from polluting energy sources like coal and oil. But I am glad that this particular wind project has stalled. I just wish it was because of the value of the site itself, its intrinsic value, and not some technicality over an FAA analysis.”

 “What do you mean?” Rob propped himself up on the couch pillows, expecting a long explanation.

 Linda looked down at her hands. “Most of the discussion about the project has been all tied up with numbers, with its *quantitative* aspects—data and dollars. Early on, the tribes argued against the location of the wind farm because of the significance of the site to their people. Cape Wind responded by reducing the number of wind turbines from 170 to 130. Then they tried to get the tribes on board with that proposal by paying them. Ratepayers in Massachusetts have complained about the high cost of the electricity from Cape Wind and the company responded by publishing data that show the price of other sources of electricity will also be going up in the future. (Just between you and me, I don’t understand why Cape Wind doesn’t just credit the millions they were going to give the tribes toward the bills the customers will pay!) Any way, then the Court said the FAA didn’t adequately justify how the turbines will not pose any risk to air traffic (*Cape Wind Hits Yet Another Hurdle*). I bet they just need to come up with some fancy models to show how airplanes can fly over the turbines (they’re as tall as 40 story buildings!), how the new wind patterns won’t affect the planes (although I bet it’ll get more turbulent nearby!), how planes can take other routes to their destinations. For me, all of that is missing the basic point.”

 “Which is . . .?”

 “The site is sacred and needs to be preserved. The people at Cape Wind should believe the tribes when they refer to oral history that indicates the ancient Wampanoag used the area for fishing and burial of their loved ones. You would think that the Cape Wind folks would listen to the Massachusetts Historical Commission, which said that during an archeological survey of the area, they were able to confirm those claims (*Aquinnah Wampanoag Sues*). You would think that they would be concerned that the Advisory Council on Historic Preservation commented that the project would have ‘significant adverse effect on the Wampanoag tribes’ cultural practices’ and would do irreparable damage to the seabed, which also could affect the tribes ability to fish in traditional places. Unfortunately, Cape Wind seems more concerned about kWh, dollars, and being the first large offshore wind farm in the U.S.”

 “Isn’t there a law that protects sacred sites?” asked the ever curious Rob.

 “I wish there were. The American Indian Religious Freedom Act of 1978 says that the U.S. government and agencies need to consult tribes when they undertake projects that might affect sacred sites on federal land. It says they need to evaluate their policies and actions and make appropriate changes to protect and preserve religious cultural rights and practices (*American Indian Religious Freedom Act; Protecting American Sacred Sites*). But there is nothing that tells them what ‘appropriate changes’ means, nothing that penalizes them if they make changes that end up harming cultural rights and practices, or if they don’t make changes at all. It gets even trickier when you have a company like private Cape Wind trying to do something on federal land. The Act doesn’t really apply to them.

 “The Native American Graves Protection and Repatriation Act of 1990 was supposed to fill in some of those gaps (*Native American Graves Protection*). In its application, that Act has dealt mainly with the return remains or ceremonial objects from museums to tribal authorities. In some cases, construction projects have been stopped because of the discovery of ancient burial grounds or villages, but usually the government provides tribes with the money to remove and rebury remains. That’s something, but . . .” Linda’s voice trailed off.

 Rob piped up to fill the silence that ensued. “Doesn’t the government have a trust responsibility to the Native Americans?”

 “Yes indeed. That’s what I referred to earlier when I mentioned the tribes should have remained a part of the discussions and the decision-making. The U.S. government is supposed to treat the tribes as sovereign nations and deal with them on a government to government basis. According to their own manual, the Department of the Interior must “engage in meaningful consultation with tribal government(s) when impacts on Indian trust resources, tribal rights, and tribal health and safety are identified. Consultations must be open and candid with respect for the sovereign status of American Indian tribal governments” (*Department of Interior’s Federal Indian Trust Responsibility*). Problems have occurred for ages regarding lands actually held in trust for the tribes (when the officials can make money off the resources of that land), and they get even thornier when projects like this one fall on non-tribal lands but do affect tribal rights to things like fishing and sacred viewscapes.”

 Linda paused. Looked thoughtfully at the ceiling, and continued. “But, at the very least there should be government to government communication, not closed doors and unilateral decision-making. President Clinton made that clear in his Executive Memorandum of 1994 and President Bush reaffirmed it in 2004. Even the U.N. Declaration on the Rights of Indigenous Peoples states that indigenous people ‘have the right to participate in decision-making in matters that would affect their rights’ (Article 18) and that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned . . .’ (Article 19). Why is it so hard for Salazar and the folks at Cape Wind to get that through their heads?”

 Rob could sense Linda’s frustration, anger, and disappointment. She had been so excited about what the project meant for the voice of Native Americans, and now seemed so dejected. He desperately wanted to help.

 “I’ve got a great idea!” he exclaimed.

 “I’m sure you do.”

 “We’ll stage a “boat in’! We’ll call everyone we know who owns a boat or a canoe or a kayak and have them all meet in Nantucket Sound. If Mr. Salazar and the Cape Wind folks won’t *listen*, maybe they need to be *shown* that people are upset and angry. We’ll block the Sound for days and days and days! We can make signs and catch fish and sing songs and have campfires!”

 “On boats?"

 “Well, maybe we’ll light the fires on shore.” Rob conceded. He continued enthusiastically, “We could even get people like the Kennedys to join us! I bet they have lots of big boats! We’ll make headlines! Maybe even get on the six o’clock news!”

 “Yeah, right.”

 “Well, miss know-it-all, what do *you* suggest we do?”

REFERENCES

*American Indian Religious Freedom Act*. (August 11, 1978). Accessed January 14, 2012. <www.nps.gov/history/local-law/fhpl\_indianrelrfreact.pdf>

Bush, President George W. (September 23, 2004). *Memorandum for the Heads of Executive Departments and Agencies. Subject: Government-to-Government Relationship with Tribal Governments*. Washington, D.C.: The White House. Accessed January 17, 2012. <www.hhs.gov/intergovernmental/tribal/docs/93004memopage1.pdf>

*Cape Wind Hits Yet Another Hurdle.* (November 1, 2011). Accessed January 14, 2012. <http://www.sustainablebusiness.com>

*Cape Wind Project Wins Construction Approval.* (April 29, 2011). Accessed January 15, 2012. <http://www.npr.org/2011/04/29/135840983/cape-wind-project-wins-construction-approval>

Champagne, Duane. (October 27, 2011). Protecting Native American Sacred Sites. *Indian Country Today.* Accessed January 16, 2012. <http:indiancountrymedianetwork.om/2011/10/27/protecting-native-american-sacred-sites-60088>

Clinton, President William J. (April 29, 1994). *Tribal Consultation—President’s Memo. Government-to-Government Relations with Native American Tribal Governments. Memorandum for the Heads of Executive Departments and Agencies.* Washington, D.C.: The White House. Accessed January 17, 2012. <www.hhs.gov/intergovernmental/tribal/presmemo.html>

*Department of the Interior’s Federal Indian Responsibility*. (Date Unknown). Washington, D.C.: Office of American Indian Trust, Department of the Interior.

Finucane, Martin. (April 19, 2011). Cape Wind Wins Federal Construction Plan Approval. *The Boston Globe*. Accessed January 15, 2012. <http://www.boston.comm/news/local/breaking\_news/2011/04/cape\_wind\_wins.html>

*Native American Graves Protection and Repatriation Act*. (November 16, 1990). Accessed January 16, 2012. <www.nps.gov.nagpra/mandates/25usc3001etseq.htm>

Toensing, Gale Courey. (July 14, 2011). Aquinnah Wampanoag Sues Feds Over Cape Wind. *Indian Country Today*. Accessed January 14, 2012. <http://indiancountrytodaymedianetwork.com/2011/07/14/aquinnah-wampanoag-sues-feds-over-cape-wind-42712>

Toensing, Gale Courey. (June 20, 2011). Cape Wind Opponents Win Legal Victory*. Indian Country Today*. Accessed January 14, 2012. <http://indiancountrytodaymedianetwork.com/2011/06/20/cape-wind-opponents-win-legal-victory-38948>

Toensing, Gale Courey. (April 6, 2011). Some Serious Blowback. *Indian Country Today*. p. 34 – 37.

Toensing, Gale Courey. (October 31, 2011). US Court Revokes FAA Approval of Cape Wind. *Indian Country Today*. Accessed January 14, 2012. <http://indiancountrytodaymedianetwork.com/2011/10/31/us-court-revokes-faa-approval-of-cape-wind-60772>

*United Nations Declaration on the Rights of Indigenous Peoples*. (September 13, 2007). United Nations. Accessed January 17, 2012. <www.un.org/esa/socdev/unpfii/documents/DRIPS\_en.pdf>

Wingfield, Brian. (June 21, 2011). Siemens Willing to Finance Cape Wind as U.S. Postpones Backing, CFO Says. *Bloomberg News*. Accessed January 14, 2012. <http://www.bloomberg.com/new/print/2011-06-21/siemens-willing-to-finance>

1. Copyright (2012) held by The Evergreen State College. Please use appropriate attribution when using and quoting this case. Cases are available at the Native Cases website at [www.evergreen.edu/tribal/cases/home.htm](file:///C%3A%5CUsers%5Cbarbara%5CAppData%5CLocal%5CTemp%5Cwww.evergreen.edu%5Ctribal%5Ccases%5Ccasecollection). This material is based upon work supported by the National Science Foundation under Grant No. 0817624. Any opinions, findings, and conclusions or recommendations expressed in this case are those of the author and do not necessarily reflect the views of the National Science Foundation. Thank you to Dr. Linda Moon Stumpff for the inspiration and Dr. Barbara Smith for her continued support of my work. [↑](#footnote-ref-1)