

App. No. ____

In the Supreme Court of the United States

Osage Wind, LLC; Enel Kansas, LLC; Enel Green Power North America, Inc.,

Petitioners,

v.

United States; Osage Mineral Council,

Respondents.

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION
FOR A WRIT OF CERTIORARI FROM JANUARY 16, 2018 TO MARCH 2, 2018

To the Honorable Justice Sotomayor, as Circuit Justice for the United States Court of Appeals
for the Tenth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners
Osage Wind, LLC; Enel Kansas, LLC; Enel Green Power North America, Inc. (petitioners)
respectfully request that the time to file a petition for a writ of certiorari in this case be extended
for forty-five days to and including March 2, 2018. The court of appeals issued its opinion on
September 18, 2017. *See App. A, infra.* The court denied a timely petition for rehearing and
rehearing en banc on October 17, 2017. *See App. B, infra.* Absent an extension of time, the
petition therefore would be due on January 16, 2018 (January 15 is a federal holiday). Petitioners
are filing this application at least ten days before that date. *See Sup. Ct. R. 13.5.* This Court has
jurisdiction under 28 U.S.C. § 1254(1) to review this case.

Background

This case involves the property rights of individuals with surface-estate ownership interest in land that was formerly part of the reservation set aside in what is now Oklahoma for the Osage Nation. The case raises questions about whether a non-party can appeal absent intervention and about the application of the Indian canon of statutory construction to disadvantage the property rights of successors-in-interest to members of the Osage Nation.

1. Petitioners are business entities who have built and are operating a wind-energy project in Osage County, Oklahoma. App. A at 5. Osage County comprises the land that Congress established in 1872 as a reservation for the Osage Nation. Act of June 5, 1872, ch. 310, 17 Stat. 228. In 1906, Congress severed the mineral estate in Osage County from the surface estate, reserving the mineral estate for the benefit of the Osage Nation and parceling out the surface estate to individual members of the Tribe. Act of June 28, 1906, ch. 3572, 34 Stat. 539, §§ 2-3 (Osage Act). The Osage Act established that the Osage Nation would retain a beneficial interest in the mineral estate in Osage County and that the United States would serve as the legal trustee for that mineral estate. *Id.* § 3. The Act authorized the Osage Nation to issue leases for “all oil, gas, and other minerals” in the reserved mineral estate, subject to the approval of the United States Department of the Interior (DOI) and to any rulemaking undertaken by DOI. *Ibid.* In allotting the surface estate in parcels to individual members of the Osage Nation, the Act provided that each allotment would be freely alienable and ensured that the property owners could use the land for “farming, grazing, or any other purpose not otherwise” prohibited by the Act. *Id.* § 2; *see* App. A at 3-4.

2. In 2010, petitioners leased surface rights to approximately 8,400 acres of privately owned land in Osage County for the purpose of building a commercial wind-energy project to generate

electricity. App. A at 5. To construct the wind-energy project, petitioners would have to install 84 wind turbines secured in the ground by reinforced concrete foundations, underground electrical lines connecting the turbines to a substation, an overhead transmission line, meteorological towers, and access roads. The proposed structures would occupy only 1.5 percent of the leased 8,400 acres. *Ibid.*

In October 2011, before petitioners broke ground on the project, the Osage Mineral Council (OMC), acting on behalf of the Osage Nation, filed suit seeking to prevent construction of the wind-energy project. App. A at 5-6. OMC claimed that the planned wind-energy project would unreasonably deprive oil-and-gas lessees of reasonable use of the surface land to support underground oil-and-gas operations, but did not contend that petitioners needed a permit to construct the project. OMC lost that case voluntarily dismissed its appeal. *Id.* at 6.

By September 2014, petitioners initiated excavation work for the planned wind turbines. App. A at 6. Petitioners dug large holes in the ground to accommodate the cement foundations required for the turbines. *Ibid.* That process involved extracting soil, sand, and rock of common mineral variety (such as limestone and dolomite), crushing extracted rocks, compacting the soil, sand, and crushed rocks in the excavated site, and placing large rocks next to the holes from which they were extracted. *Id.* at 7.

In November 2014, the United States filed this action against petitioners, claiming that the excavation work associated with digging the foundation holes constituted “mining” under DOI regulations and therefore required a lease. App. A. at 7; *see* 25 C.F.R. §§ 211.3, 214.7. In September 2015, the district court granted summary judgment to petitioners. App. A at 7. At no time during the summary judgment proceedings did OMC seek to intervene in the case. *Ibid.*

3. The United States declined to appeal the district court's adverse judgment and affirmatively communicated that decision to OMC on the last day a notice of appeal could have been timely filed. App. A at 7-8. OMC immediately filed a motion to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) and (almost simultaneously) filed a notice of appeal from the district court's decision on summary judgment. *Id.* at 8. The district court declined to rule on the motion to intervene because the filing of the notice of appeal deprived the court of jurisdiction over the case. OMC promptly appealed that judgment as well. *Ibid.*

4. The court of appeals reversed the grant of summary judgment to petitioners, and instead adopted OMC's position as a matter of law. App. A. The court first rejected petitioners' argument that OMC could not appeal the summary judgement ruling because it was not a party to the district court proceedings. *Id.* at 8-13. The court of appeals reasoned that "OMC has a unique interest in this case entitling it to appeal without having intervened below" because the United States ceased adequately representing OMC's interests when the United States declined to appeal. *Id.* at 12-13. In light of its holding that OMC could pursue the appeal as a non-party, the court declined to consider whether OMC should have been permitted to intervene. *Id.* at 26. The court also rejected petitioners' argument that OMC is barred by principles of *res judicata* from pursuing the appeal based on its failed 2011 lawsuit. *Id.* at 13-14.

The court of appeals also reversed on the merits, holding that petitioners' excavation activities qualify as mining under DOI regulations and therefore require a permit. App. A at 15-26. The court rejected the district court's conclusion that, for purposes of the applicable regulations, "mining" is limited to commercial mineral development and does not include activities "of an entity that incidentally encounters minerals in connection with surface construction activities." *United States v. Osage Wind, LLC*, No. 14-cv-704, 2015 WL 5775378, at *6 (N.D. Okla. 2015);

see App. A. at 19-21. Finding the regulatory language to be ambiguous, the court of appeals resorted to the canon of Indian construction and adopted the construction that would most benefit OMC in this case. App. A at 21-24. The court did not consider the effect of its interpretation on the Indian owners of the parceled surface estates in Osage County and their successors in interest.

5. The court of appeals denied petitioners' timely petition for rehearing en banc. App. B, *infra*. The court then granted petitioners' motion to stay the mandate pending the filing of a petition for a writ of certiorari and later declined to reconsider that order, explaining: "It is the Court's judgment that our opinion in this case presents several substantial issues of federal law upon which there is a substantial possibility that the Supreme Court would decide to review by certiorari." Oct. 26, 2017 Order.

Reasons For Granting An Extension Of Time

The time to file a petition for a writ of certiorari should be extended for forty-five days, to March 2, 2018, for several reasons:

1. The forthcoming petition will present important questions of federal law that should be resolved by this Court. First, the court of appeals permitted a non-party to pursue an appeal notwithstanding respondent United States' decision not to do so. That ruling is contrary to decisions of this Court and of other courts of appeals holding that a non-party may not pursue an appeal on its own absent unusual circumstances not present here. Second, the court of appeals adopted a plainly erroneous construction of the applicable regulations that will have the effect of denying important property rights to surface-estate owners where the related mineral estate is owned by an Indian tribe. To reach that result, the court improperly invoked the Indian canon of construction even though the surface-estate owners who would be harmed by the court's interpretation are Indians or successors in interest to Indians.

2. Petitioners have only recently retained Supreme Court counsel for the filing of a petition for a writ of certiorari. Additional time is necessary and warranted for counsel, among other things, to review the record in the case, research case law in other circuits, and prepare a clear and concise petition for certiorari for the Court's review.

3. No prejudice would arise from the extension. Whether the extension is granted or not, the petition will be considered during this Term – and, if the petition is granted, the case will be heard and decided in the Court's next Term.

4. The press of other matters before this Court makes the submission of the petition difficult absent an extension. Petitioners' counsel is counsel or co-counsel in several other cases in which petitions or other filings are due in this Court in the next two months.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for forty-five days to and including March 2, 2018.

Respectfully submitted,



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