No. 17-1237

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 MINERALS COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF AMICUS CURIAE OF THE AMERICAN WIND ENERGY ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

The American Wind Energy Association respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.2(b). Counsel of record for all parties received notice at least 10 days prior to the due date of the American Wind Energy Association's intention to file this brief. Counsel for Petitioners have consented to the filing of this brief; counsel for Defendants have withheld consent. In accordance with U.S. Sup. Ct. Rule. 37.2(a), 28 U.S.C.A., Petitioners consented to the filing of this brief. The Defendants Osage Minerals Council did not consent. The United States did not respond to the request for consent on filing.

The American Wind Energy Association is the national trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. The interests of the association are threatened by the Tenth Circuit decision, which unreasonably expands the definition of mining to include activities that only disturb the surface minerals of an estate to the extent necessary for the placement of wind turbine foundations.*

* The position taken herein represents the consensus opinion of the American Wind Energy Association; but as an organization with a large and diverse membership, not all of our members necessarily take a position on or endorse the position articulated herein.

The American Wind Energy Association has an interest in this case because if the court of appeals' ruling stands, wind energy development across a variety of areas could be required to attain Federal permits. In holding that the extraction of a small amount of minerals, the crushing of those minerals, and the subsequent replacement of those same minerals into the holes from which they were originally taken for the purpose of the placement of wind turbines is mining, the Tenth Circuit encourages lawsuits from other mineral rights holders wishing to impede the development of wind energy.

The American Wind Energy Association respectfully requests that the Court grant leave to file this brief.

April 5, 2018

Respectfully submitted,

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Wind Energy Association is the national trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. The interests of the association are threatened by the Tenth Circuit decision, which unreasonably expands the definition of mining to include activities that only disturb the surface minerals of an estate to the extent necessary for the placement of wind turbine foundations.

The American Wind Energy Association has an interest in this case because if the court of appeals' ruling stands, wind energy development across a variety of areas would be required to attain Federal permits and potentially have to pay royalties before constructing footers necessary to support a wind turbine. In holding that the extraction of a small amount of minerals, the crushing of those minerals, and the subsequent

[1] The American Wind Energy Association's counsel authored this brief, no counsel for a party to the decision below, or other entity authored this brief in whole or in part, and no person or entity other than the American Wind Energy Association made a financial contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the American Wind Energy Association's intention to file this brief.

replacement of those same minerals into the holes from which they were originally taken for the purpose of the placement of wind turbines is mining, the Tenth Circuit decision, in effect, gives mineral estate owners veto authority over the surface owners' use of their lands (if construction activities require excavation).

SUMMARY OF ARGUMENT

The Tenth Circuit erred in finding that the activities associated with the placement of concrete footers for wind turbines constitutes mining under the regulations of the Department of Interior. 25 C.F.R. §211 *et seq*. This decision was largely predicated on reading an ambiguity into a regulation where none exists. Because of this error, the court of appeals erroneously concluded that the activity in question was mining; but under the clearly articulated definition of that term, the placement of wind turbine footers does not qualify as mining.

This erroneous reading of the regulations allowed the Tenth Circuit to produce a decision that threatens the well-established rights of surface estate owners and development activities dependent thereon. If the Tenth Circuit decision were to stand, it could have far reaching implications for all land where the mineral estate is managed or owned by the Federal government. In other words, any activity that even minimally disturbs the surface of the land within these areas would be considered mining and require a Federal permit. This, would also, in effect, give mineral estate owners development-stifling authority over the surface owners' use of their lands (regarding any activities that require excavation) and thus threatens to reallocate property

rights across lands where the mineral and surface interests have been severed.

ARGUMENT

I. INVOCATION OF THE INDIAN CANON OF CONSTRUCTION WAS NOT APPROPRIATE BECAUSE THE REGULATORY DEFINITION OF MINING IS UNAMBIGUOUS AND DOES NOT APPLY TO THE CONSTRUCTION OF WIND TURBINES

The Tenth Circuit found that Petitioners engaged in "mining" as defined at 25 C.F.R. § 211.3. Department of Interior regulations require that "[n]o mining or work of any nature will be permitted upon any tract of land... until a lease covering such tract shall have been approved by the Secretary of the Interior." 25 C.F.R. § 214.7. If such a lease is required for development, payment of royalties based upon the amount and type of minerals removed may be required. 25 C.F.R. §214.10(d).

In determining that the activities at issue in this case were mining under the above-mentioned regulation, the Tenth Circuit utilized the Indian canon of construction. Under this canon, "statutes are to be construed liberally in favor of the Indians, with *ambiguous provisions* interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (emphasis added).

Like all canons of construction, the Indian canon is a tool that judges may choose to utilize to help interpret the legislative intent behind an ambiguous

statute. *Chickasaw Nation v. United States,* 534 U.S. 84, 94 (2001). But as this Court has cautioned, "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.* 476 U.S. 498, 506 (1986).

Courts should therefore only utilize this canon of construction after examining the relevant act and regulation, the surrounding circumstances, and the legislative history, and then determining, in light of all this information, whether the underlying statute or regulation is ambiguous—warranting the invocation of this canon and construction of a rule in favor of Native Americans. *DeCoteau v. Dist. Cty. Court,* 420 U.S. 425, 445 (1975). The Tenth Circuit overlooked this fundamental requirement in clear error and thus departed from the custom in which this Court and other courts of appeals use the Indian canon.

The Tenth Circuit looked specifically at the definition of "mineral development" as it was included within section 211.3 of the regulation and erroneously determined that the regulation did not provide the outer limits of what it meant to "develop" minerals. *United States v. Osage Wind*, No. 15-5121, 22 (10th Cir. Sept. 18, 2017) (lower court opinion). The court of appeals reached this conclusion even though the digging of foundation holes, crushing of medium and small rocks, and placing that dirt and rock back into the holes (as foundational support for the wind turbines) clearly does not fit into the well-settled notion of mining—as all of the minerals remained on site and very near to their original location of extraction. The Tenth Circuit even admitted that its

interpretation of the definition "does not fit nicely with traditional notions of 'mining' as that term is commonly understood." *United States v. Osage Wind*, No. 15-5121, 22 (10th Cir. Sept. 18, 2017) (lower court opinion).

The entirety of section 211.3 provides guidance and direction as to what is meant by "mineral development," citing examples of "opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals." 25 C.F.R. §211.3. While it is noted within the regulation that this list is not designed to be exhaustive, the inclusion of only activities that involve the disturbance, severance, and treatment of minerals is telling. The Tenth Circuit acknowledged that, based on this list, "mineral development" is at a minimum an "action upon the minerals in order to exploit the minerals themselves," but nevertheless went on to conclude, without any basis, that the term has a broad meaning and could also include other activities. *United States v. Osage Wind*, No. 15-5121, 22 (10th Cir. Sept. 18, 2017) (lower court opinion). Further, while the definition includes commercial mineral extractions and offsite relocations, which are not at issue here, the Tenth Circuit found that "it also encompasses action upon the extracted minerals for the purpose of exploiting the minerals themselves on site." *United States v. Osage Wind*, No. 15-5121, 22 (10th Cir. Sept. 18, 2017) (lower court opinion).

This reading is inconsistent with the plain language of the regulatory definition as well as the regulatory context in which the definition exists. It is outside the clear definition of "mining" to determine that while the listed examples provide options of what qualifies under the provision, it could also include any innumerable other options. This interpretation of the

regulations makes the examples meaningless, as they would no longer provide any explanation as to the clear meaning of the regulation. *See Bloate v. United States*, 559 U.S. 196, 209 (2010) (rejecting a broad reading of the phrase "including but not limited to" on the ground that "such a reading would violate settled principles of statutory construction because it would ignore the structure and grammar of [the statute], and in so doing render even the clearest of the subparagraphs indeterminate and virtually superfluous.").

The regulatory text and provided examples do not allow the definition of "mining" to be stretched into an open-ended term, simply because the definition included the phrase "but not limited to." The examples provided are exactly that, examples—providing a list of activities that qualify as mining and directing that activities of a similar nature to those listed would also qualify. Rather than use the examples to provide clarity on the regulation and thus further the fact that the placement of wind turbine footers is not mining, the Tenth Circuit illogically utilized them to draw the conclusion that the regulatory language was therefore ambiguous.

In the decision issued by the Northern District of Oklahoma in this case, that court correctly determined that "mining" as defined in section 211 does not encompass this activity. *United States v. Osage Wind, LLC*, No. 14-CV-704-JHP-TLW, 9 (N.D. Okla. Sept. 30, 2015). As the district court determined, the removal of the rock minerals from the ground for the sole purpose of creating a hole in which to pour a cement footer does not fall under any definition of mineral development.

The district court reasoned that mining is limited to commercial mineral development. "'Mineral

development' covers the activities of an entity engaged in the science, technique, and business of developing minerals, not those of an entity that encounters minerals in connection with surface construction activities." *United States v. Osage Wind, LLC*, No. 14-CV-704-JHP-TLW, 9 (N.D. Okla. Sept. 30, 2015). In other words, mineral development, under the definition and natural meaning of the term, requires putting the minerals to commercial use or selling the minerals in the marketplace to invoke the leasing requirements of section 211.48. Simply moving the minerals from their original placement within the surface as an incidental activity to the creation of a hole does not qualify as mineral development and thus is not mining under the regulatory definition.

This notion is further supported by the fact that under the provisions of Part 214 that measure the value of a lease, the value is determined by the minerals that are removed and sold. 25 C.F.R. § 214. For instance, section 214.10(d) ties the royalty payment owed under a lease to the commercial production of those minerals such that "[f]or substances other than gold, silver, copper, lead, zinc, coal, and asphaltum the lessee shall pay quarterly a royalty of 10 percent of the value at the nearest shipping point of all ores, metals, or minerals marketed." 25 C.F.R. § 214.10(d). These provisions support the determination that mining under the regulatory definition is meant only to encompass the removal of minerals for commercial use, not the digging of a hole and replacement of those minerals back into that very same hole, as is done in wind energy development.

Because the regulation at issue in this case is not ambiguous on its face and is even further clarified by the

provided examples of mineral development (and thus mining) within the regulation, the use of the Indian canon of construction was inappropriate. As such, the clear meaning of mineral development and mining, as provided under the regulation, governs in this litigation and does not support the finding that the activities in question constitute mining.

II. ALLOWING THE TENTH CIRCUIT'S EXPANDED DEFINITION OF MINING TO STAND WOULD REQUIRE COMPANIES ENGAGED IN THE REMOVAL OF ROCKS TO ANY DEPTH TO ACQUIRE A MINERAL LEASE ON TRIBAL LANDS AND COULD EXTEND TO ALL FEDERAL LAND

As a direct result of the Tenth Circuit's decision in just this one case, private surface-estate owners have been deprived of the full enjoyment of their fee ownership. The repercussions of such a decision could be much further reaching than just this one case—in effect, allowing mineral interest owners veto authority over the surface owners' use of their lands and thus reallocating property rights across such areas.

The implications if the Tenth Circuit ruling were to stand are widespread and could impact any industry that is required to dig holes for the completion of its activities—not just wind energy development. The Northern District of Oklahoma noted the logical problem and inconsistency of determining that the placement of wind turbines would be considered mining and implications for a wide range of other construction activities. *United States v. Osage Wind, LLC*, No. 14-CV-704-JHP-TLW(N.D. Okla. Sept. 30, 2015) ("Perhaps

tellingly, the United States fails to address the meaning of these provisions or how they could be squared with a broader definition of 'mining' that would cover excavation incident to construction.").

The Tenth Circuit's holding could also be extended to activities outside of tribal land, thus requiring a lease for any activity that involves the digging of holes on land where the Federal government manages the mineral estate. While the regulation in question applies only to Indian tribal land, it is not so dissimilar from other Federal regulatory definitions of mining and thus the Tenth Circuit's prescribed definition could be used to determine that the same activities on other land with a federally-managed or owned mineral estate require a mineral lease.

There are a variety of laws and regulations in the United States that have created ownership structures similar to the one at issue, except in other circumstances the surface estate ownership lies with the Federal government or was given to private individuals and the mineral rights were reserved to the Federal government. *See, e.g.,* Bureau of Land Management, *Leasing and Management of Split Estate* (last visited Mar. 29, 2018), *available at* www.blm.gov. As of 2017, the Federal government owned roughly 640 million acres of land, or about 28 percent of the land in the United States. Congressional Research Service, *Federal Land Ownership: Overview and Data* (Mar. 3, 2017). On these lands, the Federal government typically controls the mineral estate of the land. Between land that is federally owned and additional land in which the Federal government does not own the surface estate, but maintains ownership of the mineral rights, the Federal government manages 755 million acres of onshore

subsurface mineral estate. Institute for Energy Research, *Federal Assets Above and Below Ground* (Jan. 17, 2013). This means that to obtain the rights to conduct mining activities on much of this land, one must acquire a Federal permit.

This case thus creates an absurd result that could require the acquisition of a permit for any activity that disturbs the surface of tribal land or land with federally owned or managed mineral estates—no matter how small the activity (*i.e.*, removal of rocks to any depth in these areas) or whether or not it is done for a commercial purpose. The placement of a septic tank, the planting of a tree, etc., which all require the movement of dirt, sand, and rock minerals, would fall under the definition of mining found by the Tenth Circuit. This means that these activities, which require the digging of holes in these areas, could suddenly require a mineral lease, creating not only additional and needless administrative burdens for development activities but also potentially requiring royalty payments to be made by the developers thereon.

Without a clearly determined definition of mining, future wind energy developers and others will be unable to determine whether their projects qualify as mining on tribal and Federal lands. This will only serve to invite countless wasteful lawsuits over related regulations and statutory definitions of mining and mineral development. This litigation risk exposes developers to substantial costs and uncertainty, which will chill the investment and development in future projects on these lands—as parties would no longer have fair warning as to whether their conduct constitutes mining and would likely not pursue their projects due to this risk.

This could, in turn, stifle the ability of the Federal government and states to meet clean energy and environmental goals. Today, 29 states and the District of Columbia currently have some form of renewable electricity standards and eight states have renewable energy goals. The American Wind Energy Association, *Federal Policy: A Strong National Renewable Electricity Standard,* (last visited Mar. 29, 2018) *available at* awea.org. This means that each of these states sets a target for renewable energy development within their state in the near and long term. The Federal government also encourages the development of wind energy throughout the country. For instance, on March 28, 2017, the Presidential Executive Order on Promoting Energy Independence and Economic Growth was signed into existence. This executive order works to promote the production of domestic energy resources (including wind energy), stating "[i]t is in the national interest to promote clean and safe development of our vast energy resources". Executive Order No. 13,783, 82 FR 16093 (Mar. 31, 2017).

By creating the risk of litigation, development delays, and potential additional costs for wind development on tribal land or land with federally managed or owned mineral estates, the court of appeals' ruling will likely curtail the ability of the Federal government and states to meet their renewable energy goals. If the decision stands, it will also serve to thwart many other types of construction activities that are also in the public interest.

CONCLUSION

The Court should grant certiorari and reverse the Tenth Circuit's decision because this decision relies on an ambiguity in a regulation that simply does not exist and the policy implications of the decision could have far-reaching and absurd consequences. The definition of mining, as provided by the Department of Interior, is clearly articulated and under that definition, the construction of wind turbine footers does not constitute mining that requires a permit. Allowing the court of appeals' decision to stand would mean that any activity that even minimally disturbs the surface of tribal land or land with federally managed or owned mineral estates would be considered mining and would require a Federal permit. As such, if the Tenth Circuit's erroneous decision stands, its implications could spread far beyond the case at hand.

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