

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**

**RESPONSE TO MOTION FOR LEAVE TO FILE AND
BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PETITIONERS BY OSAGE COUNTY
FARM BUREAU, INC., ET AL.**

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The Osage Minerals Council (“OMC”) opposes the Motion for Leave to File an *Amicus Curiae* Brief by the Osage County Farm Bureau, Inc. et al. (hereinafter “Osage Farm Bureau”).

The motion should be denied for two reasons. First, the Osage Farm Bureau’s brief is of no benefit to this Court because the brief discusses an issue that Petitioner Osage Wind Farm (hereinafter “Wind Farm”) did not present to this Court. Second, Osage Farm Bureau has not met its burden to show that it has any interest in this matter.

I. OSAGE FARM BUREAU’S *AMICUS* BRIEF IS OF NO BENEFIT TO THIS COURT, BECAUSE THE BRIEF IS NOT ON THE ISSUE PRESENTED IN THIS CASE.

The primary point of Osage Farm Bureau’s *amicus* brief is to attempt to present an issue to this Court that Wind Farm did not present in merits briefing in the Tenth Circuit, that Wind Farm did not include in its question presented to this Court, and that Wind Farm only briefly alluded to in one paragraph in the body of its petition. If Wind Farm had presented a developed argument on that issue, OMC would have provided a detailed discussion of why that issue was not even preserved for this Court’s review, why the issue is not presented by the undeveloped factual record on the issue, and why the issue plainly does not merit further review by this Court.

In merits briefing before the Tenth Circuit, OMC discussed in detail why and how the Indian canon of construction applied to this case. The prerequisite for the Indian canon is well-established and is not in dispute here. Under the canon, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit.” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Wind Farm agreed with the OMC’s statement of the Indian canon, and Wind Farm’s sole responsive argument in its merits brief to the Tenth Circuit was a single paragraph in which it asserted that the Indian canon was not triggered because the law at issue was not ambiguous. 10th Cir. Doc. 01019639458 at 36. Wind Farm wisely chose not to present the issue that Osage Farm Bureau now seeks to present to this Court—that the Indian canon is inapplicable because, it claims, an Indian (probably) owned the subservient surface estate around 1906. Nowhere in its merits brief to the Tenth Circuit did Wind Farm make the argument that Osage Farm Bureau discusses in section A of Osage Farm Bureau’s proposed *amicus* brief.

Wind Farm also did not include the issue in its question presented to this Court. Again, that is for good reasons: Osage Farm Bureau’s issue presented is not supported by a developed factual record, there is no disagreement between the circuits supported by the underdeveloped factual record, the issue is not of sufficient

importance for this Court to consider, and there are serious questions regarding whether this Court would find that the issue was preserved for its review.

In its second question presented in its Petition to this Court, Wind Farm states the same issue it had presented to the Tenth Circuit in merits briefing: whether or not there was a “*clear regulatory definition*” and “*clear statutory language*.” Wind Farm Pet. at i. (emphasis added).

An *amicus* does not get to change the issues on appeal or change the issues presented to this Court. Osage Farm Bureau’s proposed *amicus* brief, in which it discusses why it thinks this Court should grant certiorari over an issue that was not factually developed below, not included in Wind Farm’s merits briefs to the Tenth Circuit, and not included in the question presented, is not of use to this Court. The Court therefore should deny Osage Farm Bureau’s request to file an *amicus*. Rule 37.1.

II. OSAGE FARM BUREAU HAS NOT MET ITS BURDEN TO SHOW THAT IT HAS AN INTEREST IN THIS MATTER.

Where, as here, the OMC withheld consent for an *amicus* filing, the *amicus* filing is not favored and the party moving to file an *amicus* brief must state the nature of the movant’s interest. Rule 37(b)(2). Two of the fifteen movants, Osage County Farm Bureau and Oklahoma Farm Bureau Legal Foundation requested the OMC’s consent. OMC withheld consent based upon OMC’s view that movants lacked the

required interest. Despite knowing that their alleged interests would be challenged, movants did not provide a legally sufficient statement of interests.

The Tenth Circuit's decision is specifically limited to large excavation (over 5,000 cubic yards) for commercial purposes in Osage County, Oklahoma, where the mineral estate is the dominant estate and the surface estate was severed and made the subservient estate.

The only one of the fifteen *amicus* who claims to have an interest related to Osage County is the Osage Farm Bureau. But conspicuously, that is also the only one of the fifteen movants which does not allege whether it actually has any members, or how many members it has.

Osage Farm Bureau also does not claim that it or any farmers or ranchers in Osage County are looking at doing major commercial excavation in the County. Instead, its argument is based upon its premise that in the future other courts will expand the Tenth Circuit decision beyond the limitations expressly stated in the decision and expressly contained in the applicable regulations. Osage Farm Bureau's conjectured parade of horrors is not going to happen. And, of course, if it were to happen, an appropriate party would be able to challenge it at that time. But for current purposes, the key point is that Osage Farm Bureau does not allege any interest that is within the expressly stated and very narrow scope of the Tenth Circuit's decision.

Without factual basis, Osage Farm Bureau is asking this Court to assume the main things it was required to show in a motion to file an *amicus*. Movant simply has not met its burden to show grounds to file an *amicus* brief.

Dated this 19th day of April, 2018.

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Affidavit of Service

I, Sarah M. Harrington, of lawful age, being duly sworn, upon my oath state that I did, on the 19th day of April, 2018, send out from Louisville, Colorado 1 package containing 10 copies of the **RESPONSE TO MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS BY OSAGE COUNTY FARM BUREAU, INC., ET AL.** in the above entitle case. All parties required to be served have been served by regular, first class, postage paid U.S. Mail as addressed to the following:

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