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 AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS BY OSAGE COUNTY FARM BUREAU, INC.; OKLAHOMA FARM BUREAU LEGAL FOUNDATION; ARIZONA FARM BUREAU FEDERATION; CALIFORNIA FARM BUREAU FEDERATION; COLORADO FARM BUREAU; IDAHO FARM BUREAU FEDERATION; THE KANSAS FARM BUREAU; MONTANA FARM BUREAU FEDERATION; NEVADA FARM BUREAU FEDERATION; NEW MEXICO FARM & LIVESTOCK BUREAU; NORTH DAKOTA FARM BUREAU; OREGON FARM BUREAU FEDERATION; SOUTH DAKOTA FARM BUREAU; WASHINGTON STATE FARM BUREAU; AND WYOMING FARM BUREAU FEDERATION

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.1(b), a group of organizations representing the interests of approximately 500,000 farm and ranch families from 14 states (*i.e.* surface-estate owners), respectfully move for permission to file the attached *amici curiae* brief supporting Petitioners. Counsel for *Amici* provided notice to all parties at least 10 days before the filing deadline of *Amici's* intent to file. Petitioners consented to the filing of this brief in writing. Respondent, Osage Minerals Counsel, withheld consent. The United States did not respond to the request.

Amici curiae are independent, non-governmental organizations that represent the interests of farmers and ranchers throughout the United States. *Amici*

include Osage County Farm Bureau, Inc. and Oklahoma Farm Bureau Legal Foundation which represent the interests of farmers and ranchers located in Osage County, Oklahoma, the particular jurisdiction where this case arose. Further, *Amici* include organizations that represent the interests of farmers and ranchers throughout the United States.

Amici are directly impacted by the Tenth Circuit's decision broadly defining the term "mining" to include activities that would not normally fall within that definition. In reaching its decision, the Tenth Circuit expressly relied upon the Indian canon of construction that ambiguities in laws designed to favor the Indians ought to be liberally construed in the Indians' favor. The court expressly held that the Indian canon "tilts our hand" toward a construction more favorable to Osage Nation.

Amici seek leave to file the attached brief in order to advise the Court of the impact that the decision will have on their members, both in Osage County, Oklahoma, and throughout the nation. For states with severed mineral estates, the court's decision potentially limits development opportunities for surface owners, devalues their surface estates, and provides Indian tribes with veto power over whether development activity on the surface may proceed. *Amici* provide a perspective that is different from the Petitioners.

Further, in litigation with Indian tribes or members, *Amici* regularly encounter the Indian canon of construction concerning ambiguities. *Amici* believe that the Tenth Circuit has wrongly applied that canon in this case by failing to recognize that the rights of the surface owners and mineral owners were fixed by the Osage Act in 1906 at a time when the competing

interests involved the Osage tribe on one side and the individual members of the Osage tribe on the other. The Indian canon is not applicable when the contesting parties are an Indian tribe and a class of individuals made up primarily of Indian members. Further, the court wrongly found an ambiguity in the regulation when none existed. The Indian canon may only be used to resolve ambiguities in favor of Indians and is not applicable in the absence of an ambiguity. Finally, the application of the Indian canon has expanded beyond the circumstances under which it was developed. Clarification of when the canon should be applied, particularly in litigation between Indian tribes or members and non-Indians, is needed. The Indian canon is subject to other canons of construction, including the canon on constitutional avoidance where statutes or regulations should be construed to avoid unconstitutional results. As more fully set forth in the brief, the Tenth Circuit's use of the Indian canon to arrive at its construction of the term "mining" raises potential constitutional issues for the rights of the surface owners. *Amici* urge the Court to accept *certiorari* to correct and clarify when courts should apply the Indian canon of construction on ambiguities.

Amici respectfully seek the Court's leave to file the attached brief supporting Petitioners.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

Osage County Farm Bureau, Inc., Oklahoma Farm Bureau Legal Foundation, Arizona Farm Bureau Federation, California Farm Bureau Federation, Colorado Farm Bureau, Idaho Farm Bureau Federation, The Kansas Farm Bureau, Montana Farm Bureau Federation, Nevada Farm Bureau Federation, New Mexico Farm & Livestock Bureau, North Dakota Farm Bureau, Oregon Farm Bureau Federation, South Dakota Farm Bureau, Washington State Farm Bureau, and Wyoming Farm Bureau Federation (collectively "*Amici*") submit this *amici curiae* brief in support of the Petition for Writ of Certiorari ("Petition") filed by Osage Wind, LLC, Enel Kansas, LLC, Enel Green Power North America, Inc., pursuant to Supreme Court Rule 37.[1]

The Petition requests the Court to review and reverse the decision of the Tenth Circuit Court of Appeals holding that "sorting and crushing of rocks to provide structural support" for on-site construction qualifies as "mining." The Petition raises two questions for review and *Amici* particularly urge the Court to consider the second question concerning the proper application of the Indian canon of construction, which the Tenth Circuit used to "tilt [its] hand" toward a

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[1] Counsel of record for all parties received notice at least ten (10) days prior to the due date of the *Amici Curiae's* intention to file this brief. Counsel for the Petitioner consented to the filing of this brief. Because counsel for the Respondent did not consent, this brief is being filed with the accompanying motion. The United States did not respond to the request. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

construction more favorable to Osage Nation. The Indian canon of construction arises repeatedly in litigation with Indian tribes or members and the proper application of that canon should be clarified by this Court.

INTERESTS OF *AMICI CURIAE*

Osage County Farm Bureau, Inc., Oklahoma Farm Bureau Legal Foundation and the members they represent are affected by the decision below because their members live, own businesses and have invested in Osage County, Oklahoma. The Tenth Circuit's decision broadly defining the term "mining" has the potential to significantly impair the ability of surface owners to develop their property, to impair the value of their property, and to deny them the "right to manage, control, and dispose of [their] lands the same as any citizen of the United States." Such rights were granted to the individual members of the Osage tribe in the Osage Act, 34 Stat. 539 (1906). Osage Act, § 2 (Seventh). The farmers, ranchers, and other surface owners in Osage County, Oklahoma, are the successors-in-interest to the individual allottees, and their rights should be identical to the rights of the allottees. The Petitioners are lessees of the surface owners.

Anyone engaged in mining in Osage County is required to obtain a lease from the Osage Minerals Council that must be approved by the Bureau of Indian Affairs. 25 C.F.R. § 214.2. Mining without obtaining such a lease can subject the person to fines. 25 C.F.R. § 214.26. The regulations contain no obligation for the Osage Minerals Council to grant such a lease. Thus, the Osage Minerals Council can now arguably block any development of the surface estate by denying a lease if such activities could be construed

to involve minerals being "acted upon for the purpose of exploiting the minerals themselves."[2] Pet. App. 25a. Many activities could fall within such a broad definition.

First, the leasing of the surface estate to a wind company for the installation of a wind farm would clearly be affected.[3] Farmers and ranchers derive valuable income from leasing the surface estate to wind companies. If the current wind farm is expanded or a new wind farm is proposed, the inability to obtain a mineral lease could be fatal to the project. Even if a lease were granted, the royalties required to be paid to the Osage Minerals Council would directly reduce the value of the leasing rights of the farmers and ranchers. Thus, the definition of mining adopted by the Tenth Circuit directly impacts farmers and ranchers located in Osage County.

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[2] The Osage Nation has sought to block the installation of the wind farm entirely. The Osage Nation sought an injunction to prevent the wind farm project, but was not successful. *See Osage Nation ex rel. Osage Minerals Council v. Wind Capital Grp.*, LLC, No. 11-CV-643-GKF-PJC, 2011 WL 6371384, at *1 (N.D. Okla. Dec. 20, 2011). The United States then commenced this litigation for the benefit of the Osage Nation.

[3] Domestic wind-power capacity has tripled since 2008, and the United States has set a target for wind power to supply 35% of the country's electrical demand. *Wind Vision Report*, U.S. Department of Energy (March 12, 2015), available at https://www.energy.gov/sites/prod/files/WindVision_Report_final.pdf. "Congress has articulated the public policy that our nation should incorporate clean energy as a necessary part of America's future and it is essential to securing our nation's energy independence and decreasing green house emissions." *W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1103 (D. Nev.), *aff'd*, 443 F. App'x 278 (9th Cir. 2011). Accordingly, the frequency of the issues raised in this case will only increase.

Many other common activities could also fall within the scope of the definition of mining. The court acknowledged that "surface construction activities may often implicate and disrupt the mineral estate" and cited examples of building a basement or swimming pool. Pet. App. 25a. While the court attempted to discount that such activities constitute mining by noting that merely encountering or disrupting the mineral estate does not trigger the definition of mining, the court failed to advise how such activities would be different from the activities of Petitioners if the owners sorted and crushed the rock and used it as backfill around the basement or swimming pool. Other activities could include building a pond or lake where the removed rock was used to form the dam. Construction of a commercial cattle feedlot, equine facility or agritourism venue could fall within the scope of the definition of mining adopted by the court below. Any potential activity that involves moving a significant amount of the surface rock could be considered mining depending upon how the removed rock was subsequently handled. The Tenth Circuit sought to minimize the impact of its decision by noting the *de minimus* exception in 25 C.F.R. § 211.3 for 5,000 cubic yards of minerals per year. However, the surface owners' property rights should not vary by the size of the project nor should they be required to limit their development activities to less than 5,000 cubic yards per year.

The Tenth Circuit's holding that sorting and crushing of minerals for the purpose of backfilling and stabilization constitutes mining under 25 C.F.R. § 211.3 is not limited to Osage County, Oklahoma, and thus the Tenth Circuit's decision has broad application throughout all of Indian country. *Amici* also represent members who live, own businesses and have invested

in other areas of Oklahoma and across the nation that will be impacted by the Tenth Circuit's decision. Whenever a surface owner seeks to develop his surface estate where the minerals are owned by the United States in trust for the benefit of an Indian tribe or individual member, 25 C.F.R. § 211.1, the owner will have to determine whether such activities implicate the definition of mining and require a mining lease. Such owners will face the same issues and impact on their property rights as owners in Osage County. At a minimum, there is significant litigation risk that will impact the economics of the project.

Finally, *Amici* and their members often encounter or are likely to encounter the Indian canon of construction in litigation with Indian tribes or members. The Court should take this opportunity to correct and clarify when such canon should be applied. For several reasons, the canon simply never should have been applied in this case, or at a minimum, should have been analyzed against the backdrop of other applicable canons. First, when the Osage Act severed the mineral estate from the surface estate in 1906, the surface owners were individual members of the Osage tribe while the mineral estate was reserved for the tribe itself. The Indian canon should not be applied where "the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). Second, there was no ambiguity in the definition of the term mining, and where the language in the statute or regulation is not ambiguous, the Indian canon does not apply. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (2009). Further, the application of the Indian canon in this case raises potential constitutional concerns related to the surface

owners, and when there are "two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the [regulation]." *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). *Amici* are concerned that other courts might employ the reasoning of the Tenth Circuit in this case to misapply the Indian canon to other statutes or regulations. *Amici* have an interest in the Court clarifying when and under what circumstances the Indian canon should be applied.

The member organizations comprising *Amici* and the members they represent are:

Osage County Farm Bureau, Inc. Osage County Farm Bureau, Inc. is an independent, non-governmental, voluntary organization of farm and ranch families in Osage County, Oklahoma. Osage County Farm Bureau is a county affiliate of Oklahoma Farm Bureau, Inc. Osage County is the largest county in Oklahoma geographically and is the home of the Tallgrass Prairie Preserve. With its numerous cow and calf operations, ranchers in Osage county raise more cattle than any other county in Oklahoma.

Oklahoma Farm Bureau Legal Foundation. Oklahoma Farm Bureau Legal Foundation is a non-profit foundation incorporated in 2001 that supports the rights and freedoms of farmers and ranchers in Oklahoma by promoting individual liberties, private property rights, and free enterprise. The foundation's sole member is Oklahoma Farm Bureau, Inc., which is an independent, non-governmental, voluntary organization of farm and ranch families formed in 1942. Oklahoma Farm Bureau has approximately 72,720 member families representing agricultural producers

who grow a variety of crops and livestock. The member families represent every size of operation from small family farms to large commercial farms and ranches.

Arizona Farm Bureau Federation. Arizona Farm Bureau Federation represents approximately 2,500 farm and ranch families across the State of Arizona. Its members are involved in the entire spectrum of Arizona agriculture, including ranchers raising cattle on state and federal range lands, cotton and alfalfa farmers whose operations neighbor housing communities, dairy producers, and vegetable farmers. The organization focuses on advocacy, education, and outreach to maximize the capacity of its members and to educate the consumer about the importance of Arizona agriculture.

California Farm Bureau Federation. California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California. California Farm Bureau Federation is California's largest farm organization comprised of 53 county farm bureaus currently representing more than 40,000 agricultural, associate and collegiate members in 56 counties. The organization aims to improve the ability of individuals engaged in production agriculture to utilize California resources to produce food and fiber in the most profitable, efficient, and responsible manner. California Farm Bureau Federation actively participates in state and federal advocacy relating to the protection of private property rights on behalf of its members.

Colorado Farm Bureau. Colorado Farm Bureau is Colorado's largest agricultural organization representing more than 24,000 member families from

around the state. The diverse membership is a great representation of the success in stewardship, planning, and implementation that goes into providing for the continued use of Colorado's natural resources.

Idaho Farm Bureau Federation. Idaho Farm Bureau Federation is an independent, nongovernmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve education improvement, economic opportunity, and social advancement. Idaho Farm Bureau represents 78,136 member families.

The Kansas Farm Bureau. The Kansas Farm Bureau was formed in 1919 as a not-for-profit advocacy organization whose mission is to strengthen agriculture and the lives of Kansans through advocacy, education, and service. The Kansas Farm Bureau is a grassroots organization with more than 106,000 member families and has members in all 105 counties in Kansas. The organization represents producers across all sectors of Kansas agriculture.

Montana Farm Bureau Federation. Montana Farm Bureau Federation is an independent, nongovernmental, voluntary organization of farm and ranch families. Montana Farm Bureau Federation represents farming and ranching interests across the State of Montana and represents approximately 20,700 member families.

Nevada Farm Bureau Federation. Nevada Farm Bureau Federation is a statewide, general farm and ranch organization in Nevada representing over 18,000 member families. The organization supports a wide range of proactive member-driven policy goals to enhance and responsibly use natural resources, to

recognize private property rights and to advance a prosperous business climate for the benefit of agricultural operations and rural communities.

New Mexico Farm & Livestock Bureau. New Mexico Farm & Livestock Bureau is an independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing agricultural problems and formulating solutions to promote the well-being of agriculture in New Mexico. It is has approximately 19,000 members. New Mexico Farm & Livestock Bureau represents its members' interests on a variety of issues through lobbying campaigns, research, educational programs (both for its members and the general public), and litigation.

North Dakota Farm Bureau. North Dakota Farm Bureau is a general farm organization representing 27,000 farmers, ranchers and landowners throughout the state.

Oregon Farm Bureau Federation. Oregon Farm Bureau Federation is Oregon's largest grassroots agriculture association representing 65,000 farming and ranching families across the state. The organization's mission is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching and natural resources industry as a whole.

South Dakota Farm Bureau. South Dakota Farm Bureau is a grassroots general agriculture organization with nearly 16,000 member families across the state. Formed in 1917, South Dakota Farm Bureau represents farming and ranching interests by focusing on advocacy, education and policy development. The organization's vision is to create a robust agriculture industry in South Dakota, which contributes to a

strong economy, healthy environment, thriving communities and nutritious food. South Dakota Farm Bureau participates in state and federal policy and regulatory efforts relating to the protection of private property rights and enhancing its members' livelihoods.

Washington State Farm Bureau. Washington State Farm Bureau is a voluntary, grassroots, advocacy organization representing the social and economic interests of the farm and ranch families in Washington State. It includes more than 47,000 member families.

Wyoming Farm Bureau Federation. Wyoming Farm Bureau Federation is a general agriculture organization with more than 12,000 member families. Its members work together to develop agricultural resources, policy, programs, and services to enhance the rural lifestyle of Wyoming. Wyoming Farm Bureau Federation is organized, controlled, and financed by members who pay annual dues. The organization provides a means by which farmers and ranchers work together for the benefit of the agricultural industry.

ARGUMENT

The Tenth Circuit's decision broadly defining "mining" was directly based upon the Indian canon of construction that ambiguity in laws designed to favor Indians ought to be liberally construed in the Indians' favor. The court noted that canon and stated that it "tilts our hand" toward a construction more favorable to Osage Nation. Pet. App. 23a. Although the court noted that the construction urged by the Petitioners requiring commercialization of the minerals "might be reasonable," it "adopt[ed] the interpretation" that favored the Osage Nation. *Id*. Because the Tenth Circuit's decision was governed by reliance upon the Indian canon of construction, if the Court misapplied that canon, then the decision was wrong and should be reversed.

A. The Indian Canon Does Not Apply When Indian Interests Are On Both Sides.

The rights of the surface owners to the land in Osage County were established in 1906 by the Osage Act. Through that Act, the surface estate was severed from the mineral estate and was allotted to individual members of the Osage tribe. Osage Act § 2. Under the Osage Act, each surface owner "except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States." *Id*. § 2 (Seventh). The Osage Act further assured surface owners that they "shall have the right to use and to lease said lands for farming, grazing or any other purpose not otherwise specifically provided for herein; and said member shall have full control of the same." *Id.* § 7. With respect to the mineral estate, the Osage Act provided that the "oil, gas, coal or other minerals" were severed and reserved for the benefit of the Osage tribe and that "nothing

herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands." *Id.* § 2 (Seventh); § 3.

The Osage Act assured the surface estate owners that "except as herein provided," the surface owners had the right to manage, control and sell their lands "the same as any citizen of the United States." Osage Act § 2 (Seventh). The exception was that the Act did not "authorize the sale of the oil, gas, coal or other minerals." *Id.* That was the only restriction placed upon the allottees as surface owners concerning the mineral estate. The Act did not contain a restriction that the surface owners could not use the surface rocks for "digging, sorting, crushing, and backfilling" in connection with a development. Yet, the Tenth Circuit, through the improper use of the Indian canon of construction, has now imposed that restriction on the surface owners. If this issue (whether the surface owners' "digging, sorting, crushing, and backfilling" the rocks constitutes "exploitation of the minerals" reserved for the Osage tribe) had arisen in 1906, the Indian canon of construction would not have been applicable. Where "the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members," the Indian canon should not be applied. *Northern Cheyenne Tribe*, 425 U.S. at 655 n.7. The allottees, as surface owners, have subsequently sold and transferred their surface estate interests and the current surface owners are the direct successors to the original allottees. The Petitioners are the lessees of the current surface owners.

The time for determining when the Indian canon of construction should apply is when the rights of the parties vest, not when a subsequent regulation is adopted nor when the ownership interest may change.

See Preseault v. United States, 100 F.3d 1525, 1540 n.13 (Fed. Cir. 1996) ("Since [the property interests of the parties] were fixed at the time of their creation, the later statutes if applied to divest those interests would constitute a separate ground for finding a governmental taking."). If "any citizen of the United States" had the right to engage in the activities of Petitioners in 1906 without violating the reservation of the "other minerals," then the Osage allottees had that right by virtue of the Osage Act. The Osage Act specifically authorized the allottees to "dispose" of their interests, which necessarily included all of their rights, title and interests in the surface estate. The successors-in-interest to the allottees have the same rights as the allottees had in 1906. The Indian canon of construction should not have been applied by the Tenth Circuit.

B. The Tenth Circuit Wrongly Found an Ambiguity In the Regulation and Applied the Indian Canon.

Where the language in the statute or regulation is not ambiguous, the Indian canon concerning ambiguities does not apply. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 555 (1987); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist, ...").

25 C.F.R. § 211.3 contains a specific definition of the term "mining." While the definition is clear, the court found an ambiguity by isolating the sub-term "mineral development" within that definition. The common definition of mining requires the sale or commercialization of the minerals. "'Mining,' as generally

defined, is the process of extracting from the earth the rough ore or mineral; that is, the act or business of making mines or working them." 58 C.J.S. Mines and Minerals § 4 (March 2018 Update). Both the statute and regulations read as a whole clearly contemplate the sale or marketing of minerals. The Osage Act focused on the "sale" of the minerals by providing that the surface estate owners could not sell the minerals. Osage Act § 2 (Seventh). The Osage mining regulations provide for a royalty based upon "the value at the nearest shipping point of all ores, metals, or minerals *marketed*." 25 C.F.R. § 214.10 (emphasis added). The general Indian mining regulations also provide for a royalty based upon "the value of production produced and *sold* from the lease." 25 C.F.R. § 211.43 (emphasis added). A mineral lease continues only as long as the minerals are "produced in *paying quantities*." 25 C.F.R. § 211.27 (emphasis added). A mineral operator must exercise diligence in mining "while minerals production can be secured in *paying quantities*." 25. C.F.R. § 211.47 (emphasis added). Rather than accepting the commonly understood definition of mining and the definition contemplated by the applicable statute and regulations which requires the sale or marketing of the minerals, the court found an ambiguity because the sub-term "mineral development" was not separately defined.

The approach by the Tenth Circuit will allow a court to find an ambiguity if the regulation does not specifically define each word within the definition. It permits finding an ambiguity in almost every statute or regulation because there will almost always be a term or sub-term that is not separately defined. Such an approach invites arbitrariness. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-

engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so." *Johnson v. United States*, 135 S. Ct. 2551, 2561, 192 L. Ed. 2d 569 (2015) (citation omitted). Similarly, the phrase "mining" has a common-sense meaning requiring commercialization of the minerals through sale and marketing. The district court correctly analyzed the definition and held that it did not encompass actions of an entity "that incidentally encounters minerals in connection with surface construction activities." Pet. App. 37a-38a. Rather, "a commercial mineral development purpose" was required. *Id*. 38a.

Without the finding of an ambiguity in the regulation defining "mining," the court had no basis for considering the Indian canon of construction. Because the finding of an ambiguity was wrong, the application of the Indian canon was wrong and the decision below should be reversed.

C. The Court Should Clarify When the Indian Canon of Construction Should Be Applied.

While the Indian canon of construction concerning ambiguities has a long history in the United States, the canon originated to address statutes and treaties between the United States and Indian tribes at a time when tribes were dependent on the Unites States.

> But in the government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been

> recognized, without exception, for more than a hundred years. . .

Choate v. Trapp, 224 U.S. 665, 675 (1912). A "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

The circumstances under which the courts originally developed and applied the canon have changed significantly. Individual Indians are citizens of the United States and of the state where they reside with the same rights, privileges, and responsibilities as all citizens. Tribes are no longer weak and defenseless or dependent upon the protection and good faith of the government. Yet, the canon continues to be expanded to apply in more circumstances. While courts historically applied the canon only in relations between the government and the tribes, here, the canon has been expanded and applied in litigation between Indian tribes or tribal members and non-Indians. When the canon is applied in the private context, the result is that non-Indians are subjected to a different set of rules than if the dispute involved all non-Indian parties. In private matters, subjecting non-Indians to different canons of construction in favor of tribes implicates constitutional issues, particularly when the decision impairs vested property rights, as was the case here.

As a result of the application of the Indian canon, a surface owner or operator is now arguably forced to procure a lease from a tribe if the development activities involve the digging, sorting, crushing, and backfilling of rocks. The Tenth Circuit's misapplication of the Indian canon in this case implicates at least two constitutional issues. The Osage Act gave the

surface owners the right to use their property to the same extent as any citizen of the United States, subject only to the exception that the Act did not authorize the sale of the minerals. Through the application of the Indian canon, those vested property rights are being impaired. Since the property interests were fixed at the time of their creation, the later application of statutes or regulations to divest those interests constitutes grounds for finding a governmental taking. *Preseault*, 100 F.3d at 1540 n.13. Further, the interpretation of the term mining potentially renders 25 C.F.R. §§ 211.3 and 214.7 an "arbitrary and unreasonable" deprivation of property without due process. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 431 (1935) ("arbitrary and unreasonable" deprivation of property without due process for Tennessee to impose one-half of the cost of an underpass to a private railway company).

Even assuming that the Indian canon could have been applied here, under the bedrock canon of constitutional avoidance, when there are "two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the [regulation]." *Rust*, 500 U.S. at 190-91. Indian "canons are often countered . . . by some maxim pointing in a different direction." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). In *Chickasaw Nation*, this Court held that the Indian canon was "offset" by applying the canon that requires the Court to give effect to each word of a statute, and the canon that warns against interpreting statutes as providing tax exemptions. *Id*. at 94-95. Further, at issue in this case is a regulation and not a treaty. One cannot "say that the pro-Indian canon is inevitably stronger [than other canons of construction]—particularly where the

interpretation of a congressional statute rather than an Indian treaty is at issue."). *Id*. at 95. The Court should grant certiorari to clarify when the Indian canon should apply.

CONCLUSION

Amici urge the Court to accept *certiorari* to consider the second question posed in the Petition. The Tenth Circuit wrongly applied the Indian canon of construction in this case. The Court should reverse the Tenth Circuit's opinion and clarify when and under what circumstances the Indian canon should be applied, particularly when the litigation is between Indian tribes or members and non-Indians.

Respectfully submitted,

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