

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

EASTERN NAVAJO DINE AGAINST URANIUM	)	
MINING, SOUTHWEST RESEARCH CENTER,	)	
MARILYN MORRIS, GRACE SAM,	)	
Petitioners,	)	
v.	)	No. 07-9505
	)	
U.S. NUCLEAR REGULATORY COMMISSION	)	
and the UNITED STATES OF AMERICA,	)	
Respondents, and	)	
HYDRO RESOURCES, INC.,	)	
Intervenor.	)	
	)	

**FEDERAL RESPONDENTS' OPPOSITION  
TO MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*  
BY THE NAVAJO NATION**

Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure and Rules 27 and 29 of this Court, the Federal Respondents oppose the Motion for Leave to File as *Amicus Curiae* by the Navajo Nation to the extent that the tendered brief attempts to raise issues in violation of this Court's stated guidelines for an *amicus curiae* brief. In support of that position, the Federal Respondents state as follows:

1. This Court has clearly stated that while it may have the discretion to address issues raised only in *amicus* briefs, it will "exercise that discretion only in exceptional circumstances." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) (citations omitted). "Our review of the relevant case law

demonstrates that it is truly the exceptional case when an appellate court will reach out to decide issues advanced not by the parties but instead by *amicus*.” *Id.* (citations omitted). To do otherwise, would allow “an attempt by *amicus* to frame the issues on appeal, a prerogative more appropriately restricted to the litigants.” *Id.* at 1403. This Court has stated that it will not consider issues raised only by an *amicus* if “the parties did not adopt them by reference, they do not involve jurisdictional questions or touch on issues of federalism or comity we might consider *sua sponte*[ ] . . .” *Wyoming Farm Bureau Federation v. Babbitt* 199 F.3d 1224, 1230, n.2 (10th Cir. 2000). *Accord: Southwestern Growth Alliance v. EPA*, 121 F.3d 106, 121 (3d Cir. 1997) (stating the “general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge upon those issues.”) (citations omitted).

2. In this case, the tendered Navajo Nation *amicus* brief presents issues that are not raised by the Petitioners in their opening brief. Specifically, the Navajo Nation *amicus* raises three “arguments”: (1) a recitation of the history of uranium mining in the Church Rock area, implying that the NRC has authority over that mining and stating – without any citation to authority or argument – that by issuing the license challenged in this case “the NRC fails to meet the mandate that Congress has assigned to it – namely, to protect the public health and safety[.]”

Brief at 9; (2) a discussion of the possible impacts of the NRC decisions (a) to consider the waste from previous mining activities as background radiation and (b) to require a surety for the flushing of the aquifer with nine pore volumes of water when decommissioning the mine, Brief at 9-13; and (3) an argument that the NRC “violated its trust responsibility to the Navajo Nation,” Brief at 13, because it did not engage in appropriate consultation with the Navajo Tribe, Brief at 13-16.

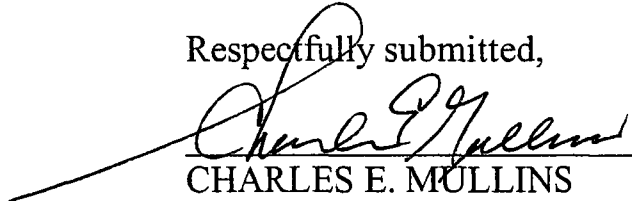
3. The Federal Respondents agree that the Petitioners raised the basic issues addressed in the second argument; thus, we will address those arguments in our brief. But as explained below, the Navajo Nation’s other arguments are impermissible.

4. The Petitioners did not raise the issues addressed by the Navajo Nation in Arguments 1 and 3. Thus, the Navajo Nation should not be heard to raise those issues. *Tyler v. City of Manhattan, supra*; *Wyoming Farm Bureau Federation v. Babbitt, supra*.

## CONCLUSION

For the foregoing reasons, this Court should not grant the Motion for Leave to File an *amicus* brief by the Navajo Nation. In the alternative, this Court should strike the first and third arguments in the Navajo Nation brief because they do not address matters raised by the Petitioners. If this Court should exercise its discretion to accept the *amicus* as tendered, this Court should grant the Respondents an additional 3,000 words to respond to the new and unanticipated arguments raised by the Navajo Nation.

Respectfully submitted,



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Dated: July 10, 2007

## CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this day I filed the Federal Respondents' Unopposed Motion for Extension of Time by sending the original and four copies to the Court and by serving two copies on the counsel listed below:

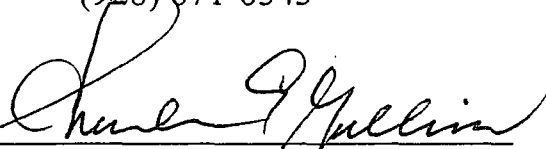
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