

Docket Nos. 13-2446 & 13-2451

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN THORPE, RICHARD THORPE,
WILLIAM THORPE, and the SAC and
FOX NATION OF OKLAHOMA
Plaintiffs-Appellees/Cross-Appellants

v.

BOROUGH OF JIM THORPE, MICHAEL SOFRANKO, RONALD CONFER,
JOHN MCGUIRE, JOSEPH MARZEN, W. TODD MASON, JEREMY MELBER,
JUSTIN YAICH, JOSEPH KREBS, GREG STRUBINGER, KYLE SHECKLER,
and JOANNE KLITSCH:
Defendants-Appellants/Cross-Appellees

*On Appeal from an Order Entered by the Honorable A. Richard Caputo, United
States District Judge,
Middle District of Pennsylvania, No. 3: 10-cv 1317-ARC*

**BOROUGH OF JIM THORPE'S RESPONSE TO THE NATIONAL
CONGRESS OF AMERICAN INDIANS MOTION TO FILE AN AMICUS
CURIAE BRIEF**

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The Borough of Jim Thorpe hereby objects to the motion by the National Congress of American Indians, hereinafter the “NCAI,” to file an *Amicus Curiae* brief pursuant to Federal Rules of Appellate Procedure 27(a)(3), 29(e) and 35(e), and Third Circuit Local Rule 29.1.

STANDING

Pursuant to the Federal Rules Appellate Procedure, “any party may file a response to a motion.”¹ As the lead defendant and appellant the Borough of Jim Thorpe has standing to file a response to NCAI’s Motion.

RELIEF SOUGHT AND GROUNDS

The Borough of Jim Thorpe respectfully request that the court deny the NCAI’s Motion for Leave to File and *Amicus Curiae* Brief as it is premature with respect to Local Appellate Rule 29.1 and currently precluded under Federal Rule of Appellate Procedure 35(e).

LEGAL ARGUMENT

The Federal Rules of Appellate Procedure “govern procedure in the United States courts of appeals.”² These rules include the method for petitioning the Court

¹ Fed. R. App. Pro. 27(a)(3).

² Fed. R. App. Pro. 1(a)(2).

for *En Banc* Hearings and Rehearings.³ The rules plainly state that “no response may be filed to a petition for *En Banc* consideration unless the court orders a response.”⁴ NACI’s Motion for leave to file an *Amicus Curiae* Brief is a response in support of the Plaintiff’s/Appellee’s petition. The rules do not appear to make any distinction between responses in support of the petition from responses in opposition of the petition. The Court has yet to order any response to the petition. As such, NCAI’s Motion and *Amicus Curaie* Brief violate the Federal Rules of Appellate Procedure.

It is true that generally *Amicus Curiae* Briefs must be filed not later than seven days after the principal brief of the party is filed.⁵ However, Federal Rule of Appellate Procedure 29(e) also says that “a court may grant leave for later filing, specifying the time within which an opposing party may answer.”⁶ Local Rule 29.1 appears to address this procedural paradox stating that “in a case ordered for rehearing before the court en banc or before the original panel, if the court permits the parties to file additional briefs, any amicus curiae must file its brief in accordance with Rule 29(e)

³ Fed. R. App. Pro. 35

⁴ Fed. R. App. Pro. 35(e).

⁵ Fed. R. App. Pro. 27(a)(3).

⁶ *Id.*

of the Federal Rules of Appellate Procedure.”⁷ This is not the situation in the current case as no rehearing has been scheduled. The Local Rules go on to say that “in a case ordered for rehearing in which no additional briefing is directed, unless the court directs otherwise, any new amicus must file a brief within 28 days after the date of the order granting rehearing.” As such, if this Court decides to have a rehearing and does not direct specific briefing schedules, then the NCAI will have 28 days from that order to file their brief.

Finally, it is the Boroughs position that it would be fundamentally unfair for the opposing party to garner a collection of support for its position while the Borough, who is following procedural rules, is forced to sit by idly. This gives the blatant appearance of a one sided argument. Furthermore, it is the type of unfairness and balance tipping that Federal Rules in general try to avoid.⁸ As it stands the NCAI is precluded from filing their *Amicus Brief* under rule Federal Rule of Appellate Procedure 35(e) and its filing is premature with respect to Third Circuit Local Rule 29.1.

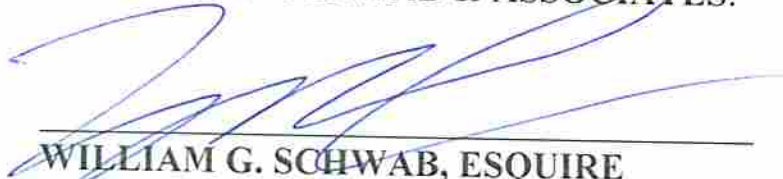
⁷ 3d Cir. L.A.R. 29.1 (2008).

⁸ See Fed. R. Civ. Pro. 1 (The rules “should be construed ... to secure the just ... determination of every action and proceeding); Fed. R. Evid. 102 (These rules should be construed so an to administer every proceeding fairly).

CONCLUSION

For the foregoing reasons, the Borough of Jim Thorpe respectfully requests that this Court deny the NCAI's Motion for Leave to File an *Amicus Curaie* Brief.

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SOFRANKO, RONALD CONFER, JOHN	:	
MCGUIRE, JOSEPH MARZEN, W. TODD:	:	
MASON, JEREMY MELBER, JUSTIN	:	
YAICH, JOSEPH KREBS, GREG	:	
STRUBINGER, KYLE SHECKLER, and	:	
JOANNE KLITSCH	:	
Defendants-Appellants/	:	
Cross-Appellees	:	

CERTIFICATE OF SERVICE

I, William G. Schwab, hereby certify that on December 17, 2014, I served a true and correct copy of the Borough of Jim Thorpe's Response to the National Congress of American Indians Motion to File an Amicus Curiae Brief and this Certificate of Service, by electronic service pursuant to the ECF system which are the last known addresses:

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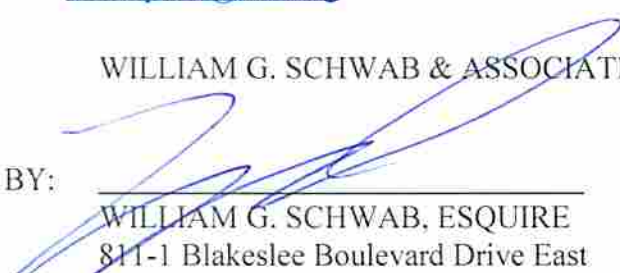
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