No. _____

In The
Supreme Court of the United States

PUBLIC SERVICE COMPANY OF NEW MEXICO,
a New Mexico Corporation,
***Petitioner*,**

v.

LORRAINE BARBOAN, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A common feature in the Eighth, Ninth and Tenth Circuits is "allotment land." This land was once part of an Indian reservation but was carved out and "allotted" to individual members of the tribe as their own property, held in trust by the United States. In 1901, Congress enacted 25 U.S.C. § 357, which allows States and state-authorized public utilities to condemn rights-of-way across allotment land for any public purpose, while paying fair market value to the allotment holders. The Tenth Circuit held that, when an Indian tribe acquires *any* interest in a parcel of allotment land – no matter how small that interest – the statute no longer applies and no part of the parcel may be condemned for any public purpose. The Questions Presented by the Tenth Circuit's decision are:

1. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which an Indian tribe has a fractional beneficial interest, especially where (a) the the tribe holds less than a majority interest, (b) the purpose of condemnation is to maintain a long-standing right-of-way for a public utility, and (c) the statute was not "passed for the benefit of dependent Indian tribes." *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918)?

2. If 25 U.S.C. § 357 authorizes such a condemnation action, may the action move forward if the Indian tribe invokes sovereign immunity and cannot be joined as a party to the action?

LIST OF PARTIES

The parties to the proceeding below were as follows:

Petitioner Public Service Company of New Mexico was the Appellant in the court of appeals.

Respondents were Appellees in the court of appeals. They are:

Lorraine J. Barboan

Laura H. Chaco

Benjamin A. House

Mary R. House

Annie H. Sorrell

Dorothy W. House

Leonard Willie

Irene Willie

Charley J. Johnson

Elouise J. Smith

Shawn Stevens

The Navajo Nation

The United States of America

Twenty-two individuals named as defendants in the district court were also named in the notice of appeal to the Tenth Circuit; however, only the eleven listed here have any interest in the two allotments of land that were the subject of that appeal. The other individual defendants hold interests in *other* allotments of land and did not participate in the appeal below. *See* Br. of Navajo Nation and Individual Allottees, at 1-2, n. 1, No. 16-2050 (filed Oct. 21, 2016).

CORPORATE DISCLOSURE STATEMENT

Public Service Company of New Mexico is a New Mexico corporation. PNM Resources, Inc., its parent corporation, is a publicly-traded New Mexico corporation. PNM Resources, Inc. owns 100 percent of the common stock of Public Service Company of New Mexico.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Public Service Company of New Mexico ("PNM") petitions the Court for a writ of *certiorari* to review a judgment of the U. S. Court of Appeals for the Tenth Circuit. At issue is a decision that, in effect, partially repeals a one hundred-year old federal eminent domain statute that allows utilities to acquire rights-of-way across "allotment land" when needed for a public purpose.

Under the Tenth Circuit's ruling, if an Indian tribe acquires *any interest* in a parcel of allotment land – no matter how minute the interest and no matter when acquired – that parcel is no longer subject to the federal statute, even where condemnation is needed to maintain a long-standing right-of-way critical to the operations of a public utility.

OPINIONS BELOW

The Tenth Circuit's opinion and order, dated May 26, 2017, are reported at 857 F.3d 1101, and reproduced in this petition's appendix at App. 1a.

The Tenth Circuit's order, dated March 31, 2016, granting leave for an interlocutory appeal, is unreported but reproduced at App. 32a.

The district court's opinion and order, dated March 2, 2016, expanding on its previous dismissal of PNM's condemnation action and certifying four questions for interlocutory appeal, is reported at 167 F. Supp. 3d 1248 and reproduced at App. 38a.

The district court's opinion and order, dated December 1, 2015, dismissing PNM's condemnation

action against two parcels in which the Navajo Nation holds an interest, are reported at 155 F. Supp. 3d 1151 and reproduced at App. 86a.

JURISDICTION

The Tenth Circuit issued its decision on May 26, 2017, and denied a timely petition for *en banc* review on July 21, 2017. On September 15, 2017, Justice Sotomayor extended the time for filing this petition to November 20, 2017. *See* No. 17A289. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Enacted in 1901, 25 U.S.C. § 357 states:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

STATEMENT

Overview

This case arises out of efforts by PNM, a public utility, to renew its right-of-way for a major high-voltage power transmission line which, for over 50 years, has carried electricity across a 60-mile stretch of northwestern New Mexico. The right-of-way crosses 57 parcels of "lands allotted in severalty to Indians," a category of property that Congress subjected to condemnation actions over a century ago when it enacted § 357. PNM obtained the

consents necessary to renew the right-of-way across 52 parcels, thus making condemnation there unnecessary. For the remaining five parcels, consents once given were revoked. Thus, PNM invoked § 357 in order to maintain its 50-foot wide right-of-way across those five parcels, following the same path used for its transmission line since 1960.

An issue arose because the Navajo Nation acquired small fractional interests in two of the five parcels. The district court ruled that, because fractional interests were now in tribal hands, a right-of-way across those two parcels could not be acquired by condemnation. The Tenth Circuit agreed.

As a result, PNM's long-established transmission line is in jeopardy of being stranded. The utility soon could be forced to abandon the current line and find a new route, at great expense, *if* one can be found. The expense of re-routing ultimately would be borne by PNM's customers and, if no alternative route is available, the burden would fall particularly hard on those families along the current route who would lose access to electricity. Moreover, as this petition will explain, the effects of the Tenth Circuit decision reach well beyond the current case and cumulatively pose a risk of substantial harm to the public interest nationwide.

Background

Beginning in the l800's and continuing until 1934, federal policy called for moving land away from tribal reservations and into the hands of individual Indians through "allotments." The land thus transferred ceased to be part of a reservation

and became the property of individual Indians, who had the right to dispose of their allotments by sale, lease, will or intestate succession. The original idea was to replicate the fee ownership system that has traditionally characterized American property law. *See generally* App. 8a.

Congress soon modified this system in order to protect new Indian owners from exploitation. Under the modified system, the United States held legal title to allotment lands, in trust, for the benefit of allottees. Initially, the trust period lasted 25 years, after which the individual owner acquired legal title. Later, in 1934, when the creation of new allotments ended, Congress indefinitely extended the trusteeship for allotment lands still held in trust. App. 11a.

Even with this modified system, "[t]he land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. The virtual fee is in the allottee, with certain restrictions on the right of alienation." *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 617 (9th Cir. 1959) (same).[1]

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[1] Notwithstanding these holdings by the Eighth and Ninth Circuits, there is a complex array of federal statutes affecting various Indian reservations; and, for purposes of federal or tribal jurisdiction, some allotment lands may still be treated as part of the reservation from which they were drawn. Even so, no party in this case has asserted that the subject allotments are within the exterior boundaries of the Navajo Reservation, and in any event § 357 applies broadly to all allotment lands without regard to whether they may be within or without the exterior boundaries of an Indian reservation.

Today, after generations of being repeatedly handed down to multiple descendants, many tracts of allotment land are held by multiple owners, each of whom holds a small beneficial interest, with the United States holding legal title as trustee. App. 9a. Individual owners are restricted in their ability to transfer their interests, but they can make transfers (in whole or in part) to an Indian tribe. 25 U.S.C. § 2212.

The Allotment Lands at Issue

For over 50 years, PNM has operated its "AY line," a 60-mile, high-voltage electric transmission line that uses a right-of-way, granted by the Bureau of Indian Affairs ("BIA") in 1960, authorizing the line to cross 57 parcels of allotment land. App. 12a-13a. The line is critically important, connecting PNM's Ambrosia substation near Grants to its Ya-Ta-Hey substation near Gallup (hence, the name "AY line"). In addition to serving a large population directly, including many members of the Navajo Nation, the AY line is part of the Western Interconnection and, in turn, the national power grid. *See infra* at 17-19. When PNM filed its condemnation action, the Navajo Nation held fractional interests in two parcels of allotment land crossed by the AY line, including a 13.6 percent interest in one 160-acre parcel, acquired in 2006, and a 0.14 percent interest in another 160-acre parcel, acquired in 2009 (the "Two Allotments"). App. 12a. Thus, the Navajo Nation acquired its fractional interests subject to the original BIA-granted easement and not long before 2010, when the easement needed to be renewed.

The BIA has authority to renew rights-of-way over allotment land, if the necessary landowner consents are obtained.[2] PNM acquired the necessary consents for all 57 parcels (for agreed compensation); however, after four years of BIA delay in completing the renewals, consents once given were revoked on five parcels – including two where the Navajo Nation acquired a share – leaving PNM without the needed majority. As a result, the BIA could not approve PNM's renewal application on those five parcels. App. 14a.

Even so, federal law allows PNM to acquire rights-of-way over allotment land through eminent domain.[3] Section 357 authorizes condemnation of allotment land "for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned." Under New Mexico law, PNM is authorized to condemn land owned in fee in order to construct and operate power transmission lines. Thus, PNM is likewise authorized by § 357 to condemn a right-of-way over allotment lands. PNM must pay fair market value for the easement, and the payment goes to the beneficial owners of the land, not to the United States as trustee.

Seeking to preserve its right-of-way and invoking § 357, PNM filed a condemnation action in

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[2] With certain exceptions, individual owners representing a majority of the fractional interests of a parcel must give consent. In addition, where the easement is obtained through the BIA, the tribe must consent if it holds an interest in the parcel. 25 U.S.C. § 324, 25 C.F.R. § 169.107(a).

[3] *See Yellowfish v. Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982) ("[C]ondemnation of allotted lands may proceed under section 357 without the Secretary's consent").

New Mexico federal district court in June 2015. App. 14a. The defendants included the acreage where the right-of-way would run ("Approximately 15.49 Acres of Land in McKinley County") and all parties holding any interest in that acreage, including the United States, as trustee, and the Navajo Nation. *Id.*

The district court issued two rulings pertinent to this appeal. First, in December 2015, the district court concluded that § 357 does not authorize condemnation of allotment land in which a tribe has acquired any fractional interest. Alternatively, the court concluded that the Navajo Nation, as partial owner of the Two Allotments, is an indispensable party, but cannot be joined due to sovereign immunity. Citing Fed. R. Civ. P. 19(b), the district court concluded that, "in equity and good conscience," the claims against the Two Allotments should be dismissed. App. 15a, n.1.

PNM sought reconsideration, asking the district court to change its decision. In the alternative, PNM asked the court to certify the case for interlocutory appeal to the Tenth Circuit. In response, the district court declined to change its decision, but granted the motion to certify in March 2017. App. 15a. Elaborating on its previous ruling, the district court rejected the alternative idea that a parcel of allotment land loses its condemnable status only if the tribe acquires a *majority* interest in the parcel. *Id*. The district court also said that "even if the Two Allotments were condemnable under § 357, [the district court] would dismiss this action against the [Navajo] Nation because it is an indispensable party that cannot be joined due to sovereign

immunity. Thus, the outcome would be the same." App. 58a-59a.

The district court concluded, however, that "an interlocutory appeal will materially advance the ultimate termination of this proceeding," 28 U.S.C. § 1292(b), and certified four questions to the Tenth Circuit:

> **I.** Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the parcel?
>
> **II.** Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?
>
> **III.** Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?
>
> **IV.** If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

App. 82a-83a.

PNM's request for interlocutory appeal was unopposed, and the Tenth Circuit granted the request. App. 144a-146a. But, the panel that actually heard the case (a different panel from the one granting the appeal) reached only the first question and affirmed the district court's decision: "[B]ecause the tribe owns an interest in the disputed parcels, § 357's '[l]ands allotted in severalty to Indians' prerequisite is inapplicable and so the law gives PNM no authority to condemn. And that deprives us of federal jurisdiction under 28 U.S.C. § 1331." App. 26a.[4]

Denying PNM's petition for *en banc* review and its subsequent motion to stay the mandate, App. 163a, 142a, the Tenth Circuit remanded the case to the district court, which declined PNM's request for a stay. PNM proceeded with condemnation of the three remaining parcels (the parcels that were not at issue in the interlocutory appeal). Recently, however, PNM learned from BIA land records that, while the case was before the Tenth Circuit, the Navajo Nation acquired fractional interests in two of those three remaining parcels, further illustrating

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[4] In the Tenth Circuit, the United States supported the Navajo Nation on the first three questions presented, including its narrow view of § 357. But, on the fourth question, the United States agreed with PNM that, if § 357 authorizes condemnation of a parcel, then "[that] condemnation action can proceed in the absence of an Indian tribe that holds an undivided interest in [that] parcel." Br. of U.S. at 42, No. 16-2050 (filed Sept. 30, 2016). Even so, the Tenth Circuit indicated that, if it had reached the other questions, it would have ruled against PNM. *See* App.17a, n.2. Given this predisposition, the ultimate resolution of this case would be expedited by granting *certiorari* on both questions presented by this petition.

the problems created by the decision below.[5] In addition, PNM is facing trespass claims, based on the presence of its transmission lines on parcels where its right-of-way has expired. *See* Compl., *Barboan v. Pub. Serv. Co. of N.M.*, No. 1:15cv826 (filed Sept. 18, 2015); App. 151a (order consolidating condemnation and trespass cases).

REASONS FOR GRANTING THE PETITION

Summary

This case lies at the intersection of Indian affairs and the larger public interest, a consideration the Court has found to merit *certiorari*. *See, e.g., United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209 (1943) (dispute involving allotment land and utility right-of-way). *Certiorari* is warranted here. The Tenth Circuit decision is not only incorrect, it poses a risk of substantial damage to the public interest. The decision also continues the disarray among the circuits over the proper formulation of the "Indian canon" of statutory construction.

In addition to the PNM right-of-way at issue here, there are other long-established rights-of-way that will soon need renewal, and those rights-of-way are now in jeopardy, along with the power transmission lines they accommodate. The problem will affect power companies across the Tenth Circuit.

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[5] PNM, the United States, and the individual defendants called this development to the district court's attention in a joint motion to stay filed on October 23, 2017. App. 165a; *Barboan v. Pub. Serv. Co. of N.M.*, No-1:15cv826, Dkt. No. 149. The Court may take judicial notice of these government records. *Id.* Ex. A; Fed. R. Evid. 201(b)(2).

Indeed, given the national structure of the power grid, the cumulative impact could be felt far more broadly. And, it is not just power companies that sometimes need eminent domain to cross allotment lands. Other critical infrastructure, such as gas pipelines, oil pipelines, water pipelines, roads and bridges may depend on § 357 as well. The decision below largely nullifies that statute and creates a risk of significant harm to interstate commerce.

The decision below is simply wrong. In 1901, when Congress made allotment lands subject to condemnation for "any public purpose," it did not create an exception to its public purpose mandate where an Indian tribe acquires some interest in that land. Instead, Congress intended for the land's amenability to condemnation to be an attribute of the *land* and to run with the land, regardless of any change in ownership. This common-sense conclusion is supported by the text of § 357, which provides for no exceptions based on who is *holding* the allotment land at the time of condemnation, and by the well-recognized principle that condemnation is an *in rem* proceeding.

The Tenth Circuit erred by (i) taking to an extreme an already-erroneous decision by the Eighth Circuit limiting the use of § 357, (ii) applying BIA regulations that the BIA says do *not* apply, and (iii) misusing the "Indian canon" of statutory construction, again splitting from the circuits that limit the canon to statutes passed for the *benefit* of Indian tribes. The Tenth Circuit also insisted upon a false dichotomy, rejecting any resolution that would accommodate any legitimate tribal interests

while still allowing vital rights-of-way to be acquired and preserved.

In sum, with respect to § 357, this case involves "an important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c). With respect to the Indian canon of construction, this case involves a split among the circuits. S. Ct. R. 10(a). The case merits this Court's review.

A. Reasons for Granting the Petition on the First Question

1. The Tenth Circuit's Decision Poses a Risk of Harm to the National Power Grid and Interstate Commerce.

To demonstrate the importance of this case, PNM will first explain, on a granular level, how the Tenth Circuit's decision undermines eminent domain for public utilities. Second, PNM will show that the problems caused by the decision will soon increase. Third, PNM will demonstrate that, because the power grid is national in scope, any adverse impact on electric utilities in one area is a potential problem for all. Fourth, PNM will address the impact on interstate commerce in areas other than electric power transmission. Finally, PNM will discuss why this case is an appropriate vehicle to address the scope of § 357.

a. The Decision Below Largely Eliminates Congressionally-Authorized Exercise of Eminent Domain of Allotment Lands.

Under the decision below, if a tribe acquires *any* interest in a parcel of allotment land – no matter how minute and no matter when acquired – that parcel is no longer subject to condemnation. *See* App. 14a-15a ("Tribal interest in the land ends allotted-land status."). Here is what the decision means in practical terms:

- In any action under § 357, any fractional owner can now prevent the preservation of *existing* rights-of-way for critical infrastructure by raising as a defense the tribe's fractional ownership. (If no such tribal ownership exists, an individual owner can readily achieve the same objective by conveying some fractional interest to the tribe.) This will strand existing facilities, making them unusable and spawning trespass claims. Utilities will be required to seek new routes and build new facilities at great expense. And, there is no assurance that new routes can be found, especially given the prevalence of allotment land in areas such as northwestern New Mexico, thus jeopardizing the continued delivery of electricity to consumers.

- Any fractional owner can likewise block the acquisition of *new* rights-of-way.

- Without condemnation – and the judicial process to oversee it – there are no checks and balances on the amount that could be demanded for a right-of-way. Where they do not choose to exclude the infrastructure completely, fractional

owners of allotment land will be able to leverage enormous payment well above fair market value, thus impacting consumers.

- Under the decision below, as soon as the tribe acquires any interest in the land, § 357 becomes inapplicable and there is no federal jurisdiction for a condemnation action. Under that logic, condemnation of individual interests is foreclosed even if no one objects to the condemnation action.

This is not just a hypothetical list of problems. The problems have already begun. When PNM appealed to the Tenth Circuit, the Navajo Nation held fractional interests in only two of the five parcels PNM was seeking to condemn. But, while the case was pending there, the Navajo Nation acquired fractional interests in two more parcels. App. 166a-167a. Thus, under the decision below, four allotments crossed by the transmission line are now immune to condemnation; and PNM is facing trespass claims based on the presence of its transmission lines on parcels where its right-of-way has expired. App. 151a.

Similarly, another district court in the Tenth Circuit has ordered a pipeline company to dig up and remove a gas transmission line that has served the public for over thirty years. *See Davilla v. Enable Midstream Partners*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017). In *Davilla,* the gas company operated under a right-of-way obtained through the BIA. When the company sought to preserve the right-of-way by condemnation, it was blocked by individual Kiowa Indian allottees, who noted that, a few years

earlier, the Kiowa Tribe acquired a small fractional interest (1.1%) in their parcel. Using the same theory later followed by the Tenth Circuit, the district court held that this tribal acquisition prevented condemnation under § 357, and it ordered the pipeline removed. *Id.* at 1235, 1239.[6]

b. The Risks of Harm Will Increase.

The impact of the decision below is amplified by two trends, which threaten to converge in a way that could endanger the reliability of many transmission lines and other critical infrastructure across the Tenth Circuit.

First, the number of parcels of allotment land where an Indian tribe holds a fractional interest is likely to increase dramatically. Some of that increase will result from the accelerated use of customary transfer processes, as individual allottees seek to obtain the advantages of the Tenth Circuit's ruling. *See* 25 U.S.C. § 2212 (allowing tribe to obtain interest by purchase or gift). By giving the tribe a tiny fractional interest – an interest so small that it will never cause any diminution in the donor's enjoyment of the land – the donor can immunize the parcel against condemnation and force the utility off the land or exact a price far above fair market value.

In addition, the federal government has decided to spend $1.9 billion through 2022 to purchase fractional interests from individual

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[6] Enable has appealed. *See Davilla*, No. CIV-15-1262 (W.D. Okla.) at Dkt. No. 60 (filed Apr. 25, 2017). The district court later delayed removal of the pipeline pending settlement discussions. *See id.* at Dkt. No. 78 (entered Sept. 5, 2017).

allottees and transfer those interests to Indian tribes.[7] The BIA reports it has already committed over $1.25 billion to acquire the "equivalent" of 2,152,755 acres, which will be transferred to 48 tribes in at least thirteen States.[8] This acquisition is the "equivalent" of over 3,363 square miles, an area larger than Delaware and Rhode Island combined.

Those figures understate the impact. In determining "equivalent" acreage, the BIA only counts the fractional interests purchased. For example, if the BIA purchased a ten percent interest in a 60-acre parcel, it counts as the "equivalent" of six acres.[9] Under the Tenth Circuit ruling, however, the tribal acquisition of *any* fractional interest prevents the exercise of eminent domain over *any part* of the parcel. Thus, while no exact figures are available, the total acreage that would be rendered immune to condemnation by the Land Buy-Back Program, using the Tenth Circuit's rationale, is much higher than the 2.1 million "equivalent acres" in the BIA report. When the program ends in 2022, and the remaining millions are spent, the land

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[7] *See* U.S. Department of the Interior, *Land Buy-Back Program for Tribal Nations,* https://www.doi.gov/buybackprogram.

[8] *See* U.S. Department of the Interior, *Land Buy-Back Program for Tribal Nations Cumulative Sales through November 9, 2017*, https://www.doi.gov/sites/doi.gov/files/uploads/table_lbbtn_transactions_through_november_9_2017.pdf.

[9] *See* U.S. Dep't. of Interior, *Land Buy-Back Program for Tribal Nations,* Frequently Asked Questions ("What does *equivalent acres purchased* mean?"), https://www.doi.gov/buybackprogram/FAQ.

rendered immune to condemnation will be even greater than it is now.

Second, the near future will likely see an increased need for condemnation, not only because of the expanding need for power lines, pipelines and highways, but also because many *existing* lines cross allotment lands under rights-of-way that were granted by the BIA for a term of years. As those rights-of-way expire, they will need to be renewed, but public utilities will increasingly encounter the same problems encountered here by PNM and by Enable in *Davilla*. *See supra* at 14-15. This is no small matter.

In sum, the increasing *need* for condemnation to maintain and extend critical infrastructure will converge with the increasing *unavailability* of condemnation, and thus create a major problem for utilities and the public. It is a problem that a proper interpretation of § 357 can prevent.

c. The Power Grid Is National in Scope.

Our nation is served by a vast interstate power grid, rather than by a collection of isolated grids serving local areas. Gone are the days when "state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in confined geographic areas." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016) ("*EPSA*"). Today "[t]hat is no longer so." *Id.*

Instead, the electric power system in the continental United States is comprised of three

major interconnected networks: the Eastern Interconnection, the Western Interconnection, and the Electric Reliability Council of Texas.[10] In decades past the nation's electric power infrastructure was "a largely patchwork system built to serve the needs of individual electric utility companies;" but, today it is "essentially a national interconnected system, accommodating massive transfers of electrical energy among regions of the United States." *New York v. FERC*, 535 U.S. 1, 7 (2002). Together, the grids form a network "of near-nationwide scope" such that "'electricity that enters the grid immediately becomes a vast pool of energy that is constantly moving in interstate commerce,' linking producers and users across the country." *Id.*[11]

Energy flowing into these grids, from whatever source, "*energizes the entire grid* [so that] . . . any activity on the interstate grid affects the rest of the grid." *New York*, 535 U.S. at 7 n.5 (emphasis in original). As a result, power companies are able "to transmit electric energy over long distances at a low cost," and are thus able to "operate more efficiently by transferring substantial amounts of electricity not only from plant to plant in one area, but also from region to region, as market conditions fluctuate." *Id.* at 8. Because the impact of any system event will ripple through the country,

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[10] *See* MIT, *The Future of the Electric Grid: An Interdisciplinary MIT Study* 3 (2011), http://energy.mit.edu/wp-content/uploads/2011/12/MITEI-The-Future-of-the-Electric-Grid.pdf.

[11] For geographic reasons, Hawaii and Alaska remain outside the national grid.

there are no longer any local issues when it comes to the electric power grid. All are national.

Infrastructure siting problems are already a concern. "Siting challenges, including a lack of coordination among States, impede the improvement of the electric system." S. Rep. No. 109-78, at 8 (2005). The coordination problems will be multiplied under the Tenth Circuit's decision, which allows the stranding of long-established transmission lines and the blockage of new ones when an Indian tribe acquires a tiny interest in allotment parcels lying along needed routes.

Thus, in its cumulative effects, the harm flowing from the Tenth Circuit's decision will not be limited to PNM, nor to the six States of the Tenth Circuit, where other power companies will face comparable problems in the exercise of eminent domain. Instead, the harm is potentially *nationwide*, a fact that underscores the importance of this case.

d. The Decision Below Risks Harm to Interstate Commerce Beyond the Electric Power Industry.

The harm from the Tenth Circuit's decision extends beyond the electric industry. This is true not only because of electricity's role in all aspects of the national economy, but also because of the decision's effects on other infrastructure dependent on eminent domain.

As this Court has noted, "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in

virtually every home and every commercial or manufacturing facility." *FERC v. Mississippi*, 456 U.S. 742, 757 (1982). Indeed, the electric industry ultimately affects "just about everything – the whole economy, as it were." *EPSA*, 136 S. Ct. at 774. As Congress has likewise recognized, the electric industry is uniquely critical to the nation. S. Rep. No. 112-34, at 11 (2011) ("Ensuring a resilient electric grid is particularly important since it is arguably the most complex and critical infrastructure that other sectors depend on to deliver services.").

Section 357 broadly grants federal condemnation authority over allotment lands to *any* public or private entity having condemnation authority under state law. Similarly, the Tenth Circuit decision broadly blocks the exercise of that authority wherever an Indian tribe has acquired any interest in such lands. Here, the electric industry is harmed. But, as shown by *Davilla*, *see supra at* 14-15, the decision also harms the natural gas industry, another area of national concern. *See* 15 U.S.C. § 717(a) ("declar[ing] that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."). Indeed, the decision below bodes harm to oil pipelines, water pipelines, roads, and all arteries of interstate commerce needing rights-of-way. As this Court said in an earlier case challenging eminent domain authority: "This cannot be." *Kohn v. United States*, 91 U.S. 367, 371 (1875).

e. This Petition Provides a Good Opportunity – and, Perhaps, the Last Opportunity – to Address the Issue.

Allotment lands lie almost entirely in the western States encompassed by the Eighth, Ninth and Tenth Circuits.[12] Two of those circuits – the Eighth and Tenth – have now prohibited use of § 357 where an Indian tribe has acquired an interest in the allotment land. Thus, this is not an issue on which the remaining circuits are likely ever to have occasion to rule (other than, perhaps, the Ninth Circuit, which has addressed the issue in *dictum, see infra* at n. 13). There is nothing to be gained by awaiting further percolation of the issue through the lower courts. If the Court does not take up this important issue now, it will not have another opportunity to do so before substantial damage is done and, indeed, it may not have another opportunity to do so at all.

2. The Tenth Circuit's Decision Is Erroneous.

There is a clear pathway to avoid the harms caused by the decision below. By enacting § 357, Congress made allotment lands subject to condemnation. The central issue here is whether that "condemnability" is an attribute of the land and

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[12] The BIA reports that 99.7 percent of allotment lands eligible for the Buy-Back Program lie within the States of these three circuits. U.S. Dep't of Interior, *2016 Status Report, Land Buy-Back Program for Tribal Nations,* p. 16 (November 1, 2016), https://www.doi.gov.sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf.

runs with the land, or whether condemnability is a personal attribute of the individual owner and terminates if the land is acquired by an Indian tribe. The Tenth Circuit ruled that Congress intended for condemnability to terminate if a tribe acquires even a miniscule interest in allotment land. That decision cannot withstand scrutiny.

a. "Condemnability" Is an Attribute of the Land.

Section 357 condemnation authority continues to apply to an allotment parcel even after a tribe acquires an interest in that parcel. This is shown by the following:

First, § 357 addresses "lands in severalty allotted to Indians," not "lands allotted to *and held by* Indians." Thus, it speaks of "land" with a history of having been removed from a reservation and "allotted… to Indians," without regard to the identity of the owner at the time of condemnation. The Tenth Circuit decision, in effect, reads into the statute words that are not there.

Second, land condemnation is an *in rem* proceeding. *United States v. Carmack*, 329 U.S. 230, 235 n.2 (1946). This is consistent with condemnability being a characteristic of the land, and not a personal attribute of the individual owner.

Third, like anyone else, Indian tribes may acquire lands in fee, and those fee lands are subject to involuntary sales through *in rem* proceedings, including partition suits, tax sales and condemnation, on the same basis as lands belonging to non-Indians. *See, e.g., Oneida Tribe of Indians v.*

Vill. of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008) (holding that allotment parcel leaving Indian hands and reacquired by tribe in fee is subject to condemnation); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996) (holding that allotment parcel passing out of Indian hands and reacquired by the tribe in fee is subject to partition suit). Because § 357 treats allotment land like fee land for purposes of condemnation – and because tribally-held fee lands may be condemned – tribally-held allotment lands may be condemned as well.

Fourth, as the Ninth Circuit has recognized: "With respect to condemnation actions by state authorities, Congress explicitly afforded *no special protection to allotted lands beyond that which land owned in fee already received* under the state laws of eminent domain." *Southern California Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (citation omitted) (emphasis added). While the case made no mention of a tribe owning a fractional interest of the allotment land, the principle articulated there properly focuses on the *land* and not on the *landowner*.[13]

Fifth, "no court has held that Indian land approved for *alienation* by the federal government and then reacquired by a tribe again becomes

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[13] The Ninth Circuit later repeated, *in dictum* and without analysis, another circuit's view that § 357 does not apply to "land held in trust for the Tribe." *United States v. Pend Oreille Pub. Util. Dist. No.* 1, 28 F.3d 1544, 1552 (9th Cir. 1994) (citing *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983). Flaws in *Nebraska Public Power* are discussed *infra* at 27-29.

inalienable." *Lummi Indian Tribe v. Whatcom Cnty.*, 5 F.3d 1355, 1359 (9th Cir. 1993) (emphasis added). Likewise, it is inappropriate to hold that allotment land approved by Congress for *condemnation* and then reacquired by a tribe again becomes immune to condemnation.

Sixth, when seeking to understand legislative intent, what matters is the intent of the Congress that enacted the statute in question.[14] As the Tenth Circuit recognized, Congress was less sympathetic to the role of Indian tribes in 1901 than it is today. *See generally* App. 7a-8a. But, this history weighs against the Tenth Circuit's understanding of § 357. It is inconceivable that the 1901 Congress intended for the policy reflected in § 357 to be frustrated whenever a tribe acquired a fractional interest in land subject to that statute.

Seventh, as the Tenth Circuit previously recognized: "If condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines." *Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982) (rejecting challenge by individual allottee to exercise of eminent domain under § 357). As a practical matter, it matters not at all whether the objection to the right-of-way comes

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[14] *E.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–118 (1980) (citing "the oft-repeated warning that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) ("Legislation dealing with Indian affairs cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted it.") (internal quotations omitted).

from an individual allottee or from the Indian tribe that has acquired some portion of the individual's interest. The unwarranted burden upon the condemning authority – and, thus, upon the public – is just the same. Both frustrate Congress' purpose in enacting § 357.

Finally, general principles recognized by this Court favor rights-of-way across allotments. In *Oklahoma Gas & Electric*, *supra*, the Court considered another statute involving rights-of-way across allotment land. Acting under 25 U.S.C. § 311, the Secretary of the Interior granted the State of Oklahoma the right to construct a highway across parcels allotted to individual Indians, and Oklahoma later granted an electric company the right to construct transmission lines alongside the highway within the State's right-of-way. The Secretary sued the utility to have its use of the right-of-way declared invalid, and this Court ruled in the utility's favor. While partially couched in terms that are overly paternalistic today, the outcome was guided by general principles that have analogous application here:

> The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect [Native Americans] ….
>
> * * * * *
>
> Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways

> crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear.

318 U.S. at 211.

Likewise, the Tenth Circuit's interpretation of § 357 is not necessary to protect the Navajo Nation or other Native American tribes, especially since condemnation actions assure allotment owners fair market value, as determined in a federal court. Because of the Land Buy-Back Program and other transfers, the western States are becoming increasingly spotted with allotments in which a tribe holds a fractional interest. Complications and confusions will follow if those allotment lands are subject to rules differing from those that apply to fee lands and allotment lands in which tribes hold no interest. There is nothing to suggest that Congress intended such an outcome.

b. The Tenth Circuit's Analysis Is Flawed.

The Tenth Circuit observed that "the United States government's treatment of the original inhabitants of this country has not been a model of justice." App. 7a. But, the court of appeals' desire to compensate for past injustices has led it into a thicket of faulty legal reasoning.

The Tenth Circuit based its decision on four grounds: (i) an Eighth Circuit decision, (ii) BIA regulations, (iii) a canon of construction favoring Indian tribes, and (iv) a false dichotomy in dealing

with tribal fractional interests. None of these grounds can withstand scrutiny.

The Eighth Circuit Decision: The Tenth Circuit relied heavily on *Nebraska Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (1983) ("*NPP*"). App. 21a-22a. In *NPP*, a group of individual Indian allottees transferred their interests in allotment parcels to the Winnebago Tribe, reserving to themselves only life estates. *Id.* at 958. The Eighth Circuit ruled that, by such action, the allottees successfully blocked the acquisition of a right-of-way for an electric transmission line by a power company seeking to invoke § 357. In so ruling, the Eighth Circuit implicitly assumed that all "tribal land" is immune to condemnation, and it concluded that, because of the transfer, the allotment land had become "tribal land" under the then-current BIA definition. Quoting 25 C.F.R. § 169.1(d), the Eighth Circuit said:

> "'Tribal land' means land or any interest therein, title to which is held by the United States in trust for a tribe….".
>
> We believe this regulation makes clear that it is the fact of tribal ownership which establishes the existence of tribal land, not the identity or title of the grantor…. Thus, we conclude that the conveyances… *create tribal land* not subject to condemnation under section 357.

719 F.2d at 962 (emphasis added). For an individual and an Indian tribe to "create" land immune to

condemnation by recording a deed – rather than leaving that decision to Congress – is problematic.

Moreover, whatever BIA regulations may say, the *statute* at issue, § 357, contains no mechanism for allotment lands to become "tribal land" in the sense of being immune to condemnation. Nor do BIA regulations justify the result. As the BIA recently explained, those regulations do not provide guidance on § 357. *See* 80 Fed. Reg. 72492, 72495 (Nov. 19, 2015) ("The final rule does not include the term 'eminent domain' or address eminent domain.... Statutory authority exists in 25 U.S.C. 357 for condemnation under certain circumstances, but *these regulations do not address or implement that authority*.") (emphasis added). Thus, allotment parcels that fall within the definition of "tribal land," as that term is used in BIA-administered programs, are not thereby excluded from condemnation under § 357.

Even if *NPP* were correctly decided under the facts of that case, the Tenth Circuit carried that precedent to an untenable extreme. First, in *NPP*, the land conveyances gave the tribe *full* beneficial ownership of the parcels, subject only to the passage of time as the grantors' life estates ran their course and expired. Such full ownership, even if delayed, presented a different case than where the tribe's interests are very small, as they are here.

Second, the land at issue in *NPP* was not subject to a pre-existing easement for an already-established power transmission line. Here, PNM's maintenance of a transmission line across the Two Allotments, for nearly 50 years before the Navajo

Nation acquired its interests, should carry considerable weight in the analysis. The Navajo Nation took its interests not only subject to an existing right-of-way, but subject to an expectation that PNM would seek to preserve that right-of-way, by condemnation if necessary, with the tribe receiving its share of judicially-determined fair market value. Thus, the *NPP* decision is a frail reed on which to base the decision below.

The BIA Regulations: The Tenth Circuit also based its decision on the current version of the same regulations on which the Eighth Circuit mistakenly relied. *See* App. 22a (citing 80 Fed. Reg. 72492, 72497). But, again, the BIA has explained that its regulations do not address § 357 condemnations. *See supra* at 28. Thus, those regulations furnish no basis for interpreting the statute. The Tenth Circuit erred by saying otherwise.

The Indian Canon: The Tenth Circuit said that "'statutes are to be construed liberally in favor of Indians and tribes, and that any ambiguities or doubtful expressions of legislative intent are to be resolved in their favor.'" App. 17a (quoting *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (*en banc*) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))). PNM believes that § 357 unambiguously authorizes the condemnation at issue; however, even if § 357 were ambiguous, the Tenth Circuit erred in using the "Indian canon" to govern the outcome.

The basic Indian canon of statutory construction has been formulated by this Court two

different ways. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), the Court stated the canon comprehensively: "[S]tatutes passed *for the benefit of dependent Indian tribes* or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." (Emphasis added.) The same formulation was used in *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific*) and *Negonsott v. Samuels*, 507 U.S. 99 (1993) (quoting *Alaska Pacific* and correcting litigant who stated the canon without limiting it to statutes passed for the benefit of tribes). Under this formulation, the Indian canon does not apply here because § 357 is not intended to favor *tribal* interests. It is intended to favor the broader *public* interest.[15]

At other times, the Court has used an abbreviated formulation, omitting the phrase limiting the canon to statutes passed for the *benefit* of Indian tribes. Such a formulation appears in *Blackfeet Tribe*, cited by the decision below. In *Blackfeet Tribe*, the Court said simply: "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 471 U.S. at 766. This same formulation is found in other decisions by this Court, including *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992), *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999) and, most recently,

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[15] The public includes, of course, Native Americans, who, like their non-Indian neighbors, benefit from utility services made possible through eminent domain.

Chickasaw Nation v. United States, 534 U.S. 84, 92 (2001) (all quoting *Blackfeet Tribe*).

PNM maintains that *Alaska Pacific* provides the preferred formulation of the canon. But, even if the *Blackfeet Tribe* formulation is used, the Indian canon would not govern the outcome here. "[C]anons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent." *Scheidler v. NOW, Inc.*, 547 U.S. 9, 23 (2006). Moreover, "[s]pecific canons are often countered . . . by some maxim pointing in a different direction." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (internal quotation marks and citation omitted) (holding Indian canon "offset" by competing canon). Even if the Indian canon were relevant here, it would be overcome by a competing canon: "'All laws should receive a sensible construction… [so] as not to lead to injustice, oppression, or an absurd consequence.'" *Sorrells v. United States*, 287 U.S. 435, 446 (1932) (quoting *United States v. Kirby*, 7 Wall. 482, 486 (1868)). Given the consequences of the decision below, *see supra* at 13-14, the Tenth Circuit's construction of § 357 violates this principle.

Moreover, the Tenth Circuit's construction of § 357 does not actually favor Indians, a conclusion reinforced by the fact that landowner majorities in 52 of the 57 parcels consented to renewal of the right-of-way. Indeed, "Indian allottees benefit as much from public projects as do those non-Indian property owners whose land is interspersed with the allottees' land." *Yellowfish,* 691 F.2d at 931. *See Shakopee Mdewakanton Sioux Cmty. v. Hope*, 16 F.3d 261, 264 (8th Cir. 1994) (finding that

interpreting statute to favor Indians required, in that case, a result contrary to what the Indian tribes sought).

For these reasons, too, the Tenth Circuit erred.

The False Dichotomy: Finally, the Tenth Circuit said it had only "two choices":

> (1) concluding that all land ever allotted is subject to condemnation under § 357, even if a tribe reobtains *a majority or total interest* in it, or (2) concluding that even previously allotted land that a tribe reobtains *any interest* in becomes tribal land beyond condemnation under § 357.

App. 22a-23a (emphasis added). PNM believes the first result is correct; however, even if PNM were mistaken, that would not justify the Tenth Circuit in flying to the other extreme, disregarding any possible midpoint along the way.

One option would be to allow the utility to condemn the interests of individuals, but without effect on the interests held by the tribe. This approach was followed in *WBI Energy Transmission, Inc. v. Easement & Right-Of-Way Across: Twp. 2 S.*, No. CV-14-130-BLG-SPW, 2017 U.S. Dist. LEXIS 17956 (D. Mont. 2017). In *WBI*, when negotiations over renewing an existing right-of-way failed, the gas transmission company sought to condemn an easement over allotment land, including two parcels where both an individual and the Crow Tribe held fractional interests. The court allowed the company

immediate possession of the parcels – and approved condemnation of the right-of-way – while explaining that its order "is applicable only to the extent of [the individual's] interest in the allotments and has no force with respect to the Crow Tribe's interest in [the] allotments…." *Id.* at * 9-10.

The *WBI* approach is reminiscent of familiar principles of co-tenancy because (i) those who hold interests in the same allotment parcel are tenants in common;[16] and (ii) "[e]ach cotenant has a right to enter upon, explore and possess the entire premises, and to do so *without the consent* of his cotenants, though he may not do so to the exclusion of his cotenants to do likewise." 2 Tiffany Real Property § 426 (3d ed.) (emphasis added). Thus, under the *WBI* approach, even if the interest held by the tribe cannot be condemned, the condemnor may use eminent domain to step into the shoes of the individual co-tenants, thus acquiring the right-of-way with respect to *their* interests and making use of the parcel without excluding the tribe from the property.

Another option would be for the character of the land – condemnable or not – to be determined based on who held a *majority* interest when the condemnation action began or when the

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[16] *See, e.g.,* 25 U.S.C. § 2212 (treating "an Indian tribe receiving a fractional interest" as "tenant in common with the other owners."). *See also, Haeker v. United States Gov't*, No. CV-14-20-BLG-SPW-CSO2014 U.S. Dist. LEXIS 113121 (D. Mont. Aug. 14, 2014) (holding that allotment-holders are "tenants in common with . . . other Indian owners.") (citing *Quiver v. Deputy Assistant Sec'y – Indian Affairs (Operations)*, IBIA 85-17-A, 85-18-A, 1985 I.D. LEXIS 63 (1985)).

infrastructure was constructed. Where individuals held a majority interest, the land would be condemnable; where the tribe held a majority interest, the land would not be. Such an approach would (i) avoid the absurdity and injustice of defeating condemnation – and stranding millions of dollars in infrastructure – by transferring to a tribe a minutely small, fractional interest, and (ii) respect any tribal interests that might arise where the tribe is the dominant beneficial owner of a parcel and there is no infrastructure already in place.

The Tenth Circuit rejected any such midpoints. This Court need not do so.

3. The Circuits Are Split on the Meaning of the Indian Canon.

As previously noted, the Court has stated the Indian canon in two different ways. Sometimes the Court has used the narrow formulation found in the *Alaska Pacific* line of cases; and sometimes it has used in the broader formulation found in the *Blackfeet Tribe* line of cases. *See supra* at 29-30. This tension between these two lines of cases is reflected in a split among the circuits as to the proper formulation of the canon.

The split is best demonstrated by the contrast between the **Tenth Circuit** and the **D.C. Circuit**. Using a very expansive formulation, the Tenth Circuit applies the canon to statutes "even where they *do not mention Indians at all*." *Pueblo of San Juan*, 276 F.3d at 1191-92. (emphasis added). The Tenth Circuit cited *Pueblo of San Juan* in ruling against PNM. App. 17a

On the other hand, the D.C. Circuit has emphatically endorsed the narrow approach, explaining that the canon "applies *only* to statutes 'passed for the benefit of dependent Indian tribes.'" *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011) (quoting *Alaska Pacific*) (emphasis added).

Decisions in recent years show that other circuits are split between the *Alaska Pacific* approach and the *Blackfeet Tribe* approach, with some circuits fluctuating between the two:

- The **First** and **Eighth Circuits** have used the narrow formulation. *See Penobscot Nation v. Mills*, 861 F.3d 324, 333 (1st Cir. 2017) (citing *Alaska Pacific*); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 547-548 (8th Cir. 1996) (citing *Alaska Pacific*).

- The **Sixth Circuit** has applied the broad formulation. *See Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (2009) (citing *Blackfeet Tribe*).

- The **Second Ninth** and **Eleventh Circuits** have fluctuated:

    - *Compare Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 288 (2d Cir. 2015) (quoting *Alaska Pacific*) *with Connecticut v. U.S. Dep't. of Interior*, 228 F.3d 82, 92 (2d Cir. 2000) (quoting *Blackfeet Tribe*).

    - *Compare Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1228-29 (9th Cir. 1999)

(quoting *Alaska Pacific*), *with Crow Tribal Hous. Auth. v. U.S. Dep't. of Hous. & Urban Dev.*, 781 F.3d 1095, 1103 (9th Cir. 2015) (quoting *Blackfeet Tribe*).

- *Compare Colbert v. United States*, 785 F.3d 1384, 1390 n. 8 (11th Cir. 2015) (quoting *Alaska Pacific*) *with Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2012) (quoting *Blackfeet Tribe*).

The Indian canon is an important feature of American jurisprudence. *Alaska Pacific and Blackfeet Tribe* have been cited by federal and state courts over 200 times since 2000. Granting *certiorar*i will enable the Court to definitively embrace either the *Alaska Pacific or Blackfeet Tribe* formulation and end the circuit disarray.

B. Reasons for Granting the Petition on the Second Question.

Although the Tenth Circuit indicated that it was only deciding whether § 357 authorizes a condemnation action against a parcel of allotment land once an Indian tribe has acquired a fractional interest in that land, it agreed with the district court that the tribe's sovereign immunity precludes any such condemnation action even if § 357 still applies. Specifically, the Tenth Circuit stated that "the district court's orders provide thorough and well-reasoned bases to affirm" and are "especially persuasive on the question of tribal immunity." App. 17a, n.2. Given the importance of preserving the flow of electricity in this portion of New Mexico, this Court should grant *certiorari* on both issues and resolve these questions simultaneously – rather than

resolving Question 1, remanding, and then resolving Question 2 in a subsequent petition for *certiorari.*

Moreover, the second question is very closely related to the first one. If the Court agrees with PNM that tribal ownership of a fractional interest in allotted land does not render § 357 inapplicable, then the Court should also hold that the condemnation action can proceed, even if the Indian tribe claims sovereign immunity and cannot be joined as a party to the action.

This is a small step to take, especially given this Court's *Carmack* decision, holding that the landowner need not participate in a condemnation action, *supra* at 22.[17] Indeed, in the Tenth Circuit, the United States *agreed* that, if § 357 authorizes condemnation of a parcel of allotment land, then "[that] condemnation action can proceed in the absence of an Indian tribe that holds an undivided interest in [that] parcel." U.S. Resp. Br, at 42 (filed Sept. 30, 2016). "[T]ribes… are not indispensable parties, without whom a condemnation action may not proceed." *Id.* at 46–47. Although the Navajo Nation and individual defendants took the opposite position in the Tenth Circuit, the agreement between the United States and PNM on this final point is another reason to grant *certiorari* on the second question presented.

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[17] Thus, while the question whether sovereign immunity was implicitly abrogated by § 357 is subsumed in the second question presented, the abrogation question need not be reached in order to find that the condemnation action can proceed in the absence of the tribe

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

[ENTERED: May 26, 2017]

FILED
United States Court of Appeals
Tenth Circuit

May 26, 2017

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff - Appellant, v. LORRAINE BARBOAN, a/k/a, Larene H. Barboan; BENJAMIN HOUSE, also known as, BENNIE HOUSE; ANNIE H. SORRELL, also known as, ANNA H. SORRELL; MARY ROSE HOUSE, also known as, MARY R. HOUSE; DOROTHY HOUSE, also known as, DOROTHY W. HOUSE; LAURA H. LAWRENCE, also known as, LAURA H. CHACO; JONES DEHIYA; JIMMY A. CHARLEY, also known as, JIM A. CHARLEY; MARY GRAY CHARLEY, also known as, MARY B. CHARLEY;	No. 16-2050

BOB GRAY, Deceased, also known as, BOB GREY; CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY; THOMAS THOMPSON GRAY, also known as, THOMAS GREY; JIMMIE GREY, also known as, JIMMIE GRAY; MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY; MARLA L. CHARLEY, also known as, MARLA CHARLEY; KALVIN A. CHARLEY; IRENE WILLIE, also known as, IRENE JAMES WILLIE; CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON; ELOUISE J. SMITH; LEONARD WILLIE; SHAWN STEVENS; GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON; GLENDA BENALLY, also known as, GLENDA G. CHARLESTON; NAVAJO NATION; UNITED STATES OF AMERICA,

Defendants - Appellees,

and

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO; NAVAJO TRIBAL UTILITY AUTHORITY; CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.; TRANSWESTERN PIPELINE COMPANY, LLC; CITICORP NORTH AMERICA, INC.; CHEVRON USA INC., as successor in interest to Gulf

Oil Corp.; HARRY HOUSE, Deceased; PAULINE H. BROOKS; LEO HOUSE, JR.; NANCY DEHEVA ESKEETS; LORRAINE SPENCER; LAURA A. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON; EDDIE MCCRAY, also known as, EDDIE R. MCCRAE; ETHEL DAVIS, also known as, ETHEL B. DAVIS; WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY; ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as, ELOISE ANN JAMES, also known as, ELOUISE WOODS; ALTA JAMES DAVIS, also known as, ALTA JAMES; ALICE DAVIS, also known as, ALICE D. CHUYATE; PHOEBE CRAIG, also known as, PHOEBE C. COWBOY; NANCY JAMES, also known as, NANCY JOHNSON; BETTY JAMES, Deceased; LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS; GENEVIEVE V. KING; LESTER CRAIG; FABIAN JAMES; DAISY YAZZIE CHARLES, also known as, DAISY YAZZIE, also known as, DAISY J. CHARLES; ROSIE YAZZIE, Deceased; KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES; VERNA M. CRAIG; JUANITA SMITH, also known as, JUANITA R. ELOTE; ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.; BERDINA DAVIS;

MICHELLE DAVIS; STEVEN MCCRAY; VELMA YAZZIE; GERALDINE DAVIS; LARRISON DAVIS, also known as, LARRISON P. DAVIS; ADAM MCCRAY; MICHELLE MCCRAY; EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS; CELENA DAVIS, also known as, CELENA BRATCHER; FRANKIE DAVIS; VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON; VERN CHARLESTON; KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON; SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON; SPENCER KIMBALL CHARLESTON, JR., Deceased; EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON; CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON; SAM MARIANO; HARRY HOUSE, JR; MATILDA JAMES; DARLENE YAZZIE; UNKNOWN OWNERS, CLAIMANTS AND HEIRS OF THE PROPERTY INVOLVED; UNKNOWN HEIRS OF HARRY HOUSE, Deceased; UNKNOWN HEIRS OF BOB GRAY (BOB GREY), Deceased; UNKNOWN HEIRS OF BETTY JAMES, Deceased; UNKNOWN HEIRS OF ROSIE C. YAZZIE, Deceased; UNKNOWN HEIRS OF SPENCER KIMBALL

CHARLESTON, JR., (SPENCER K. CHARLESTON), Deceased; UNKNOWN HEIRS OF HELEN M. CHARLEY, Deceased; ESTATE OF ROSIE C. YAZZIE; ESTATE OF SPENCER K. CHARLESTON; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

GPA MIDSTREAM ASSOCIATION; THE NATIONAL CONGRESS OF AMERICAN INDIANS; PUEBLO OF LAGUNA; THE UTE MOUNTAIN UTE TRIBE; THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, TRANSWESTERN PIPELINE COMPANY, LLC,

Amici Curiae.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:15-CV-00501-JAP-CG)

Kirk R. Allen (Stephen B. Waller, with him on the briefs), Miller Stratvert P.A., Albuquerque, New Mexico, for Plaintiff-Appellant.

Paul Spruhan, Assistant Attorney General (Ethel Branch, Attorney General, with him on the brief), Navajo Nation Department of Justice, Window Rock, Arizona, for Navajo Nation, Defendant-Appellee.

Jeffrey S. Beelaert (John C. Cruden, Assistant Attorney General, James C. Kilbourne, William B. Lazarus, and Mary Gabrielle Sprague, Attorneys, with him on the brief), U.S. Department of Justice, Washington, D.C., for the United States, Defendant-Appellee.

Zackeree S. Kelin (Michael M. Mulder, The Law Offices of Michael M. Mulder, Evanston, Illinois, with him on the brief), Davis Kelin Law Firm LLC, Albuquerque, New Mexico, for the Individual Allottees, Defendants-Appellees.

Clint Russell and Stratton Taylor, Taylor, Foster, Mallett, Downs Ramsey & Russell, Claremore, Oklahoma, filed an amicus brief for GPA Midstream Association, in support of Plaintiff-Appellant.

Jennifer H. Weddle, Troy A. Eid, Harriet McConnell, and Laura E. Jones, Greenberg Traurig, LLP, Denver, Colorado, for Ute Mountain Ute Tribe; John Dossett, National Congress of American Indians, Embassy of Trial Nations, Washington, D.C.; Dan Rey-Bear, Rey-Bear McLaughlin, LLP, Spokane, Washington, for Pueblo of Laguna; Naomi Stacy and Dan Hester, for Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon, Amici Curiae.

Deana M. Bennett and Emil J. Kiehne, Modrall Sperling Roehl Harris & Sisk, PA, Albuquerque,

New Mexico, filed an amicus brief for Transwestern Pipeline Company, LLC, in support of Plaintiff-Appellant.

Before **BACHARACH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

PHILLIPS, Circuit Judge.

Unable to win the consent of all necessary landowners, a public utility company now contends that it has a statutory right to condemn a right-of-way on two parcels of land in New Mexico. Because federal law does not permit condemnation of tribal land, the Navajo Nation's ownership of undivided fractional interests in the parcels presents a problem for the company. We affirm the district court's dismissal of the condemnation action against the two land parcels in which the Navajo Nation holds an interest.

I

No one can feign surprise to learn that the United States government's treatment of the original inhabitants of this country has not been a model of justice. The government spent much of the nineteenth century emptying the eastern part of the country of Indians and sending them west. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 623-26 (1970). Then, when settlers caught up with the tribes in the west, the government sought to confine those tribes, and other tribes native to the west, ever

more tightly onto reservations. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 221-23 (1959). Much tragedy and bloodshed ensued.

In the late nineteenth century, after the government had largely segregated Indians from the rest of society, Congress changed course. But the new course still harmed Indian tribes and their members. Instead of excluding tribal members from American society while permitting them some autonomy on the reservations, Congress tried to force tribes to assimilate into American society, minus much of their autonomy. Congress carved reservations into allotments and assigned the land parcels to tribal members—surplus lands were made available to white settlers. So began the Allotment Era. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The Allotment Era "was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

Congress began allotting land one tribe at a time and allowed Indians to sell the land as soon as they received it. *Cty. of Yakima*, 502 U.S. at 254. Tribal members began to lose their allotted lands in hasty and even fraudulent transactions. *Id.* In 1887, Congress passed the General Allotment Act, commonly known as the Dawes Act, which allowed

the President to apply the allotment process to most tribal lands across the country, without tribal consent. *Id.* But as a check against the rapid post-allotment loss of Indian land, Congress also mandated that the federal government would hold Indian-allotted land in trust for twenty-five years, after which time it would issue a fee patent to the allottee or his heirs. *Id.*

Despite this attempted protection, "[t]he policy of allotment of Indian lands quickly proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987). As allotments spread throughout the country, Indians continued to lose land—by the time the Allotment Era ended in 1934, as much as two-thirds of allotted lands had passed out of Indian ownership. Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 1.04 (Nell Jessup Newton, et al. eds., 2012 ed.). Even the twenty-five-year trust protection did serious harm: "parcels became splintered into multiple undivided interests in land, with some parcels having hundreds . . . of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time." *Hodel*, 481 U.S. at 707.

As allotments began to create a checkerboard of tribal, individual Indian, and individual non-Indian land interests, Congress passed several right-of-way statutes to help ensure that necessities such as telegraph lines and roads could continue without encumbrance. *See United States v. Okla. Gas & Elec. Co.*, 127 F.2d 349, 352 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943). In 1901, Congress passed one such Act. Act of March 3, 1901, ch. 832, 31 Stat. 1058 (the

Act). The Act's most relevant section for our purposes, which is codified at 25 U.S.C. § 357, lies at the center of this appeal:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Id. § 3, 31 Stat. 1084 (codified as amended at 25 U.S.C. § 357).

In construing § 357's meaning, it helps to compare the Act's preceding paragraph. *Id.* § 3, 31 Stat. 1083 (codified as amended at 25 U.S.C. § 319). Unlike § 357, § 319 limited the tribes' exclusive use of tribal lands. Section 319 gave the Secretary of the Interior authority to grant rights-of-way for telephone and telegraph lines through Indian reservations, through lands held by Indian tribes or nations in the former Indian Territory, through lands reserved for Indian agencies or schools, and "through any lands which have been allotted in severalty to any individual Indian under any law or treaty." *Id.*

In comparison, § 357 does not mention any condemnation authority for rights-of-way through Indian reservations and other types of non-allotted tribal lands. And even without that context, we see no language in § 357 that authorizes condemnation of tribal land, a result Congress has full power to order if it chooses. *Cherokee Nation v. S. Kan. Ry.*

Co., 135 U.S. 641, 656-57 (1890). Thus, as we have noted, "a plain and clear distinction" exists "between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians." *Okla. Gas & Elec. Co.*, 127 F.2d at 354.

Perhaps the failure to authorize condemnation of tribal lands stemmed from a belief that doing so was unnecessary. After all, the Congresses of the Allotment Era "anticipated the imminent demise of the reservation." *Solem*, 465 U.S. at 468. What need would a party have to condemn tribal land if soon no tribal lands would exist? And yet Congress has never enlarged § 357's condemnation authority even after it has become clear that tribes and reservations are here to stay.

In 1934, Congress again shifted course on Indian affairs. But this time, perhaps for the first time in American history, the congressional pendulum swung decisively toward favoring tribal sovereignty. The 1934 Indian Reorganization Act ended the Allotment Era—Congress halted allotments, began restoring unallotted surplus land to tribal ownership, and indefinitely extended the twenty-five-year trust period for allotted lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5144); *Cty. of Yakima*, 502 U.S. at 255. Extensive federal efforts later even began to help tribes buy back lost land—efforts that continue to this day. *See, e.g.*, Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2515 (1983) (codified as amended at 25 U.S.C. §§ 2201-2221) (setting up mechanisms to consolidate tribal holdings); Claims Resolution Act of

2010, Pub. L. No. 111-291, 124 Stat. 3064, 3066-3067 (authorizing a $1.9 billion land buy-back program for tribal nations). Among other avenues, tribes may now purchase interests in previously allotted lands, 25 U.S.C. § 2212, or inherit less than five percent of an undivided ownership interest through intestate descent, 25 U.S.C. § 2206(a)(2)(D). And so the tribes and reservations that the Allotment Era Congresses expected to wither away instead endured.

II

That history produced, and informs, the case before us. In 1919, the federal government allotted 160 acres in New Mexico, known as Allotment 1160, to a man named Hostine Sauce, who later became known as Leo Frank, Sr. In 2006, through two conveyances from beneficial owners as authorized by the Indian Land Consolidation Act, the Navajo Nation acquired an undivided 13.6% interest in Allotment 1160. Similarly, in 1921, the federal government allotted another 160 acres in New Mexico, known as Allotment 1392, to a person named Wuala. In 2009, through intestate descent as authorized by the Indian Land Consolidation Act, the Navajo Nation acquired an undivided 0.14% interest in Allotment 1392. Both allotments are within the exterior boundaries of the Navajo Nation and have always had protected trust status.

Public Service Company of New Mexico (PNM) is a public utility company that in 1960 obtained a right-of-way from the federal Bureau of Indian Affairs (BIA)—an agency within the Department of the Interior—for an electric transmission line across the land now in dispute. The transmission line runs

about sixty miles and crosses fifty-seven land parcels that were once allotted to individual Indians, including the two parcels in which the Navajo Nation now holds an undivided interest.

The right-of-way had a fifty-year expiration date—so it was set to expire in 2010. In November 2009, PNM applied to the Secretary of the Interior for a twenty-year renewal of the right-of-way. That application process was created by the 1948 Indian Right-of-Way Act, Act of Feb. 5, 1948, ch. 45, 62 Stat. 17-18 (codified at 25 U.S.C. §§ 323-328), which mandates that "[n]o grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. The regulations stemming from the 1948 Act affirm the necessity for tribal consent. *See, e.g.*, 25 C.F.R. § 169.107(a) (2016) ("For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe . . . ."). For land parcels held in trust for individual Indians, the Secretary of the Interior can grant rights-of-way so long as the holders of a majority of interests consent. 25 U.S.C. § 324.

The renewal process began smoothly for PNM. The Navajo Nation gave written consent for the right-of-way through lands in which the United States holds the entire interest in trust. In addition, PNM obtained consent from a majority of beneficial-interest owners for the parcels that had been allotted and in which the United States holds interest in trust. So in November 2009, the BIA began to process PNM's renewal application. But enough individual Indian owners in five land parcels

revoked their consent to tip the total consenting to less than 50% of the fractional interests. In January 2015, the BIA notified PNM that it could not approve the renewal application without that consent.

On June 13, 2015, PNM filed a complaint in federal district court in New Mexico seeking to condemn the fifty-foot-wide right-of-way through the five parcels for which the company no longer had consent. The complaint alleges federal-question jurisdiction under 28 U.S.C. § 1331, pleading a claim under § 3 of the 1901 Act, codified at 25 U.S.C. § 357. PNM alleged that § 357 authorizes the condemnation of any land ever allotted to Indians, whoever might later own the land. Unlike the twenty-year renewal period that PNM sought in the application process, PNM's complaint sought a perpetual right-of-way. The complaint named as defendants all parties holding interest in the five parcels, including the Navajo Nation and the United States.

In December 2015, the district court dismissed without prejudice—for lack of subject-matter jurisdiction—PNM's condemnation claims for the two parcels in which the Navajo Nation holds an interest. The court stayed the claims for the other three parcels pending the resolution of this appeal. The court held that § 357 does not authorize condemnation of land in which a tribe has acquired an interest. The court concluded that "[t]he Nation cannot be considered as an owner of 'lands allotted in severalty to Indians.'" Appellant App. vol. 1 at 137 (quoting 25 U.S.C. § 357). Tribal interest in the land

ends allotted-land status.[1] The court reminded PNM that it could still pursue a voluntary easement.

Rather than take that course, PNM moved the court to reconsider and set aside the dismissal. Alternatively, PNM asked the district court to certify four interlocutory-appeal questions. In March 2016, the district court issued an order that affirmed its earlier decision and elaborated on its reasoning: "PNM's 'once an allotment always an allotment' rule is not supported by any case law authority or the plain language of § 357 and its historical context." Appellant App. vol. 2 at 304. In response to PNM's policy arguments about the negative consequences of not allowing condemnation, the court reminded PNM that, even if negotiation should fail—which the Navajo Nation and the United States argued PNM had not shown was inevitable—it was "up to Congress, not this Court, to open up the condemnation avenue over trust lands fractionally owned by tribes." *Id.* at 320.

The district court granted PNM's request to certify four questions of law for interlocutory appeal:

> I. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which

[1] The district court also concluded that the Navajo Nation was a required party to the condemnation action under Fed. R. Civ. P. 19(a) because of the Nation's interest in the land to be condemned, but one that could not be joined because of sovereign immunity. And the court found that under Fed. R. Civ. P. 19(b), "in equity and good conscience" the condemnation action could not proceed without the Nation. Appellant App. vol. 1 at 155.

the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the parcel?

II. Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?

III. Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?

IV. If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in, a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

Id. at 324.

The district court also denied PNM's request to sever the company's claims against the two parcels with Navajo Nation interests, concluding that it was better to stay the claims for the other three allotments pending the resolution of the

interlocutory appeal. PNM has appealed the four certified questions.

III

Because we affirm the district court's decision, we need reach only the first question certified for appeal: does § 357 authorize condemnation against land in which the United States holds fee title in trust for an Indian tribe, when the tribe has a fractional beneficial interest in the parcel?[2] We review de novo the district court's statutory interpretation of § 357. *United States v. Martinez*, 812 F.3d 1200, 1202 (10th Cir. 2015). But we also note an important canon of construction that applies to this case. "A well-established canon of Indian law states that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

In matters of statutory construction, we "must begin with the language employed by Congress" and assume that "the ordinary meaning of that language

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[2] Though we need not reach the other questions raised on appeal, we note that the district court's orders provide thorough and well-reasoned bases to affirm on each. The court's orders are especially persuasive on the question of tribal immunity, which the court rightly observes must be abrogated unequivocally, not implicitly, by Congress. *See Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011). PNM offers evidence of only implicit abrogation. We take note of this to demonstrate that even had PNM prevailed on the § 357 statutory question, it still would have had a long, difficult road ahead before its condemnation action could proceed.

accurately expresses the legislative purpose," so we look to the plain language of § 357. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). "Allotment" is an Indian-law term of art that refers to land awarded to an individual allottee from a common holding. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972). No one disputes that PNM may seek condemnation of any land parcel previously allotted and whose current beneficial owners are individual Indians. The language of § 357 plainly authorizes such actions.

But starkly absent from § 357's language is any similar authorization for tribal lands. Tribal lands go unmentioned. As we have already noted, that absence in § 357 sharply contrasts with the paragraph immediately preceding § 357, which is part of the same section of the Act, but is codified at 25 U.S.C. § 319. Section 319 authorized the Secretary of the Interior to grant certain rights-of-way over reservations and other lands held by tribes, as well as allotted lands. *See* 25 U.S.C. § 319. And none of PNM's cited cases support its broad contention, let alone in this context, that "[f]or more than a century, the plain meaning of Section 357 has been that if a particular parcel is allotted land, that parcel may be condemned regardless of which persons or entities own fractional interests in such parcel." Appellant Opening Br. at 10; *see United States v. Clarke*, 445 U.S. 253, 254 (1980) (finding that § 357 authorizes condemnation via a formal procedure by the condemning authority, not by physical occupation and inverse condemnation for compensation); *S. Cal. Edison Co. v. Rice*, 685 F.2d

354, 356 (9th Cir. 1982) (noting that § 357 treats individual Indian allottees like any other private landowners for condemnation purposes and finding that their lands are not in use for a public purpose). The statutory silence for condemnation of tribal lands, then, poses a serious obstacle for PNM.

PNM tries to circumvent that obstacle by asking us to make several implicit conclusions. First, it asks us to view what happened during the Allotment Era as a permanent brand on Native land: that upon Congress's taking tribal lands and chopping them into allotments, Congress forever rendered all those lands as "lands allotted" within § 357's meaning. Later changes in ownership cannot matter, PNM argues, and neither can the amount of the interest that a tribe acquires: in PNM's view, even lands that a tribe fully reobtains are "[l]ands allotted in severalty to Indians." 25 U.S.C. § 357. This is PNM's proposed rule that "once an allotment always an allotment"—rejected by the district court for lack of legal and historical backing. Appellant App. vol. 2 at 304. In support of this novel rule, PNM relies on the historical context underlying the 1901 Act. By PNM's reckoning, the Congresses of the Allotment Era wanted and expected tribes and reservations to soon be relics of the past—so they could hardly have expected that "any fractional beneficial interests would ever be transferred to the very tribe from whose reservation the lands had been removed by allotment." Appellant Opening Br. at 11.

Though we acknowledge the historical record, it provides us no license to disregard or slant § 357's plain language. Congress has neither enacted nor

amended § 357 to establish that ever-allotted status would permanently trump any later tribal acquisitions.[3] In a different setting, the Supreme Court has refused "to extrapolate from this expectation [of the demise of reservations]" an intent to diminish a reservation. *Solem*, 465 U.S. at 468. Likewise, here we refuse to extrapolate from that expectation to amend the plain language of § 357. Even if § 357 were ambiguous, we still would apply the Indian-law canon to rule in favor of tribal sovereignty and against a permanent anti-tribal-land classification. Section 357 does not reach tribal lands, even if land reobtains that status long after it was allotted.

IV

We must next clarify what qualifies as tribal land for the purposes of § 357. We have ruled that § 357 reaches allotted land even after that land has passed to individual heirs of the allottees. *Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977). As explained above, we reject PNM's contention that any land ever allotted forever becomes "[l]ands allotted" within § 357's meaning, even when the tribe later fully reacquires and owns that land. But we still must decide what happens when tribes acquire a fractional interest. For the two

[3] In our view, PNM's reading of § 357 requires inserting language that is not there, as shown by the missing language included in the brackets: "[All Tribal] Lands [ever] allotted in severalty to Indians [, regardless of whether they return to tribal ownership,] may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

mixed-ownership parcels at issue here, the Navajo Nation holds such fractional-ownership interests—a 13.6% interest in Allotment 1160, and a 0.14% interest in Allotment 1392.

In *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County*, 719 F.2d 956, 961-62 (8th Cir. 1983), the Eighth Circuit confronted a similar question. There, the Winnebago Tribe of Nebraska held undivided future interests in land that a public utility company sought to condemn. *Id.* at 957-58. The court held that those future interests sufficed to make the relevant parcels tribal land, beyond § 357's condemnation reach. *Id.* at 961-62. For support, the court considered a regulation promulgated under the 1948 Right-of-Way Act (codified at 25 U.S.C. §§ 323-328).[4] *Id.* at 962. That regulation, and its amended version, treats any tribal interest as sufficient to establish tribal-land status. *See id.* ("'Tribal land' means land *or any interest therein*, title to which is held by the United States in trust for a tribe . . . ." (quoting 25 C.F.R. § 169.1(d) (1983))); 25 C.F.R. § 169.2 (2016) ("Tribal land means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status."). The BIA has also clarified that "a tract is considered

[4] A district court in our circuit, also looking to the regulations for clues, similarly found that because a tribe "owns an undivided 1.1% interest in the tract that is held in trust, the Court finds that the tract is tribal land and cannot be condemned pursuant to 25 U.S.C. § 357. The Court, therefore, finds that it does not have subject matter jurisdiction over this action." *Enable Okla. Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061, at *3 (W.D. Okla. Aug. 18, 2016).

'tribal land' if any interest, fractional or whole, is owned by the tribe. A tract in which both a tribe and individual Indians own fractional interest is considered tribal land for the purposes of regulations applicable to tribal land." Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492, 72,497 (Nov. 19, 2015) (codified at 25 C.F.R. pt. 169). In doing so, the BIA rejected opposing views that would have limited tribal land to tracts not individually owned or in which the tribe holds a majority interest. *Id.* The BIA also noted that the different treatment afforded to individual and tribal interests befits the unique government-to-government relationship between the United States and Native tribes, and federal attempts to promote tribal self-governance. *Id.* at 72,492. Thus, even if tribal interest does not constitute a majority interest, tribal consent is still required for a right-of-way. *Id.* at 72,509.

These regulations have a limited impact on our interpretation of § 357 because they do not apply to condemnation actions. *Id.* at 72,495, 72,517. PNM views the inapplicability of the regulations as a critical point, arguing that the district court and the Eighth Circuit erred by considering them. PNM ignores that the district court went to great lengths to explain that the regulations were referenced "only to amplify" the court's conclusion about tribal lands based on § 357's plain meaning. Appellant App. vol. 2 at 311. We view the regulations similarly. Faced with a definition based on the federal government's long-stated policy goal of respecting tribal sovereignty, PNM gives us no alternative definition other than its extreme position that § 357 reaches even land held entirely by a tribe. In essence, we face two choices: (1) concluding that all land ever

allotted is subject to condemnation under § 357, even if a tribe reobtains a majority or total interest in it, or (2) concluding that even previously allotted land that a tribe reobtains any interest in becomes tribal land beyond condemnation under § 357. Governed by § 357's plain language, we must choose the latter approach. We side with the Eighth Circuit and agree with the district court's conclusion: "When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; that land becomes 'tribal land' not subject to condemnation under § 357." *Id.* at 304.[5]

V

PNM argues that Congress would not have encouraged tribes to increase their tribal lands under land buy-back and consolidation programs if it had believed that it correspondingly was shrinking § 357 condemnation authority for those reacquired lands. And if that is so, PNM argues that this shows Congress never intended tribal lands to be exempt from condemnation under § 357. We reject these arguments. First, Congress has known about the Eighth Circuit's case for 34 years and has not amended § 357 to allow condemnation of tribal lands. Second, the Acts creating tribal buy-back and consolidation programs say nothing about allowing

[5] Because we hold that the tribal interests make Allotments 1160 and 1392 tribal land for the purposes of § 357, PNM cannot proceed with a condemnation action against the individual interests in the parcels while leaving the tribal interests undisturbed. Holding otherwise would accomplish little other than to waste judicial resources, and those of PNM, as PNM would still need tribal consent before it could obtain a right-of-way under 25 U.S.C. § 324.

condemnation on tribes' reacquired land. So we must conclude that § 357, as in 1901, does not give condemnation authority over tribal lands.

PNM complains that our interpretation of § 357 will create "stranded" infrastructure on tribal land for which it will now have no choice but to negotiate rights-of-way with the tribes or face trespass actions. Appellant Reply Br. at 26. PNM goes so far as to raise, without elaboration, the specter of a due-process deprivation.

But PNM has no legal backing for its interpretation. No court has held that § 357 allows condemnation of tribal land, whether the tribal interest is fractional, future, or whole. The only major decision on point is *Nebraska Public Power District*, decided by the Eighth Circuit in 1983, holding that any tribal interest, including undivided future interests, acquired by the tribe after allotment defeats any condemnation authority provided in § 357. 719 F.2d at 961-62. In managing the transmission line in this case and its other infrastructure, PNM had every reason to know about the Eighth Circuit case, as well as the reigning canon of construction favoring tribal sovereignty. PNM invested in the face of adverse precedent and with no supportive case law at its back. Whatever negative policy effects it claims may follow, PNM's remedy lies elsewhere.

VI

Because the Navajo Nation did not acquire its undivided fractional interests by allotment, PNM argues that the Nation is a mere successor-in-

interest under § 357. *See Transok*, 565 F.2d at 1153. All agree that the Navajo Nation acquired its interests in the disputed parcels by the congressionally approved mechanisms of conveyance and intestate descent. The issue is not how the tribe acquired the land, but instead what is the land's present status now that the tribe has acquired it. As discussed, we hold that the land is now tribal land and thus beyond the reach of condemnation.

PNM also attempts to make a distinction where none exists. PNM argues that it does not seek to divest the tribe of its fractional interest, but instead merely to condemn a right-of-way on its land. We acknowledge as much, but § 357 contains no authorization for any tribal-land condemnation, whether by divestiture or otherwise. Because we have determined that Allotments 1160 and 1392 are tribal land, PNM cannot force condemnation.

In addition, PNM argues that § 357 supports PNM's condemnation authority by the manner in which it provides for condemnation payments. Section 357 provides that money awarded as damages from a condemnation action "shall be paid to the allottee." PNM seizes upon this language and, combined with the United States' off-handed observation that the payment language also applies to an allottee's heirs, uses it to argue that, if § 357 reaches heirs despite a lack of explicit textual reference, must not § 357 reach tribes also? In this argument, PNM once again suggests that tribes (like heirs) are mere successors-in-interest. But unlike ordinary heirs inheriting interests in land, tribes are "sovereign political entities possessed of sovereign authority." *Nanomantube v. Kickapoo Tribe in Kan.*,

631 F.3d 1150, 1151-52 (10th Cir. 2011). That Congress allows tribes to inherit and purchase interests in previously allotted land does not mean that Congress subjects the reacquired tribal lands to condemnation under § 357. Absent explicit authorization, tribal sovereignty prevails.

PNM also argues that the significance of a tribal interest on an ever-allotted land parcel depends on the statutory meaning of the word "lands" itself. Because condemnation is an "in rem" action, PNM argues, § 357 does not, and we should not, consider who owns interest in the "lands" as a relevant factor in determining § 357's reach. Appellant Opening Br. at 25-28; Appellant Reply Br. at 9. But as the district court noted, a § 357 proceeding is not a pure in rem proceeding. Thus, under § 357, we look not only to what lands are at issue, but to their ownership. Here, because the tribe owns an interest in the disputed parcels, § 357's "[l]ands allotted in severalty to Indians" prerequisite is inapplicable and so the law gives PNM no authority to condemn. And that deprives us of federal jurisdiction under 28 U.S.C. § 1331.

Finally, PNM argues that interpreting § 357 as we do will leave it vulnerable to trespass actions and paying higher compensation to obtain consent. Worse, it argues, because of congressional efforts to help tribes buy back interest in lands lost during the Allotment Era, the availability of condemnation under § 357 will continue to shrink as tribes avail themselves of well-funded programs enabling them to buy back formerly tribal land. This, PNM argues, amounts to an implied partial repeal of § 357, a position built upon its view that § 357 allows

condemnation of tribal lands. Because we reject that view, the argument has no force.

Nor do we believe that PNM's unfavorable policy outcome necessarily comes from Congress overlooking it. In the 116 years after the 1901 Act, Congress has not amended § 357 to favor PNM's interpretation. Nor has it responded to *Nebraska Public Power District* in the thirty-four years since the Eighth Circuit decided that case disfavoring similar arguments to PNM's. Instead, Congress has acted to protect and strengthen tribal sovereignty. *See, e.g.*, Rights-of-Way on Indian Land, 80 Fed. Reg. at 72,509 (observing that requiring tribal consent for a right-of-way "restores a measure of tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy"); U.S. Dep't of Interior, Updated Implementation Plan, Land Buy-Back Program for Tribal Nations 10, 23, 31 (2013) (noting that a "foundational goal" of the buy-back program is "to strengthen tribal sovereignty" and prioritizing acquisitions to accomplish that goal); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (noting that a "key goal of the Federal Government is to render Tribes more self-sufficient"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (recognizing that Congress has demonstrated "a firm federal policy of promoting tribal self-sufficiency" and "tribal independence").

PNM's claims that condemnation serves the interest of the tribe and its members by allowing continued operation of transmission lines on tribal land are likewise best directed elsewhere. Such

claims may be valuable during negotiations for voluntary rights-of-way. If the tribe does not accept such claims as true, that is the tribe's prerogative.

VII

We also deny the motion to intervene of Transwestern Pipeline Company, LLC (Transwestern). Transwestern first entered this case as a party after PNM named it as a defendant possibly having an interest in the property involved in the condemnation action. Transwestern has a right-of-way crossing parts of Allotment 1392, but not the part that PNM sought to condemn. So Transwestern disclaimed any interest in the easements that PNM sought and also waived any future notice of the proceedings. When the Navajo Nation filed a motion to dismiss, Transwestern chose not to file an opposing brief. At the district court, the Navajo Nation and the United States argued that the land in dispute was tribal land beyond § 357's condemnation authority. When the district court dismissed PNM's condemnation action for Allotments 1160 and 1392, Transwestern concurred with PNM's motion to alter or amend the Dismissal Order and its request for certification of issues for interlocutory appeal. In addition, Transwestern filed an "Answer and/or Cross-Petition" in support of PNM's Petition for Permission to Appeal. Transwestern Intervention Reply Br. at 5. When Transwestern filed a motion to participate as a party on appeal, we denied it, allowing Transwestern instead to move to intervene or appear as amicus.

We evaluate motions to intervene on appeal based on the four requirements of Fed. R. Civ. P.

24(a): (1) an applicant's timely application, (2) an "interest relating to the property or transaction which is the subject of the action," (3) possible impairment or impediment of that interest, and (4) lack of adequate representation of that interest by existing parties. *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005). Though we usually take a liberal view of Rule 24(a), when an applicant has not sought intervention in the district court, we permit it on appeal "only in an exceptional case for imperative reasons." *Id.* at 1103 (quoting *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000)). We do not interpret Rule 24(a) as imposing "rigid, technical requirements," but instead read it as capturing the practical circumstances that justify intervention. *San Juan Cty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). Under these standards, we conclude that we must deny Transwestern's motion to intervene.

First, PNM is adequately representing Transwestern's interest in the case. When the applicant and an existing party share an identical legal objective, we presume that the party's representation is adequate. *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1072-73 (10th Cir. 2015). Here, PNM and Transwestern have the same legal objective—prevailing on their interpretation that § 357 allows condemnation of land ever allotted to Indians in severalty, even when a tribe later reacquires an interest.

Second, Transwestern had ample opportunity to be heard at the district court and declined to do so. At the most consequential phase of the district

court proceedings—the Navajo Nation's ultimately successful motion to dismiss—Transwestern declined to participate in briefing. Both the Navajo Nation and the United States raised the now-disputed issue of the scope of § 357 in the district court. Transwestern has already had the opportunity it now seeks and let it slip by.[6]

Transwestern argues that an adverse decision for PNM in this case would significantly affect its own extensive network of energy infrastructure. That seems likely. But that was equally true in the district court, where Transwestern declined to make its arguments. We see little that has changed in the meantime, except perhaps a heightened fear of an unfavorable decision.

Nor is Transwestern being excluded from the case. All parties consent to Transwestern's status as amicus curiae, and we have considered the company's briefed arguments. But Transwestern's legal objective duplicates PNM's, and its arguments come too late for us to grant intervention.[7]

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[6] We decline to decide whether the United States is correct in its allegation that Transwestern engaged in "sandbagging tactics" by willfully holding back arguments in the district court in hopes of more favorable treatment on appeal. United States Intervention Br. at 2. But opening the door to such tactics is another reason weighing against allowing Transwestern's intervention. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011).

[7] Granting Transwestern's motion to intervene would not change the outcome of the case. The company offers only one relevant argument that was not substantially raised by the appellant: that the Supreme Court in *County of Yakima* allowed the local county to tax lands that had been earlier

CONCLUSION

For the reasons stated, we affirm the district court's dismissal of the condemnation action for lack of subject-matter jurisdiction as to the two land parcels in which the Navajo Nation holds an interest.

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allotted from a tribal reservation, that had passed out of trust status into fee-simple status, and that later had been repurchased by the tribe. 502 U.S. at 270. Transwestern argues that this shows that the Supreme Court recognizes the permanence of a land's allotment status even after the tribe re-obtains the land. Thus, in our case, Transwestern argues, we should recognize the permanence of the disputed land's allotment status even after a tribal purchase and inheritance.

But *County of Yakima* differs from our case in at least one key aspect—here, the land never became fee-simple land. Instead, it has always retained its status as held in trust by the United States. What *County of Yakima* turned on was not allotment status, but fee-simple status. The Court held that once land had become fee-simple land, the tribe could not unilaterally return it to protected status and exempt itself from ad valorem taxes via its purchase. *Id.* The Court did not give any independent meaning to allotment status—it simply reviewed that history to show why the relevant Act of Congress resulted in the land being held in fee-simple status. *Id.* at 254-56, 258-60. Moreover, a case on local tax authority does not automatically compel us to adopt the same principles for condemnations.

PNM raised a similar argument in the district court based on *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), and the district court rejected it for the same fee-title status versus trust status divide that we have just discussed. PNM did not raise the case again on appeal.

[ENTERED: May 26, 2017]

FILED
United States Court of Appeals
Tenth Circuit

May 26, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff - Appellant, v. LORRAINE BARBOAN, a/k/a, Larene H. Barboan; BENJAMIN HOUSE, also known as, BENNIE HOUSE; ANNIE H. SORRELL, also known as, ANNA H. SORRELL; MARY ROSE HOUSE, also known as, MARY R. HOUSE; DOROTHY HOUSE, also known as, DOROTHY W. HOUSE; LAURA H. LAWRENCE, also known as, LAURA H. CHACO; JONES DEHIYA; JIMMY A. CHARLEY, also known as, JIM A. CHARLEY;	No. 16-2050 (D.C. No. 1:15-CV-00501-JAP-CG) (D. N.M.)

MARY GRAY CHARLEY, also known as, MARY B. CHARLEY; BOB GRAY, Deceased, also known as, BOB GREY; CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY; THOMAS THOMPSON GRAY, also known as, THOMAS GREY; JIMMIE GREY, also known as, JIMMIE GRAY; MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY; MARLA L. CHARLEY, also known as, MARLA CHARLEY; KALVIN A. CHARLEY; IRENE WILLIE, also known as, IRENE JAMES WILLIE; CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON; ELOUISE J. SMITH; LEONARD WILLIE; SHAWN STEVENS; GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON; GLENDA BENALLY, also known as, GLENDA G. CHARLESTON; NAVAJO NATION; UNITED STATES OF AMERICA,

Defendants - Appellees,

and

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY

COUNTY, NEW MEXICO; NAVAJO TRIBAL UTILITY AUTHORITY; CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.; TRANSWESTERN PIPELINE COMPANY, LLC; CITICORP NORTH AMERICA, INC.; CHEVRON USA INC., as successor in interest to Gulf Oil Corp.; HARRY HOUSE, Deceased; PAULINE H. BROOKS; LEO HOUSE, JR.; NANCY DEHEVA ESKEETS; LORRAINE SPENCER; LAURA A. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON; EDDIE MCCRAY, also known as, EDDIE R. MCCRAE; ETHEL DAVIS, also known as, ETHEL B. DAVIS; WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY; ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as, ELOISE ANN JAMES, also known as, ELOUISE WOODS; ALTA JAMES DAVIS, also known as, ALTA JAMES; ALICE DAVIS, also known as, ALICE D. CHUYATE; PHOEBE CRAIG, also known as, PHOEBE C. COWBOY; NANCY JAMES, also known as, NANCY JOHNSON;

BETTY JAMES, Deceased; LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS; GENEVIEVE V. KING; LESTER CRAIG; FABIAN JAMES; DAISY YAZZIE CHARLES, also known as, DAISY YAZZIE, also known as, DAISY J. CHARLES; ROSIE YAZZIE, Deceased; KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES; VERNA M. CRAIG; JUANITA SMITH, also known as, JUANITA R. ELOTE; ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.; BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY; VELMA YAZZIE; GERALDINE DAVIS; LARRISON DAVIS, also known as, LARRISON P. DAVIS; ADAM MCCRAY; MICHELLE MCCRAY; EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS; CELENA DAVIS, also known as, CELENA BRATCHER; FRANKIE DAVIS; VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON; VERN CHARLESTON; KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON;

SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON; SPENCER KIMBALL CHARLESTON, JR., Deceased; EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON; CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON; SAM MARIANO; HARRY HOUSE, JR; MATILDA JAMES; DARLENE YAZZIE; UNKNOWN OWNERS, CLAIMANTS AND HEIRS OF THE PROPERTY INVOLVED; UNKNOWN HEIRS OF HARRY HOUSE, Deceased; UNKNOWN HEIRS OF BOB GRAY (BOB GREY), Deceased; UNKNOWN HEIRS OF BETTY JAMES, Deceased; UNKNOWN HEIRS OF ROSIE C. YAZZIE, Deceased; UNKNOWN HEIRS OF SPENCER KIMBALL CHARLESTON, JR., (SPENCER K. CHARLESTON), Deceased; UNKNOWN HEIRS OF HELEN M. CHARLEY, Deceased; ESTATE OF ROSIE C. YAZZIE; ESTATE OF SPENCER K. CHARLESTON; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; UNITED STATES

DEPARTMENT OF THE INTERIOR,

Defendants.

GPA MIDSTREAM ASSOCIATION; THE NATIONAL CONGRESS OF AMERICAN INDIANS; PUEBLO OF LAGUNA; THE UTE MOUNTAIN UTE TRIBE; THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION,

Amici Curiae.

JUDGMENT

Before **BACHARACH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk

[ENTERED: March 2, 2016]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO; NAVAJO NATION; NAVAJO TRIBAL UTILITY AUTHORITY; CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.; TRANSWESTERN PIPELINE COMPANY, LLC; CITICORP NORTH AMERICA, INC.; CHEVRON USA INC., as successor in interest to Gulf Oil Corp.; HARRY HOUSE, Deceased; LORRAINE BARBOAN, also known as, LARENE H. BARBOAN; PAULINE H. BROOKS; BENJAMIN HOUSE, also known as, BENNIE HOUSE; ANNIE H. SORRELL, also known as, ANNA H. SORRELL; MARY ROSE HOUSE, also known as, MARY R. HOUSE; DOROTHY HOUSE, also known as, DOROTHY W. HOUSE; LAURA H. LAWRENCE, also known as, LAURA H. CHACO; LEO HOUSE, JR.; JONES DEHIYA; NANCY DEHEVA ESKEETS; JIMMY A. CHARLEY, also known as, JIM A. CHARLEY; MARY GRAY CHARLEY, also known as, MARY B. CHARLEY; BOB

GRAY, Deceased, also known as, BOB GREY; CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY; THOMAS THOMPSON GRAY, also known as, THOMAS GREY; JIMMIE GREY, also known as, JIMMIE GRAY; LORRAINE SPENCER; MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY; MARLA L. CHARLEY, also known as, MARLA CHARLEY; KALVIN A. CHARLEY; LAURA A. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON; IRENE WILLIE, also known as, IRENE JAMES WILLIE; EDDIE MCCRAY, also known as, EDDIE R. MCCRAE; ETHEL DAVIS, also known as, ETHEL B. DAVIS; CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON; WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY; ELOUISE J. SMITH; ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as, ELOISE ANN JAMES, also known as, ELOUISE WOODS; LEONARD WILLIE; ALTA JAMES DAVIS, also known as, ALTA JAMES; ALICE DAVIS, also known as, ALICE D. CHUYATE; PHOEBE CRAIG, also known as, PHOEBE C. COWBOY; NANCY JAMES, also known as, NANCY JOHNSON; BETTY JAMES, Deceased; LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS; GENEVIEVE V. KING; LESTER CRAIG; SHAWN STEVENS; FABIAN JAMES; DAISY YAZZIE CHARLES, also known as, DAISY YAZZIE, also known as, DAISY J.

CHARLES; ROSIE YAZZIE, Deceased; KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES; VERNA M. CRAIG; JUANITA SMITH, also known as, JUANITA R. ELOTE; ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.; BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY; VELMA YAZZIE; GERALDINE DAVIS; LARRISON DAVIS, also known as, LARRISON P. DAVIS; ADAM MCCRAY; MICHELLE MCCRAY; EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS; CELENA DAVIS, also known as, CELENA BRATCHER; FRANKIE DAVIS; GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON; VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON; VERN CHARLESTON; GLENDA BENALLY, also known as, GLENDA G. CHARLESTON; KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON; SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON; SPENCER KIMBALL CHARLESTON, JR., Deceased; EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON; CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON; SAM MARIANO; HARRY HOUSE, JR.; MATILDA JAMES; DARLENE YAZZIE; Unknown owners, Claimants and Heirs of the Property Involved, Unknown Heirs of Harry House, Deceased; Unknown Heirs of

Bob Gray (Bob Grey), Deceased; Unknown Heirs of Betty James, Deceased; Unknown Heirs of Rosie C. Yazzie, Deceased; Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased; Unknown Heirs of Helen M. Charley, Deceased; ESTATE OF ROSIE C. YAZZIE, Deceased; ESTATE OF SPENCER K. CHARLESTON, Deceased; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and UNITED STATES DEPARTMENT OF THE INTERIOR;

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND ORDER DISMISSING NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392

Plaintiff Public Service Company of New Mexico (PNM) asks the Court to alter or amend its MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 101) (Memorandum Opinion) and set aside its ORDER OF DISMISSAL WITHOUT PREJUDICE (Doc. No. 102) (Order of Dismissal). *See* PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR

SEVERANCE OF CASE (Doc. No. 107) (Motion).[1] Because PNM has failed to meet the requirements

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[1] On January 12, 2016, the Navajo Nation (Nation) filed its RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Doc. No. 110) (Nation's Response). On January 12, 2016, the United States filed UNITED STATES' RESPONSE IN OPPOSITION TO PLAINTIFF'S DECEMBER 29, 2015 MOTION TO ALTER OR AMEND ORDER OF DECEMBER 1, 2015 (Doc. No. 114) (the United States' Response). On January 25, 2016, 22 of the individual allotment owner defendants filed INDIVIDUAL DEFENDANTS' RESPONSE TO PNM'S MOTION TO ALTER OR AMEND (Doc. No. 116) (22 Defendants' Response) adopting the arguments in the Nation's Response and the United States' Response. On January 26, 2016, PNM filed PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S REPLY TO THE NAVAJO NATION'S RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Doc. No. 117) (Reply to Nation's Response). On February 5, 2016, PNM filed PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S REPLY TO THE UNITED STATES' RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Reply to United States' Response). And on February 8, 2016, PNM filed PNM filed PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S REPLY TO 22 DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Reply to 22 Defendants' Response). The Court has carefully considered all arguments presented in these briefs.

for granting motions to reconsider, the Court will deny the Motion in part. However, the Court will grant the Motion in part and certify for interlocutory appeal the controlling questions of law presented in this case.

I. BACKGROUND

This case involves a utility easement granted to PNM in the 1960s for a fifty-year term (the Original Easement). On the easement PNM constructed and maintains a 115-Kilovolt electric transmission line, known as the "AY Line." The AY Line is a crucial component of PNM's electricity transmission system in northwestern New Mexico and crosses five allotments owned by members of the Navajo Nation (Nation). The allotments, located in McKinley County, New Mexico, will be referred to as (1) Allotment 1160, (2) Allotment 1204, (3) Allotment 1340, (4) Allotment 1392, and (5) Allotment 1877 (together, the Five Allotments). The United States owns fee title to the Five Allotments in trust for the beneficial interest owners. The Nation owns an undivided 13.6 % beneficial interest in Allotment 1160 and an undivided .14 % beneficial interest in Allotment 1392 (together, the Two Allotments).

In April 2009, prior to the expiration of the Original Easement, PNM acquired written consent from a sufficient number of the individual owners of beneficial interests and submitted a renewal application to the Department of the Interior's Bureau of Indian Affairs (BIA). In June 2014, counsel for the 22 Defendants, who own a majority of the beneficial interests in the Five Allotments, notified the BIA and PNM that they had revoked

their consent. In the ensuing months, PNM attempted in good faith, though unsuccessfully, to obtain the necessary consents to renew the Original Easement.[2] In January 2015, the BIA notified PNM that the revocations precluded the BIA from approving PNM's renewal application.

On June 13, 2015, PNM initiated this action under 25 U.S.C. § 357 to condemn a perpetual easement on the Five Allotments. Asserting sovereign immunity, the Nation moved to dismiss the condemnation claims against it and against the Two Allotments arguing that the Nation is an indispensable party. The Court granted the Nation's MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Motion to Dismiss) and dismissed the condemnation claims against the Nation without prejudice.

In the Motion, PNM asks the Court to set aside the Memorandum Opinion and the Order of Dismissal. In the alternative, PNM asks the Court to apply its ruling prospectively and allow PNM to condemn easements required for PNM's existing infrastructure. If the Court denies both of these requests, PNM asks the Court to (1) certify for interlocutory appeal the controlling questions of law presented in this case or (2) sever PNM's claims against the Two Allotments from this case and enter a final appealable judgment. Because an interlocutory appeal will promote judicial economy and will help determine questions of law vital to PNM's authority to condemn property in Indian

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[2] The FAC does not allege whether PNM sought the Nation's consent to renew the Original Easement.

Country, the Court will grant PNM's request to certify issues for interlocutory appeal.

II. STANDARD OF REVIEW

PNM's Motion asks the Court to alter or amend the Memorandum Opinion under Rule 59(e). Technically, Rule 59(e) does not apply here because the Memorandum Opinion is not a final order or judgment. *Guttman v. New Mexico*, 325 F. App'x 687, 690 (10th Cir. 2009) ("Rule 59(e) does not apply because the court's order was not a final judgment . . ."). Properly speaking, PNM's Motion is a motion to revise an interim order under Fed. R. Civ. P. 54(b), which provides, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." However, the standard for reviewing a Rule 54(b) motion for reconsideration is the same as the standard for reviewing a Rule 59(e) motion to alter or amend a judgment. *Ankeney v. Zavaras*, 524 F. App'x 454, 458 (10th Cir. 2013) (unpublished); *see also Pia v. Supernova Media, Inc.*, No 2:09-cv-00840, 2014 WL 7261014, *1–2 (D. Utah Dec. 18, 2014) (unpublished). Hence, the Court can grant the Motion if PNM shows: (1) there has been an intervening change in the controlling law; (2) there is new evidence previously unavailable; or (3) the Court needs to correct clear error or prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). In other words, the Court may grant the Motion if it has "misapprehended the facts, a party's position, or the

controlling law." *Id.* As with a Rule 59(e) motion, PNM may not ask the court to revisit issues already considered. *Id.* And PNM may not "rehash previously rejected arguments." *Achey v. Linn County Bank*, 174 F.R.D. 489, 490 (D. Kan. 1997). In addition, PNM may not present arguments that it could have raised in the initial briefing. *Van Skiver v. United States*, 953 F.2d 1241, 1243 (10th Cir. 1991).

III. ANALYSIS

A. DISMISSAL WAS NOT *SUA SPONTE*

Section 3 of the Act of March 3, 1901 provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." 25 U.S.C. § 357. The Court concluded PNM could not condemn the Two Allotments under § 357 because the Nation owns a fractional interest in the Two Allotments. Thus, the Court determined that the Two Allotments are no longer "lands allotted in severalty to Indians" as provided in § 357. Alternatively, the Court held that as a partial owner of the Two Allotments, the Nation is an indispensable party that cannot be joined due to sovereign immunity. Therefore, the Court determined that, under Rule 19(b), "in equity and good conscience," the claims against the Two Allotments should be dismissed.

PNM contends that since the Nation only argued for dismissal under Rule 19 and did not argue that PNM lacked authority to condemn the Two Allotments under § 357, "PNM had no reason to address any argument that the Two Allotments are 'tribal lands,' are no longer 'lands allotted in severalty to Indians,' or are in any way exempt from the scope of Section 357." (Mot. at 5.) According to PNM, the Court reached its key holding *sua sponte* in the absence of any party advocating for such holding. (*Id.*) In response, the Nation contends that the Court's ruling on this issue was not essential to the decision because the alternative reason for dismissal of the Nation as an indispensable party with sovereign immunity is sufficient to uphold the decision to dismiss the Two Allotments.

In the first part of its Memorandum Opinion, the Court concluded that under the plain language of § 357 and under the scant case law interpreting § 357 in this context, PNM could not condemn the Two Allotments. In addition to considering the language of § 357 and the statutory history of Indian land allotment, the Court followed the holding in in *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant*, 719 F.2d 956, 961 (8th Cir. 1983) (*NPPD*).

NPPD was a § 357 condemnation action brought against several tracts of land within the Winnebago Reservation. *Id.* at 957. The tracts had been allotted to individual tribal members under the General Allotment Act, 25 U.S.C. § 331 *et seq*., or under a treaty between the tribe and the United States. *Id.* at 958. Shortly before the condemnation action was filed, several individual allotment owners

transferred undivided future interests in their tracts to the United States in trust for the tribe, and the owners retained life estates. *Id.* In Part I of its opinion, the Eighth Circuit Court of Appeals reversed the district court's holding that none of the tracts could be condemned because § 357 had been impliedly repealed by the 1948 Act (25 U.S.C. §§ 323–328) authorizing the Interior Secretary to grant rights of way across Indian lands. *Id.* at 958. The Eighth Circuit concluded that both statutes were enforceable. *Id.* at 961.

In Part II of its opinion, the Eighth Circuit used the definition of tribal lands in 25 C.F.R. § 169.1(d), a regulation governing consensual grants of rights of way on Indian lands. Section 169.1(d) defines tribal land as "land or *any interest therein*, title to which is held by the United States in trust for a tribe." *Id.* (emphasis added). The Eighth Circuit concluded that under this definition, tracts partially owned by the tribe had become "tribal land" that could not be condemned under § 357. *Id.* at 962.

PNM correctly asserts that in the Nation's Motion to Dismiss, the Nation did not argue that the Two Allotments were "tribal land." However, in its Response to the Motion to Dismiss (Doc. No. 39), PNM asserted that the Indian Land Consolidation Act (ILCA), the statute under which many tribes acquired title to previously allotted lands, did not "change the legal character of any parcel from allotted land to any other type of land (such as tribal trust land) as a result of an Indian tribe's acquisition of a fractional interest." (Resp. (Doc. No. 39) at 6.) PNM also asserted an "Indian tribe that acquires a fractional interest is, in substance, only stepping

into the shoes of an allottee." (*Id.*)[3] Although these contentions were in the background section of PNM's Response to the Motion to Dismiss, PNM clearly presented its belief that the statutes, particularly the ILCA, which were intended to reverse the disastrous allotment policy, had no effect on § 357's general applicability to allotted lands. And, in its argument section, PNM asserted that in § 357, Congress specifically allowed condemnation of allotted land without regard to "which persons or entities own fractional interests in such parcel." (*Id.* at 7.) PNM further argued that Congress enacted and amended the ILCA without modifying § 357, thereby demonstrating a congressional intent to abrogate tribal sovereign immunity against condemnation actions involving allotted lands. (*Id.*)

In its Response to the Motion to Dismiss, PNM asked the Court to focus on Part I of the *NPPD* opinion in which the Eighth Circuit found that the location of allotted lands, on or off of a reservation, did not alter their status as condemnable allotted lands:

> The appellees urge that we distinguish the previous courts of appeals decisions because they involved allotted land outside an Indian reservation. In contrast, the allotted land in this case is located within an Indian reservation. It may well be good policy to treat allotted land within a reservation, in which a tribe has a greater interest, differently

[3] This argument was rejected by the *NPPD* court: "[i]t is the fact of tribal ownership which establishes the existence of tribal land, not the identity of the grantor." *NPPD*, 719 F.2d at 962.

> from allotted land outside the reservation. Congress, however, has drawn no such distinction in the statute. We cannot ignore the plain meaning of the statute, which provides simply for condemnation of "allotted land" without regard to its location.

Id. at 961. PNM contended that if location did not alter the lands' status, neither should tribal ownership of the Two Allotments. PNM stressed that it was relying only on Part I of *NPPD*, that it expressly disagreed with the conclusion in Part II of *NPPD*, and that it would request to file a surreply brief if the Nation presented the *NPPD* Part I argument in its Reply brief. However, no surreply was necessary because the Nation, in both its Motion to Dismiss and in the Reply, only argued that the Nation should be dismissed because it had sovereign immunity, that it had not waived its immunity, and that its immunity had not been abrogated by Congress.[4]

In sum, the Court declined to follow PNM's argument that in § 357 Congress intended to abrogate tribal immunity by allowing the condemnation of allotted lands even if partially owned by tribes. The Court ruled that tribal ownership of the Two Allotments removed them from the reach of § 357 and that despite Congress's

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[4] However, PNM recognized that the Nation and the United States had already cited and quoted Part II of the *NPPD* opinion in their answers and argued that the Two Allotments were "tribal lands" as defined in the Part 169 regulations. *See* ANSWER TO CONDEMNATION COMPLAINT (Doc. No. 23) at 2; ANSWER OF THE UNITED STATES (Doc. No. 25) at 6.

implied abrogation of the United States' sovereign immunity, the implied abrogation did not extend to the Nation. In its Memorandum Opinion, the Court agreed, "with the reasoning in *NPPD* that § 357 does not allow condemnation of lands owned by tribes[.]" However, the Court primarily relied "on the plain language of § 357 and its distinct application to lands 'allotted in severalty to Indians[,]'" which illustrated "a singular Congressional focus on allotted land owned by individual tribal members." (Mem Op. at 14 and note 16.) Therefore, the Court did not rule *sua sponte* that the Two Allotments were "tribal lands" as defined in the regulations related to consensual easements. Nevertheless, in the interest of clarity and completeness, the Court will address all of the contentions in the Motion, including the arguments related to *NPPD* Part II and the definition of "tribal land" found in the Part 169 regulations. More importantly, as the Nation contends, the Court's conclusion that PNM lacked statutory authority to condemn the Two Allotments, if erroneous, does not mean that the decision to dismiss the Nation and the Two Allotments must be set aside. The Court correctly determined that under Rule 19, the Nation was an indispensable party to this condemnation action that could not be feasibly joined due to sovereign immunity. Therefore, the case had to be dismissed because "in equity and good conscience," the action could not proceed against the Two Allotments in the Nation's absence.

B. ONCE AN ALLOTMENT NOT ALWAYS AN ALLOTMENT

PNM maintains that for 130 years land "allotted in severalty to Indians" has been

synonymous with the term "allotment." According to PNM, the allotment of land was a one-time historical event that permanently changed reservation lands into allotments subject to condemnation under § 357. However, Congress's changing policy toward Indian land and its abandonment of the allotment policy proves otherwise. As described in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*,

> In the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.

502 U.S. 251, 254 (1991). In the Indian General Allotment Act of 1887, also known as the Dawes Act,[5] Congress

> empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. The Dawes Act restricted immediate alienation or encumbrance by providing that each allotted parcel would be held

[5] PNM attached to its Motion a copy of the Dawes Act, which was titled "An act to provide for the allotment of lands in severalty to Indians . . ." (Mot. Ex. 1.) PNM also attached a 1910 statute on descent and distribution of allotments, which referenced the Dawes Act and the lands as "allotments." (Mot. Ex. 2.)

> by the United States in trust for a period of 25 years or longer; only then would a fee patent issue to the Indian.

Id. As described in the Memorandum Opinion, Congress's allotment policy changed within a few decades because allotment proved disastrous for the Indians. *Hodel*, 481 U.S. 704, 706–07 (1987).[6]

PNM persuasively asserts that when the General Allotment Act was enacted, Congress did not contemplate, or have reason to contemplate, that allotted lands or fractional interests in allotted lands, would ever be transferred back to the tribe. In fact, Congress intended that allotted lands would eventually be freed from the trust and patented in fee to the owners. *See* 25 U.S.C. §349 (enacted in 1887, amended in 1906) (providing that state and territory laws applied to lands "[a]t the end of the

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[6] The Supreme Court in *Hodel* outlined the unintended consequences of the General Allotment Act:

> Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. . . . The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40–, 80–, and 160–acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.

Id. at 707 (citations omitted).

trust period and when the lands have been conveyed to the Indians by patent in fee[.]").

As noted by the Supreme Court in *Babbitt v. Youpee*, Congress ended further allotment in the 1934 Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq*. and allowed the Secretary of the Interior to acquire "any interest in lands . . . within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians." 519 U.S. 234, 237 (1997) (quoting 25 U.S.C. § 465). In repudiation of federal allotment policies, the IRA ended allotment and made possible the organization of tribal governments and tribal corporations. The passage of the IRA ended "the erosion of Indian land and resources and reaffirmed the inherent powers of tribal governments." AMENDING THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES, S. Rep. No. 112–166 (2012).

In 1983, Congress enacted the Indian Land Consolidation Act (ILCA), 25 U.S.C. §§ 2201–2221, which "contains a handful of provisions designed to ameliorate, over time, fractionated ownership." American Indian Law Deskbook, § 3.15 (4th ed. 2008). Under the ILCA, a tribe may purchase, at fair market value, all the interests in a tract so long as the owners of over fifty per cent of the undivided interests consent. The 2000 amendments to ILCA allowed the Secretary of the Interior to acquire fractional interests and hold them in trust for the tribe with jurisdiction over the property. 25 U.S.C.

§ 2212. Despite Congress's efforts, "interests in lands already allotted continued to splinter with each generation." 519 U.S. at 238.

PNM maintains, and the Court agrees, that at the time § 357 was enacted in 1901, Congress intended for all allotted land to be subject to condemnation for public purposes, even before the trust period ended and the land was patented in fee to the individual allottees. However, PNM asks the Court to go a step further and find that once Congress allotted land to individual tribal members, the land remained subject to condemnation even after the land was reacquired in trust for a tribe under subsequent statutes. But PNM goes a step too far. PNM has not cited, and the Court has not located, a case holding that a parcel of land previously "allotted in severalty to" an individual Indian, but later transferred to the United States in trust for a tribe, is subject to condemnation under § 357 because the parcel is identified as an "allotment." And, PNM criticizes the one decision, *NPPD*, which held that such a parcel of land is not subject to condemnation under § 357.[7] Therefore, the Court did not clearly err in concluding that an interest in a previously allotted parcel of land later acquired in trust for a tribe was not condemnable under § 357.

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[7] In *NPPD* Part II, the utility district argued that the future interests in an allotment conveyed to the Winnebago tribe should not constitute "tribal land." 719 F.2d at 961. However, relying on the definition of "tribal land" in the Part 169 regulations related to consensual easements, the Eighth Circuit stated, "by defining tribal land as 'any interest' in land, [tribal land] includes the undivided future interests or expectancies conveyed in this case." *Id.* at 962.

PNM claims that the Court failed to define what it meant by "tribal lands," and the Court failed to explain how the Two Allotments became "tribal land" and ceased being "allotments." The Court followed the reasoning in *NPPD*, but to elaborate, the Court restates its conclusion: When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; that land becomes "tribal land" not subject to condemnation under § 357. PNM correctly points out that there is no legal mechanism by which land can be characterized as partially allotted land and partially tribal land, and that is not what the Court has concluded. But, PNM's "once an allotment always an allotment" rule is not supported by any case law authority or the plain language of § 357 and its historical context.

As an alternative, PNM argues that "[t]he Court also has not identified any recognized legal classification or categorization that the Two Allotments could possess (other than "Allotments") in light of their continued majority beneficial-interest ownership by individual Indians." PNM would characterize the Two Allotments as condemnable "allotments" due to their majority ownership by individuals. By implication, the Two Allotments would not be condemnable only when a tribe acquires a majority beneficial interest in the land. Again, PNM cites no statutory authority or case law to support this alternative. According to PNM, the Court's ruling has created a new category of "tribal land," and may have adverse effects on the interests of individual fractional owners of the Two Allotments. In this case, however, the 22 Defendants, who constitute a majority of individual

ownership interests in the Five Allotments, are aligned with the Nation and the United States in opposition to the Motion as they previously opposed condemnation. *See* 22 Defendants' Response (Doc. No. 116) (adopting Nations' Response and the United States' Response).

PNM's contention that once land was allotted, it could never regain its status as tribal land, is not persuasive in light of the shift in congressional policy in favor of tribal sovereign ownership. Upon review of the statutory history of allotted lands, the Court concludes that Congress facilitated the transfer of beneficial interests from individual land owners to tribes not only to reduce the fractionation of allotted lands among individuals but also to restore lands to protected tribal status.

C. APPLYING THE PART 169 REGULATIONS

PNM next asserts, as it did in its Response to the Motion to Dismiss, that the Court should not follow *NPPD* because the Eighth Circuit incorrectly used the definition of "tribal land" set forth in the regulations governing consensual easements under 25 U.S.C. §§ 323–328. PNM cites *WBI Energy Transmission, Inc. v. Easement & Right-of-Way Across in Big Hom & Yellowstone Ctys., Montana*. WBI Energy Transmission, Inc. (WBI) held a 20 year consensual pipeline easement across several allotments owned by a single individual. No. CV 14-130-BLG-SPW, 2015 WL 4216841, *1 (D. Mont. July 10, 2015). After failing to obtain the landowner's consent to a renewal of the easement, WBI brought a condemnation action under 25 U.S.C. § 357 and

under the Natural Gas Act, 15 U.S.C. §§ 717–717z. *Id.* The landowner filed a motion *in limine* to preclude WBI "from arguing that its condemnation can be for more than 20 year term." *Id.* at * 4. The landowner relied on 25 U.S.C. §§ 321 and 323 governing consensual easements, and WBI argued that §§ 321 and 323 and the accompanying regulations were inapplicable to condemnation.[8] The district court agreed with WBI and found that "condemnation provides an alternative method to acquire the easement, WBI is not confined by the perimeters of § 321 or § 323." *Id.*

PNM asks the Court to follow the *WBI* court's reasoning and find that in this § 357 condemnation proceeding, PNM is not confined by the definition of "tribal land" from the Part 169 regulations. First, PNM mischaracterizes the Court's decision, which was not based solely on the regulatory definition of "tribal land." Second, the holding in *WBI* does not convince the Court to change its conclusion that due to the Nation's ownership interest, the Two Allotments are no longer "lands allotted in severalty to Indians" as provided in § 357. Moreover, even if the Two Allotments were condemnable under § 357, Court would dismiss this action against the Nation because it is an indispensable party that cannot be

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[8] Section 321 authorizes the Interior Secretary to grant easements across Indian allotments for the construction of pipelines provided that the easement "shall not extend beyond a period of twenty years." Section 323 authorizes the Secretary to grant rights of way "subject to such conditions he may prescribe." Under the applicable regulations, a new easement for a gas pipeline can be permanent, but easement renewals can be granted "for a like term of years." 25 C.F.R. §§ 169.18–169.19.

joined due to sovereign immunity. Thus, the outcome would be the same.

Next, PNM takes issue with the Court's footnote discussion of cases that cited *NPPD* with approval. (Mem. Op. at 14 n.16.) PNM argues that none of those courts directly approved of Part II of the *NPPD* opinion and the use of the regulatory definition of "tribal lands." However, the first case cited by the Court did just that: "The Utility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees under 25 U.S.C. § 357, but this statute does not apply to land held in trust for the Tribe." *United States v. Pend Oreille Public Util. Dist. No. 1*, 28 F.3d 1544, 1552 (9th Cir. 1994) (citing *NPPD* 719 F.2d at 961). That subject was only discussed in Part II of the *NPPD* opinion. 719 F.2d at 961–62.

Nevertheless, PNM correctly maintains that the *Pend Orielle* court and the other cases cited in footnote 16 did not answer the question presented here as to whether land in which a tribe owns a fractional beneficial interest is exempt from § 357 condemnation. PNM correctly asserts that no court, other than the *NPPD* court and now this Court, have held that tracts of land that are jointly owned by individuals and a tribe may not be condemned under § 357. By the same token, however, no court has held that such land is condemnable under § 357. In sum, the Court, relying on the only Circuit Court of Appeals case that had decided this issue, did not commit clear error in holding that PNM cannot condemn the Two Allotments under the plain language of § 357.

D. THE AMENDED PART 169 REGULATIONS

PNM contends that if the Court affirms its use of the definition of tribal lands from 25 C.F.R. § 169.1(d), the Court should reevaluate its findings in light of the amendments to the Part 169 regulations (Amended Part 169), which will become effective on March, 21 2016. As already mentioned, the Court did not decide that the Two Allotments were exempt from condemnation solely because they are tribal lands as defined in the Part 169 regulations. However, if the Court were to consider the Amended Part 169 regulations, the Court would not change its decision.

In June 2014, the BIA promulgated the amendments to "comprehensively update and streamline the process for obtaining BIA grants of rights-of-way on Indian land," and the BIA invited comments. *See* 79 Fed. Reg. 34,455-01 (June 17, 2014). PNM contends that the Amended Part 169 regulations, as amplified by the comments and the BIA's responses to the comments, support either of two conclusions: (1) that these regulations are not applicable to condemnation proceedings; or (2) that allotments jointly owned by a tribe and individuals should not be considered "tribal land" exempt from condemnation.

PNM's first argument is correct. The new regulations and the comments reaffirm that the Amended Part 169 regulations do not govern condemnation actions under § 357. For example, the old version of 25 C.F.R. § 169.21 stated:

> The facts relating to any condemnation action to obtain a right-of-way over individually owned lands shall be reported immediately by officials of the Bureau of Indian Affairs having knowledge of such facts to appropriate officials of the Interior Department so that action may be taken to safeguard the interests of the Indians.

The Amended Part 169 regulations omit this section apparently to remove any confusion about whether these regulations apply to § 357 condemnations.

In addition, one commenter asked the BIA why the term "eminent domain" was not defined in the amendments. The BIA responded: "the final rule does not include the term 'eminent domain' or address eminent domain, so this definition is not added. Statutory authority exists in 25 U.S.C. § 357 for condemnation under certain circumstances, but these regulations do not address or implement that authority." *See* Rights-of-Way on Indian Land; Final Rule, 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015). The BIA further commented: "The current rule does not provide guidance for condemnation of Indian land. The statutory provisions at 25 U.S.C. § 357 govern this process." 80 Fed. Reg. at 72,517.

PNM contends these comments show that the BIA has discouraged the use of the regulatory definition of "tribal land" to interpret § 357. The Court, however, agrees with the United States' argument that although the Amended Part 169 regulations do not govern condemnation actions, the BIA's analysis and treatment of fractionated Indian

lands is useful to interpret other Indian land statutes, particularly § 357.[9]

Alternatively, PNM argues that several of the Amended Part 169 regulations support a finding that the Two Allotments should not be considered "tribal land." For example, in Amended Part 169.2, the term "tribal land" is defined as "any tract in which the surface estate, or an *undivided interest in the surface estate*, is owned by one or more tribes in trust or restricted status." 25 C.F.R. § 169.2 (effective Mar. 21, 2016) (emphasis added). Conversely, the United States asserts that this new definition reveals that the Two Allotments would be considered tribal land. But, PNM points out that even though a fractional interest in land can be considered tribal land in § 169.2, the BIA does not treat "tribal land" and "individually owned land" as mutually exclusive legal classifications. For example, the BIA responded to a commenter who asked whether a tract in which both a tribe and an

[9] In its Reply to the United States' Response, PNM argues that the United States should have explained the BIA's commentary on Amended Part 169, but instead, by remaining silent, the United States has essentially conceded PNM's position. (Reply (Doc. No. 118) at 4.) However, the United States made no concession. In its Response, the United States points to the definition of "tribal lands" in the Amended Part 169 regulations which include "an undivided interest in the surface estate." And the United States points to comments related to the definition of "tribal land" which included fractional interests in land owned by both individuals and tribes. (*Id.* 9–10.) The United States maintains that the new regulations and comments do not support a finding that the Court erred in its conclusion that lands jointly owned by a tribe are not eligible for condemnation.

individual own interests would be considered "individually owned Indian land" or "tribal land:

> A tract in which both a tribe and an individual own interests would be considered "tribal land" for the purposes of requirements applicable to tribal land and would be considered "individually owned Indian land" for the purposes of the interests owned by individuals.

Id. at 72,496. While BIA clearly recognizes the rights of both tribal and individual owners with regard to grants of easements, the BIA's treatment of jointly owned land does not convince the Court to change its decision. The Nation's joint ownership interest has an attendant right to possession of the entire tract, and the BIA recognizes that right:

> Comment—"Tribal Land": A tribal commenter asked whether a tract is considered tribal land, even if fractional interests are owned by both the tribe and individual Indians. Another commenter suggested defining "tribal land" to include only land that is not individually owned. A commenter suggested limiting tribal land to those tracts in which the tribe holds a majority interest.
>
> Response: Under the proposed definition and final definition, a tract is considered "tribal land" if any interest, fractional or whole, is owned by the

> tribe. *A tract in which both a tribe and individual Indians own fractional interest is considered tribal land for the purposes of regulations applicable to tribal land. If the tribe owns any interest in a tract, it is considered "tribal land" and the tribe's consent for rights-of-way on the tract is required under 25 U.S.C. 323 and 324.*

Id. at 72,497 (emphasis added). Also on that subject, some commenters opposed the BIA's requirement that an applicant get a tribe's consent to a right of way when a tribe owns a fractional interest "because a tribe could unilaterally stop other individual Indian landowners who have a majority interest from granting the right-of-way." *Id.* The BIA responded, "tribal consent is required for any tract in which the tribe owns an interest, regardless of whether the tribal interest is less than a majority. *Requiring tribal consent restores a measure of tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy*." 80 Fed. Reg. at 72509 (emphasis added). The emphasized language exhibits the BIA's deference toward tribal ownership and tribal governance of land even when a tribe owns a small interest in the land. Given this deference to fractional tribal ownership, it is entirely reasonable to conclude in other contexts, like condemnation, that tribes who own a fractional interests in land should be treated with the equal deference.

In conclusion, the Court followed *NPPD* and its reliance on the Part 169 definition of "tribal land"

only to amplify the Court's conclusion that the plain meaning of "lands allotted in severalty to Indians" excludes lands partially owned in trust for tribes. And, after examining the Amended Part 169 regulations and BIA commentary, particularly the BIA's deferential treatment of those lands, the Court stands by its interpretation of § 357. In view of the absence of case law authority in this circuit, the Court can appropriately borrow from the BIA's regulatory policy on Indian lands, to interpret the statute governing the condemnation of land.[10]

E. DISMISSAL FOR FAILURE TO JOIN AN INDISPENSABLE PARTY UNDER RULE 19; THE COURT'S USE OF RULE 71.1; and *IN REM* PROCEEDINGS

If the Court sets aside its ruling and finds that PNM has the authority to condemn the Two Allotments, PNM still faces the Court's alternative

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[10] PNM correctly points out that in § 357 Congress provided no statutory authority for a federal agency to interpret or limit its scope. (Resp. (Doc. No. 118) at 6). *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (discussing deference to an agency's construction of statute which agency administers and stating "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). In contrast, the consensual easement statutes specifically authorize the Secretary to "prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title." 25 U.S.C. § 328. However, the statutory scheme allowing consensual easements is relevant to the overall analysis of this case not only as to the reach of § 357 but also in determining under Rule 19 that PNM has an adequate remedy apart from condemnation.

ruling that the Two Allotments must be dismissed because the Nation is an indispensable party. In its Memorandum Opinion, the Court determined that under Rule 71.1(c)(1), all persons having an interest in property to be condemned must be joined as parties. (Mem. Op. at 11.) The Court cited Wright & Miller in support of this conclusion. *Id.* (citing 12 Fed. Prac. & Proc. § 3045). According to PNM, the Court should not have construed Rule 71.1's requirement that a plaintiff "must add as defendants all those persons who have or claim an interest" as a limitation on § 357's authorization of condemnation actions. In other words, PNM argues that the dismissal of indispensable parties under Rule 19 and as persons with an interest in the property under Rule 71.1 does not mean that the Two Allotments must be dismissed.

PNM also contends that the Court should have cited a subsequent statement in the same section of Wright & Miller: "[S]ince the [condemnation] proceeding is in rem, there are no indispensable parties; the failure to join a party does not defeat the condemnor's title to the land, though the party will retain his or her right to compensation. . . ." *Id.* According to PNM since condemnation proceedings are strictly *in rem*, the dismissal of the Nation cannot deprive PNM of its authority to condemn an easement on the Two Allotments despite the strictures of Rule 19 and Rule 71.1.

In response, the Nation and the United States argue that this contention could have been raised earlier; therefore, it is an inappropriate basis for granting the Motion. However, in the interest of

clarity, the Court will address PNM's *in rem* argument.

To begin with, the Court recognizes that a condemnation action generally is considered an *in rem* proceeding against property. *United States v. Petty*, 327 U.S. 372, 376 (1946) (stating in condemnation suit brought by United States that "[c]ondemnation proceedings are in rem."). However, the United States Supreme Court held that in § 357 condemnation proceedings against allotted Indian trust land, the United States is an indispensable party. *Minnesota*, 305 U.S. at 386. The Supreme Court further determined Congress had implicitly waived the United States' sovereign immunity by allowing suits against the United States to be brought in federal court. *Id.* at 388. Therefore, under § 357 a condemning authority cannot proceed against allotted land without joining the United States. *Id. See also Town of Okemah v. United States*, 140 F.2d at 965 (citing *Minnesota* and holding that United States was an indispensable party in a condemnation suit against individual allottees who owned land with restrictions on alienation). Consequently, a federal condemnation proceeding under § 357 is not purely an *in rem* proceeding in which there are no indispensable parties.

In support of its contention, PNM cites two cases involving issues of sovereign immunity and condemnation under state law. First, *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 N.D. 83, 643 N.W.2d 685 (2002), was a case in which an individual transferred fee title to the subject land to an Indian tribe in

order to thwart a public works project. The North Dakota Supreme Court recognized an issue of first impression: "May a state condemn land within its territorial boundaries which has been purchased in fee by an Indian tribe, but which is not reservation land, aboriginal land, allotted land, or trust land?" *Id.* at 688. The court started with the premise that a condemnation proceeding under North Dakota law is strictly *in rem* and as such, *in personam* jurisdiction over a party is not required. *Id.* at 689. After determining that the proceeding met the due process requirements: (1) there were minimum contacts between the party and the forum state, and (2) all property owners had been given notice as required under state law, *id.* at 690, the Court allowed the condemnation to go forward:

> The State, and the District acting on behalf of the State, has broad authority to acquire property located within its territorial jurisdiction to be used for public purposes. A condemnation action is purely in rem, and does not require acquisition of in personam jurisdiction over the owners of the land. . . .
>
> The land at issue in this case is essentially private land which has been purchased in fee by an Indian tribe. It is not located on a reservation, is not allotted land, is not part of the Tribe's aboriginal land, is not trust land, and the federal government exercises no superintendence over the land. Under these circumstances, the State may exercise territorial jurisdiction over the

> land, including an in rem condemnation action, and the Tribe's sovereign immunity is not implicated.

643 N.W.2d at 693.

The *Cass County* ruling is distinguishable in key ways. First, the power to condemn under § 357 does depend on *in personam* jurisdiction as the Supreme Court held in *Minnesota*. In addition, the Two Allotments are allotted trust land and the federal government and the Nation, exercise "superintendence over the land." *Id.* And since the Nation's sovereign immunity has not been abrogated, the Court cannot go forward without *in personam* jurisdiction over the Nation.

The second case is *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 482 (1923). In that case, the City of Chattanooga, Tennessee filed a condemnation action against property within the City that was owned by the State of Georgia and operated as a railroad yard. Georgia argued that the City could not sue for condemnation due to Georgia's sovereign immunity. The Supreme Court disagreed:

> Having divested itself of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee . . ., [Georgia's] property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owner.

> Moreover, the acceptance by Georgia of the permission given it to acquire the railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land and precludes a claim that it is not subject to taking for the use of the public, and amounts to a consent that it may be condemned as may like property of others.

Id. at 482–83 (citations omitted). The Supreme Court further noted that Georgia had been given notice and could voluntarily appear, but otherwise Georgia "had a plain, adequate, and complete remedy in the condemnation proceedings. . . ." *Id.* at 483.

PNM argues that the Court should follow the reasoning in these cases and find this action is an *in rem* proceeding that may proceed despite the absence of the Nation as a party. However, in *Cass* the land was subject to state condemnation proceedings because the tribe owned unrestricted land in fee that was not part of a reservation or an allotment. Land owned by a tribe in fee is subject to condemnation and taxation under state law. *See* 25 U.S.C. § 349; *and County of Yakima*, 502 U.S. at 267 (concluding that fee patented land on a reservation was subject to state ad valorem tax). In *Georgia*, the Supreme Court was considering land owned by a sovereign state in its proprietary capacity, not in its sovereign capacity. And, the Supreme Court held that in its proprietary capacity, Georgia had consented to be sued as any other private land owner. Here, the Nation owns the Two Allotments in a sovereign capacity, and did not implicitly consent

to suit by acquiring an interest in the property. Thus, neither case persuades the Court that this proceeding can continue as an *in rem* proceeding against the Two Allotments despite the Nation's absence.

F. NATION'S SOVEREIGN IMMUNITY CAN BE DISTINCT FROM THAT OF THE UNITED STATES

PNM points to the Tenth Circuit's opinion in *Somerlott v. Cherokee Nation Distr., Inc.*, where the Tenth Circuit recognized that tribal sovereign immunity is co-extensive with the United States' sovereign immunity 686 F.3d 1144, 1149–50 n.3 (10th Cir. 2012). PNM admits, however, that despite this general rule, a congressional waiver of the United States' sovereign immunity does not *per se* result in a waiver of tribal sovereign immunity. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 n.14 (10th Cir. 1982) (noting that United States' and tribal immunity are generally coextensive, and stating, "[o]f course, this is not to say that where Congress waives the United States' immunity it implicitly waives the immunity of Indian tribes also."). PNM asks the Court to consider the holding in *Wagoner County Rural Water Dist. No. 2 v. United States*, No. 07 CV 0642-CVE-PJC, 2008 WL 559437, *2 (N.D. Okla. Feb. 26, 2008). In *Wagoner County*, four water districts, a nonprofit corporation, and a private nursery brought an action against the Grand River Dam Authority, the United States, and the Cherokee Nation seeking a declaration of the parties' rights to water impounded in a reservoir. *Id.* The plaintiffs asked the court to

find that both the United States' and the Cherokee Nation's sovereign immunity had been waived in the McCarran Amendment. *Id.* In the McCarran Amendment, 43 U.S.C. § 666(a), Congress permitted parties to join the United States as a defendant in an adjudication of certain water rights. *Id.* The district court held

> [T]he United States Supreme Court has held that the McCarran Amendment "did not waive the sovereign immunity of [American-]Indians as *parties*" to lawsuits brought under the Amendment. The McCarran Amendment waived sovereign immunity only with respect to the reserved water rights of the United States, which include those *rights* reserved on behalf of certain American-Indian tribes. Here, the United States waiver of immunity under the Amendment does not automatically extend to the Cherokee Nation simply because both entities possess coextensive sovereignty.

Id. (emphasis in original) (citations omitted). PNM argues that, unlike *Wagoner County*, Congress expressly authorized condemnation of "lands allotted in severalty to Indians," which should be interpreted as an authorization of *in rem* actions against allotments. PNM asserts that, as a result, the implicit waiver of United States' sovereign immunity recognized by the Supreme Court in *Minnesota* should extend to the Nation. According to PNM, a holding otherwise would place more importance on the Nation's sovereign immunity above that of the United States with respect to allotted lands.

However, the Supreme Court in *Minnesota* did not seem to consider the *in rem* nature of a condemnation proceeding. The State of Minnesota had argued that it had power to condemn the allotted lands under § 357 without making the United States a party based on the state's authority given by a treaty and its sovereign capacity to exercise its governmental functions. *Id.* at 385. The Supreme Court responded with a two-part analysis. First, the Supreme Court concluded that "[t]he United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States." 305 U.S. at 386. Second, the Supreme Court found that under § 357 the "authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts. . . . This suit was begun in state court." *Id.* at 388. The Supreme Court upheld the dismissal of the action removed from state court "although in a like suit originally brought in a federal court it would have had jurisdiction." *Id.* at 389. The Court cannot find support within *Minnesota* or its progeny for a finding that Congress's authorization to condemn allotted lands conferred by implication permission to sue a tribe. In addition, no court has held that a congressional waiver of the United States' immunity for certain suits in federal court can be applied with equal force to a tribe.

Hence, PNM's argument that this *in rem* condemnation action can proceed against the Two Allotments despite the absence of the Nation directly contradicts the Supreme Court's ruling in

Minnesota. If the Supreme Court viewed § 357 condemnations as purely *in rem* proceedings, it would not have considered the United States an indispensable party. Moreover, no court has held that even though the United States is an indispensable party to a § 357 action, a tribe, as a joint owner, is not a required or indispensable party. And, more importantly, although the Supreme Court in *Minnesota* found that Congress had waived the United States' sovereign immunity, no court has applied the same implicit waiver to a tribe under § 357.[11] In fact, it is doubtful that Congress intended, even implicitly, to waive tribal sovereign immunity in § 357 because at the time § 357 was enacted, Congress intended to parcel out all tribal reservation and communal property to individuals. On a related note, PNM has cited no authority holding that a tribe with beneficial title to land need not be joined in a condemnation action if the fee owner, the United States, is properly joined.

G. NO MANIFEST INJUSTICE AND PNM HAS AN ADEQUATE REMEDY APART FROM CONDEMNATION

PNM contends that if the Court's holding "were to become controlling law in the Tenth Circuit, such a decision would result in manifest injustice to PNM and its customers, and would also have far

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[11] In the Memorandum Opinion, the Court recognized that the holding in *Minnesota* on the implicit waiver of the United States' sovereign immunity has been criticized and that the Tenth Circuit has refused to apply the same reasoning in a partition action against Indian lands. (*See* Mem. Op. at 16–17, citing *Prince v. United States*, 7 F.3d 968, 970 (10th Cir. 1993)).

reaching, negative effects throughout Indian Country." (Mot. at 17.) PNM asserts that a tribe could acquire a miniscule ownership interest in allotted lands and block all condemnations for public purposes. PNM quotes the North Dakota Supreme Court:

> The decision of the district court (that there was no jurisdiction of a condemnation as to fee patented lands) would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project.

Cass County 643 N.W.2d at 694. PNM also contends that the effects of this Court's ruling are even more pronounced in light of the Amended Part 169 regulations requiring an easement applicant to get the consent of a tribe who holds even a small fractional interest in a parcel of land. *See* 25 C.F.R. § 169.3 (effective Mar. 21, 2016). PNM maintains that if the requisite consent from both the tribe and a majority of individual owners is not attainable, then it will have no alternative remedy under the condemnation statute. PNM contends that this Court's ruling opens up an avenue for abuse if a tribe wishes to block a project or if a tribe requests unreasonable payment in compensation. PNM asserts that in light of that possibility, utility companies and governmental entities will avoid building public works projects on Indian lands. PNM

submits that the Court's holding will stand in the way of the BIA's stated policy of attracting economic development to Indian lands because increased project costs will impede a tribe's ability to attract non-Indian investment to Indian lands. *See generally*, 80 Fed. Reg. 72,505–72,506 (Nov. 19, 2015).

The Court recognizes and has certain sympathy with the policy arguments that PNM makes. However, it cannot have escaped notice by tribal officials and allotment land owners that they must cooperate in the granting of access to tribal lands to encourage investment in those lands. More importantly, this is the incorrect forum to address PNM's concerns. *County of Yakima*, 502 U.S. at 265 (noting the Yakima Nation's arguments about the implications of the court's rulings were more appropriately made to Congress). It is Congress's job to consider and correct the negative effects of its laws.

In a related argument, PNM maintains that it cannot acquire a consensual easement because the 22 Defendants have informed PNM and this Court in a filing in a related trespass case that they "refuse to provide consent to the required easements." *See Barboan et al. v. PNM*, No. 15 CV 826 WPJ/KK, Plaintiffs' Response to Nominal Defendant United States of America's Motion to Dismiss This Action in Its Entirety (Doc. No. 23) at p. 5. PNM argues that the Court should not have found that PNM has an adequate remedy in the Court's Rule 19 analysis.

The Nation responds that PNM ignores the possibility that it can negotiate with the owners of

the Two Allotments for a higher compensation or other consideration for its easement. (Nation's Resp. To Mot. at 8.) Alternatively, the Nation argues that PNM's inability to sue for condemnation is a recognized consequence in cases against sovereigns. Moreover, the lack of a remedy, as in this situation, should be given less weight in a Rule 19 analysis involving sovereigns. As a general rule, dismissal due to an absent sovereign even in the absence of a remedy "is contemplated by the doctrine of sovereign immunity." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 872 (2008). In essence, the Nation asserts that the lack of a remedy is a natural result of the sovereign immunity doctrine and should not be dispositive in the Rule 19 analysis.

The United States counters that PNM's conclusion that it has no adequate remedy is premature because PNM has not presented evidence that a negotiated easement is absolutely impossible. PNM has presented no evidence that it has contacted counsel for the Nation or the 22 Defendants in an effort to negotiate a consensual easement.

The Court recognizes that the legal situation faced by PNM is not of its own making. In fact, Congress created this situation by allowing lands previously allotted to individuals to be reacquired in trust for tribes without amending § 357. It is up to Congress, not this Court, to open up the condemnation avenue over trust lands fractionally owned by tribes.

H. PROSPECTIVE APPLICATION

PNM asks the Court to apply the ruling prospectively due to the significant injustice to PNM and its rate payers. Generally speaking, the law announced in a court's decision controls the case at bar. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987). However, courts have restricted rulings to prospective application in specific circumstances that go beyond the particular hardship incurred when a party does not prevail. *Chevron Oil. Co. v. Huson*, 404 U.S. 97, 106–07 (1971). Three factors guide the Court in determining whether to apply a ruling prospectively. First the Court examines whether the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* Second, the Court determines whether, given the history, purpose and effect of the decision, retroactive application will further or retard its operation. Third, the Court analyzes whether retroactive application of the new rule "could produce substantial inequitable results." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1494 (10th Cir. 1991).

1. New Principle of Law

PNM maintains that at the time it obtained the Original Easement in the 1960s, it was "well-settled federal law that PNM could, if necessary, condemn easements on the affected Allotments if PNM was unable to successfully negotiate right-of-way renewals." (Mot. at 23.) According to PNM, Congress, in 1983 and later in 2000, did not send a

signal, "that § 357 condemnation rights were in any way affected by the ILCA or any ILCA-authorized tribal acquisitions of fractional beneficial interests." (*Id.*) PNM maintains that in 2009, when it began seeking a renewal of its Original Easement, "PNM reasonably relied on long-settled federal law and made substantial investment-backed expectations based on that reliance." (*Id.*) However, the Eighth Circuit's ruling in *NPPD* occurred in 1983, and the primary treatise on Indian law recognized that ruling. In Cohen's Handbook on Federal Indian Law, condemnation is only discussed in the chapter on "individual Indian property." And Cohen's Handbook states that § 357 "authorizes condemnation of '[l]ands allotted in severalty to Indians,' but does not authorize condemnation of any tribal interests in allotments[.]" Cohen, § 16.03[4][d] n.170. And as discussed above, no court, prior to or after *NPPD*, has held that a condemning authority has the right under § 357 to condemn land owned by the United States in trust for both individuals and tribes. Courts have only allowed condemnation of lands owned by tribes in fee under state law. As argued by the Nation, sovereign immunity is a long-settled doctrine, and PNM could not have been surprised to learn that the Nation would oppose this action against it on those grounds. The first factor does not weigh in PNM's favor.

2. Retroactive Application Will Further the Purpose of the Law.

The second factor requires an examination of the purpose behind the decision at issue and whether prospective application will "unduly

undermin[e] the 'purpose and effect' of the new rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94–95 (1993). If this decision applies prospectively, that is, only to new public works projects as PNM requests, then the purpose and effect of this decision will certainly be undermined.

3. Retroactive Application Would Not Produce Substantial Inequitable Results.

PNM asserts that under this ruling it will be required to pay substantial sums to either remove or reroute the AY Line or to satisfy the individual owners and the Nation. In any event, PNM will be required to incur and pass along to its rate payers the costs of this easement acquisition that "Congress never intended public utilities or their ratepayers to bear." (*Id.* at 24.)

The Court agrees with the Nation's and the United States' counter arguments. The Nation argues that PNM fails to explain how in the pursuit of a renewed easement, PNM "reasonably relied on long-settled federal law and made substantial investment-backed expectations based on that reliance." The United States asserts that the easements involved in this case cover a small part of the AY Line. PNM has worked with the Nation on access rights related to the entire AY Line, and PNM has agreed to pay adequate consideration. The United States contends that fractional interests and what to do with them has been an issue for over seventy years and is nothing new; therefore, PNM should not claim surprise at this situation. The

Nation has the power to deal with its land as it sees fit, and PNM's request for prospective application is contrary to the history of legal precedent and of precedent regarding tribal sovereign immunity. PNM has not presented a persuasive argument to this Court that the ruling here should be made prospective.

I. CERTIFICATION FOR INTERLOCUTORY APPEAL

To certify a question for interlocutory appeal, the Court must determine that the Memorandum Opinion and Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." 28 U.S.C. § 1292(b). The Court of Appeals may, in its discretion, "permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]" *Id.* However, an application for an appeal does not stay proceedings in the district court "unless the district judge or the Court of Appeals or a judge thereof shall so order." *Id.* PNM contends that if the Court does not amend or set aside its Memorandum Opinion, the Court should certify the ruling for interlocutory appeal.

PNM states that there are "controlling issues of law" concerning "whether Section 357 authorizes a condemnation action against an Allotment in which a tribe holds a fraction of the beneficial interest." (Mot. at 25.) The Court agrees that this case involves controlling issues of law that present "substantial ground for difference of opinion." Even though the

Court followed the Eighth Circuit's lead in *NPPD*, the only case on the interpretation of § 357 in this context, there are no cases within this circuit on this issue. Moreover, cases involving statutory interpretation are well suited for interlocutory appeal. The phrase "question of law" as used in 28 U.S.C. § 1292(b) "has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Branzan Alternative Investment Fund, LLLP v. The Bank of New York Mellon Trust Company, N.A.*, No. 14-cv-02513-REB-MJW, 2015 WL 6859996, *1 (D. Colo. Nov. 9, 2015) (unreported). Such questions typically involve law that is unsettled. *Id.* Consequently, for the purposes of 28 U.S.C. § 1292(b), district courts should certify questions when they are unsure what the law is, not when there is merely a dispute as to how the law applies to the facts of a particular situation. *Id.* Hence, the Court finds that there are controlling questions of law as to which there is substantial ground for difference of opinion, and there is no clear precedent on which to rely.

In addition, an interlocutory appeal will materially advance the ultimate termination of this proceeding. If interlocutory appeal is denied, PNM will have to condemn the other three Allotments; and if PNM then successfully appeals this ruling, it will have to repeat the condemnation process for the Two Allotments. If, however, PNM loses the appeal, it may have to change the location of its transmission line to bypass the Two Allotments. It is more efficient, therefore, to allow appeal at this time. The Court will certify for interlocutory appeal the following questions:

I. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the parcel.

II. Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?

III. Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?

IV. If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in, a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

J. SEVERANCE AND FINAL JUDGMENT

Under Rule 21, "[t]he court may . . . sever any claim against any party." Fed. R. Civ. P. 21. "[W]here certain claims in an action are properly severed under Fed. R. Civ. P. 21, two separate actions result." *Chrysler Credit Corp. v. Country*

Chrysler, Inc., 928 F.2d 1509, 1519 (10th Cir. 1991). A court may sever claims under Rule 21, if the two claims are "discrete and separate," i.e., one claim must be capable of resolution despite the outcome of the other claim. After severance, a court may render a final, appealable judgment in one of the two severed actions notwithstanding the continued existence of unresolved claims in the other. *Gaffney v. Riverboat Servs. Of Indiana*, 451 F.3d 424, 441–42 (7th Cir. 2006) (holding that the plaintiffs' severed claims against one defendant reached final decision, thereby vesting jurisdiction in circuit court).

As an alternative to interlocutory appeal, PNM asks the Court to sever its claims against the Two Allotments and enter a final judgment so that PNM may appeal the Court's Memorandum Opinion. In addition to the Nation, Defendants Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, and Dorothy W. House are owners of fractional beneficial interests in Allotment 1160. Defendants Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, and Shawn Stevens are owners of fractional beneficial interests in Allotment 1392 along with the Nation. Thus, PNM asks the Court to sever its condemnation claims against the Nation and 11 of the individual defendants. Other than PNM's desire to appeal the Court's dismissal, there is no reason to sever the claims against the Two Allotments. Even though a severance would allow this condemnation action to go forward as to the other three allotments, the Court has concluded it is better to stay those claims pending the resolution of PNM's interlocutory appeal. Since the Court is granting PNM's request for certification of an interlocutory appeal, the Court

will deny without prejudice PNM's request for severance.

IT IS ORDERED that:

1. PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Doc. No. 107)

a. is denied in part, and the Court will not alter or amend the Memorandum Opinion or set aside the Order of Dismissal;

b. is denied in part, and the Court will not sever PNM's claims against the Two Allotments;

c. is granted in part, and the Court certifies for interlocutory appeal the controlling issues of law outlined above; and

2. All claims in this case are stayed pending the resolution of the interlocutory appeal.

/s/
SENIOR UNITED STATES DISTRICT JUDGE

[ENTERED: December 1, 2015]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO; NAVAJO NATION; NAVAJO TRIBAL UTILITY AUTHORITY; CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.; TRANSWESTERN PIPELINE COMPANY, LLC; CITICORP NORTH AMERICA, INC.; CHEVRON USA INC., as successor in interest to Gulf Oil Corp.; HARRY HOUSE, Deceased; LORRAINE BARBOAN, also known as, LARENE H. BARBOAN; PAULINE H. BROOKS; BENJAMIN HOUSE, also known as, BENNIE HOUSE; ANNIE H. SORRELL, also known as, ANNA H. SORRELL; MARY ROSE HOUSE, also known as, MARY R. HOUSE; DOROTHY HOUSE, also known as, DOROTHY W. HOUSE; LAURA H. LAWRENCE, also known as, LAURA H. CHACO; LEO HOUSE, JR.; JONES DEHIYA; NANCY DEHEVA ESKEETS; JIMMY A. CHARLEY, also known as, JIM A. CHARLEY; MARY GRAY CHARLEY, also known as, MARY B. CHARLEY; BOB

GRAY, Deceased, also known as, BOB GREY; CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY; THOMAS THOMPSON GRAY, also known as, THOMAS GREY; JIMMIE GREY, also known as, JIMMIE GRAY; LORRAINE SPENCER; MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY; MARLA L. CHARLEY, also known as, MARLA CHARLEY; KALVIN A. CHARLEY; LAURA A. CHARLEY; HELEN M. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON; IRENE WILLIE, also known as, IRENE JAMES WILLIE; EDDIE MCCRAY, also known as, EDDIE R. MCCRAE; ETHEL DAVIS, also known as, ETHEL B. DAVIS; CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON; WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY; ELOUISE J. SMITH; ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as, ELOISE ANN JAMES, also known as, ELOUISE WOODS; LEONARD WILLIE; ALTA JAMES DAVIS, also known as, ALTA JAMES; ALICE DAVIS, also known as, ALICE D. CHUYATE; PHOEBE CRAIG, also known as, PHOEBE C. COWBOY; NANCY JAMES, also known as, NANCY JOHNSON; BETTY JAMES, Deceased; LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS; GENEVIEVE V. KING; LESTER CRAIG; SHAWN STEVENS; FABIAN JAMES; DAISY YAZZIE CHARLES, also known as, DAISY

YAZZIE, also known as, DAISY J. CHARLES; ROSIE YAZZIE, Deceased; KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES; VERNA M. CRAIG; JUANITA SMITH, also known as, JUANITA R. ELOTE; ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.; BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY; VELMA YAZZIE; GERALDINE DAVIS; LARRISON DAVIS, also known as, LARRISON P. DAVIS; ADAM MCCRAY; MICHELLE MCCRAY; EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS; CELENA DAVIS, also known as, CELENA BRATCHER; FRANKIE DAVIS; GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON; VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON; VERN CHARLESTON; GLENDA BENALLY, also known as, GLENDA G. CHARLESTON; KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON; SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON; SPENCER KIMBALL CHARLESTON, JR., Deceased; EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON; CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON; SAM MARIANO; JORGE ADRIAN ORTEGA-GALLEGOS; Unknown owners, Claimants and Heirs of the Property Involved, JORGE ADRIAN ORTEGA-GALLEGOS,

Unknown Heirs of Harry House, Deceased, JORGE ADRIAN ORTEGA-GALLEGOS, Unknown Heirs of Bob Gray (Bob Grey), Deceased, Unknown Heirs of Betty James, Deceased, Unknown Heirs of Rosie C. Yazzie, Deceased, Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased, ESTATE OF ROSIE C. YAZZIE, Deceased, ESTATE OF SPENCER K. CHARLESTON, Deceased, UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392

On June 13, 2015, Public Service Company of New Mexico (PNM) filed a COMPLAINT FOR CONDEMNATION (Doc. No. 1) seeking a perpetual easement for electrical transmission lines. (*See* Complaint Exs. 2-6; ¶ 37.) PNM brought this action to condemn a perpetual easement over five parcels of land owned by members of the Navajo Nation (Nation): (1) Allotment 1160, (2) Allotment 1204, (3) Allotment 1340, (4) Allotment 1392, and (5) Allotment 1877 (together, the Five Allotments). (*Id.*) The Nation owns an undivided 13.6 % interest in Allotment 1160 and an undivided .14 % interest in Allotment 1392 (together, the Two Allotments). (*Id.*)

In the MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 32) (the Motion), the Nation argues that this Court lacks subject matter jurisdiction and asks the Court to dismiss it as a defendant because, as a sovereign nation, it is immune from suit. In addition, the Nation asks the Court to dismiss the Two Allotments because under Fed. R. Civ. P. 19, the Nation is an indispensable party that cannot be joined. Defendants Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, Dorothy W. House,[1] Jones Dehiya,[2] Kalvin Charley, Mary B. Charley, Melvin L. Charley, Marla L. Charley, Christine G. Begay, Jimmie Gray, Thompson Grey, Bob Grey,[3] Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, Shawn Stevens,[4] Glen C. Charleston, and Glenda G. Charleston[5] (together, the 22 Defendants) have joined the Motion.[6] *See* NOTICE OF DEFENDANTS'

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[1] Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, and Dorothy W. House are owners of fractional interests in Allotment 1160.

[2] Jones Dehiya is an owner of a fractional interest in Allotment 1204.

[3] Kalvin Charley, Mary B. Charley, Melvin L. Charley, Marla L. Charley, Christine G. Begay, Jimmie Gray, Thompson Grey, and Bob Grey are owners of fractional interests in Allotment 1340.

[4] Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, and Shawn Stevens are owners of fractional interests in Allotment 1392

[5] Glen C. Charleston and Glenda G. Charleston are owners of fractional interests in Allotment 1877.

[6] Despite the joinder of the 22 Defendants in the Motion, the other three allotments will not be dismissed.

JOINDER IN NAVAJO NATION'S MOTION TO DISMISS (Doc. No. 33) (Notice of Joinder). The United States also agrees that the Nation and the Two Allotments should be dismissed from this action. *See* ANSWER OF THE UNITED STATES (Doc. No. 25); and RESPONSE TO THE NAVAJO NATIONS [SIC] MOTION TO DISMISS (Doc. No. 44).

PNM opposes the Motion. *See* PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S RESPONSE IN OPPOSITION TO DEFENDANT NAVAJO NATION AND 22 DEFENDANTS' MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 39) (the Response), and the Nation has filed a Reply brief. *See* REPLY IN RESPONSE IN OPPOSITION TO MOTION TO DISMISS (Doc. No. 45) (the Reply).

After the Motion was fully briefed, PNM filed its FIRST AMENDED COMPLAINT FOR CONDEMNATION (Doc. No. 49) (FAC) adding the United States Department of Health and Human Services (HHS) and the United States Department of the Interior (DOI) as defendants because "records of the United States of America, Department of the Interior, Bureau of Indian Affairs ("BIA") relating to the Property indicate that the United States, HHS, and DOI, including, but not limited to, their respective constituent agencies the United States Public Health Service and the BIA, may have other interests in or encumbrances affecting the

Property."[7] (FAC ¶ 23.)[8] Even though the Motion was filed prior to the FAC, the Court will rule on the Motion as though it applies to the FAC. On October 27, 2015, the 22 Defendants filed their ANSWER TO FIRST AMENDED COMPLAINT FOR CONDEMNATION (Doc. No. 95) asserting a counterclaim against PNM for trespass.[9]

I. BACKGROUND

A. ORIGINAL EASEMENT

On April 8, 1960, the BIA granted to PNM a fifty-year right of way easement (the Original Easement) authorizing PNM to construct, maintain, and operate an electric transmission line in northwestern New Mexico. (FAC ¶¶ 27-28.) During the 1960's, PNM constructed a 115-Kilovolt electric transmission line that connected PNM's Ambrosia substation, located north of Grants, New Mexico, to PNM's Ya-Ta-Hey substation, located west of Gallup, New Mexico. The transmission line, known as the "AY Line," is a crucial component of PNM's system

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[7] Under Rule 71.1, a plaintiff seeking to condemn property may amend its complaint without leave of the court and at any time before the trial on compensation. Fed. R. Civ. P. 71.1 (f).

[8] In its answer, the United States Department of Health and Human Services asserts that it has sovereign immunity from this suit. *See* ANSWER OF HEALTH AND HUMAN SERVICE TO THE AMENDED COMPLAINT (Doc. No. 97) at 7.

[9] On September 18, 2015, the 22 Defendants filed a trespass suit against PNM and the United States, as a nominal defendant, in the United States District Court for the District of New Mexico. *See Barboan et al. v. Public Service Co. of N.M.*, Case No. 15 CV 826 LF/KK. The United States has moved to dismiss the case. *Id.* (Doc. No. 14).

for the transmission of electricity to this area of New Mexico. (FAC ¶ 30.) The Navajo Nation and its members benefit from the support that the AY Line provides to PNM's electricity distribution system. (*Id.*)

In 2009, in anticipation of the April 2010 expiration of the Original Easement, PNM sought the consent of the Allotment owners to a renewal of the Original Easement. (FAC ¶ 31.) On November 3, 2009, PNM, having obtained written consent from the requisite percentage of Allotment owners, submitted its renewal application to the BIA. (FAC ¶¶ 32-33.) In June 2014, however, counsel for some of the owners notified the BIA and PNM that the owners had revoked their earlier written consents. (FAC ¶ 34.) In January 2015, the BIA notified PNM that the revocations of consent precluded the BIA from approving the application. (FAC ¶ 35.) During the ensuing months, PNM attempted in good faith, though unsuccessfully, to obtain the necessary consents to renew the Original Easement.[10] (FAC ¶ 36.)

B. HISTORY OF ALLOTTED LANDS

In the late nineteenth century, Congress initiated a program allowing the division of communal Indian property into individually-owned property. *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997). Under the Indian General Allotment Act of 1887 (the General Allotment Act), ch. 119, 24 Stat. 388, portions of Indian reservation land were

[10] The FAC does not allege whether PNM sought the Nation's consent to renew the Original Easement. PNM's application for renewal is still pending at the BIA. *See* FAC ¶ 35.

transferred, or allotted, to individual tribal members. *Id.* Land not allotted to individual tribal members was opened to non-Indians for settlement. *Babbitt*, 519 U.S. at 237. However, the United States continued to hold fee title to allotted lands in trust for the individual Indian allottees or the individual allottees owned the land subject to restrictions on alienation. *Id.*; *State of Minnesota v. United States*, 305 U.S. 382, 386 (1939). On the death of the allottee, the land descended according to the laws of the State or Territory where the land was located. 24 Stat. 389. In 1910, Congress provided that allottees could devise their interests in allotted land. Act of June 25, 1910, ch. 431, § 2, 36 Stat. 856, codified as amended, 25 U.S.C. § 373.

Over time, the division of title to individual allottees "proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (describing how parcels became splintered with multiple owners, some parcels having hundreds of owners). In 1934, Congress passed the Indian Reorganization Act of 1934, 25 U.S.C. §§ 450 et seq., which ended further allotment of Indian land. However, interests in lands already allotted continued to be divided over the generations. *Babbitt*, 519 U.S. at 238.

C. CONDEMNATION OF ALLOTTED LANDS

As part of the General Allotment Act, Congress also allowed condemnation of allotted lands. *See* 25 U.S.C. § 357. The United States Supreme Court has held that, as fee owner of allotted lands, the United States is an indispensable party to condemnation proceedings under § 357.

State of Minnesota, 305 U.S. at 386–388. *See also Town of Okemah, Okla. v. United States*, 140 F.2d 963, 965 (10th Cir. 1944). The Supreme Court reasoned that in authorizing the condemnation of allotted lands, Congress "conferred by implication permission to sue the United States." *State of Minnesota*, 305 U.S. at 388. Consequently, a condemnation action under § 357 must be filed in federal court, where the United States has consented to be sued. *Id.* at 388–89.

D. GRANTS OF RIGHTS OF WAY

In the Indian Right of Way Act of February 5, 1948, (the 1948 Act), Congress authorized the Secretary of the Interior (Secretary) to grant rights of way across allotted lands with the consent of allottees holding a majority of the ownership interests. 25 U.S.C. §§ 323–328. The Secretary could also grant rights of way across land held in trust for Indian tribes with the "consent of the proper tribal officials." 25 U.S.C. § 324. In exchange, the allottees and the tribes must be paid compensation in an amount the Secretary finds to be just. 25 U.S.C. § 325. Section 328 provides that the Secretary may promulgate regulations to administer §§ 323–328. The regulations are codified in 25 C.F.R. §§ 169.1–169.28.[11]

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[11] *See generally* Todd Miller, Easements on Tribal Sovereignty, 26 Am. Indian L. Rev. 105, 121–25 (2002) (hereinafter Miller). "The only way to obtain these easements [over tribal lands] is by the procedures set out in [§§ 323–328] and detailed in the regulations. This requires approval from the Secretary of Interior and written consent from the appropriate tribal officials." *Id.*

The Tenth Circuit has held that 25 U.S.C. §357 and §§ 323–328 provide independent, alternative methods for a state-authorized condemnor to obtain a right of way over allotted lands. *Yellowfish v. City of Stillwater, Okla.,* 691 F.2d 926, 930–31 (10th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983) (rejecting the argument that the 1948 Act impliedly repealed Section 357). *See also Nebraska Public Power Dist. v. 100.95 Acres of Land in Thurston County, Hiram Grant*, 719 F.2d 956, 961 (8th Cir. 1983) (hereinafter, *NPPD*) (holding that federal law provides for the option of condemnation of an individual allottee's interest under 25 U.S.C. § 357 if the condemning authority is unable to obtain a voluntary easement).

E. THE INDIAN LAND CONSOLIDATION ACT

On January 12, 1983, Congress passed the Indian Land Consolidation Act (ILCA), P.L. 97-459, 96 Stat. 2515, codified as amended in 25 U.S.C. §§ 2201–2221, in an attempt to further ameliorate the problem of "fractionated ownership of Indian lands." *Hodel*, 481 U.S. at 709. Under the ILCA, "any tribe, acting through its governing body, is authorized, with the approval of the Secretary to adopt a land consolidation plan providing for the sale or exchange of any tribal lands or interest in lands for the purpose of eliminating undivided fractional interests in Indian trust or restricted lands or consolidating its tribal landholdings . . ." 25 U.S.C. § 2203. The Secretary was authorized to acquire fractional interests from allotment owners and hold those interests in trust for the tribe. 25 U.S.C.

§§ 2209; 2212. In the amendments to ILCA enacted in 2000, Congress provided,

> Subject to the conditions described in subsection (b)(1) of this section, an Indian tribe receiving a fractional interest . . . may, as a tenant in common with the other owners of the trust or restricted lands, lease the interest, sell the resources, consent to the granting of rights-of-way, or engage in any other transaction affecting the trust or restricted land authorized by law.

25 U.S.C. § 2213(a). Section 2213(b)(1) states that, as to allotted land which the Secretary has purchased in trust for a tribe, the Secretary has a lien on any revenue accruing to the interest of a tribe in allotted land, "until the Secretary provides for the removal of the lien . . ." 25 U.S.C. 2213(b)(1).[12] And, "until the Secretary removes a lien from an interest in land . . . the Secretary may approve a transaction covered under this section on behalf of an Indian tribe." 25 U.S.C. § 2213(b)(2)(B). Under § 2213(c), if a tribe does not consent to a lease or other agreement affecting its interest in allotted land, the Secretary may enter into the lease or agreement, but "the

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[12] Under § 2213, the Secretary may remove a lien if the Secretary finds that (1) the costs of administering the interest equal or exceed the revenue; (2) it will take an unreasonable period of time for the parcel to generate revenue that equals the purchase price; (3) a subsequent decrease in value of the parcel makes it unlikely to generate revenue that equals the purchase price in a reasonable time; or (4) payment of the purchase price has been tendered into the Acquisition Fund created under § 2215.

Indian tribe shall not be treated as being a party to the lease or agreement. Nothing in this section (or in the lease or agreement) shall be construed to affect the sovereignty of the Indian tribe." 25 U.S.C. § 2213(c)(1) and (2).

II. STANDARD OF REVIEW

A. SOVEREIGN IMMUNITY OF INDIAN TRIBES

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . .; they are 'a separate people' possessing 'the power of regulating their internal and social relations. . . .' " *United States v. Mazurie,* 419 U.S. 544, 557 (1975) (citations omitted). The Tenth Circuit Court of Appeals described Indian sovereign immunity:

> It is well-established that "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 . . . (1978) (citations and quotations omitted). As sovereign powers, Indian tribes are immune from suit absent congressional abrogation or clear waiver by the tribe. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753 . . . (1998).

Somerlott v. Cherokee Nation Distributors, Inc., 686 F.3d 1144, 1148 (10th Cir. 2012).

Tribal sovereign immunity is subject to the superior and plenary control of Congress. *Santa Clara Pueblo*, 436 U.S. at 57. Congress may abrogate tribal immunity, but Congress must clearly express its intent to do so. *Michigan v. Bay Hills Indian Community*, 134 S.Ct. 2024, 2031 (2014). And courts will not lightly assume Congress "in fact intends to undermine Indian self-government." *Id.* at 2031–32. Alternatively, a tribe may waive sovereign immunity, but "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) *and United States v. King*, 395 U.S. 1, 4, (1969)).

B. FEDERAL CONDEMNATION LAW

Indian lands are generally governed by federal law. *NPPD*, 719 F.2d at 961. PNM asserts authority to condemn under Section 3 of the Act of March 3, 1901, 25 U.S.C. § 357:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

An "allotment" is a parcel of land awarded to an individual tribal member from a common holding. *Affiliated Ute Citizens of Utah v. United States*, 406

U.S. 128, 142 (1972) (citation omitted) (noting that "allotment" is a term of art in Indian law).

C. FEDERAL PROCEDURAL LAW

Even though § 357 allows condemnation of allotted lands under the laws of the State where the lands are located, the Court must follow federal procedural law. *Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less,* 746 F.3d 362, 367 (8th Cir. 2014) (stating that federal rules displace state procedural law in all federal condemnation proceedings."). Federal Rule of Civil Procedure 71.1 provides, "[t]hese rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." Fed. R. Civ. P. 71.1(a). Rule 71.1 requires that, "[w]hen an action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff *must add as defendants* all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, . . ." Fed. R. Civ. P. 71.1(c)(1) (emphasis added). Thus, all persons having any interest in the property to be condemned must be joined as defendants. 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Fed. Prac. & Proc. § 3045 (2d ed. 1997). As the owner of fee title to the Five Allotments, the United States must be joined in a condemnation action as well.[13] Rule 71.1

[13] *See* ANSWER OF THE UNITED STATES (Doc. No. 25) ¶ 23 (admitting that the United States holds in trust the Five Allotments for the benefit of the individual allottees and for the Nation).

further provides, "[a]t any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property." Fed. R. Civ. P. 71.1(i)(1)(C).[14] "The court may at any time dismiss a defendant who was unnecessary or improperly joined." Fed. R. Civ. P. 71.1(i)(2).

D. SUBJECT MATTER JURISDICTION

The Nation argues that the Court lacks subject matter jurisdiction over this action because the Nation is immune from suit in this Court. *See* Fed. R. Civ. P. 12(b)(1).[15] In ruling on the Motion to dismiss for lack of subject matter jurisdiction, the Court must accept the allegations in the FAC as true and construe the allegations in favor of PNM. *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (citing *Riggs v. City of Albuquerque,* 916 F.2d 582, 584 (10th Cir. 1990)). The Nation asserts that since it is immune from suit, this Court also lacks jurisdiction over the Two Allotments in which the Nation owns fractional interests and, therefore, the Two Allotments should be dismissed as well. The Nation contends that Rule 19 on joinder of parties should guide the Court's analysis in determining whether to dismiss the Two Allotments.

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[14] Because the Court will dismiss the Two Allotments on the basis of a legal issue after full briefing, there is no need for a hearing.

[15] "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . lack of subject-matter jurisdiction[.]" Fed. R. Civ. P. 12(b)(1).

E. JOINDER OF PARTIES

Rule 19 provides,

> **(a) Persons Required to Be Joined if Feasible.**
>
> **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligation because of the interest.
>
> . . .
>
> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might

> prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions of the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate;
>
> and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19(a) and (b).

To summarize, the Nation contends that since it is immune from suit, the Court should find "in equity and good conscience" that the action should not proceed against the Two Allotments. PNM counters that the Nation is not immune from this action; however, if the Court dismisses the Nation, the action should proceed as to the Two Allotments because the Nation is not an indispensable party under Rule 19.

III. ANALYSIS

A. PLAIN LANGUAGE OF § 357

In its Response, PNM, citing *United States v. Clarke*, 445 U.S. 253 (1980) and *NPPD*, argues that

the plain language of 25 U.S.C. § 357 shows a Congressional intent to abrogate tribal sovereign immunity from condemnation suits. (Resp. at 7.) In *Clarke*, the Supreme Court determined that the plain meaning of the term "condemnation" in § 357 was "a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it," and not an action against a state or local government for inverse condemnation. *Id.* at 258. Section 357 did not allow condemnation of allotted land by physical occupation. *Id.* In *NPPD*, the Eighth Circuit Court of Appeals concluded that § 357 allowed condemnation of allotted land whether located inside or outside reservation borders, noting "[w]e cannot ignore the plain meaning of the statute, which provides simply for condemnation of 'allotted land' without regard to its location." 719 F.2d at 961.

PNM contends that following the lead of *Clarke* and *NPPD*, this Court should find that the plain meaning of "lands allotted," as used in § 357, includes all allotted land, "without regard to its" ownership. In essence, PNM asserts that "allotted lands" in § 357 means lands previously allotted to individual Indians "regardless of which persons or entities own fractional interests" at the time of the condemnation. (Resp. at 7.) However, the court in *Clarke* did not take an expansive view of the term "condemnation," and the court in *NPPD* expressly refused to hold that allotted lands owned by tribes, which it determined were "tribal lands," were subject to condemnation under § 357. 719 F.2d at 962 (holding that under § 357 a public utility could not condemn allotted land in which individual allottees

had a life estate but a tribe held a reversionary interest).[16]

Despite PNM's contention that § 357's plain language allows condemnation against allotments owned by tribes, the Court concludes that the wording "[l]ands allotted *in severalty to Indians* may be condemned" illustrates a singular Congressional focus on allotted land owned by individual tribal members. 25 U.S.C. § 357 (emphasis added). *Cf. Carcieri v. Salazar*, 555 U.S. 379, 387–88 (2009)

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[16] In its Response, PNM argues that the court in *NPPD* incorrectly determined that any portion of allotted land transferred from individual allottees to a tribe became "tribal land." The court in *NPPD* used the definition of "tribal land" in the regulations promulgated under the 1948 Act, 25 U.S.C. §§ 323–328, codified in 25 C.F.R. §§ 169.1-169.28. "Tribal land" is defined as "land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance . . ." 25 C.F.R. § 169.1(d). PNM argues that the regulations should be applicable only to the subject of the 1948 Act, which is "rights-of-way over and across tribal land, individually owned land and Government owned land." 25 C.F.R. § 169.2. PNM maintains that these regulations should not apply to condemnation actions. However, other courts have followed the holding in *NPPD*. *See, e.g., United States v. Pend Oreille Public Util. Dist. No. 1*, 28 F.3d 1544, 1552 (9th Cir. 1994) (citing case and noting that § 357 "does not apply to land held in trust for the Tribe."); *Bear v. United States*, 611 F. Supp. 589, 599 (D. Nebr. 1985) (citing case and noting that treaty lands cannot be condemned under § 357); and *Houle v. Central Power Elec. Co-op, Inc.*, No. 4:09–cv–021, 2011 WL 1464918, *6 (D. N.D. Mar. 24, 2011) (unreported) (citing case and stating that § 357 condemnation claims may be brought against individual allotment owners). Moreover, the Court agrees with the reasoning in *NPPD* that § 357 does not allow condemnation of lands owned by tribes, and the Court also relies on the plain language of § 357 and its distinct application to lands "allotted in severalty to Indians."

(noting that the term "Indian" in 25 U.S.C. § 465 means an individual member of a recognized Indian tribe).[17] The Nation cannot be considered as an owner of "lands allotted in severalty to Indians."

In *Eastern Band of Cherokee Indians v. Griffin*, the court dealt with a different right of way statute, 25 U.S.C. § 311, which allowed the Secretary to grant rights of way for highways over individually allotted lands and over reservations, without tribal consent. 502 F. Supp. 924, 929 (W.D. N.C. 1980). In response to tribal members' argument that instead of a consensual right of way, the land had been condemned without just compensation, the court commented, "Congress provided for condemnation proceedings under . . . Section 357, but limited such proceedings to lands which have been allotted to individual Indians. This section does not apply . . . because the lands in question . . . have never been allotted to individual Indians as that term is defined by Congress and the courts." 502 F. Supp. at 930. The Court concludes that under its plain language, § 357 only allows condemnation of allotted lands owned by individual tribal members, and § 357 does not expressly apply to allotted lands acquired by Indian tribes.

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[17] Under the General Allotment Act, the word "Indian" is used to denote an individual, who is referred to as an "allottee" or as "he" or "she." *See, e.g.,* 25 U.S.C. §§ 334 (allotment to Indians not residing on reservations), 336 (allotments to Indians making settlement), 348 (patents to be held in trust), 349 (fee patents issued by Secretary "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs.").

B. LACK OF AMENDMENT TO § 357

PNM further contends that Congress' enactment of the ILCA, which allows tribes to obtain interests in allotted land, without any modification of § 357, evidences Congressional intent to allow condemnation actions against allotted land owned by tribes. PNM presents several arguments concerning the history of § 357 and the ILCA in support of its contention.

1. Extending Supreme Court's implied abrogation of the United States' sovereign immunity in § 357

PNM first points to the holding in *State of Minnesota*, in which the Supreme Court commented that § 357 implicitly waived the sovereign immunity of the United States for condemnation actions in federal court. In that case, Minnesota sued for condemnation in state court under § 357 to build a highway over nine individually-owned allotments located on the Grand Portage Indian Reservation. 305 U.S. at 383. The United States specially appeared, removed the case to federal court, and moved to dismiss for lack of jurisdiction due to sovereign immunity. *Id.* The district court denied the motion reasoning that the United States was not a necessary party, "since consent . . . to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 [U.S.C.] Section 357[.]" *Id.* at 384. The Eighth Circuit Court of Appeals reversed the district court's holding. *United States v. State of Minnesota*, 95 F.2d 468 (8th Cir. 1938).

The Supreme Court determined that the United States was an indispensable party to the condemnation proceedings because it holds fee title to the allotments. 305 U.S. at 388. In response to the argument that § 357 authorized state court suits against the United States, the Supreme Court commented, "[i]t is true that authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts." *Id.* Because this suit was in state court, the Court upheld the dismissal. *Id.* at 389. The Supreme Court noted that if the action had been initiated in federal court, "it would have had jurisdiction." *Id.*

Courts have cited *State of Minnesota* as recognizing Congress' implicit abrogation of federal sovereign immunity from § 357 suits in federal court. *See, e.g., Town of Okemah*, 140 F.2d at 965 (citing *State of Minnesota* and concluding that "Section 357, *supra*, by authorizing condemnation, conferred by implication permission to sue the United States."). According to PNM, this same reasoning should apply to find that Congress impliedly abrogated the Nation's sovereign immunity in § 357. As the Nation points out, however, no court has concluded this, and subsequent cases citing *State of Minnesota* do so without further analysis. *See Jachetta v. United States,* 653 F.3d 898, 907 (9th Cir. 2011) (citing *State of Minnesota* and stating, "[b]ecause § 357 permits condemnation actions that cannot effectively proceed absent the United States, § 357 waives the government's sovereign immunity."); and *Prince*, *infra* (noting the holding as to § 357, but declining to find implied permission to sue the United States

under another provision of the General Allotment Act).

By contrast, the Tenth Circuit has suggested that the Supreme Court's implied waiver in *State of Minnesota* conflicts with the requirement that federal immunity must be unequivocally waived. In *Prince v. United States*, the Tenth Circuit upheld the dismissal of a partition action against the United States and individual Indian allottees. 7 F.3d 968, 970 (10th Cir. 1993). The plaintiff, a non-Indian, owned an undivided 23/378th fee interest in the land, and the remaining percentage of the allotted land was owned by the United States in trust for individual members of the Comanche Indian tribe. *Id.* The plaintiff sued in state court for partition of the land in kind under 25 U.S.C. § 348. *Id.* at 969. The United States removed the action to federal court, and moved to dismiss for lack of jurisdiction due to sovereign immunity. *Id.* The plaintiff asked the court to follow the holding in *State of Minnesota* and find that § 348, applying state partition laws to allotments, also impliedly waived United States' immunity from state court partition actions. However, the Tenth Circuit distinguished *State of Minnesota*, and held that "because [25 U.S.C.] § 348 does not provide jurisdiction to the state court to entertain this partition action, a waiver of sovereign immunity cannot be implied from this provision." *Id.* at 970.

As these cases illustrate, the holding in *State of Minnesota* has been narrowly applied to allow suits under § 357 against the United States in federal court that involve individual allotments. In addition, the Tenth Circuit refused to expand the

holding to allow suits against the United States in state court under § 348. Hence, this Court will not expand *State of Minnesota* to find an implied abrogation of the Nation's sovereign immunity in § 357. It bears repeating that the Nation's sovereign immunity must be abrogated by unequivocal statutory language.

2. The ILCA's effect on § 357

Next PNM argues that the Congress' failure to amend § 357, after enacting the ILCA, indicates that Congress intended to allow condemnation actions to proceed even though tribes obtained allotments. In particular, PNM points to amendments to ILCA in 2000 in which Congress limited tribal power over some transactions involving allotted lands by allowing the Secretary to approve transactions without a tribe's consent. 25 U.S.C. § 2213 (b)(2)(B) and (c). Congress treated non-consenting tribes as non-parties to those transactions, and Congress explicitly provided that neither the statute nor the transaction agreement could "affect the sovereignty of any Indian tribe." 25 U.S.C. § 2213(c)(2). PNM contends that this limitation of tribal power in the ILCA and the reinstatement of sovereign immunity in non-consensual transactions, without an amendment to § 357, shows "Congress apparently understood that (a) Section 357 already operated as a waiver or abrogation of tribal sovereign immunity against condemnation of allotted lands, or (b) a tribe's acquisition of fractional interests pursuant to ICLA [sic] would necessarily constitute the tribe's own waiver of any sovereign immunity against condemnation of allotted lands." (Resp. at 8.) The

Court does not find either of these arguments persuasive.

There is no mention of condemnation in the ILCA and there is no basis on which to conclude that Congress understood that the ILCA would open up tribes to condemnation actions under § 357 after tribes acquired allotted lands. PNM asks the Court to consider the language in 25 U.S.C. § 2213(c)(2) as an admission by Congress that tribal sovereignty could be affected by allowing the Secretary to approve a transaction without the consent of a tribe. Although it is not clear in the Response, PNM seems to assert that Congress must have thought the sovereign immunity language in § 2213(c)(2) was necessary because courts might find that Congress abrogated a non-consenting tribe's immunity by allowing a transaction without a tribe's consent. The Court does not accept the premise that Congress found it necessary to reinstate the sovereign immunity of non-consenting tribes in transactions involving allotments. Nor does the ILCA statutory scheme reveal that Congress knew it had waived tribal sovereign immunity in the condemnation statute.

PNM cites *United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1*, No. CIV 80-116 RMB, 1995 WL 17198637, *6 (E.D. Wash. July 24, 1995). The controversy in that case stemmed from the construction of the Box Canyon dam built decades earlier on a location downstream from the Kalispel Indian Reservation. *Id.* The dam caused certain reservation lands and allotted lands to flood year around. *Id.* The United States, on behalf of the Kalispel Tribe and the individual allottees, sued the

Utility for trespass. *Id.* At trial, the district court determined that the Utility had trespassed and awarded damages, but not injunctive relief against future flooding. *Id.* *2. The district court denied injunctive relief because it concluded the Tribe would be fully compensated in the condemnation proceeding filed by the Utility. *Id.*

The Ninth Circuit reversed the denial of injunctive relief finding that the Utility could not condemn land held in trust by the United States for the Tribe under § 357. *United States v. Pend Oreille Public Utility Dist. No. 1*, 28 F.3d 1544, 1551 (9th Cir. 1994) (citing *NPPD*). The Ninth Circuit further ruled that the Utility could not condemn the land under the Federal Power Act (FPA), but had to obtain a license, which required the Secretary to find "that the Utility's power project will not interfere with the purpose for which the Kalispel Reservation was created or acquired." *Id.* at 1548. However, the Ninth Circuit left to the district court the issue of whether the Utility could nevertheless condemn lands of individual Indian allottees under § 357. *Id.* at 1552.

On remand, the United States argued that § 357 was impliedly repealed by the FPA. 1995 WL 17198637, *5. The district court held that "the FPA and § 357 . . . are alternative methods for obtaining allotted Indian lands for a power project." *Id.* Citing an earlier Ninth Circuit decision, the district court stated, "Congress [in § 357] explicitly afforded no special protection to *allotted lands* beyond that which land owned in fee already received under the state laws of eminent domain." *Id.* *6 (emphasis added) (citing *Southern California Edison Co. v. Rice*, 685 F.2d 354 (9th Cir. 1982)). The district court

also noted that Congress did not amend § 357 after implementing its policy of allotting lands in severalty to Indians, and said this "establishes [Congress'] intent to allow condemnation actions to proceed against allotted lands." *Id.* (citing *Rice*, 685 F.2d at 356). However, the district court found that the Utility could not condemn the land under § 357 because condemnation under that section required the United States' consent, which the Utility had not obtained. *Id.*, *aff'd* 135 F.3d 602, 614 (9th Cir. 1998).

PNM asks the Court to extend the reasoning in *Pend Oreille* and hold that Congress, by not amending § 357 after allowing tribal acquisition of allotted lands in the ILCA, intended to allow condemnation of *allotted lands* even after those lands were acquired by tribes under the ILCA. However, PNM ignores the Ninth Circuit's holding in *Pend Oreille*, 28 F.3d at 1552, that condemnation under § 357 could be prosecuted only against individually allotted lands. In sum, although Congress has continuously allowed the condemnation of allotted lands after enacting the ILCA, this Court, along with other courts, cannot discern a Congressional intent to abrogate tribal sovereign immunity as to condemnation actions against allotted lands acquired by tribes. *See, e.g., NPPD*, 719 F.2d at 961 (distinguishing between allotted land, subject to § 357, and "tribal land," not subject to § 357).

3. Special statute versus general statute

PNM argues that a well-recognized doctrine of statutory construction applies to allow this

condemnation action against the Nation. PNM asserts that § 357 is a "special statute applying only to condemnation proceedings" and that "[w]here there are two statutes upon the same subject, the earlier being special and the later general, unless there is an express repeal or an absolute incompatibility, the presumption is that the special is intended to remain in force as an exception to the general." *Town of Okemah*, 140 F.2d at 965. According to PNM, § 357's special authorization to condemn allotted lands in federal court remains in full force as an exception to any sovereign immunity claims that might arise when tribes acquired allotted lands under the general ILCA.

PNM asks the Court to apply the reasoning of the Tenth Circuit in *Town of Okemah*. In that case, the Tenth Circuit determined that § 357 required the joinder of the United States in a condemnation proceeding, which meant that the suit must be brought in federal court. Moreover, the court determined that § 357 was not repealed by the later general statute, the Act of April 12, 1926, 44 Stat. 239. The Act of April 12, 1926 permitted suits affecting title to lands owned by members of the Five Civilized Tribes in Oklahoma to be brought in state courts and made judgments binding on the United States if notice was served on the Superintendent of the Five Civilized Tribes. *Id.* The court upheld the dismissal of a state court condemnation proceeding against allotments owned by individual members of one of the Five Civilized Tribes because § 357 was in full force and effect despite the later statute allowing state court suits involving land of the Five Civilized Tribes. *Id.*

In order for PNM's argument to persuade, § 357 must be interpreted to allow condemnation of allotted lands owned by individual Indians and allotted lands acquired by tribes under the ILCA. By its express language, however, § 357 allows condemnation against lands allotted in severalty to Indians, not tribes. Moreover, § 357 allows condemnation of allotted lands, but the ILCA allows voluntary acquisition of allotted lands, and the ILCA regulates transactions involving those allotted lands, which include consensual, not condemned, rights of way. Unlike the statutes governing suits against allotted land in *Town of Okemah*, § 357 and the ILCA are not "statutes upon the same subject." *Id.* at 965. Hence, § 357, a specialized condemnation statute, does not allow condemnation of previously allotted lands acquired by Indian tribes under the ILCA, a general Indian land consolidation statute.

However, even if the Court were to accept PNM's argument that §357 allows condemnation of allotted lands despite ownership by a tribe, which the Court does not, that conclusion alone would not expose the Nation to condemnation suits. Section 357 must not only authorize condemnation of allotted lands owned by tribes, it must also authorize condemnation suits against tribes. Congress can direct a statute to govern actions of Indian tribes, but Congress must also expressly abrogate an Indian tribe's sovereign immunity for enforcement suits. *Santa Clara Pueblo*, 436 U.S. at 59 (holding that even though federal statute (ICRA) provided, "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws[,]" the statute did not expressly authorize civil actions against the tribe to

enforce this provision in federal court). Consequently, although Congress has not amended the language of § 357 that allows condemnation of allotted lands, this Court declines to say that this means Congress intended to abrogate tribal sovereign immunity so as to allow condemnation of allotments acquired by tribes. *Cf. Kiowa Tribe of Okla.*, 523 U.S. at 755 (noting that "a State may have authority to tax or regulate tribal activities occurring within the State, . . . however, [that] is not to say that a tribe no longer enjoys immunity from suit.") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (holding that power to tax does not mean state has power to enforce tax laws in state court)).

4. Application of *Oneida* case

Finally, PNM points to a case allowing condemnation against land owned by an Indian tribe located outside the boundaries of a reservation. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, 542 F. Supp. 2d 908 (E.D. Wis. 2008) involved land that had originally been part of the Oneida reservation. One hundred years prior to the lawsuit, the United States transferred the land by fee patent to individual tribal members. *Id.* at 909. The tribal members then transferred fee title to non-Indians, and much later the tribe repurchased the land on the open market. *Id.* at 912. The tribe sought declaratory relief in federal court that it was immune from a condemnation suit pending in state court. *Id.* Noting that "[l]and is either exempt from state law, or it is not[,]" *id.* at 921, the district court held that the United States' transfer of the land by fee patents to the individual tribal members

removed all federal protections for the land and the land was subject to condemnation under state law, despite its later acquisition by a tribe with sovereign immunity. *Id.* at 922–23. The tribe argued that when it acquired title to the land, the land became "tribal land" as defined in 25 C.F.R. § 169.1(d). The court rejected the argument because § 169.1(d) defines tribal land as "land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance. . . ." *Id.* at 922. The *Oneida* court reasoned that the land was not "tribal land" because fee patents had been issued, and "all restrictions as to the sale, taxation and alienation of the lands" had been removed. *Id.* Once federal protection was removed from these allotted lands, "a tribe may not unilaterally restore it by purchasing the land on the open market." *Id.* at 923.

PNM contends that under the *Oneida* court's reasoning, since the Two Allotments were subject to condemnation when owned by individual tribal members, the Nation's acquisition of fractional interests in the Two Allotments could not reinstate immunity protection over them, just as the Oneida tribe could not restore federal protection over the land purchased on the open market. *Id.* However, PNM fails to account for the elemental difference between the land acquired by the Oneida tribe and the Two Allotments. The Oneida tribe acquired fee simple title to the land from individual fee owners. The Nation does not have fee title to the Two Allotments. The court in *Oneida* recognized this very important distinction when it rejected the argument

that the land had become "tribal land," as defined by 25 C.F.R. § 169.1(d):

> [T]itle to the land at issue in this case is not held by the United States in trust for the Tribe; nor is it held by the Tribe subject to federal restrictions against alienation or encumbrance. The Tribe holds it in fee simple. Having purchased the land on the open market, the Tribe is free, subject to the limitations of its own constitution and by-laws, to sell it to whomever it chooses.

Id. at 922 (citing *NPPD*). The *Oneida* court also rejected the tribe's attempt to equate its ownership interest with that of the allotment owners in *NPPD*:

> Although the land in [*NPPD*] . . . had been allotted in severalty to individual Indians during the allotment era, the trust period for those allotments had never expired. . . . That is not the case here. Fee-patents issued for all of the land that the Village seeks to condemn nearly 100 years ago. . . .[U]pon issuance of fee-patents by the United States, all federal protection for the land in question, including exemption from state laws authorizing condemnation of land for public purposes, was removed.

Id. In this case, however, the Nation did not acquire fee title to the Two Allotments. It was the acquisition of the fee title that removed the federal protection from the land in *Oneida*. Here, federal protection was continuously available for all trust

land beneficially owned by the Nation, including all allotted land acquired from individual allottees.

The Nation's sovereign immunity must be unequivocally abrogated by Congress, and Congress' allowance of transfer of allotted lands to tribes in the ILCA is not an unequivocal abrogation. Nor can the Nation be held to have waived its immunity merely by acquiring a fractional interest in the Two Allotments. As the Nation asserts in its Reply, it is up to Congress to solve the issues related to tribal immunity from § 357 condemnation actions involving allotted land that would otherwise be subject to condemnation if owned by individual tribal members. If Congress deems it appropriate to abrogate tribal immunity in order to facilitate condemnation of rights of way through tribal trust lands, Congress must unequivocally do so. *Cf. Kiowa Tribe of Okla.*, 523 U.S. at 758 (declining to limit sovereign immunity to reservation activities or to non-commercial activities, "we defer to the role Congress may wish to exercise in this important judgment.").

C. DISMISSAL OF THE TWO ALLOTMENTS

The Nation argues that as an owner of a fractional interest in the Two Allotments, the Nation must be a party in this condemnation action. However, as a sovereign, the Nation is immune from suit. Hence, the Nation asks the Court to dismiss it as a defendant. In addition, the Nation asks the Court to dismiss the Two Allotments because the Nation is a required party that cannot be joined. PNM asserts that the Nation is not a required party under Rule 19(a), but if it is, the Court need not

dismiss under Rule 19(b) because the Court can accord complete relief among the existing parties while protecting the Nation's interests.

In relying on Rule 19, both PNM and the Nation ignore the basic premise that PNM lacks the authority to condemn the Two Allotments because the portion of the Two Allotments owned by the Nation are now considered "tribal land," as opposed to allotted land. Hence, the Two Allotments cannot be condemned under § 357. *NPPD*, 719 F.2d at 961. As the court in *NPPD* recognized, when a tribe acquires an interest in allotted land, the land is no longer land "allotted in severalty to Indians," and § 357 authorizes a condemnation authority to condemn only individually allotted land. *See NPPD*, 719 F.2d at 962.

However, the Court will address the Rule 19 arguments. The Court must first determine whether as a fractional interest owner in the Two Allotments, the Nation is a required party under Rule 19(a). If a required party cannot be joined, under Rule 19(b), the Court next considers whether the case should be dismissed if "in equity and good conscience" the action cannot proceed in that party's absence. The four factors to consider under Rule 19(b) are

> first, to what extent a judgment rendered in the person's absence might be prejudicial to [the person] or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a

> judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989).

1. Under Rule 19(a), the Nation is a required party.

The Nation argues that *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012) is instructive. The Northern Arapaho Tribe (NAT) sought to enjoin state and county officials from imposing vehicle excise taxes on Indians living on the Wind River Indian Reservation (the Reservation) because, as inhabitants of "Indian Country," they were exempt from taxes. The NAT argued that the Reservation's status as Indian Country was not altered by a 1905 Agreement under which some of the Reservation land was ceded to the United States. *Id.* at 1276. The NAT and the Eastern Shoshone Tribe each owned an undivided one-half interest in the Reservation lands.

The defendants moved to dismiss under Rule 12(b)(7) for failure to join the Eastern Shoshone Tribe and the United States as defendants. The district court denied the motion to dismiss but ordered the Eastern Shoshone Tribe and the United States joined as third party defendants. The Eastern Shoshone Tribe and the United States then moved to dismiss under Rule 12(b)(1) on the grounds of

sovereign immunity. In response, the defendants renewed their contention under Rule 19 that the Eastern Shoshone Tribe and the United States were indispensable parties and the case "in equity and good conscience" should be dismissed. The district court agreed and dismissed the case.

The Tenth Circuit affirmed and concluded that the Eastern Shoshone Tribe was an indispensable party because it had an "interest relating to the subject of the action," namely the "Indian Country" status of the land, and a determination of that status in its absence would impair its ability to protect its one-half interest in the land. *Id.* at 1279. Also, the disposition of the case in the absence of the Eastern Shoshone Tribe "may . . . leave an existing party—namely the State of Wyoming—subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations." *Id.* (citing Rule 19(a)(1)(B)(ii)).

The Nation argues that, like the Eastern Shoshone Tribe, it is a required party under Rule 19(a)(1)(B)(i) because it owns a fractional interest in the Two Allotments and its governance of the Two Allotments will be affected by the perpetual easement PNM seeks. PNM contends that the Nation is not a required party because complete relief can be accorded to the fractional interest owners of the Two Allotments even in the Nation's absence. According to PNM, the award of just compensation for the easement in this proceeding will be distributed among the allotment owners, including the Nation, according to their percentage ownership.

PNM also recognizes that a condemnation proceeding has two stages. During the first stage, the Court determines whether PNM has the authority to condemn the easements under § 357. If the answer is yes, then the Court determines the amount of just compensation. In its argument, however, PNM skips the first half of the analysis and focuses on the allocation of the condemnation proceeds. PNM fails to address its authority to bring this action, which derives from § 357, and the Court has just concluded that PNM has no authority to condemn the Nation's interest in the Two Allotments under § 357.

PNM illustrates its point regarding fair distribution of the condemnation award by comparing this action to a consensual easement. If PNM had obtained a consensual easement from the Secretary under 25 U.S.C. § 2213, without the Nation's consent, then PNM would pay the Secretary for that easement, and the Nation would be entitled to a portion of that payment. PNM maintains that if this condemnation case went forward as to the Two Allotments, the Nation would likewise be entitled to its portion of the just compensation award. PNM fails to acknowledge that under the consensual easement provisions, if the Nation did not consent but the Secretary approved the easement, the Nation would not be considered a party to the easement agreement, and its sovereignty would not be affected. 25 U.S.C. § 2213(c)(2). Moreover, PNM equates the Nation's lack of consent to an easement under this section, with the Nation's absence from a lawsuit under which the Two Allotments would be involuntarily taken and the Court would determine

an amount of just compensation. *See* Fed. R. Civ. P. 71.1(h) (involving trial of the issues).

The Nation counters that it is a required party under Rule 19(a) because if this action continues without the Nation, its interest in not having its property involuntarily taken by eminent domain would certainly be "impaired or impeded." Fed. R. Civ. P. 19(a)(1)(b)(ii). The Court agrees. As a sovereign, the Nation has an independent interest to be free from involuntary condemnation of the Two Allotments. The Nation's interest in being immune from condemnation actions and even its interest in adequate compensation cannot be adequately protected. This conclusion is supported by Rule 71.1(c)(3) that the plaintiff "must add as defendants all those persons who have or claim an interest" in the property. This requirement is tied to the due process rights of property owners in condemnation actions. *See Leyba v. Armijo,* 11 N.M. 437, 68 P. 939, 940–41 (1902) (noting that property may not be condemned without due process which means adherence to statutory requirements and notice to the owner of property).

PNM asserts that the Nation's interest will not be impaired or impeded because the United States, as trustee with a fiduciary duty to protect the Nation, will sufficiently safeguard the interests of the Nation. As recognized by the court in *Pend Oreille*, "the interest of the United States continues throughout the condemnation proceedings and extends to what shall be done with the proceeds." 1995 WL 17198637, *6. However, the United States cannot protect the Nation's primary interest in maintaining its immunity from suit. Finally, Rule 71.1 requires

joinder of both the holders of beneficial title and the holders of legal title to property. As a fractional interest owner of the Two Allotments, the Nation is a required party to this condemnation action.

2. Under Rule 19(b), the Two Allotments must be dismissed.

The Court considers four factors in this analysis: (1) whether existing and absent parties will be prejudiced; (2) whether that prejudice can be lessened or avoided; (3) whether the judgment would be adequate in the party's absence; and (4) whether the plaintiff would have an adequate remedy if the case is dismissed.

> (a) whether the judgment, in the party's absence, will be prejudicial to the party or to existing parties

The Nation argues that its vital sovereignty interests would be prejudiced if condemnation of the Two Allotments is allowed in its absence. PNM argues that the Nation's interests in the Two Allotments will not be prejudiced. PNM again points to the statutory scheme in the ILCA that allows the Secretary to enter into transactions affecting the Two Allotments—and to compensate the Nation in proportion to its fractional interest—even if the Nation does not consent to the transaction. 25 U.S.C. § 2213. In addition, PNM contends that the condemnation of an easement will not affect the Nation's title to its undivided fractional interests in the Two Allotments. However, the Nation is asserting prejudice as to its sovereignty, and not to its pocketbook or ownership interest. PNM dismisses

the fundamental difference between the consensual grants of rights of way and condemnation actions. The former is an administrative process under which the Secretary determines whether a transaction is in the best interests of allotment owners. The latter is an involuntary taking of property in an adversarial proceeding, an assault on the Nation's sovereignty. This factor weighs in favor of dismissing the Two Allotments.

(b) whether the prejudice can be lessened or avoided by protective provisions in the judgment or by the shaping of relief

PNM asserts that the Nation's interests could be protected if the Court provided for proportionate distribution of the award to the Nation in the condemnation judgment. However, this assumes the only interest negatively affected is the Nation's right of compensation. The involuntary imposition of a right of way on the Two Allotments prejudices the Nation's sovereignty interests. The finding of just compensation cannot be tailored to lessen that effect.

(c) whether a judgment rendered in the party's absence will be adequate

The Tenth Circuit explained that "[t]he concern underlying this factor is not the plaintiff's interest 'but that of the courts and the public in complete, consistent, and efficient settlement of controversies,' that is, 'the public stake in settling disputes by wholes, whenever possible.'" *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1291–92 (10th Cir. 2003) (quoting, *Provident Tradesmens Bank &*

Trust Co. v. Patterson, 390 U.S. 102, 111 (1967)). PNM contends that permitting this litigation to proceed to judgment would wholly settle the matter involving PNM's easement on the Two Allotments; thus, this factor weighs against dismissal.

The Nation states it is unclear what effect a condemnation, without the Nation's presence, would have on PNM's right of way to maintain its electrical transmission line. A condemnation must bind all owners of property, and an incomplete condemnation judgment may be unenforceable. *Martin v. Wilkes*, 490 U.S. 755, 761–62 (1989) (stating as a general matter, judgments do not bind non-parties); *see also Jachetta*, 653 F.3d at 907 ("If the United States is not a party to the action, any judicial decision condemning the land 'has no binding effect,' so "the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto."). This factor does not weigh in PNM's favor.

(d) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

PNM contends that dismissal of this action as to the Two Allotments would leave PNM without a way to exercise its right of eminent domain. PNM asserts that because the United States Supreme Court has held in *State of Minnesota* that the United States is an indispensable party to all actions brought under § 357, all condemnation actions must be brought in federal court. Hence, PNM must bring this action in federal court where the Nation cannot be sued. And, PNM has no other forum in which to condemn its easement on the Two Allotments. In

other words, PNM contends that without the authority to condemn the Two Allotments under § 357, it has no means by which it can acquire its easement. The Nation admits this, but argues that sovereign immunity necessarily results in a lack of remedy against a sovereign and that its sovereignty interests outweigh PNM's eminent domain rights.

The Court finds that PNM is not completely without a remedy. PNM can acquire a voluntary easement under 25 U.S.C. §§ 323–328. As stated *supra*, this statutory scheme and administrative procedure is an alternative to § 357's condemnation of allotted land in federal court. *See generally* Miller, 26 Am. Indian L. Rev. at 121–25 (recognizing that the only way to obtain easements over tribal lands is by the procedures set out in §§ 323–328 and detailed in the regulations, which requires approval from the Secretary of Interior and written consent from the appropriate tribal officials).

The Court concludes that under Rule 19(a) the Nation is a required party that cannot be joined and that under Rule 19(b) the Court cannot "in equity and good conscience" proceed with this condemnation action against the Two Allotments.

IT IS ORDERED that the MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 32) is granted and the claims against the Nation and the Two Allotments will be dismissed without prejudice for lack of subject matter jurisdiction.

/s/
SENIOR UNITED STATES DISTRICT JUDGE

[ENTERED: October 24, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Plaintiff,

vs. CV No. 15-501 JAP/CG

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO, et al.,

Defendants.

Consolidated with

LORRAINE BARBOAN, et al.

Plaintiffs,

vs. CV No. 15-826 JAP/CG

PUBLIC SERVICE COMPANY OF NEW MEXICO, et al.

Defendants.

ORDER GRANTING MOTION TO STAY DEADLINES IN INITIAL SCHEDULING ORDER

THIS MATTER is before the Court upon the parties' *Joint Motion to Stay Deadlines Contained in the Court's September 18, 2017 Initial Scheduling*

Order, (Doc. 149), filed October 23, 2017. The parties ask the Court to stay the deadlines in the Initial Scheduling Order, (Doc. 148), for 90 days so the parties can determine the current ownership status of the three remaining allotments. (Doc. 149 at 2-3). The Court, having considered the Motion, noting it is unopposed, and being otherwise fully advised, finds that the Motion is well taken and should be **GRANTED**. The deadlines in the Initial Scheduling Order, including the Rule 16 Scheduling Conference set for November 9, 2017, are hereby **VACATED** and will be reset by separate order in 90 days.

/s/
THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE

[ENTERED: September 11, 2017]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO; NAVAJO NATION; NAVAJO TRIBAL UTILITY AUTHORITY; CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.; TRANSWESTERN PIPELINE COMPANY, LLC; CITICORP NORTH AMERICA, INC.; CHEVRON USA INC., as successor in interest to Gulf Oil Corp.; HARRY HOUSE, Deceased; LORRAINE BARBOAN, also known as, LARENE H. BARBOAN; PAULINE H. BROOKS; BENJAMIN HOUSE, also known as, BENNIE HOUSE; ANNIE H. SORRELL, also known as, ANNA H. SORRELL; MARY ROSE HOUSE, also known as, MARY R. HOUSE; DOROTHY HOUSE, also known as, DOROTHY W. HOUSE; LAURA H. LAWRENCE, also known as, LAURA H. CHACO; LEO HOUSE, JR.; JONES DEHIYA; NANCY DEHEVA ESKEETS; JIMMY A. CHARLEY, also known as, JIM A. CHARLEY; MARY GRAY CHARLEY, also known as, MARY B. CHARLEY; BOB GRAY, Deceased, also known as, BOB GREY; CHRISTINE GRAY

BEGAY, also known as, CHRISTINE G. BEGAY; THOMAS THOMPSON GRAY, also known as, THOMAS GREY; JIMMIE GREY, also known as, JIMMIE GRAY; LORRAINE SPENCER; MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY; MARLA L. CHARLEY, also known as, MARLA CHARLEY; KALVIN A. CHARLEY; LAURA A. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON; IRENE WILLIE, also known as, IRENE JAMES WILLIE; EDDIE MCCRAY, also known as, EDDIE R. MCCRAE; ETHEL DAVIS, also known as, ETHEL B. DAVIS; CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON; WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY; ELOUISE J. SMITH; ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as, ELOISE ANN JAMES, also known as, ELOUISE WOODS; LEONARD WILLIE; ALTA JAMES DAVIS, also known as, ALTA JAMES; ALICE DAVIS, also known as, ALICE D. CHUYATE; PHOEBE CRAIG, also known as, PHOEBE C. COWBOY; NANCY JAMES, also known as, NANCY JOHNSON; BETTY JAMES, Deceased; LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS; GENEVIEVE V. KING; LESTER CRAIG; SHAWN STEVENS; FABIAN JAMES; DAISY YAZZIE CHARLES, also known as, DAISY YAZZIE, also known as, DAISY J. CHARLES; ROSIE YAZZIE, Deceased; KATHLEEN YAZZIE JAMES, also known

as, CATHERINE R. JAMES; VERNA M. CRAIG; JUANITA SMITH, also known as, JUANITA R. ELOTE; ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.; BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY; VELMA YAZZIE; GERALDINE DAVIS; LARRISON DAVIS, also known as, LARRISON P. DAVIS; ADAM MCCRAY; MICHELLE MCCRAY; EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS; CELENA DAVIS, also known as, CELENA BRATCHER; FRANKIE DAVIS; GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON; VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON; VERN CHARLESTON; GLENDA BENALLY, also known as, GLENDA G. CHARLESTON; KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON; SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON; SPENCER KIMBALL CHARLESTON, JR., Deceased; EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON; CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON; SAM MARIANO; HARRY HOUSE, JR.; MATILDA JAMES; DARLENE YAZZIE; Unknown owners, Claimants and Heirs of the Property Involved, Unknown Heirs of Harry House, Deceased; Unknown Heirs of Bob Gray (Bob Grey), Deceased; Unknown Heirs of Betty James, Deceased; Unknown

Heirs of Rosie C. Yazzie, Deceased; Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased; Unknown Heirs of Helen M. Charley, Deceased; ESTATE OF ROSIE C. YAZZIE, Deceased; ESTATE OF SPENCER K. CHARLESTON, Deceased; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and UNITED STATES DEPARTMENT OF THE INTERIOR;

Defendants.

Consolidated with

LORRAINE J. BARBOAN, LAURA H. CHACO, BENJAMIN A. HOUSE, MARY R. HOUSE, ANNIE H. SORRELL, DOROTHY W. HOUSE, JONES DEHIYA, KALVIN CHARLEY, MARY B CHARLEY, MELVIN L. CHARLEY, MARLA L. CHARLEY, CHRISTINE G. BEGAY, JIMMIE GRAY, THOMPSON GREY, BOB GREY, LEONARD WILLIE, IRENE WILLIE, CHARLEY JOHNSON, ELOISE J. SMITH, SHAWN STEVENS, GLEN C. CHARLESTON, and GLENDA G. CHARLESTON,

Plaintiffs,

vs. **No. 15 CV 826 JAP/CG**

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, and the UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER

In the MOTION TO CONFIRM STATUS OF COURT'S STAY ORDER (Doc .No. 142) (Motion), Public Service Company of New Mexico (PNM) asks the Court to continue a stay of these consolidated cases pending the outcome of a PNM's proposed petition for certiorari to the United States Supreme Court. PNM states it will seek review of the Tenth Circuit Court of Appeals' opinion affirming this Court's ruling in the MEMORANDUM OPINION AND ORDER (Doc. No. 101)and in the MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND ORDER DISMISSING NAVAJO MATION AND ALLOTMENT NUMBERS 1160 AND 1393 (together the Opinion).[1] In the Opinion, the Court dismissed PNM's claims against the Navajo Nation without prejudice, and the Court dismissed claims involving two parcels of land (the Two Allotments) concluding that the Court lacked jurisdiction under 25 U.S.C. § 357 to grant condemnation over lands partially owned by an Indian tribe.[2] Twenty-two of the individual defendants in the condemnation action (No. 15 CV 501 JAP/CG) oppose the Motion. *See* INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STAY (Doc. No. 143)

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[1] These opinions can also be found at 155 F.Supp.3d 1151 (D.N.M. Dec. 1, 2015) and 167 F.Supp.3d 1248 (D.N.M. Mar. 2, 2016) respectively.

[2] "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." 25 U.S.C. § 357.

(Response). PNM filed a reply brief. *See* REPLY IN SUPPORT OF MOTION TO CONFIRM STATUS OF COURT'S STAY ORDER (Doc. No. 145) (Reply). The United States and the Navajo Nation take no position on the Motion. (Mot. at 4.) Because PNM had failed to show good cause to continue the stay, the Court will deny the Motion.

I. BACKGROUND

Since 1960, PNM's electric transmission line (the AY Line) has crossed five parcels of land in McKinley County, New Mexico owned by individual members of the Navajo Nation who are Plaintiffs in No. 15 CV 826 JAP/CG. Those parcels or allotments are identified as Allotment 1160; Allotment 1204; Allotment 1340; Allotment 1392; and Allotment 1877 (the Five Allotments). The Navajo Nation owns fractional undivided beneficial interests in Allotments 1160 and 1392 (the Two Allotments). PNM's fifty-year consensual easement to operate the AY Line expired on April 8, 2010. In 2009, PNM began a year-long attempt to obtain another consensual easement. After initial consent, a majority of the owners of the Five Allotments withdrew their consent. As a result, the Bureau of Indian Affairs (BIA) denied PNM's application for renewal of the right of way. On June 13, 2015, PNM filed this condemnation action. On September 18, 2015, twenty-two of the seventy-seven individual owners of the Five Allotments, filed a suit in trespass.[3] No. 15 CV 826 JAP/CG. This Court consolidated the condemnation case with the

[3] These twenty-two owners claimed that since April 8, 2010 PNM's AY Line has trespassed on their property.

trespass case. MEMORANDUM OPINION AND ORDER (Doc. No. 128) (Mar. 7, 2016).

In the Opinion, the Court dismissed the Navajo Nation as a party without prejudice, and the Court dismissed the Two Allotments because the Court lacked jurisdiction under 25 U.S.C. § 357. The Court determined that because the Navajo Nation owned a partial beneficial interest in the Two Allotments, those parcels were no longer "lands allotted in severalty to Indians." *Id.* The Court also ruled that even if the Two Allotments could be condemned under § 357, the Navajo Nation was an indispensable party to the condemnation action, but it could not be joined due to its sovereign immunity from suit in this Court. Consequently, under the Court's ruling, PNM must obtain a consensual easement from a majority of the fractional owners of the Two Allotments and from the Navajo Nation or it must move its transmission line to bypass the Two Allotments. PNM has the authority under § 357 to condemn the other three Allotments.

The Court issued another order staying the consolidated cases pending PNM's interlocutory appeal of the Opinion to the Tenth Circuit. *See* 167 F.Supp.3d 1248 (D.N.M. Mar. 2, 2016).[4]

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[4] In that opinion, the Court denied reconsideration of its dismissal of claims involving the Two Allotments from this condemnation action without prejudice. In addition, the Court denied PNM's motion to sever the condemnation action against the three remaining allotments. Finally, the Court granted PNM's request to certify for interlocutory appeal *inter alia* the legal issue of PNM's power to condemn the Two Allotments partially owned by Indian tribes.

On May 26, 2017, the Tenth Circuit Court of Appeals affirmed the Opinion. *Pub. Serv. Co. of New Mexico v. Barboan,* 857 F.3d 1101 (10th Cir. 2017). On July 21, 2017, the Tenth Circuit denied PNM's petition for rehearing en banc. On July 31, 2017, the Tenth Circuit issued its mandate returning jurisdiction of this case to this Court. (*See* Doc. No. 140.)

On August 3, 2017, Magistrate Judge Carmen E. Garza ordered the parties to the consolidated cases to file a Joint Status Report and Provisional Discovery Plan. (Doc. No. 144) (JSR). The parties' JSR covers the condemnation related to Allotments 1204, 1340, and 1877.

II. STANDARD OF REVIEW

Various Rules of Procedure govern stays in district courts and courts of appeals pending further appeals. See Fed. R. Civ. P. 62(h) (governing stays pending appeals in district courts); Fed. R. App. P. 8(a) (governing motions for stays in circuit courts); and Fed. R. App. P. 41(d) (governing motions for a stay of the circuit court's mandate pending petition for certiorari). Importantly, the Tenth Circuit summarily denied a motion to stay its mandate pending review by the Supreme Court. (Resp. Ex. 2.)

Under Rule 62(h), district courts must consider these factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

III. DISCUSSION

PNM asks the Court to continue the stay claiming that the same reasons that prompted the Court to stay the action pending an interlocutory appeal to the Tenth Circuit still apply. In other words, PNM claims that its request for a stay pending review by the Supreme Court is just a continuation of the interlocutory appeal process. PNM also contends that if the Supreme Court grants certiorari, it will decide an important statutory issue vital to PNM's authority to condemn real property in Indian Country. Finally, PNM argues that a stay pending a decision by the Supreme Court would prevent piecemeal condemnation of the Five Allotments. PNM maintains that if it wins the appeal in the Supreme Court, it can then condemn all Five Allotments, but if it loses the appeal, even though PNM may condemn three of the five allotments, PNM "may have to change the location of its transmission line to bypass the Two Allotments." (Mot. at 3.) In its Reply, PNM points out that this Court should continue the stay to avoid the complications that could occur if this case and the appeal in the Supreme Court case proceed simultaneously.

However, the Court is unconvinced that a ruling by the Supreme Court favorable to PNM will necessarily result in the condemnation of all Five Allotments. If the Supreme Court grants certiorari and reverses the Tenth Circuit, it could remand the case to allow the Tenth Circuit to decide the

questions on appeal on which it did not rule. The important issues the Tenth Circuit did not consider were whether the Navajo Nation is an indispensable party to any condemnation proceeding against the Two Allotments and whether the Navajo Nation can be joined despite its sovereign immunity. The Tenth Circuit explained:

> Though we need not reach the other questions raised on appeal, we note that the district court's orders provide thorough and well-reasoned bases to affirm on each. The court's orders are especially persuasive on the question of tribal immunity, which the court rightly observes must be abrogated unequivocally, not implicitly, by Congress. *See Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011). PNM offers evidence of only implicit abrogation. We take note of this to demonstrate that even had PNM prevailed on the § 347 statutory question, it still would have had a long, difficult road ahead before its condemnation action could proceed.

Pub. Serv. Co. of New Mexico v. Barboan, 857 F.3d 1101, 1108 (10th Cir. 2017).

The Court concludes that PNM has failed to show that it is likely to succeed in its petition for certiorari. There is no circuit split on this legal issue—the only other circuit court that has ruled on the issue gave support for this Court's decision. In addition, no Tenth Circuit judge dissented from the

denial of *en banc* review. Moreover, even if PNM obtains certiorari review and reversal of the Tenth Circuit, PNM will still face the difficult issue of the Navajo Nation's sovereign immunity and Congress's failure to explicitly abrogate that immunity in § 357.

PNM has also failed to convince the Court that the balance of harms favors a continuation of the stay. *Hilton*, 481 U.S. at 776. But the Allottees persuasively assert that many of them "are elderly and have not received compensation from [PNM] for use of the right of way since it expired in 2010." (Resp. Ex. 1 at 1–2.) Finally, the public interest lies in a decision or settlement related to the AY Line's location.

IT IS ORDERED that the MOTION TO CONFIRM STATUS OF COURT'S STAY ORDER (Doc .No. 142) is denied.

/s/
SENIOR UNITED STATES DISTRICT JUDGE

[ENTERED: July 31, 2017]

FILED
United States Court of Appeals
Tenth Circuit

July 31, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff - Appellant, v. LORRAINE BARBOAN, a/k/a, Larene H. Barboan, et al., Defendants - Appellees, and APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO, et al., Defendants. ----------	No. 16-2050

GPA MIDSTREAM ASSOCIATION, et al.,

Amici Curiae.

ORDER

Before **BACHARACH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

These matters are before the court on Appellant's Motion to Stay Issuance of Mandate (the "Motion") and the Individual Allottees' Response in Opposition to Appellant's Motion. Upon consideration thereof, the Motion is denied.

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk

[ENTERED: March 31, 2016]

FILED
United States Court of Appeals
Tenth Circuit

March 31, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation,

Petitioner,

and

TRANSWESTERN PIPELINE COMPANY, LLC,

Consol Petitioner,

v.

LORRAINE J. BARBOAN; LAURA H. CHACO; BENJAMIN A, HOUSE; MARY R. HOUSE; ANNIE H. SORRELL; DOROTHY W. HOUSE; JONES DEHIYA; KALVIN CHARLEY; MARY B. CHARLEY; MELVIN L.

No. 16-700
(D.C. No. 1:15-CV-00501-JAP-CG)
(D. N.M.)

CHARLEY; MARLA L. CHARLEY; CHRISTINE G. BEGAY; JIMMIE GREY; THOMPSON GREY; BOB GREY; LEONARD WILLIE; IRENE WILLIE; CHARLEY J. JOHNSON; ELOUISE J. SMITH; SHAWN STEVENS; GLENDA C. CHARLESTON; GLEN C. CHARLESTON,

Defendants Counterclaimants – Respondents,

and

UNITED STATES OF AMERICA; NAVAJO NATION,

Respondents.

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **GORSUCH**, Circuit Judges.

This matter is before the court on Public Service Company of New Mexico's *Petition for Permission to Appeal from December 1, 2015 Order and Memorandum of the United States District Court for the District of New Mexico in Case 1:15-CV-00501*. The petition was filed pursuant to 28 U.S.C. §1292(b) and Federal Rule of Appellate Procedure 5. We also have responses on file from the Navajo

Nation, the Barboan defendants, and Transwestern Pipeline Company.

Upon consideration, the petition is granted.

Within 14 days of the date of this order, Public Service Company of New Mexico shall pay the $505 filing fees to the Clerk of the District of New Mexico. *See* Fed. R. App. P. 5(d)(1)(A). A notice of appeal is not required. Instead, the date of this order shall serve as the date of the notice of appeal. *Id.* at 5(d)(2).

The clerk of this court is directed to open a new appeal once the district court notifies this court that the filing fees have been paid. *Id.* at 5(d)(3).

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk

[ENTERED: March 7, 2016]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO; NAVAJO NATION; NAVAJO TRIBAL UTILITY AUTHORITY; CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.; TRANSWESTERN PIPELINE COMPANY, LLC; CITICORP NORTH AMERICA, INC.; CHEVRON USA INC., as successor in interest to Gulf Oil Corp.; HARRY HOUSE, Deceased; LORRAINE BARBOAN, also known as, LARENE H. BARBOAN; PAULINE H. BROOKS; BENJAMIN HOUSE, also known as, BENNIE HOUSE; ANNIE H. SORRELL, also known as, ANNA H. SORRELL; MARY ROSE HOUSE, also known as, MARY R. HOUSE; DOROTHY HOUSE, also known as, DOROTHY W. HOUSE; LAURA H. LAWRENCE, also known as, LAURA H. CHACO; LEO HOUSE, JR.; JONES DEHIYA; NANCY DEHEVA ESKEETS; JIMMY A. CHARLEY, also known as, JIM A. CHARLEY; MARY GRAY CHARLEY, also known as, MARY B. CHARLEY; BOB

GRAY, Deceased, also known as, BOB GREY; CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY; THOMAS THOMPSON GRAY, also known as, THOMAS GREY; JIMMIE GREY, also known as, JIMMIE GRAY; LORRAINE SPENCER; MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY; MARLA L. CHARLEY, also known as, MARLA CHARLEY; KALVIN A. CHARLEY; LAURA A. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON; IRENE WILLIE, also known as, IRENE JAMES WILLIE; EDDIE MCCRAY, also known as, EDDIE R. MCCRAE; ETHEL DAVIS, also known as, ETHEL B. DAVIS; CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON; WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY; ELOUISE J. SMITH; ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as, ELOISE ANN JAMES, also known as, ELOUISE WOODS; LEONARD WILLIE; ALTA JAMES DAVIS, also known as, ALTA JAMES; ALICE DAVIS, also known as, ALICE D. CHUYATE; PHOEBE CRAIG, also known as, PHOEBE C. COWBOY; NANCY JAMES, also known as, NANCY JOHNSON; BETTY JAMES, Deceased; LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS; GENEVIEVE V. KING; LESTER CRAIG; SHAWN STEVENS; FABIAN JAMES; DAISY YAZZIE CHARLES, also known as, DAISY YAZZIE, also known as, DAISY J.

CHARLES; ROSIE YAZZIE, Deceased; KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES; VERNA M. CRAIG; JUANITA SMITH, also known as, JUANITA R. ELOTE; ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.; BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY; VELMA YAZZIE; GERALDINE DAVIS; LARRISON DAVIS, also known as, LARRISON P. DAVIS; ADAM MCCRAY; MICHELLE MCCRAY; EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS; CELENA DAVIS, also known as, CELENA BRATCHER; FRANKIE DAVIS; GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON; VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON; VERN CHARLESTON; GLENDA BENALLY, also known as, GLENDA G. CHARLESTON; KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON; SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON; SPENCER KIMBALL CHARLESTON, JR., Deceased; EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON; CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON; SAM MARIANO; HARRY HOUSE, JR.; MATILDA JAMES; DARLENE YAZZIE; Unknown owners, Claimants and Heirs of the Property Involved, Unknown Heirs of Harry House, Deceased; Unknown Heirs of

Bob Gray (Bob Grey), Deceased; Unknown Heirs of Betty James, Deceased; Unknown Heirs of Rosie C. Yazzie, Deceased; Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased; Unknown Heirs of Helen M. Charley, Deceased; ESTATE OF ROSIE C. YAZZIE, Deceased; ESTATE OF SPENCER K. CHARLESTON, Deceased; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and UNITED STATES DEPARTMENT OF THE INTERIOR;

Defendants.

Consolidated with

LORRAINE J. BARBOAN, LAURA H. CHACO, BENJAMIN A. HOUSE, MARY R. HOUSE, ANNIE H. SORRELL, DOROTHY W. HOUSE, JONES DEHIYA, KALVIN CHARLEY, MARY B CHARLEY, MELVIN L. CHARLEY, MARLA L. CHARLEY, CHRISTINE G. BEGAY, JIMMIE GRAY, THOMPSON GREY, BOB GREY, LEONARD WILLIE, IRENE WILLIE, CHARLEY JOHNSON, ELOISE J. SMITH, SHAWN STEVENS, GLEN C. CHARLESTON, and GLENDA G. CHARLESTON,

Plaintiffs,

vs. **No. 15 CV 826 WPJ/KK**

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, and the UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO CONSOLIDATE AND FOR REASSIGNMENT

PNM brought Case No. 15 CV 501 JAP/CG (the Condemnation Case) to acquire a perpetual easement for its high-voltage electric utility line (the AY Line) on approximately 15.49 acres of land in McKinley County, New Mexico. Twenty-two of the landowner defendants in the Condemnation Case brought Case No. 15 CV 826 WPJ/KK (the Trespass Case) against PNM claiming that since the expiration of its fifty-year easement in April 2010, PNM's AY Line has trespassed on their property. The plaintiffs (*Barboan* Plaintiffs) in the Trespass Case ask the Court to reassign the Trespass Case to the presiding judge in the Condemnation Case and to consolidate the Trespass Case with the Condemnation Case. *See* MOTION TO CONSOLIDATE AND FOR REASSIGNMENT (Case No. 15 CV 501 Doc. No. 108); MOTION TO CONSOLIDATE AND FOR REASSIGNMENT (Case No. 15 CV 826 Doc. No. 31) (together, the Motion). Because both the Condemnation Case and the Trespass Case involve similar issues of law and fact, the Court will grant the Motion.

In the 1960s, PNM was granted a fifty-year easement on five allotments of land beneficially owned by members of the Navajo Nation (Nation):

(1) Allotment 1160, (2) Allotment 1204, (3) Allotment 1340, (4) Allotment 1392, and (5) Allotment 1877 (together, the Five Allotments). (Case No. 15 CV 501, Am. Complaint (FAC) ¶ 21 (Doc. No. 49) Exs. 2-6.) The *Barboan* Plaintiffs own a majority of the beneficial interests in the Five Allotments. (*Id.*) The Nation owns an undivided 13.6 % beneficial interest in Allotment 1160 and an undivided .14 % beneficial interest in Allotment 1392. (*Id.*) Allotment 1160 and Allotment 1392 will be referred to as the Two Allotments. The United States owns the fee title to the Five Allotments in trust for the individual owners and for the Nation. (*Id.* ¶ 23.)

PNM and the United States oppose the Motion for the same reason: consolidation of the Condemnation Action with the Trespass Action would nullify the Court's previous ruling that under Fed. R. Civ. P. 71.1, the *Barboan* Plaintiffs may not bring a counterclaim for trespass in the Condemnation Case. *See* MEMORANDUM OPINION AND ORDER DISMISSING COUNTERCLAIM ASSERTED BY INDIVIDUAL DEFENDANTS. Case No. 15 CV 501 JAP/CG (Doc. No. 103). *See also* PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S RESPONSE IN OPPOSITION TO 22 DEFENDANTS' MOTION TO CONSOLIDATE AND FOR REASSIGNMENT (Doc. No. 111); DEFENDANT UNITED STATES OF AMERICA'S RESPONSE IN OBJECTION TO ALLOTTEES' MOTION TO CONSOLIDATE AND FOR REASSIGNMENT (Doc. No. 112).[1]

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[1] In ruling on the Motion, the Court has also considered the arguments in the *Barboan* Plaintiffs' REPLY IN SUPPORT OF MOTION TO CONSOLIDATE (Doc. No. 115).

I. STANDARD OF REVIEW

Rule 42 provides,

> If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions or (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a). Once the Court has determined that there are common questions of law or fact, it "should then weigh the interests of judicial convenience in consolidating the cases against the delay, confusion, and prejudice consolidation might cause." *Nieto v. Kapoor*, 210 F.R.D. 244, 248 (D.N.M. 2002) (quoting *Servants of the Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1572 (D.N.M. 1994)). Courts consolidate cases to promote "convenience and economy of administration." *Chaara v. Intel Corp.*, 410 F. Supp. 2d 1080, 1089 (D.N.M. 2005).

II. BACKGROUND

A. THE CONDEMNATION ACTION

In November 2009, knowing that its easement would expire in April 2010, PNM acquired the requisite consents from owners of a majority of the beneficial interests in the Five Allotments and submitted a renewal application to the BIA under 25 U.S.C. §§ 321–328. In June 2014, however, the

Barboan Plaintiffs withdrew their consent. In 2015, the BIA notified PNM that it could not approve PNM's renewal application. Thus, PNM brought the Condemnation Case on June 13, 2015 under 25 U.S.C. § 357.[2] PNM has asked the Court to appoint a three member commission under NMSA 1978 § 42A-1-19 to determine the amount of fair compensation PNM must pay to the owners of the Five Allotments.

On December 1, 2015, the Court granted the Nation's motion to dismiss concluding that PNM lacked statutory authority to condemn the Two Allotments and that the Nation is an indispensable party who has sovereign immunity from suit. *See* MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 101).[3] The Court has certified for interlocutory appeal several controlling issues of law from that decision. (*Id.*) Consequently, PNM's ability to condemn the Two Allotments depends on the

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[2] Section 357 provides,

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357.

[3] PNM moved to reconsider that ruling, but the Court has denied that request in part. *See* MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND ORDER DISMISSING NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392.

resolution of the interlocutory appeal. The Court has also stayed all claims in the Condemnation Case against the Five Allotments. (*Id.*)

On December 1, 2015, the Court also entered its MEMORANDUM OPINION AND ORDER DISMISSING COUNTERCLAIM ASSERTED BY INDIVIDUAL DEFENDANTS (Doc. No. 103). In dismissing the trespass counterclaims from the Condemnation Case, the Court relied on an interpretation of Rule 71.1 (e)(3)[4] adopted by a majority of courts, that counterclaims are not permitted in condemnation proceedings. *See, e.g., Kansas Pipeline Co. v. 200 Foot by 250 Foot Piece of Land,* 210 F. Supp. 2d 1253, 1258 (D. Kan. 2002) (holding that counterclaims are "pleadings" not permitted under Rule 71.1(e)). Despite that ruling, the Court will consolidate the condemnation and trespass claims.

B. THE TRESPASS ACTION

On September 18, 2015, apparently in response to PNM's motion to dismiss their trespass counterclaims in the Condemnation Case, the *Barboan* Plaintiffs filed the Trespass Case. They claim that since PNM's consensual easement expired in April 2010, PNM has been trespassing on their

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[4] The rule provides,

> A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed.

Fed. R. Civ. P. 71.1 (e)(3).

property in violation of 25 U.S.C. § 345.[5] The *Barboan* Plaintiffs have demanded a jury trial to determine liability and damages, which they claim would be "the fair market value of the continued use of the right-of-way easement" from the date PNM's easement expired to the date condemnation damages are awarded. (Case No. 15 CV 826 Compl. (Doc. No. 1) ¶ 17; Mot. at 3.)

The United States, named as a nominal defendant, has moved to dismiss the Trespass Case arguing *inter alia* that PNM has a license to use the easement while its application for a renewal of the easement is pending before the United States Department of the Interior's Bureau of Indian Affairs (BIA). DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS (Case No. 15 CV 826, Doc. No. 15) (US Motion to Dismiss).[6] PNM

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[5] Section 345 states,

> All persons who are in whole or in part of Indian blood or descent . . . who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled . . . may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States[.]

25 U.S.C. § 345.

[6] In the US Motion to Dismiss, the United States has argued that the Court lacks federal question jurisdiction over the Trespass Case because the *Barboan* Plaintiffs may not sue for trespass under 25 U.S.C. § 345. The United States has also argued that the Nation is an indispensable party that should be joined in the Trespass Case and that the case should be dismissed in the Nation's absence under Rule 19.

and the *Barboan* Plaintiffs have opposed the US Motion to Dismiss. *See* DEFENDANT PUBLIC SERVICE COMPANY OF NEW MEXICO'S RESPONSE TO DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS (Doc. No. 20) *and* PLAINTIFFS' RESPONSE TO NOMINAL DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS THIS ACTION IN ITS ENTIRETY (Doc. No. 23).[7] The United States has also moved to stay discovery in the Trespass Case until the Court rules on the US Motion to Dismiss.[8] *See* UNITED STATES OF AMERICA'S MOTION TO STAY DISCOVERY (Doc. No. 22). The *Barboan* Plaintiffs oppose the motion to stay.[9]

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[7] In response the *Barboan* Plaintiffs assert that the Tenth Circuit has allowed trespass actions under § 345. In its response, PNM asserts that the *Barboan* Plaintiffs have the right to sue for trespass under 25 U.S.C. § 345 and that Nation is not an indispensable party. *See* DEFENDANT PUBLIC SERVICE COMPANY OF NEW MEXICO'S RESPONSE TO DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS (Doc. No. 20) *and* PLAINTIFFS' RESPONSE TO NOMINAL DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS THIS ACTION IN ITS ENTIRETY (Doc. No. 23).

[8] According to the United States, all parties would be prejudiced if discovery were allowed to proceed and the Court later dismissed the Trespass Case for lack of jurisdiction.

[9] *See* RESPONSE IN OPPOSITION TO NOMINAL DEFENDANT UNITED STATES OF AMERICA'S MOTION TO STAY DISCOVERY (Doc. No. 32).

III. ANALYSIS

A. COMMON QUESTIONS OF LAW AND FACT

1. PNM's Right to Use the Easement

Controversies involving property rights to Indian allotments are governed by federal law. *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010) (holding that allottees could not bring a state law trespass claim but could bring federal common law trespass claim under 25 U.S.C. § 345). However, in those cases federal courts are guided by state law. *Id.* at 1282–83. Under New Mexico law, a person is liable for trespass if he intentionally enters the land of another or causes a thing or third person to do so without permission. *North v. Public Service Company of New Mexico*, 101 N.M. 222, 680 P.2d 603, 605 (1983). A pivotal issue in both the Condemnation Case and Trespass Case will be whether PNM is unlawfully occupying its easement, and that depends on PNM's authority to condemn an easement. *Id.* The Court has held that PNM cannot condemn an easement on the Two Allotments, but that decision has been certified for interlocutory appeal. In short, PNM's liability for trespass on the Two Allotments depends on its ability to condemn. This common issue of law favors consolidation.

Also, the United States avers that, since PNM's renewal application was filed, PNM has a license to occupy its easement while that application is pending before the BIA. *See* MEMORANDUM IN SUPPORT OF THE UNITED STATES OF

AMERICA'S MOTION TO DISMISS (Doc. No. 33) at 5. The *Barboan* Plaintiffs assert that their withdrawal of consent prevents the BIA from granting PNM's application. Therefore, the status of PNM's renewal application is relevant to the trespass claim as to the Two Allotments. The Court has held that since PNM cannot sue the Nation for condemnation, the BIA process for consensual easements is the only alternative for PNM to acquire an easement on the Two Allotments. These common issues also favor consolidation.

3. Damages and Just Compensation

The *Barboan* Plaintiffs claim that the issue at the heart of their Trespass Case is "the fair market value for the damages they have suffered from PNM's past and continued use and occupancy of their land without compensation." (Mot. at 4.) According to the *Barboan* Plaintiffs, the Condemnation Case involves the same issue of fair market value. (*Id.*) The *Barboan* Plaintiffs recently indicated that "any fair market valuation for the easement must include trespass, comparative values of lands wherein there are tribal interests, and that the appropriate methodology for determining fair market value is based on the highest and best use." JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN (Case No. 15 CV 501, Doc. No. 121 at 4) (JSR).

As for the Two Allotments, if PNM has condemnation authority, that is, if the Tenth Circuit reverses this Court's decision, the measure of damages will be the fair market value of the

easement. If PNM lacks the ability to condemn the Two Allotments, it may be trespassing on the Two Allotments. If PNM is determined to be trespassing, the fact finder will have to determine when the trespass began, either at the time PNM's consensual easement expired in April 2010, at the time the *Barboan* Plaintiffs withdrew their consent, or at the time the BIA indicated it could not approve the renewal application. As for the remaining three allotments, however, PNM clearly has the right to condemn an easement; thus, the owners will recover condemnation damages.

In sum, the Condemnation Case and the Trespass Case involve common issues of law and fact.

B. JUDICIAL CONVENIENCE WEIGHED AGAINST DELAY, CONFUSION, AND PREJUDICE

After finding common questions of law and fact, the Court must weigh the interests of judicial convenience in consolidating the cases against the delay, confusion, and prejudice that consolidation may cause. *Anderson Living Trust v. WPX Energy Prod., LLC*, 297 F.R.D. 622, 630 (D.N.M. 2014) (citing 9A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, *Federal Practice & Procedure, Civil* § 2383 (3d ed.) ("[C]onsolidation . . . is . . . a matter of convenience and economy in judicial administration. The district court is given broad discretion to decide whether consolidation under Rule 42(a) would be desirable and the district judge's decision inevitably is highly contextual.").

The Court concludes that consolidation is appropriate. Notably, the Court has stayed all claims in the Condemnation Case pending the resolution of the interlocutory appeal. Once PNM's interlocutory appeal is resolved, either the condemnation or trespass claims will be viable as to the Two Allotments. If the Tenth Circuit upholds this Court's decision, then the *Barboan* Plaintiffs will have a basis for their trespass claims. If the Tenth Circuit reverses this Court's decision, then PNM may prosecute its condemnation claims against the Two Allotments. Thus, with regard to the Two Allotments, the appeal will dictate what claims may move forward. In either instance, consolidation will save time and resources particularly in retaining experts as to the fair market value of all Five Allotments.

The Court recognizes that consolidation contradicts the previous ruling dismissing the trespass counterclaim. And in a sense, the Court has revised its previous decision. Fed. R. Civ. P. 54(b) (allowing court to revise a decision at any time prior to final judgment). The Court notes, however, that consolidation does not merge separate suits into one cause of action. *Harris v. Illinois-California Exp., Inc.*, 687 F.2d 1361, 1368 (10th Cir. 1982). And, despite consolidation, the Condemnation Case and the Trespass Case retain their separate identities. *Hillman v. Webley,* Case No. 95-1513, 1996 WL 559656, *7 (10th Cir. Sept. 30, 1996) (recognizing that consolidation of cases "does not merge the suits into a single cause, or change the rights of the parties"), *cited in In re Bank of America Wage and Hour Employment Litigation*, No. 10–MD–2138–JWL, 2010 WL 4180530, *3 (D. Kan. Oct. 20, 2010).

In sum, consolidation recognizes the interrelated nature of these particular claims.

IT IS ORDERED that the MOTION TO CONSOLIDATE AND FOR REASSIGNMENT (Case No. 15 CV 501 Doc. No. 108) and the MOTION TO CONSOLIDATE AND FOR REASSIGNMENT (Case No. 15 CV 826 Doc. No. 31) are granted and future filings should be made in the lower numbered Condemnation Case.

/s/ James A. Parker
SENIOR UNITED STATES DISTRICT JUDGE

[ENTERED: July 21, 2017]

FILED
United States Court of Appeals
Tenth Circuit

July 21, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff - Appellant, v. LORRAINE BARBOAN, a/k/a, Larene H. Barboan, et al., Defendants - Appellees, and APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO, et al., Defendants. ----------	No. 16-2050

GPA MIDSTREAM ASSOCIATION, et al.,

Amici Curiae.

ORDER

Before **BACHARACH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk

[FILED: October 23, 2017]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Plaintiff,

v. No. 1:15-cv-00501-JAP-CG

LORRAIN BARBOAN, a/k/a LARENE H. BARBOAN, *et al.*,

Defendants.

Consolidated with

LORRAINE J. BARBOAN, et al.,

Plaintiffs, No. 1:15-cv-00826-JAP/CB

v.

PUBLIC SERVICE COMPANY OF NEW MEXICO, et al.,

Defendants.

JOINT MOTION TO STAY DEADLINES CONTAINED IN THE COURT'S SEPTEMBER 18, 2017 INITIAL SCHEDULING ORDER

Plaintiff Public Service Company of New Mexico ("PNM"), by its attorneys of record, Miller Stratvert P.A. (Kirk R. Allen), Defendants Individual Allottees, by its attorneys of record, Davis Kelin Law Firm, LLC (Zackeree S. Kelin) and Defendant United States of America, by its attorneys of record

the United States Department of Justice (Assistant United States Attorney Manuel Lucero) hereby move the Court for an Order staying for 90 days the deadlines contained in the Court's September 18, 2017 Initial Scheduling Order. The Court should grant this Joint Motion for the reasons set forth below:

1. On May 26, 2017, the Tenth Circuit Court of Appeals issued its opinion and judgment, affirming this Court's dismissal without prejudice of the condemnation action brought by PNM against allotments 1160 and 1392 in which the Navajo Nation holds a fractional interest.

2. On July 31, 2017, the Tenth Circuit issued a mandate returning the case to this Court's jurisdiction. Consistent with this mandate the Court entered the September 18, 2017 Initial Scheduling Order ("Scheduling Order"). [Doc. 148]

3. In September, 2017, PNM requested from the Bureau of Indian Affairs ("BIA") updated Title Status Reports ("TSR") for the five allotments subject to PNM's original condemnation action (allotments 1160, 1392, 1340, 1877 and 1204) to determine the current ownership status. The TSRs for the five allotments requested by PNM in September, 2017 and received from the BIA are attached as Exhibit A.

4. The TSR for allotment 1340 was certified by the BIA on August 26, 2016, and indicates that the Navajo Nation owned as of that date a fractional interest in allotment 1340. The TSR for allotment 1877 was certified by the BIA on September 7, 2016, and indicates that the Navajo

Nation owned as of that date a fractional interest in allotment 1877. The TSR for allotment 1204 was certified by the BIA on August 28, 2015, and indicates that the 100% owner, defendant Dehiya Jones, is now deceased. The TSR for allotment 1204 does not indicate who now owns allotment 1204.

5. On October, 18, 2017, Counsel for PNM, the Individual Allottees, and the United States conducted the "meet and confer" as directed by the Scheduling Order. All counsel agreed that it was imperative to determine the current ownership status of allotments 1340, 1877 and 1204 before proceeding further with this action. The ownership status may have a direct impact on the scope or of the condemnation action. Therefore, it is in the best interest of parties and would promote judicial economy if the Court granted a 90 day stay of the deadlines so that the parties can definitely make this determination.

WHEREFORE, PNM, the Individual Allottees, and the United States respectfully request that the Court stay for 90 days the deadlines imposed by the Scheduling Order until the parties determine the ownership status of allotments 1340, 1877, and 1204, and for such other relief as the Court deems proper.

Respectfully submitted,

MILLER STRATVERT P.A.

By */s/ Kirk R. Allen*
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I certify that on the 24th day of October, 2017, I mailed a copy of the foregoing via first-class U.S. Mail, postage prepaid, to the following parties:

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