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

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff, v. APPROXIMATELY 15.49 ACRES OF LAND IN McKINLEY COUNTY, NEW MEXICO; UNITED STATES OF AMERICA; NAVAJO NATION, et al., Defendants.	No. 1:15-cv-00501

REPLY TO RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Defendant Navajo Nation (Nation) files its Reply to Plaintiff Public Service Company of New Mexico's Response in Opposition to the Nation's Motion to Dismiss.

I. UNDER THE SUPREME COURT STANDARD REQUIRING AN UNEQUIVOCAL WAIVER OF TRIBAL IMMUNITY, THE NATION HAS SOVEREIGN IMMUNITY FROM THIS CONDEMNATION SUIT.

Public Service Company (PNM) ignores the standard for a waiver of sovereign immunity and instead focuses on "implied" waivers and the alleged congressional understanding of the

interaction of Section 357 and the Indian Land Consolidation Act. *See* Response in Opposition, Doc. 39, at 7-10. Neither is consistent with the high standard required by the Supreme Court for waivers of tribal immunity. When Section 357 is interpreted in light of the actual standard, it does not waive the Nation's immunity.

Though PNM fails to mention this principle at all in its response, Congress or the Nation must "unequivocally" waive immunity. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031 (2014). In either case, a waiver cannot be implied. *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1152 (10th Cir. 2011); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotation marks omitted). Thus, when Congress abrogates tribal immunity, its intent to do so must be clear. *Bay Mills*, 134 S.Ct. at 2031. This principle reflects that courts will not lightly assume that Congress "in fact intends to undermine Indian self-government." *Id.* at 2031-32.

A. The plain language of Section 357 does not show an unequivocal congressional waiver of the Nation's immunity.

Nothing in the plain language of Section 357 unequivocally waives the Nation's immunity. As discussed in the Motion to Dismiss, tribal governments are not mentioned at all in the text of Section 357. Congress's intent to waive the Nation's immunity cannot be shown through silence, or the "unequivocal" requirement is meaningless. Section 357 recognizes a cause of action, nothing more. It does not purport to breach tribal immunity. Under the high standard set for abrogation of sovereign immunity, there must be something more to show an unequivocal waiver. There is not, and therefore the Nation is immune from this condemnation action.

1. *Minnesota v. United States* does not recognize an unequivocal waiver of tribal sovereign immunity.

The waiver of immunity for the United States recognized by the Supreme Court in *Minnesota v. United States*, 305 U.S. 382 (1939), is not binding here. Indeed, tribal immunity was not even an issue in the case; the issue was whether the United States was immune from suit in state court for condemnation of an allotment. *Id.*, 305 U.S. at 386-88. Indeed, it appears from the opinion that the United States did not even contest immunity for direct actions in federal court, and therefore the Court's statement was made in the context of a situation where that immunity was not even raised. *See id.* Further, the sum total of the discussion in *Minnesota* is one conclusory sentence recognizing an alleged *implied* waiver in Section 357. *See id.* at 386 ("It is true that authorization to condemn confers *by implication* permission to sue the United States.") (emphasis added). However, the Court in the next sentence went on to state that Congress had generally authorized suits against the United States in federal court, suggesting Section 357 did not by itself waive immunity. *Id.*

Subsequent cases do not support *Minnesota's* implied waiver reasoning, even for federal immunity. Later case law on Section 357 merely follows *Minnesota*, with no additional analysis of how Congress could have implicitly waived federal immunity through Section 357. *See, e.g.*, *Town of Okemah v. United States*, 140 F.2d 963, 965 (10th Cir. 1944); *Jechetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011). Further, the Tenth Circuit has suggested that the implied waiver reasoning is in conflict with general principles of federal immunity, which also requires an unequivocal waiver. *See Prince v. United States*, 7 F.3d 968, 970 (1993) (noting no unequivocal waiver in 25 U.S.C. § 348 and distinguishing *Minnesota* based on language of that statute).

Whatever the stare decisis effect *Minnesota* may have on the question of federal immunity, which the United States has not raised in this case, it cannot mandate a waiver of the Nation's immunity. Supreme Court case law on tribal immunity requires a clear waiver of immunity by the tribe or Congress, and Section 357 cannot "implicitly" waive the Nation's immunity, even if it allegedly did so for the United States. Absent any evidence of that intent, the Nation's immunity is intact.

2. The Indian Land Consolidation Act does not waive the Nation's immunity.

Nothing in the Indian Land Consolidated Act's language affects the Nation's immunity in this case, and indeed Section 2213 of the act acknowledges a tribe's immunity and disclaims any effect on it.

PNM misreads Section 2213's provisions. PNM characterizes that section as meaning a tribe does not have a veto on development or a disproportionate interest in decision-making for an allotment in which it holds an interest. Response, Doc. 39, at 8. It correctly notes that if the United States retains a lien on a tribe's allotted interest acquired under the act, Section 2213 authorizes the Secretary of Interior to grant a right-of-way without the tribe's consent. *Id.* Based on this, PNM asserts that Congress "apparently" understood that a tribe would not have immunity from a condemnation action under Section 357. *Id.*

Section 2213 does not suggest or recognize a waiver, and indeed affirmatively confirms that a tribe is immune from suit when it holds an interest in an allotment. Section 2213 concerns the specific situation where there is a lease, right-of-way or some other document affecting the tribe's allotment interest, but the tribe itself did not consent because its interest was subject to a federal lien. *See* 25 U.S.C. §§ 2213(b)(1) (stating Secretary holds lien); (b)(2)(B) (stating Secretary may approve right-of-way affecting tribal allotment interest without tribal consent during pendency of lien). In such situations, the Secretary can approve a lease or right-of-way

on behalf of the tribe, and the tribe's consent is not required. *Id.* However, Section 2213 continues, stating that if a lease or right-of-way is approved without tribal consent, the tribe will not be considered a party to the transaction and it will not affect the "sovereignty" of the tribe. 25 U.S.C. § 2213(c)(2). Importantly, the title of subsection (c)(2) of Section 2213 is "Tribe not treated as party to lease; no effect on tribal sovereignty; *immunity*." (emphasis added). Read in context, that subsection means that if the Secretary approves use of an allotment on behalf of a tribe, thereby affecting the tribe's interest in the allotment without its consent, that approval will not affect the "sovereignty" *or* the "immunity" of that tribe. This interpretation is confirmed by the legislative history of Section 2213. *See* S.Rep. 106-361, 2000 WL 1063269 at *20 ("This section employs very broad language to eliminate any argument that either a tribe's *immunity or its other governmental authority* is altered by a lease that the Secretary approves on behalf of the tribe." (emphasis added)).

Based on the above, Section 2213 recognizes the tribe has sovereign immunity in relation to its ownership rights in the allotment, and such immunity remains intact even when the Secretary approves a use of the allotment without tribal consent. Far from suggesting a waiver of the tribe's immunity, that section acknowledges existing immunity and disclaims any effect on it.[1]

[1] As the issue of immunity here involves two federal statutes and their intent, the ruling in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008), is inapplicable. That case concerned a factually distinct situation where a tribe re-acquired land on the open market that had been alienated to non-Indians, and where that tribe continued to hold the land in fee. *See id.* at 909. As the court itself recognized, that land was quite different from allotments that never lost their trust status, such as the allotments at issue in this case. *Id.* at 922. The court ruled the tribe's immunity did not protect it from a state condemnation action under the specific land status, which was not a trust allotment subject to Sections 357 and 2213 of Title 25. *Id.* at 921. As those statutes apply here, the question is whether Congress abrogated the Nation's federally-recognized immunity applicable to its property interest in a trust allotment.

3. The Nation does not waive its immunity merely by holding an interest in an allotment.

Mere ownership of an interest in an allotment is not an unequivocal waiver. Like congressional abrogation of immunity, a court must find a waiver under the high standard set by the Supreme Court: the tribe must unequivocally waive its immunity. As recognized by Section 2213(c)(2) of the Indian Land Consolidation Act, ownership of an allotment interest is not inconsistent with immunity, and a tribe retains its sovereign immunity when a transaction affects its allotment interest. Therefore, there cannot be an unequivocal waiver through mere possession of an allotment interest.

II. THE ALLOTMENTS MUST BE DISMISSED FROM THE ACTION, AS THE NATION IS A REQUIRED PARTY THAT MUST BE JOINED.

As the Nation is immune from the condemnation action, the remaining question is whether as a required party that must be joined, the matter should be dismissed under Rule 19. PNM makes several arguments, none of which justify moving forward with the case, when inevitably the Nation's property interest will be adversely affected in its absence.

A. The Nation is a required party.

PNM contends that the Nation is not required because, among other reasons, the United States may adequately represent the Nation's interests. Response, Doc. 39, at 16-17. According to PNM, the Nation's absence would then not impair or impede the ability to protect its interest.

PNM's position is curious, as it was PNM that joined the Nation as a party in the first place, even though the United States was also joined as a party. At the time of its Complaint, PNM clearly believed the Nation as a partial owner of the allotment had to be joined, and it served a summons and complaint on the Nation as a required party. PNM apparently now believes it did not have to join the Nation, and could have simply proceeded with its suit with the

United States as defendant. Presumably, under this theory, PNM could dispense with naming any of the actual allottees, as none would be actually required, and it could simply condemn the allotment through suing the United States alone. Its own conduct in naming and serving all the allottees, including the Nation, refutes that contention.

As articulated by PNM, the question is whether the United States can adequately protect the Nation's interest. Importantly, PNM suggests that the Nation's interest here solely is its share in the proceeds of the condemnation. Response, Doc. 39, at 14-15. However, as stated in its Motion to Dismiss, the Nation also has an independent interest to be free from involuntary condemnation of the allotment, regardless of whether it can share in the proceeds in its absence. *See* Doc. 32, at 6. That the Nation would share in the proceeds, as PNM suggests, does nothing to protect its interest in not being subject to condemnation in the first place. Absent the Nation being a properly-joined party to the action, condemnation might proceed anyway, and a right-of-way imposed on the land without the Nation's consent.

Even if the United States in theory could represent the Nation's interests, the plain language of Rule 19 explicitly looks to the ability of the party *itself* to defend its interests, not the ability of a another party to do so. *See* FRCP 19(a)(1)(b)(i). The United States may or may not share the Nation's interest, and the possibility that it might cannot override the clear language of Rule 19(a)(1)(b)(i) that the party itself must be able to protect its interest. The Nation clearly cannot protect its own interest, even if the United States is present, if it cannot be joined to the case.

Assuming the United States could assert the Nation's interests, its positions in this case are in potential conflict with the Nation. The Nation cannot control the legal positions taken by the United States, and those positions could be adverse to the Nation's interests. The United

States might or might not resist the condemnation, or might or might not contest the amount of compensation asserted by PNM. It might not contest either, and the Nation would have no ability to remedy it if it is absent from the case. Further, some of the individual allottees have separately filed an action for trespass, and have named the United States, as well as PNM as defendants. *See Barboan v. Public Service Co.*, Case No. 1:15-cv-00826, Complaint, Doc. 1. While the Nation is not, at least yet, a party to that action, as a defendant now adverse to individual Navajo allottees in a separate case, the United States' interest in the situation is not necessarily aligned with the Nation's interest.

Based on the above, the Nation has a separate interest in the case that cannot be foreclosed by the presence of the United States. Therefore, the Nation is a required party.

B. The Rule 19(b) factors favor dismissal of the allotments in the Nation's absence.

PNM correctly states that a court still must weigh the Rule 19(b) factors when a sovereign asserts that its immunity precludes an action going forward in its absence. Response, Doc. 39, at 18. However, that analysis should be conducted in light of the important sovereign immunity interests at issue. *See Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999). In that context, the Rule 19(b) factors favor the Nation.

PNM asserts that the 19(b)(1) factor does not favor the Nation, again because it allegedly will be compensated like all the other allottees whether it is present or not, and therefore cannot be prejudiced. Response, Doc. 39, at 19-20. As discussed above, the Nation's interest is broader than simple compensation. It will be prejudiced by the case moving forward at all, potentially resulting in condemnation and an involuntary right-of-way granted over the allotment in its absence and without its consent. The Nation is clearly prejudiced, whether or not the Secretary has the ability in other situations to approve a right-of-way without the consent of the Nation.

Here the Secretary is not granting the right-of-way; PNM is seeking an order from this Court to do so.

Under 19(b)(2), PNM asserts that contemporaneous payment of compensation to the Nation by order of the Court would lessen or avoid prejudice to the Nation. Response, Doc. 39, at 20. This again assumes the only interest negatively affected is compensation. As discussed above, the very involuntary imposition of a right-of-way on the allotment prejudices the Nation. That cannot be lessened or avoided if the case goes forward, when the only result is an order of condemnation.

Under 19(b)(3), PNM argues that an order of condemnation, even in the Nation's absence, would wholly settle the issue. *Id.* at 20-21. As stated in the Motion to Dismiss, it is unclear what effect a condemnation order would have in the absence of one of the owners. Doc 32, at 7 and n.1. Before the Nation's Motion to Dismiss, PNM clearly believed a condemnation judgment must bind all of the allottees and the United States, as it named and served all owners of the allotments as defendants. It apparently now believes it can receive a right-of-way from this Court even without the Nation's presence. PNM also asserts the Nation can be compensated by court order, even when the Nation itself is not a party and would not be bound by the judgment. As a general matter a party cannot be bound by a judgment it was not a party to, *see Martin v. Wilkes*, 490 U.S. 755, 761-62 (1989), and therefore it is not at all clear that a condemnation judgment with an award of compensation will negate any separate claim by the Nation. At the very least, it is unclear that the matter would be settled, weighing against continuing the case under the 19(b)(3) factor.

As discussed in the Motion to Dismiss, the Nation concedes PNM would have no other remedy to force an involuntary condemnation of the allotment if the case could not move

forward. However, that "result is contemplated by the doctrine of sovereign immunity." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 872 (2008). Dismissal of this case even if PNM has no other condemnation remedy is warranted because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986); *see also Confederated Tribes of Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1500 (9th Cir.1991) ("Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity."). As the Nation, a government possessing sovereign immunity from involuntary actions, has a property interest in the allotment, PNM may not involuntarily condemn that allotment.

PNM additionally argues other factors than those enumerated in Rule 19(b) justify moving forward in the Nation's absence. PNM primarily argues that its inability to force condemnation on an allotment that includes a sovereign tribe as a partial owner is an "absurd and illogical result" when the United States actively encourages and funds consolidation of allotments through acquisition of tribal government interests. Response, Doc. 39, at 21-22. That is a policy argument beyond this Court's responsibility to remedy. Congress can examine the policy issues PNM raises, and can resolve them through potential amendments to Section 357 and the Indian Land Consolidation Act. *See Bay Mills*, 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). If Congress deems it appropriate to abrogate tribal allotment owners' immunity to facilitate condemnation of rights-of-way, it may do so. It has not done so, and therefore PNM cannot currently move forward with its case until Congress decides otherwise.

CONCLUSION

As the Nation is immune from suit, PNM's condemnation claim to involuntarily impose a right-of-way on the allotments should be dismissed in the Nation's absence.

RESPECTFULLY SUBMITTED this 5th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Mexico using the CM/ECF system on October 5, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

_ /s/ Paul Spruhan