Ethel B. Branch, Attorney General
The Navajo Nation

Paul Spruhan, Assistant Attorney General
NAVAJO NATION DEPT. OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515-2010
Telephone: (928) 871-6210

Attorneys for Navajo Nation

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-JAP-CG

RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE.

Defendant Navajo Nation (Nation) files its Response to 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. 107] (Motion).

STANDARD

Plaintiff Public Service Company of New Mexico (PNM) files its primary motion under Fed. R. Civ. P. 59(e) to alter or amend the Court's Memorandum and Order Granting Motion to Dismiss the Navajo Nation and Allotment Numbers 1160 and 1392 [Doc. 101] (Memorandum). The Court has discretion whether to grant the motion, and the decision will only be reversed if the appellate court "has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1152 (10th Cir. 2012). Grounds for granting the motion include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *Id.* The motion is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. *Servants of the Paraclete v. John Does I-XVI*, 204 F.3d 1005, 1012 (10th Cir. 2005). However, the motion is not to be used "to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*

PNM also files an alternative motion asking for one of three other types of relief. First, it requests that the Court apply its ruling only prospectively. Motion at 23-24. It further requests that the Court certify a controlling question of law for an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at 24-25. Finally, it requests that the Court sever Allotment Numbers 1160 and 1392 from the other three allotments and issue a final judgment it can appeal. *Id.* at 26-27. As none of the requested remedies are mandatory, each is within the Court's discretion to grant or deny.

ARGUMENT

I. EXCEPT FOR THREE MINOR ARGUMENTS, PNM DOES NOT CONTEST THE CORE HOLDINGS IN THE COURT'S ORDER, AND THEREFORE THE ISSUE OF WHETHER THE ALLOTMENTS ARE "TRIBAL LANDS" IS UNNECESSARY FOR THE COURT TO DECIDE.

PNM raises several arguments to support its request to alter or amend the Memorandum. It claims the Court committed clear error in holding (1) Allotment Numbers 1160 and 1392 are "tribal lands" exempt from Section 357, (2) the Nation is immune from suit, and (3) the Nation is indispensable to the condemnation action for those allotments. Motion at 3-17. Finally, it alleges that the Memorandum results in manifest injustice to itself, to individual allottees, and to "Indian Country" generally. *Id.* at 17-21.

In its "clear error" argument, PNM focuses primarily on whether the two parcels are "tribal lands" or "allotments" for purposes of 25 U.S.C. § 357, based on a holding unnecessary to the Court's decision, that the Nation's ownership interests make the two allotments "tribal lands." PNM does briefly contend that the Nation lacks immunity because the United States lacks immunity, Motion at 11-12, that as condemnation is allegedly an *in rem* proceeding the Nation is not indispensable,[1] *id.* at 13-16, and that it does not have an adequate remedy if it cannot condemn the two allotments, *id.* at 16-17. Otherwise PNM makes no claim that the Court's immunity and Rule 19 analyses are wrong.

Even if PNM is right that the parcels are "allotments" and not "tribal lands" under Section 357, the Court's Memorandum is otherwise correct that the Nation has immunity and is indispensable under Rule 19, barring the condemnation action against the two parcels. The Court therefore need only consider the arguments that potentially affect the core holdings on

[1] As discussed more fully below, PNM does not discuss the standards of FRCP 19 to argue the Nation is not indispensable. Instead, PNM asserts that this condemnation action is an *in rem* proceeding, and therefore the Nation is not indispensable. Motion at 13-16.

immunity and Rule 19. If the Court rejects the three arguments, the Court can simply amend the Memorandum to delete the discussion concerning "tribal lands" to alleviate PNM's stated concerns. However, the result would remain the same: the condemnation action could not go forward. As such, though it agrees the parcels are "tribal lands" and not "allotments" under Section 357, the Nation only responds to the arguments directed at the immunity and indispensability portions of the Court's Memorandum.

II. THE COURT DID NOT COMMIT CLEAR ERROR IN HOLDING THE NATION HAS IMMUNITY FROM THE CONDEMNATION SUIT.

In its Motion, PNM asserts that the Nation's immunity is co-extensive with the immunity of the United States. Motion at 16-17. Based on this contention, PNM argues that the Nation's immunity therefore was implicitly waived when Congress implicitly waived the immunity of the United States in Section 357. *Id.*

PNM made this same argument in its Response in Opposition to the Nation's Motion to Dismiss. *See* Response [Doc. 39], at 7 ("It stands to reason that such implicit waiver or abrogation, which applies to the United States as fee owner and trustee for the beneficial owners, would also extend to the sovereign immunity of any tribe that later became such a beneficial owner through its acquisition of fractional interests in allotted lands."). PNM cannot raise it again. *See Servants of the Paraclete*, 204 F.3d at 1012 (barring use of motion to amend to "revisit issues already addressed"). However, even if the Court entertains the argument, Congress must separately waive a tribal nation's immunity, as a waiver of federal immunity does nothing to waive the Nation's immunity. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1334 n.14 (10th Cir. 1982) ("Of course, this is not to say that where Congress waives the United States' immunity it implicitly waives the immunity of Indian tribes also.").

PNM attempts to justify its argument by asserting condemnation under Section 357 is an *in rem* proceeding, thereby altering the Court's conclusion that the Nation cannot be sued without its consent even if the United States' immunity has been waived. Motion at 16-17.[2] The *in rem* nature of a condemnation proceeding is a new argument that could have been raised in PNM's Response to the Nation's Motion to Dismiss, but was not. It therefore cannot be raised for the first time in its motion to alter or amend. *Servants of the Paraclete*, 204 F.3d at 1012 (barring use of motion to "advance arguments that could have been raised in prior briefing"). However, even if the Court entertains the argument, PNM fails to explain why the Nation would not be immune. The alleged *in rem* nature of the proceeding does nothing to change the effect of the implicit waiver of the United States' immunity, and PNM fails to show otherwise. Whether *in rem* or not, the condemnation proceeding may only include the United States, and not the Nation, absent a specific waiver of the Nation's immunity.

III. THE COURT DID NOT COMMIT CLEAR ERROR IN HOLDING THE NATION IS INDISPENSABLE.

Like its argument on immunity, PNM relies on the *in rem* nature of a condemnation proceeding to argue the Nation is not indispensable. Motion at 13-16. Similarly, PNM cannot raise this issue at this stage, when it had the opportunity to make that argument in its Response to the Nation's Motion to Dismiss. *See Servants of the Paraclete*, 204 F.3d at 1012. However, even if the Court entertains the argument, PNM is incorrect that the condemnation action can proceed in the Nation's absence.

[2] PNM does not actually argue the Nation lacks immunity simply because of the alleged *in rem* nature of the condemnation suit. It argues that the Nation is not immune because the United States is not immune. *See* Motion at 16-17.

A. The general statement in the Wright & Miller treatise that there are no indispensable parties in a condemnation action does not apply in this case.

PNM's primary support for its argument comes from the Wright & Miller Federal Practice and Procedure treatise. Motion at 13-14. PNM quotes the treatise, which states "[b]ut since the 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." 12 Fed. Prac. & Proc. § 3045. The treatise includes no actual analysis to support its conclusion, and its citations suggest the rule applies to cases where the United States government condemns private property under its eminent domain authority, not when a private party seeks to condemn property owned by a tribal sovereign. *See id.*, n.3 (discussing cases). Regardless, even if there are no indispensable parties generally in condemnation proceedings, it is clearly not the case for condemnation of allotments under Section 357. The U.S. Supreme Court in *Minnesota* held that the United States is indispensable in an action to condemn allotments:

> The 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.

302 U.S. at 386 (emphasis added). Therefore, for the specific condemnation cause of action under Section 357, sovereign governments with an interest in the property are indispensable. As the Nation also has an interest in the property, it is equally indispensable.[3]

[3] PNM's reliance on *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twnp.*, 643 N.W.2d 685 (N.D. 2002) and *State of Georgia v. City of Chattanooga*, 264 U.S. 472 (1923), to overcome the Nation's indispensability is equally unavailing.

In *Cass County*, the North Dakota Supreme Court authorized condemnation of a fee parcel owned by a tribal nation. However, the court emphasized the fee status of the land at issue and only recognized an *in rem* exception to tribal sovereign immunity because "[i]t 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." 643 N.W.2d at

Further, the Wright and Miller treatise does not consider the effect of FRCP 19, the rule relied on by the Nation and applied by the Court. Under that rule, the Nation is indispensable, as concluded by the Court. As a sovereign property owner, it has an interest in the proceeding seeking to condemn that property that would be "impaired or impeded" by its absence from the case. FRCP 19(a). PNM does not assert that part of the Court's ruling is clear error, and therefore there is no reason to disturb that conclusion. Therefore, the Court's Rule 19 analysis governs, and PNM's motion should be denied.

B. The Court's conclusion that PNM has an adequate remedy by seeking a voluntary easement is not clear error, and regardless, it does not change the Court's Rule 19 analysis.

PNM argues the Court's conclusion that there is an adequate remedy is clear error, but it is unclear what effect PNM believes the alleged error has on the Court's overall ruling. PNM alleges that the Court was "incorrect" when it stated that PNM may acquire a voluntary easement instead of relying on involuntary condemnation. Motion at 22. According to PNM, because the allottees have declined to consent, it does not have any other remedy than condemnation. *Id.* However, left out from PNM's analysis is the possibility that it can yet negotiate with the allottees a higher compensation or other consideration for its rights-of-way, negating the need for

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694 (emphasis added). As the parcels here are allotted land or trust land under federal superintendence, the decision is clearly distinguishable.

In *Georgia*, the U.S. Supreme Court held the State of Georgia was not immune from a condemnation action by the City of Chattanooga for land owned by Georgia and used as a rail yard as part of its operation of a railroad. 264 U.S. at 482-83. However, in that case the U.S. Supreme Court explicitly considered Georgia's ownership of the yard in Tennessee to be proprietary, and not sovereign, concluding that Georgia could not assert any immunity defense to the eminent domain action because it "occupies the same position there as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity." *Id.* at 481. Here, the Nation as a sovereign owns interests in allotted land, and is not operating or using the land in a proprietary capacity similar to that of Georgia in that case. *Georgia* is then also clearly distinguishable.

condemnation. As it may still do so, it can still acquire a voluntary easement, and it is not without an alternative remedy.

Regardless, even if PNM is correct, the only real effect would be to change the Court's conclusion on the Rule 19(b) factor that considers whether PNM has an adequate remedy. *See* Memorandum at 31-32. However, as discussed in the Nation's Motion to Dismiss, the lack of a remedy under 19(b) does not affect whether the matter should be dismissed in the Nation's absence, as 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).

IV. THE CONCLUSION THAT THE TWO PARCELS CANNOT BE CONDEMNED DOES NOT RESULT IN MANIFEST INJUSTICE.

In arguing that manifest injustice results from the Court's Memorandum, PNM raises various policy arguments. Motion at 17-21. These are the same arguments or quite similar to the arguments it already raised in its Response to the Nation's Motion to Dismiss, made in the context of whether the action should proceed under Rule 19 "as a matter of equity and good conscience." *See* Response at 21-23. However, even if different, PNM could have raised those arguments at that time. Either way, PNM is barred from raising them now. *See Servants of the Paraclete*, 204 F.3d at 1012.

Even if the Court entertains those arguments, the Court's ruling does not rise to the level of "manifest injustice" for several reasons. As PNM chose to name the Nation as a defendant in the action, it should have reasonably anticipated a sovereign immunity defense. Immunity is not an unusual defense for a tribal nation, and PNM's interactions with the Nation and other tribal nations should have led it to expect the possibility its involuntary condemnation could not go forward because of the Nation's immunity. Further, as discussed above, PNM may still

negotiate a voluntary right-of-way, even it means raising its offer of compensation or other consideration to the individual allottees. Also, if the immunity of a tribal nation is so catastrophic to the ability of utilities to acquire rights-of-way, PNM and other similarly-situated utilities can seek relief from Congress. Finally, allottees negatively affected by a tribal nation's ownership of an allotment can work through their tribal governments to persuade tribal leaders to not assert a sovereign immunity defense, to consent to the right-of-way, to relinquish their ownership interests completely, or to otherwise cooperate to prevent the alleged injustice to individual tribal members PNM asserts. They may also join PNM in seeking a congressional fix if development is stymied as significantly as PNM claims. For all these reasons, the Court's ruling should not be disturbed.

V. THE COURT SHOULD NOT APPLY THE RULING PROSPECTIVELY.

As an alternative to vacating its Memorandum, PNM asks the Court to apply it only prospectively. Motion at 23-24. PNM cites no authority to support its request, but claims it "reasonably relied on long-settled federal law and made substantial investment-backed expectations based on that reliance." *Id.* at 23. However, tribal sovereign immunity is long-settled federal law. *See Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030-31 (2014) ("[W]e have time and again treated the doctrine of tribal immunity as settled law." (internal quotation and punctuation marks omitted)). So is the indispensability of absent sovereign governments in matters affecting their interests. *See* FRCP 12(b)(7); 19. That PNM apparently did not consider the effect of naming the Nation as an involuntary defendant should not justify prospective application of the Memorandum, even if the Court had the authority to do so, which PNM does not show.

VI. THE COURT SHOULD NOT CERTIFY THE MEMORANDUM FOR INTERLOCUTORY APPEAL.

As an alternative remedy, PNM requests that the Court certify the ruling dismissing the Nation for an interlocutory appeal under 28 U.S.C. § 1292(b). PNM justifies its request by stating there is a "controlling issue of law" concerning "whether Section 357 authorizes a condemnation action against an Allotment in which a tribe holds a fraction of the beneficial interest." Motion at 25. While the Nation agrees that is a controlling question of law, PNM omits the other two requirements of Section 1292(b): (1) the question must be one which has "substantial ground for difference of opinion," and (2) an immediate appeal from the order "may materially advance the ultimate termination of the litigation."

While the Nation agrees that a ruling on appeal may materially advance the ultimate termination, critically, there can be no substantial ground for difference of opinion. As discussed above, tribal sovereign immunity and indispensability of a tribal sovereign are well-established doctrines in federal law, and the inability of PNM to name the Nation as an involuntary defendant absent a waiver or to move forward with a case affecting the Nation's interests in its absence are not seriously in question. That no other case other than *Nebraska Power Dist. v. 100.95 Acres of Land in Thurston County*, 719 F.2d 956 (1983), and this one bars condemnation of allotments with tribal ownership interests does not result in a "substantial ground for difference of opinion." PNM provides no evidence that any other court has allowed condemnation of tribal interests when a tribe has asserted immunity and indispensability, or that any other court has suggested it would come to that opposite conclusion. PNM's objection to the outcome of the Court's Memorandum does not mean there is an actual "substantial ground" for a difference of opinion. Therefore, PNM fails to fulfill Section 1292(b), and the Court should decline to certify the issue.

VII. THE COURT SHOULD DENY PNM'S REQUEST TO SEVER THE TWO ALLOTMENTS AND ISSUE A FINAL ORDER.

As a last alternative, PNM requests that this Court sever Allotments 1160 and 1392 from the case and issue a final judgment on its dismissal of the Nation. PNM cites no authority for the Court to do this, and other than reiterating its arguments on why certification of an interlocutory appeal is appropriate, provides no justification. PNM structured its case to include the Nation and the two allotments. That it received a negative ruling on those two allotments should not be justification in and of itself to split the allotments apart purely to facilitate PNM's appeal. The Court should therefore deny the request.

CONCLUSION

For the reasons stated above, the Court should deny PNM's Motion.

RESPECTFULLY SUBMITTED this 12th day of January, 2016.

By: /s/ *Paul Spruhan*
Ethel Billie Branch, Attorney General
Paul Spruhan, Assistant Attorney General
Navajo Nation Department of Justice
Post Office Box 2010
Window Rock, Arizona 86515-2010
Tele: (928) 871-6937
pspruhan@nndoj.org

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 January 12, 2016. 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/ *Dana Martin*
Dana Martin, Legal Secretary
Navajo Nation Department of Justice