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

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

Plaintiff,

vs. CIV. No. 15-CV-501 JAP/CG

APPROXIMATELY 15.49 ACRES OF LAND IN McKINLEY COUNTY, NEW MEXICO; UNITED STATES OF AMERICA; NAVAJO NATION, et al.,

Defendants.

UNITED STATES' RESPONSE IN OPPOSITION TO PLAINTIFF'S DECEMBER 29, 2015 MOTION TO ALTER OR AMEND ORDER OF DECEMBER 1, 2015

Defendant, the United States of America, by and through its undersigned counsel, hereby submits the following Response in Opposition to Public Service Company of New Mexico's ("Plaintiff" or "PNM") "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 to Alter or Amend"). Through that Motion to Alter or Amend, Plaintiff asks the Court to amend its Order of Dismissal Without Prejudice [Doc. 102] ("Order") and Memorandum Opinion and Order Granting Motion to Dismiss the Navajo Nation and Allotment Numbers 1160 and 1393 [Doc. 101] ("Memorandum Opinion"). In the alternative, Plaintiff asks the Court to certify certain legal questions for Interlocutory Appeal or to sever portions of the case to make way for an appeal. Memorandum Opinion, at 24-27. For the following reasons, the United States respectfully requests this

Court dismiss Plaintiff's Motion to Alter or Amend, and grant any further relief as the Court deems proper:

1. **Plaintiff's Motion to Alter or Amend does not meet the established grounds to grant a Rule 59(e) Motion. As such, the Motion to Alter or Amend should be denied.**

Plaintiff relies upon Fed. R. Civ. P. 59(e) ("Rule 59(e)") to support its request for the Court to alter or amend the Order. Rule 59(e) Motions are considered to be Motions for Reconsideration. Importantly, Federal District Courts have "considerable discretion" when ruling on a Motion for Reconsideration. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

Plaintiff correctly provides that the grounds for granting a Rule 59(e) Motion, includes "(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." *Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 611 (10th Cir. 2012) (internal quotation marks omitted); Motion to Alter or Amend, at 2-3. However, Plaintiff fails to acknowledge that "Rule 59(e) motions are to be 'aimed at reconsideration, not initial consideration.' The parties should not use Rule 59(e) to raise arguments which could, and should, have been made before judgment issued." *In re Lugo,* 2014 Bankr. LEXIS 1090 (2014), at 5 (internal citations omitted). Finally, Plaintiff fails to acknowledge that the granting of a Rule 59(e) Motion is an "extraordinary relief" that is to be used "sparingly and only when the need for justice outweighs the interests advanced by a final judgment." *Id.* at 4-5.

Plaintiff, in its Motion to Alter or Amend, fails to demonstrate any intervening change in controlling law or the existence of any new evidence. Moreover, Plaintiff fails to evidence any clear error on the part of the Court or that manifest injustice has been

wrought. Finally, Plaintiff, throughout the Motion to Alter or Amend, impermissibly seeks to introduce new arguments and legal theories into the proceedings. Because Plaintiff fails to meet the grounds for the granting of a Rule 59(e) Motion, the instant Motion to Alter or Amend should be denied.

2. Plaintiff's Allegation Concerning "Notice and Opportunity" is Unfounded.

Through its Memorandum Opinion, the Court concluded that 25 U.S.C. § 375 "only allows condemnation of allotted lands owned by individual tribal members, and § 375 does not expressly apply to allotted lands acquired by Indian tribes." Memorandum Opinion, at 15. In essence, the Court determined "PNM lacks the authority to condemn the Two Allotments[1] 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." *Id.* at 25. Plaintiff contends the basis of the Court's determination was not addressed in earlier briefing and "[t]he Court appears to have reached its key holding *sua sponte* in the absence of any party advocating for such holding." Motion to Alter or Amend, at 5. Plaintiff argues it "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." *Id.*

A review of the underlying briefing, including Plaintiff's own "Response in Opposition to Defendant Navajo Nation and 22 Defendants' Motion to Dismiss the Navajo Nation and Allotment Numbers 1160 and 1393" ("Response to MTD"), (Doc. 39)

[1] In its Motion to Alter or Amend, Plaintiff provides "[t]his Rule 59(e) Motion refers to the Two Allotments when discussing matters pertinent to the Nation's fractional beneficial interests, but refers to the Five Allotments (including the Two Allotments) when discussing Allotments and this matter generally." Motion to Alter or Amend, at 3. The Court, in its Memorandum Opinion, used this same language. Memorandum Opinion, at 3. For purposes of clarity, the United States, here, adopts that same terminology.

demonstrates Plaintiff's allegation to be unfounded. Not only was Plaintiff made aware of the Navajo Nation ("Nation") and United States' "tribal lands" argument, it squarely addressed the same in its own Response to [the] MTD. In that Response to MTD, Plaintiff clearly and explicitly referenced and discussed the Nation's reliance on the holding in *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston County, Hiram Grant,* 719 F.2d 956 (8Th Cir. 1983) (hereinafter *Nebraska)* providing:

> In its Answer [Doc. 23] to PNM's Complaint for Condemnation, the Nation cited to Part II of the Eighth Circuit's decision in *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant,* 719 F.2d 956 (8th Cir. 1983) (hereinafter *Nebraska)* to support the proposition that the Nation's interest in the Two Allotments 'means the parcels are 'tribal land' under 25 C.F.R. § 169.1(d), requiring tribal consent to the easement under 25 U.S.C. § 324' and that '[a]s 'tribal land,' 25 U.S.C. § 357 does not apply.' The Nation does not raise this argument or cite *Nebraska* in its Motion and therefore PNM does not address such argument in this Response. To the extent the Nation may present *Nebraska* or a 'tribal land' – based argument in its Reply, PNM will seek leave to file a Surreply on that new issue.
>
> To the extent this Court itself may locate and consider Part II of the *Nebraska* decision, PNM respectfully notes that Part II of *Nebraska* should not guide this Court's analysis because, among other things, (a) the transfer at issue in Part II of *Nebraska* occurred prior to the 1983 enactment of the [Indian Land Consolidation Act] ; (b) the referenced 25 C.F.R. § 169.1, which is titled 'Definitions,' expressly states that its defined terms are "As used in this [P]art 169' rather than generally applicable; and likewise (c) the Eighth Circuit erroneously relied upon the Part 169 Regulations (promulgated under the authority of Sections 323-328) when interpreting Section 357.

Response to MTD, at 11, fn. 1. In choosing to include this footnote, PNM clearly demonstrated that it was aware of the possible implications of *Nebraska.* Moreover, through the footnote, Plaintiff presented its interpretation of the "tribal lands" argument and further argued that *Nebraska* should not guide the Court's reasoning. *Id.* Finally, and contrary to Plaintiff's assertion, the implications of *Nebraska* was not a "new issue," as both the Nation and the United States relied upon that case in the Answers filed with this very Court.

The Nation clearly addressed the issue in its "Answer to Condemnation Complaint," arguing:

> Even if the Nation can be joined, its interests in the allotments means that the parcels are 'tribal land' under 25 C.F.R. § 169.1(d), requiring tribal consent to the easement under 25 U.S.C. § 324. As 'tribal land,' 25 U.S.C. § 357 does not apply. *Nebraska Public Power Dist. v. 100.95 Acres of Land in County in Thurston,* 719 F.2d 956, 961 (8th Cir. 1983). Because Section 357 does not apply, the allotments cannot be condemned, *id.*, and PNM fails to state a claim for which this Court can grant relief.

Nation's Answer to Condemnation Complaint, [Doc. 23], at 2-3.

The United States, in its "Answer to the Complaint," also squarely addressed the issue and asked the Court to dismiss the condemnation action as related to Allotment Nos. 1160 and 1392. There, the United States argued:

> Further, Courts have determined that 25 U.S.C. § 357, the condemnation statute, may only be applied to allotted lands. *Nebraska Public Power Dist. v. 100.95 Acres of Land in County [of] Thurston*, 719 F.2d 956, 961 (8th Cir. 1983). And because the Nation owns undivided interests in Allotment Nos. 1160 and 1392, those Allotments are considered 'tribal lands' which cannot be condemned and over which a right-of-way (as here requested by Plaintiffs) cannot be granted absent Tribal consent and Secretarial approval. 'Tribal Lands' are defined, in pertinent part, to be 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) (emphasis added). Here, the Nation's ownership interest in the identified Allotments is an undivided interest in an Allotment that is held in trust and subject to Federal restrictions against alienation. As such, at least concerning Allotment Nos. 1160 and 1392, the condemnation action should be dismissed.

Answer of the United States [Doc. 25] at 6 (emphasis in original).

Plaintiff had clear notice and opportunity to address the "tribal lands" issue, and in fact, addressed the same in its Response to MTD. Moreover, because the issue was addressed below, the Court's determination in this regard was anchored in the briefing and not reached as argued by Plaintiff "*sua sponte* in the absence of any party

advocating for such holding." Motion to Alter or Amend, at 5. Finally, Plaintiff fails to establish any error that would support the granting of the extraordinary relief requested. As such, the Motion to Alter or Amend should be dismissed.

3. Plaintiff's Argument Concerning the Current Legal Status of the Two Allotments is Now Impermissible. Moreover, Even if Such Argument Was Now Allowed, It Is Unpersuasive.

Plaintiff, through its Motion to Alter or Amend, impermissibly seeks to introduce a new argument or legal theory concerning the current legal status of the Two Allotments. Plaintiff now attempts to argue that the Two Allotments "remain 'land allotted in severalty to Indians' as a matter of law and are thus within the scope of Section 357's condemnation authority." *Id*. In essence, Plaintiff argues that the Nation's intervening acquisition of interests in the Two Allotments does not alter the base categorization of those properties as "lands allotted in severalty to Indians" and that such property may still be condemned pursuant to 25 U.S.C. § 357.

Again, a Rule 59(e) Motion is intended to remedy clear errors made on the part of the Court or prevent manifest injustice. Such Motions are not intended to be an opportunity for parties, like the Plaintiff, to assert new argument or legal theories. *In re Lugo*, at 5. ("The parties should not use Rule 59(e) motions to raise arguments which could, and should have been made before judgment issued."). Nowhere in its Response to MTD [Doc. 39], or in other briefing, does Plaintiff make this argument. As such, Plaintiff's Motion to Alter or Amend, or at least this argument, should be dismissed.

Moreover, even if Plaintiff's argument is now cognizable, it is unpersuasive. The *Nebraska* Court squarely addressed this issue and declined to adopt the arguments presented by Plaintiffs. The *Nebraska* plaintiffs argued that any future interests in an

allotment conveyed to a Tribe would not constitute "tribal land." In essence, they argued that the grantee takes only the interest of the grantor and since the grantor held an interest in allotted lands, they argued that the Tribe's interests constituted "'lands held by the tribe' but not 'tribal land.'" *Nebraska,* 719 F.2d at 961.

However, the *Nebraska* Court, relying upon the definition of "tribal land" found in the previous iteration of the 25 C.F.R. Part 169 regulations[2], determined "[i]t is the fact of tribal ownership which establishes the existence of tribal land, not the identity or title of the grantor. Moreover, by defining tribal land as 'any interest' in land, it includes the undivided future interests or expectancies conveyed in this case." *Id.,* at 962.

Again, Plaintiff is now barred from introducing new arguments or legal theories into the proceedings. Moreover, even if now permissible, Plaintiff's argument concerning the legal status of the Two Allotments is not persuasive. Clearly, no error on the part of the Court has been identified by Plaintiff. As such, Plaintiff's Motion to Alter or Amend should be denied.

4. **Similarly, Plaintiff's Attempt to Introduce Argument Concerning the Court's Reliance on the then-Existing Part 169 Regulations is Unpersuasive.**

Plaintiff attempts to establish the Court committed error when it relied upon the definition of "tribal land" found in the version of 25 C.F.R. Part 169 then in place to

[2] "Tribal Land" was defined under the previous iteration of the right-of-way regulations to mean, in pertinent part, "lands 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, and includes such land reserved for Indian Bureau administrative purposes." 25 C.F.R. § 169.1(d) (1982).

interpret the condemnation statute found at 25 U.S.C. § 357. Motion to Alter or Amend, 8-11. However, such argument is unpersuasive.

As recognized by this Court and the parties, two distinct processes are available to achieve a right-of-way; 1) the granting of a right-of-way upon evidence of owner consent and compensation paid pursuant to 25 U.S.C. §§ 323-328; or 2) via condemnation under 25 U.S.C. § 357. Moreover, the parties agree that the regulations implemented to support 25 U.S.C. §§ 323-328 and found at 25 C.F.R. Part 169 do not pertain to condemnation actions undertaken pursuant to 25 U.S.C. § 357. However, what the Plaintiff fails to recognize is that the right-of-way regulations found at Part 169 become relevant when a Court (or any other entity) must determine whether lands to be condemned are in fact, "land allotted in severalty," and thus, eligible for condemnation; or whether the property is no longer eligible for condemnation; or whether any mitigating factors, such as a Tribe acquiring an interest in an allotment, has happened that would prevent condemnation. Thus, while the Part 169 regulations do not control condemnation actions[3], the regulations are not irrelevant when determining whether a Tribe acquiring an interest in allotted land removes that land from the reach of 25 U.S.C. § 357.

As such, Plaintiff fails to establish any error on the part of the Court that would justify the extraordinary action of granting of its Motion to Alter or Amend.

5. While Rule 59(e) Provides "New Evidence" May be Considered, Plaintiff's Reading of the Newly Promulgated 25 C.F.R. Part 169 Regulations Fails to Support its Motion to Alter or Amend.

[3] And, in fact, the previous version of the Part 169 Regulations only required "officials of the Bureau of Indian Affairs having knowledge of such facts [relating to condemnation] [report the same] to appropriate officials of the Interior Department so that action may be taken to safeguard the interests of the Indians." 25 C.F.R. § 169.21 (1982).

Plaintiff correctly provides that a ground for granting a Rule 59(e) Motion can be the presentation of "new evidence previously unavailable." Motion to Alter or Amend, at 2. And Plaintiff states "if the Court maintains that the Part 169 regulations and the [*Nebraska*] Part II have some bearing on interpreting Section 357, then the Court should reevaluate its analysis in light of the very recent amendments to the Part 169 Regulations." *Id.,* at 11. However, the newly promulgated regulations[4] fail to support Plaintiff's Motion to Alter or Amend.

Seemingly, Plaintiff ignores the definition of "tribal land" found in the revised regulations and supporting commentary there provided. As defined in the revised regulations, "tribal lands" are defined, in pertinent part, to mean "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 (2015) (emphasis added). As such, land owned by a Tribe in trust or restricted status, even an interest in an allotment (surface estate) would be included in this new definition.

Moreover, a review of the comments provided with the new regulations and related to the definition of "tribal lands" show a clear intention to include in the definition of "tribal land," lands in which a Tribe owns an interest, regardless of the size of that interest:

> *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 only include land that is not individually owned. A commenter suggested limiting tribal land to those tracts in which the tribe holds a majority interest.

[4] A wholesale amendment of the right-of-way regulations was undertaken in late 2015. *See* 80 Fed. Reg. 72492 (Nov. 19, 2015). These regulations become effective March 21, 2016. *See* 80 Fed. Reg. 79258 (Dec. 21, 2015).

> *Response*: Under the proposed definition and the final definition, a tract is considered 'tribal land' if any interest, fractional or whole, is owned by a 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.

80 Fed. Reg. 72492, 72497 (Nov. 19, 2015) (emphasis added). The comment provided by Plaintiff[5] which concerns the definition of "individually owned Indian Land" does not constitute "an intervening change in controlling law" that would support a Rule 59(e) Motion. Rather that comment merely shows that the BIA needs to be aware of the ownership of any particular parcel – whether it is wholly individually owned or whether a Tribe has acquired an interest in any allotment - when asked to review and/or approve a right-of-way applied for under 25 U.S.C. §§ 323-328.

Plaintiff fails to establish that the Court erred in making its determination. As such, Plaintiff's Motion to Alter or Amend should be denied.

6. Plaintiff's Arguments Concerning the *In Rem* Nature of a Condemnation Proceeding Are Not Now Permissible. Moreover, even If such Argument was Allowed, it is Not Persuasive.

Through its earlier Response to MTD, Plaintiff presented a variety of arguments to support its contention that the Nation has somehow waived its sovereign immunity. *See* generally, Response to MTD [Doc. 39], 7-12 ("Congress has abrogated any tribal sovereign immunity against a condemnation action involving allotted lands;" "In the alternative, the Nation has waived any sovereign immunity against a condemnation action involving the Two Allotments in which the nation acquired a fractional interest pursuant to the [Indian Land Consolidation Act].").

[5] Motion to Alter or Amend, at 12.

Plaintiff now attempts to impermissibly present another (new) theory as to why it believes the Nation has waived its sovereign immunity. Plaintiff newly argues in its Motion to Alter or Amend that the *in rem* nature of condemnation actions under 25 U.S.C. § 357 triggers an implicit waiver of the Nation's sovereign immunity. Motion to Alter or Amend, at 16-17.

Again, a Rule 59(e) Motion is intended to correct error on the part of the Court or prevent manifest injustice. Such Motions are not to be used to introduce new legal theory or argument. *In re Lugo,* at 5. Here, Plaintiff's new "*in rem*" argument should not be allowed pursuant to the instant Motion to Alter or Amend. Moreover, even if Plaintiff was allowed to pursue this argument, it would fail, as Plaintiff ignores long established precedence concerning the waiver of a Tribe's sovereign immunity.

Plaintiff seemingly (and impermissibly) conflates the sovereign immunity of the United States with that of the Nation and argues any sovereign immunity waiver by the United States can be imputed to the Nation. Motion to Alter or Amend, 17. ("However, because Section 357 expressly authorized the condemnation of 'lands allotted in severalty to Indians' – that is, authorizes *in rem* actions against Allotments themselves – Congress's implicit waiver of the sovereign immunity of the United States (as fee owner) necessarily establishes a coextensive implicit waiver of the sovereign immunity of any tribe that may acquire or claim a beneficial interest or other interest in such allotted lands."). Plaintiff fails to acknowledge certain well-established precedence related to Tribal sovereign immunity. There is little question that the Nation enjoys sovereign immunity from suit. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031 (2014). Moreover, and importantly, such immunity can only be waived by the Nation or

Congress and such waiver must be "unequivocally expressed." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1152 (10th Cir. 2011). Courts are cautioned against assuming Congress "in fact intends to undermine Indian self-government." *Bay Mills,* 134 S. Ct. at 2031-2032. A review of 25 U.S.C. § 357 demonstrates nothing that would evidence Congressional intent to waive tribal immunity. (In fact, Tribes are not mentioned at all in that section). And, as evidenced by the Nation's filing in this case, [Doc. 23; Doc. 32], the Nation has expressly and implicitly not waived its immunity. And for these reasons, Plaintiff's Motion to Alter or Amend should be denied.

7. **Plaintiff Impermissibly Seeks to Introduce "Manifest Injustice" Arguments Into the Proceedings. Such Arguments Should Be Dismissed.**

Plaintiff, next, through its Motion to Alter or Amend, impermissibly seeks to introduce a new argument or legal theory related to "manifest injustice" into the instant proceeding and contrary to the standards of a Rule 59(e) Motion. *See* Motion to Alter or Amend, 17-21. A review of Plaintiff's Response to MTD shows no mention of any "manifest injustice" arguments. And for that reason alone, the Motion to Alter or Amend should be dismissed. However, notwithstanding that fact, Plaintiff's argument would fail, even if cognizable.

Importantly, the "manifest injustice" standard under Rule 59(e) does not mean that the Court weighs the practical effects of its ruling on the individual parties. It goes without saying that any party against whom a judgment is made is adversely affected by the Court's order. Rather, the Tenth Circuit has interpreted the "manifest injustice" standard to reach "improper actions that have affected the outcome of the case" such

as attorney misconduct. *Maul v. Logan County Bd. of County Comm'r*, 2006 U.S. Dist. LEXIS 86934, *4 (W.D. Okla. Nov. 29, 2006). Plaintiff has not demonstrated any improper action that affected the outcome of the case.

Even if Plaintiff's "manifest injustice" arguments were now allowed, Plaintiff has failed to establish any error on the part of the Court or improper action on the part of any party that would support its contention. Therefore, Plaintiff's Motion to Alter or Amend should be dismissed.

8. Plaintiff's "Remedy" Arguments are Unpersuasive.

Finally, Plaintiff argues that the Court committed error by concluding that Plaintiff still has an adequate remedy available even if it is ultimately determined the Two Allotments cannot be condemned. Motion to Alter or Amend, at 23; *see also* Memorandum Opinion at 31 ("PNM can acquire a voluntary easement under 25 U.S.C. §§ 323-328 . . . [as] an alternative to § 357's condemnation of allotted land in federal court."). Such a conclusion on the part of Plaintiff is premature as no conclusive evidence has been presented that a negotiated easement is an absolute impossibility. Importantly, no evidence has been presented that Plaintiff has initiated contact with the Nation (or initiated new contact through counsel with the individual allottees now represented OR with the other allottees not represented) since the commencement of this litigation to finally determine if negotiated owner consent can be obtained.[6] None of the parties now know if a negotiated settlement is impossible, or not. (It is irrelevant that

[6] The question as to whether Plaintiff had previously sought the consent of the Nation to the proposed right-of-way renewal was posed in the Court's Memorandum Opinion. Memorandum Opinion, at 6, fn. 10 ("The [First Amended Complaint] 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.")

Plaintiff might have to pay consideration above what it determines fair in order to achieve the requested right-of-way renewal.)

Moreover, the Court, in the Memorandum Opinion, clearly considered and addressed this issue. Memorandum Opinion, at 31-32. There, the Court weighed the various competing interests and determined "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." *Id.*at 32. The Court's decision is entitled to deference.

9. Request for Prospective Application of Court Ruling.

PNM argues that the Court's granting of the Nations Motion to Dismiss blindsided them with respect to acquiring an easement. However, the easements dealt with here are only a small part of the entire AY Line. PNM has dealt with the Nation on large sections of the AY Line for which PNM has had to pay adequate consideration. This fee is not the issue, it is the fee being sought by the remaining allottees that are bringing this action that concern PNM. Fractional interests and what to do with them has been an issue for over seventy years and is nothing new, to entities that have to deal with Tribes and their sovereignty. For PNM to now claim this was a surprise is a bit disingenuous. The Nation has the power to deal with its land as it sees fit. The request for prospective application of the Court decision is contrary to the history of legal precedent that recognizes Tribal sovereignty. PNM's request would have a larger impact on the Tribes than not granting the request. In future matters where Tribes attempt to exercise their sovereignty, entities will make the same arguments that it is unfair to apply the changed circumstance that would adversely affect them. The

Supreme Courts decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), sets forth the three considerations recognized by the Court as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, *id*., at 106, 92 S.Ct., at 355; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id*., at 107, 92 S.Ct., at 355; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid*.

PNM argues that if the Courts dismissal of the Nation stands, it should not apply its ruling retroactively to the facts of this case. The general rule is that the law announced in the Court's decision controls the case at bar. See, e.g., *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608, 107 S.Ct. 2022, 2025, 95 L.Ed.2d 582 (1987); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109, 2 L.Ed. 49 (1801). In some civil cases, the Court has restricted its rulings to have prospective application only, where specific circumstances are present. *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. at 355-356. Under the *Chevron Oil* approach, the customary rule of retroactive application is appropriate here. The application of the Court's ruling should not solely depend on the particular equities of PNM, and that is what PNM is requesting this Court to base its consideration to amend or alter its decision. The *Nebraska* decision on which the Nation based its motion and the Court, its decision has been law for almost 30 years. Whether PNM agrees or disagrees with the ruling in *Nebraska* and its application here is another question and has been fully addressed. Finally, while PNM argues that it is not aware of any courts citing *Nebraska* to prevent the condemnation of

allotted lands in which a tribe owns an interest, it should be noted that PNM fails to cite any cases where a court has allowed condemnation of allotted lands in which a tribe owns an interest.

10. Request for Interlocutory Appeal.

Plaintiff asks the Court, if it denies the Motion to Alter or Amend its December 2, 2015 Order Dismissing the Navajo Nation to certify the opinion and order [(Doc. No. 102)] for interlocutory appeal under 28 U.S.C. §1292(b). Under §1292(b), a district judge may certify an interlocutory appeal if "such 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." *Lindley v. Life Investors Ins. Co. of America*, 2010 WL 2465515. If a district judge makes this certification, the moving party may seek leave from the court of appeals to pursue an interlocutory appeal. *Homeland Stores, Inc. v. Resolution Trust Corp.,* 17 F.3d 1269, 1271 (10th Cir.1994). Section 1292(b) is meant to be used sparingly and interlocutory appeals under this section are rare. *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 573 (1 st Cir.2004). Interlocutory appeals may be permitted when an immediate appeal of a controlling issue will avoid protracted litigation. *Koehler v. Bank of Bermuda Ltd*., 101 F.3d 863, 865 (2d Cir.1996); *State of Utah by and through Utah State Dep't of Health v. Kennecott Corp*., 14 F.3d 1489, 1495 (10th Cir.1994).

Plaintiff argues that there is a controlling issue of law as to which there is substantial ground for a difference of opinion, but that is not enough and plaintiff appears to misunderstand the purpose of an interlocutory appeal. The issue is whether

there are substantial grounds for difference of opinion on the issues of law raised by parties; it is not whether plaintiff disagrees with this Court's ruling. *American Soc. for Prevention of Cruelty to Animals v. Ringling Brothers and Barnum & Bailey Circus*, 246 F.R.D. 39, 43 (D.D.C 2007) (denying motion for interlocutory appeal when the moving party's motion simply expressed "continued disagreement" with the court's order). It is here clear that Plaintiff disagrees with the Court's decision, but it has not cited any authority suggesting that there is a split of authority on any issue addressed in the Memorandum Opinion and Order or that there is legal authority suggesting that the Tenth Circuit Court of Appeals might reach a different decision.

PNM has the ability to negotiate with the Nation (and the individual owners) on the fractional allotments at any time as it would with the interests the Nation has on the larger portions for which it has already negotiated an easement for the existing AY Line. The questions that PNM wants certified to the Tenth Circuit are not controlling issues of law with respect to the condemnation action that is pending before this Court. Clearly, PNM can proceed at any time to negotiate a price for the easements, probably at the same terms it has in the past for the overall easement over the Nations land. The real issue and question is the price it is willing to pay to the remaining allotees who are demanding a higher price than PNM is willing to pay.

11. Request to Sever Two Allotments from Instant Proceedings So As To Allow Appeal.

Finally, PNM asks that if the Court affirms its dismissal of the Nation from this suit and that it denies its request for certification of an interlocutory appeal that it sever this case so that (a) the instant case will involve only PNM's condemnation of three Allotments (numbered 1204, 1340 and 1877) in which the Nation does not claim any

fractional beneficial interest, (b) a new, separate case will involve only the Two Allotments (numbered 1160 and 1392) and (c) the Courts' Order of dismissal as to the Nation and the Two Allotments can be expressly designated as a "final Judgment" entitling PNM to immediate appeal. PNM says this will promote judicial economy for this court and the Tenth Circuit "generally". However, PNM doesn't say how this will promote judicial economy. PNM is free to negotiate with the Nation on the two allotments it has an interest in at any time. It has already done so on other portions of the AY Line. What PNM asks would not promote judicial economy.

WHEREFORE and for the above reasons, the United States respectfully requests this Court dismiss Plaintiff'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" and for such other and further relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of January 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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