IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC., a Delaware limited liability company,	)	
Plaintiff,	)	Case No. CIV-15-1250-M
vs.	)	
A 25 FOOT WIDE EASEMENT and right-of-way for underground natural gas pipeline lying and situated in the Southwest Quarter of the Southeast Quarter and the West Half of the Southeast Quarter of the Southeast Quarter in Section 28, Township 7 North, Range 11 West of the I. B. & M., in Caddo County, State of Oklahoma, et al,	)	
Defendants.	)	

PLAINTIFF'S OBJECTION AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS [DOC. 47]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Preface

The increasing fractionalization of Indian allotment lands and unforeseen consequences arising from the Indian Land Consolidation Act "(ILCA"), Title 25, Ch. 24, §§ 2201-2221, present significant challenges to Oklahoma's energy and utility industries. It is becoming increasingly common for essential, pre-existing public projects and infrastructure, such as water transmission pipelines[1], natural gas transmission pipelines[2], and electric transmission lines[3] to be impacted by the escheatment of fractional interests in Indian allotment lands to Tribal interests. Energy companies and public utilities are faced with a Hobson choice. Pay demands sometimes numbering in the tens-of-millions for the renewal of easements across fractional interests of Tribal land, such as 1% of .73 acres, in order to obtain the approval and renewal of a pre-existing easement on land which escheated to a Tribe by the ILCA. Or, re-route and move existing infrastructure to other locations, such as onto adjacent individual Indian allotments, where fractional Tribal interests do not exist, sometimes miles away, resulting in tens-of-millions of dollars in additional expenses to the industry, utilities, consumers and ratepayers. Enable submits that a way forward exists which harmonizes well-established federal law governing the condemnation of Indian allotment lands and the ILCA based on the express terms of each statute. For the reasons stated hereinafter, the United States' Motion to Dismiss [doc. 47] should be denied because: (1) this Court may exercise

---

[1] *See e.g., The City of Oklahoma City v. A 100 Foot Wide Easement et al., Case No. 5:15-cv-00274-M, filed 3-18-2015* (water line easement involving Oklahoma City and the heirs of an Absentee Shawnee allotment owner).

[2] *Enable v. A 100 Foot Wide Easement,* 5:15-cv-1250-M, filed 11-11-15.

[3] *Public Service Co. of New Mexico v. Approx. 15.49 acres et al.,* United States District Court for

subject matter jurisdiction over this condemnation suit because 25 U.S.C. § 357 (hereinafter "§ 357"), which was originally enacted by Congress on March 3, 1901 and has never been amended, expressly permits the condemnation of lands allotted to Indians, and; (2) in an *in rem* action such as this condemnation suit, the United States – in its capacity as Trustee – fully and fairly represents the interests of the individual allottees and the Kiowa Tribe, so they are not indispensable parties who much be joined under Fed. R. Civ. P. 19. The ILCA does not change the legal analysis long recognized by federal courts in *Okemah* and *Cheyenne River, infra*, as the lands in question remain "lands allotted" to Indians within the meaning of § 357 and the ILCA. Accordingly, the United States' Motion to Dismiss should be denied.

Background

Enable is the owner and operator of a network of natural gas transmission pipelines across Oklahoma. Enable's transmission pipeline in Caddo County, Oklahoma, crosses a tract of restricted Indian land known as Emaugobah Kiowa Allotment 84 (hereinafter "Kiowa 84"). It is undisputed that Kiowa 84 is a tract of land allotted by the federal government during the early 20th century to an individual Kiowa allottee named Emaugobah, also known as Millie Oheltoint, but held in trust by the United States Department of Interior, Bureau of Indian Affairs "(BIA"). *See Complaint, doc. 1, ¶ 1, Exhibit 1.* According to BIA records, Emaugobah passed away on July 9, 1953. *See Exhibit 1 attached hereto.* Likewise, it is undisputed that ownership of Kiowa 84 is retained by the thirty-eight (38) heirs of Emaugobah, as tenants in common, subject to the trusteeship of the BIA. *See Complaint.*

---

the District of New Mexico, Case No. 1:15-cv-00501 (electric transmission line).

On November 19, 1980, the BIA approved the grant of a .73 acre easement across Kiowa 84 in exchange for consideration of $1,925.00 for a twenty (20) year term right-of-way for the Defendants' predecessor in interest – Producer's Gas Company – to install, construct, operate and maintain a natural gas transmission pipeline. *See Plaintiffs' Motion to Dismiss Counterclaim, doc. 14, exhibit 2.* The natural gas transmission pipeline has been in continuous operation since its installation in the early 1980's. The 20 year term easement expired by its own terms on November 20, 2000. On or about June 14, 2002, Defendants' predecessor-in-interest, Enogex, Inc., submitted to the BIA a new application for a new 20-year term regarding the existing natural gas pipeline right of way consisting of .73 acres. *See doc. 14-3.* Enogex offered to pay $3,080 for the .73 acre easement based on an appraisal of the subject property. *Id.* Plaintiff Marcia Davilla, among others, rejected Enogex's offer on or about August 8, 2004. *See doc.14-4.* For use of the .73 acre easement from 2000 until July 18, 2006, Enogex, Inc., paid to the BIA $1,089.35, inclusive of interest and assessments, for the use of the easement and $15 in enforcement costs.

Upon information and belief, sometime after 2004 an ownership interest of 1.1 percent in Kiowa 84 inured to the Kiowa Indian Tribe of Oklahoma, ostensibly through the operation of the ILCA, which provides for the escheatment of fractional interests of less than two percent to the particular Indian tribe of which the allotment owner is a member (hereinafter "the Tribal interest"). Neither the *Davilla* plaintiffs nor the United States have clarified or attempted to explain to the Court how or exactly when the Kiowa Tribe acquired its 1.1 percent interest in Kiowa 84. Instead, the *Davilla* plaintiffs have perfunctorily alleged that the

Tribal interest exists with a Title Status Report, document 14-1, attached to their motion to dismiss. A previous report obtained from the BIA in 2004 does not show the existence of any Tribal interest in Kiowa 84. *See BIA Ownership report dated 7-31-2004,Exhibit 2.*

The 1.1 percent Tribal interest in the 136.25 acres of real property and the litigants' different perspectives on the legal status of this 1.1 percent Tribal interest form the entire basis for this dispute and the *Davilla* plaintiffs' motion to dismiss. Although it cannot be disputed that the Kiowa Tribe has "stepped into the shoes" of a Kiowa 84 allotment owner as a tenant-in-common with (38) other individual allottees, the United States and the *Davilla* Plaintiffs now claim that Kiowa 84 cannot be condemned because the legal nature of the entire 136.25 acre parcel of land has been cloaked with sovereign immunity by virtue of the 1.1 percent Tribal interest which escheated to the Tribe sometime after 2004.

Enable disagrees and asserts that Congress long ago waived sovereign immunity for the condemnation of allotment lands for public projects. The escheatment of a fractional interest in lands allotted to individual Native Americans to the Tribe does not cloak an allotment parcel with immunity from condemnation, something which it did not previously enjoy while wholly owned by individual allottees. Nothing in the ILCA alters the legal status of allotment land, or transforms the legal character of allotment land into Tribal land. In fact, the very definitions and provisions of the ILCA reflect Congress' express desire to retain the original legal character of the land as it was originally allotted to the individual Native Americans. In other words, as a dependent sovereign nation, the Kiowa Tribe's fractional ownership interest obtained from an allottee does not grant sovereign immunity from suit, which exceeds that of

the United States. On the contrary, Congress has waived tribal sovereign immunity for the limited purposes of condemnation of lands previously allotted to Native Americans. Accordingly, Enable asserts that the United States' motion to dismiss [doc. 47] should be denied for the reasons asserted herein and, to the extent necessary, adopts and incorporates buy reference the arguments and authorities raises by Enable in its responses to the *Davilla* plaintiffs' motions to dismiss filed in document 14 in case 5:15-cv-01262-M ("the trespass case"), and document 32 in case 5:15-cv-1250-M ("the condemnation case"),

ARGUMENTS AND AUTHORITIES

I. Indian Nations are Dependent Sovereigns.

It has long been recognized that Indian Nations are dependent sovereign entities who possess the rights of self-government, self-determination and, as a general matter, immunity from suit in state and federal district courts, except where Congress has required that sovereignty be curtailed or surrendered. *See Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010)("They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."). As dependent sovereign nations, Indian tribes do not possess sovereign immunity greater than that enjoyed by the United States, and the immunity of Indian nations may be circumscribed by Congress. *See Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149 (10th Cir. 2012)("[T]ribal sovereignty is deemed to be coextensive with the sovereign immunity of the United States.") Tribal sovereignty is also limited, for example, by creation of tribal entities

based on state law, such as distinct corporations incorporated under the laws of states, which do not enjoy the Tribe's umbrella of sovereign immunity. *Somerlott*, 686 F.3d at 1149.

As recently stated by the Supreme Court in *Michigan v. Bay Mills Indian Community*, to wit:

> Indian tribes are domestic dependent nations that exercise inherent sovereign authority. As dependents, the tribes are subject to plenary control by Congress. The Constitution grants Congress powers we have consistently described as plenary and exclusive to legislate in respect to Indian tribes. And yet they remain separate sovereigns pre-existing the Constitution. Thus, unless and until Congress acts, the tribes retain their historic sovereign authority.... The qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands.... It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit. Thus, we have time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver).

130 S. Ct. 2024, 2030-31 (2013)(internal citations omitted).

The aforementioned authorities are illustrative of the fact that Congress may, and has, circumscribed the contours of sovereign immunity, particularly in situations where lands allotted to individual Native Americans and Tribes are the subject of condemnation proceedings, such as the two Enable cases before this Court.

II. Indian Lands are subject to condemnation actions when authorized by Congress.

A. Indian Nation lands may be condemned through *In Rem* proceedings.

The United States Supreme Court has recognized for well over a century that condemnation actions are *in rem* proceedings against the land itself. *See United States v. Dunnington*, 146 U.S. 338, 352-53 (1892)(stating that a proceeding *in rem* is "a taking, not of

the rights of designated persons in the thing needed, but of the thing itself, with a general monition to all persons having claims in the thing."); *Accord, United States v. Petty Motor Co.,* 327 U.S. 372, 376 (1946)("Condemnation proceedings are in rem."); *State of Minnesota v. United States*, 125 F.2d 636, 639 (8th Cir. 1942)("a proceeding such as this...is in rem against the land..."). In fact, the United States has condemned lands owned by Indian Nations through numerous *in rem* actions where the Indian nation owner of the land is not named as a necessary party, only the land itself. *See e.g., United States v. 687.30 acres of land et al.,* 319 F. Supp. 128, 132 (D.Neb. 1970)(condemning trust lands of Winnebago Nation for lake); *United States v. 5,677.94 acres of land of Crow Reservation*, 162 F. Supp. 108, 109 (D. Mont. 1958)(condemning Crow Indian Nation lands for construction of dam); *Seneca Nation of Indians v. United States*, 338 F.2d 55, 56 (2nd Cir. 1964)(condemning Seneca tribal lands for highway); *United States v. 687.30 acres of land et al.,* 319 F. Supp. 128, 133 (D.Neb. 1970).

In the case of *Cherokee Nation v. Southern Kansas Railway Co.,* the United States Supreme Court held that the land of an Indian Nation may be condemned for a public purpose, such as a railroad line and telephone and telegraph lines. 135 U.S. 641, 10 S .Ct. 965, 965 (1890). More generally, the Supreme Court held that the United States may exercise the right of eminent domain notwithstanding the rights of territories, states, or Indian Nations, because it is "essential to the independent existence and perpetuity of the United States, ..." 135 U.S. at 656. The Court overruled the Cherokee Nation's objections to the taking of its lands in Indian Territory for a railroad line to be operated by the Southern Kansas Railway Company:

> The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held

> subject to the authority of the general government to take them for such objects or are germane to the execution of the powers granted to it, provided only that they are not taken without just compensation being made to the owner.
>
> 135 U.S. at 657.

The United States is the only indispensable party when a tract of Indian land held in trust for the beneficial owners is condemned, since the matter is an *in rem* proceeding and the United States acts in its capacity as Trustee holding title to the land. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992)(noting the Trusteeship of the United States while it holds title); *Accord, United States v. Mitchell*, 445 U.S. 535, 542 (1980)(title to restricted Indian lands remains in the United States as Trustee); *See also Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906, 909 (8th Cir. 1964)(hereinafter "*Cheyenne River*"). In *Cheyenne River*, the United States initiated a condemnation action to acquire 640 acres of land from Peter Hiatt, a member of the Cheyenne River Sioux Tribe, for the construction of a reservoir. 338 F.2d at 908. Although the Tribe had already conveyed its interest to the United States, the Tribe filed a motion to intervene in Hiatt's case as the real party in interest, which the federal district court denied. *Id.* Judgment was entered *in rem* for the value of the 640 acres taken, and the Tribe appealed to the United States Court of Appeals for the Eighth Circuit. *Id.* On appeal, the 8th Circuit discussed the *in rem* nature of condemnation proceedings and, notably, which entity constitutes an indispensable party when the United States holds the land as Trustee, observing that:

> ***The authorities support the view that generally the Government is the indispensable party in an action which involves alienation or condemnation***

> ***of Indian property. Generally one whose rights will be affected by a judgment is an indispensable party to litigation.*** But there are exceptions...It is true that one whose rights will be affected by a judgment or decree is usually an indispensable party in the action. ***But there is a well recognized exception to that rule, within which this case falls, that where the trustee is capable of fully representing the interests of the beneficiary, the beneficiary is not an indispensable party to the action.***
>
> 338 F.2d at 909-10 (internal edits)(citations omitted)(emphasis added).

Thus, in an *in rem* condemnation action - such as the two Enable cases pending before this Court, the only indispensable party to each action is the United States in its role as Trustee of the lands held by it in fee title for the beneficial Kiowa owners. It is not necessary to join the individual Native American allottees or the Kiowa Indian Nation itself, where the land being condemned *in rem* is held in trust by the United States for the beneficial Native American owners. This is because the sole issue to be decided in this *in rem* condemnation proceeding is the amount of just compensation for the property interest being taken for public use. *See e.g., United States v. 2979.72 acres of land*, 235 F.2d 327, 329 (4th Cir. 1956) ("The condemnation suit is a proceeding in rem. The owners of the res are entitled to have the compensation divided among them according to their interest in the res taken. The value of the property once being determined in a proper proceeding, the sum so determined stands in the place of the property and can be distributed upon the adjudication of the value of the respective interests.").

The Supreme Court of South Dakota has concisely summarized the administrative nature of *in rem* proceedings in *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*,(hereinafter "*Cass County*"). 2002 N.D. 83, 643 N.W. 2d 685, 688 (N.D.

2002). In *Cass County*, a local water resource district condemned 1.43 acres of land held in fee by the Chippewa Tribe ("the Tribe") for the construction of a flood control dam. 643 N.W. 2d at 688. The 1.43 acre tract was conveyed to the Tribe by Roger Shea, who opposed the dam, shortly before the County filed its condemnation action. *Id.* In what was undoubtedly an illusory transaction for purposes of obstructing the construction of the dam, Shea conveyed the 1.43 acre tract to the Tribe by a warranty deed in exchange for $500, reserving to himself the right to graze the land for $1. *Id.* The water district named both Shea and the Tribe in its state court condemnation action, pursuant to state law. *Id.* The Tribe moved to dismiss the action based on sovereign immunity, and the trial court agreed. *Id.* at 688. In considering the Tribe's arguments regarding sovereign immunity, the North Dakota Supreme Court concisely summarized the administrative nature of *in rem* condemnation actions, noting that:

> It is well settled that a condemnation action is strictly in rem. *A proceeding in rem is an action against the property itself, and* ***in personam jurisdiction is not required***. The general rule is set out in 20 Am.Jur.2d Courts § 80 (1995): *[A] decision in rem does not impose responsibility or liability on a person directly, but operates directly against the property in question ... irrespective of whether the owner is subject to the jurisdiction of the court in personam. A proceeding in rem is essentially a proceeding to determine rights in a specific thing or in specific property, against all the world, equally binding on everyone. It is a proceeding that takes no cognizance of an owner or person with a beneficial interest, but is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants.* The action of the court is binding, even in the absence of any personal notice to the party interested or any jurisdiction over his person.

Citing the Supreme Court of the United States in *Shaffer v. Heitner*, 433 U.S. 186, 199, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), the North Dakota Supreme Court in *Cass County* further outlined the distinctions between *in rem* and *in personam* jurisdiction, observing that:

> [S]tate authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated in personam and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called in rem or quasi in rem. *The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.*

Cass County, 643 N.W. 2d at 689 (internal citations omitted)(emphasis added).The Supreme Court of North Dakota reversed the trial court's dismissal of the condemnation case because the Tribe had acquired its fee title from a non-tribal member who was not subject to any trust restrictions, and the land was not held in trust by the Tribe. "When Congress removes restraints on alienation on Indian land which was originally held in trust, state laws are fully applicable to subsequent claims." *Id.* at 695.

Although the removal of trust restrictions in *Cass County* is an important fact not present in the Enable condemnation cases before this Court, the *in rem* nature of the Enable condemnation proceedings is governed by the legal principles recited in *Cass County,* and *Cheyenne River, supra.* The Enable condemnation actions are *in rem* proceedings and the Kiowa Tribe is not an indispensable party to the actions, since the United States is the indispensable party in its capacity as Trustee and holder of the title to the allotted land. *See also Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011)("When a state brings formal condemnation proceedings to acquire an Indian allotment, the United States is an indispensable party to that action because the United States remains the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees." (Internal citations

omitted, citing *Minnesota*, 305 U.S. at 388). Thus, the presence or absence of the Kiowa Tribe or of one or more of the 38 individual allottees does nothing to enhance or diminish their rights to the proceeds generated by Enable's condemnation of the allotted lands held in trust for them by the United States, as it fully and fairly represents their interests as their Trustee. Accordingly, the Kiowa Tribe is not an indispensable party in these cases.

B. Allotment Land.

During the late 19th Century, the United States government embarked upon a nationwide policy of dissolving established Indian reservations and conveying the former reservation lands to individual Native Americans who were enrolled members of the tribes residing on the lands. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992). To achieve that result, Congress passed a series of laws allowing large amounts of land within the boundaries of former reservations to be conveyed to individual Native Americans under a special trust relationship with the United States. *Id.* at 253-54. After a period of time where alienation of the lands was restricted, such as 25 years, the goal was to pass title from the United States government, as Trustee, to the individual allottees and the trust relationship would be terminated. *Id.*

In this case, it is undisputed that the subject Kiowa 84 parcel of land is "allotment land" that was originally allotted to an individual Kiowa owner named Emaugobah, also known as Millie Oheltoint, but held in trust by the United States. *See Complaint, doc. 1, ¶ 1, Exhibit 1, Bureau of Indian Affairs title report.* An allotment is a specific parcel of land awarded to an individual tribal member from a common holding of land that typically once comprised part of

a larger Indian reservation. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972). "Allotted lands refer to lands held in severalty by individual Indians. Tribal land, on the other land, consisted of the *unallotted* lands of the reservation." *See Hackford v. Babbitt*, 14 F.3d 1457, 1468 (10th Cir. 1994)(discussing General Allotment Act of 1887 and Ute Partition and Termination Act, citing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 (1976)). As Trustee for the beneficial Indian owners, the United States is the fee simple owner of allotted lands. *See e.g. State of Minnesota v. United States*, 305 U.S. 382, 386 (1939); *County of Yakima,* 502 U.S. at 253-254; *United States v. Mitchell*, 445 U.S. at 542.

C. Condemnation of Allotment Land under Federal Law.

1. U.S.C. § 357.

In the condemnation action, case no. 5:15-cv-1250-M, and the trespass case, 5:15-cv-01262-M, Enable has sought to condemn a .71 acre easement to renew its pre-existing natural gas transmission pipeline easement which has been in continuous operation since the early 1980's. Enable has proceeded under 25 U.S.C. § 357 (hereinafter "§ 357"), which was originally enacted by Congress on March 3, 1901 and has never been amended. 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.

It is widely accepted that § 357 is a Congressional waiver of sovereign immunity permitting suit against the United States government in its capacity as Trustee for Indian allottees whose

land is condemned for public projects. *See Minnesota,* 305 U.S. at 388-89(highway condemnation case brought by State of Minnesota against United States for crossing of nine allotted parcels of restricted Indian land). "Because § 357 permits condemnation actions that cannot effectively proceed absent the United States, § 357 waives the government's sovereign immunity." *See Jachetta* 653 F.3d at 907; *See also, United States v. Clarke*, 445 U.S. 253, 254 (1980). In *Clarke*, the Supreme Court of the United States held that inverse condemnation actions could not be brought by American Indian allotment owners under § 357 for damages to allotment lands caused by states or municipalities. *Clarke*, 445 U.S. at 254. In reaching its conclusion, the Court in *Clarke* discussed the underlying purposes of the statute and applied the plain meaning canon of interpretation to its language, observing:

> We think this is a case in which the meaning of a statute may be determined by the admittedly old-fashioned but nonetheless still entirely appropriate "plain meaning" canon of statutory construction. *We further believe that the word "condemned," at least as it was commonly used in 1901, when 25 U.S.C. § 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it.*
>
> *Clarke*, 445 U.S. at 254 (emphasis added).

The Supreme Court's acknowledgement that the simple purpose of § 357 is to provide just compensation to owners of lands allotted to Native Americans is consistent with other courts which have considered the matter. In *Southern Calif. Edison v. Rice*, the United States Court of Appeals for the Ninth Circuit described the purpose of § 357 as follows:

> 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. Thus, consistent with its assimilation policy, Congress placed Indian allottees in the*

> *same position as any other private landowner vis-a-vis condemnation actions, with the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds.*
>
> *Southern Calif. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir.1982)(emphasis added).

To be clear, § 357 has expressly permitted the condemnation of Indian allotment lands since its passage by Congress in 1901, so long as just compensation is paid for the taking of the interest in the allotment land. The money paid quite literally takes the place of the interest taken. Section 357 has never been repealed, amended, or revised. Its clear purpose is to allow the taking of Indian allotment lands for public projects upon the payment of just compensation to the allotment owners. *See also Felix S. Cohen's Handbook of Federal Indian Law*, §16.03[4][d][ii], pp. 1084-85 (2012)(discussing § 357 and its purpose of allowing the alienation of lands allotted to Indians for any public purpose under the laws of the State where the land is located).

2. Section 357 is a Special Statute Allowing the Condemnation of Allotment Lands.

In the case of *Town of Okemah v. United States*, the town of Okemah sought to condemn an easement in the District Court of Okfuskee County across lands allotted to full-blood Creek Indians which were restricted against alienation. 140 F.2d 963, 964 (10th Cir. 1944). Although the restricted lands were held in trust by the United States for the Creek Indian owners, the United States government was not named as a party to the action. *Id.* The Town of Okemah did not name the United States as a party defendant, but instead served notice on the Five Civilized Tribes pursuant to the Act of April 12, 1926, Title 44 Stat. 239

(the "Act of 1926"). *Id.* The Act of 1926 provides for the filing in state district courts of actions affecting the title or interest to lands allotted to the citizens of the Five Civilized Tribes and restricted in terms of alienation. *See United States v. Rice*, 327 U.S. 742, 745-46 (1946). As summarized by the Supreme Court in *Rice,* Section 3 of the Act of 1926 provided as follows:

> [A] party to a suit in the State courts of Oklahoma to which a restricted *745 member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, * * * and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes. The United States is afforded a specified time after notice is given to appear in the suit, and after such appearance, or the expiration of the time specified, it is provided that 'the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. The Act further provides that *the United States* may be, and hereby *is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court*, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit * * *. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States * * * and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and *the cause shall then proceed in the same manner as if it has been originally commenced in said district court*, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

Rice, 742 U.S. at 745; *See also Shade v. Downing*, 333 U.S. 586, fn. 1 (1948)(noting that the United States has no interest in a legal proceeding to determine the heirs of a full-blood Cherokee decedent who owned allotment land).

The Act of 1926 expressly permitted the United States – as Trustee of the Creek allottees

– to remove the Okemah action from Okfuskee County district court to the Eastern District of Oklahoma and to file a motion to dismiss the condemnation action on grounds that it had not been named as an indispensable party to the action. *Id.* The Eastern District granted the motion to dismiss, and the Town appealed, alleging that it had complied with the express terms of the Act of 1926, which authorized the filing of probate suits in state courts. *Id.* On appeal, the United States Court of Appeals for the Tenth Circuit Court examined the interplay between § 357 and the Act of 1926. The 10th Circuit harmonized the two statutes at work in *Okemah* as follows:

> *[T]he act of April 12, 1926 is a general* statute in the sense that it applies to all suits of the character therein described. *Section 357*, supra, *is a special statute applying only to condemnation proceedings.* Where 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.* Here, there was no express repeal and there is no absolute incompatibility, for both statutes can be given reasonable operation by the application of such presumption...*We do not think Congress intended by the Act of April 12, 1926 to amend Sec. 357....*
>
> 140 F2.d at 966 (emphasis added).

The reasoning of *Okemah* is a correct and reasonable interpretation of the law governing the condemnation of lands originally allotted to individual Native Americans. Moreover, the holding of *Okemah* is directly applicable to the facts of this case, where the Court has before it a situation where a small fraction of allotment land (1.1%) – held in trust by the United States for individual Native Americans for almost a century – has inured to an Indian Nation by operation of a *general* federal law enacted eighty-two (82) years after the adoption of §357 in which Congress waived the sovereign immunity of the United States in

condemnation actions against allotment land. Based on the authorities cited, *supra*, the 1.1 percent interest in Kiowa 84 – which is derived from an individual allotment – does not transform Kiowa 84 into land which requires the involvement of the Kiowa Tribe as an indispensable party. Enable's condemnation causes of action are *in rem* proceedings where the United States is the only indispensable party as Trustee. *Cheyenne River*, 338 F.2d at 909-10; *Minnesota*, 125 F.2d at 639.

3. The Indian Land Consolidation Act is a general law affecting the descent and distribution of allotted lands, which does not modify 25 U.S.C. § 357.

Through its exercise of plenary powers over Native American Tribes, Congress enacted the ILCA, on January 12, 1983. Through the ILCA, Congress enacted statutory mechanisms to prevent the descent and distribution of small fractional interests in lands previously allotted to individual Native Americans, provided that the owners of the fractional allotments are compensated for their fractional interests in the land when it is divested from them and conveyed to the Indian Tribe of which the allottee owner is a member. *See generally Hodel v. Irving*, 481 U.S. 704, 712-715 (1987)(discussing the intent of Congress to alter the descent and distribution of fractional interests in allotment lands and finding the original Act unconstitutional as a taking of private property without just compensation).

In Title 25 § 2209, the ILCA specifically provides that "[t]itle to any land acquired under this chapter by any Indian or Indian tribe shall be taken in trust by the United States for that Indian or Indian tribe." This does not alter the result in *Cheyenne River, supra*, 338 F.2d at 909, and neither the individual allottees nor the Kiowa Tribe are indispensable parties to Enable's condemnation actions because any interest in land inuring to the Tribe under the

ILCA is held in trust by the United States, as trustee, thereby making it the only necessary and indispensable party to the condemnation of what has long been recognized as allotment land. Other specific provisions of the ILCA similarly provide that tribal sovereignty is not implicated by its operation, such as 25 U.S.C. § 2213(a) and (c)(2), which specifically provide that the Secretary of the Interior may lease allotment property which an Indian tribe acquires through the operation of the ILCA, even if the Tribe does not consent, to wit:

> The lease or agreement described in paragraph (1) shall apply to the portion of the undivided interest in allotted land described in such paragraph (including entitlement of the Indian tribe to payment under the lease or agreement), *and the 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)(2)(emphasis added)

Likewise, the operation of § 2213 specifically rests upon the express Congressional statement that "the 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." Once again, the only indispensable and necessary party to the condemnation of allotment land is the United States, in its capacity as Trustee for the individual Native Americans or Tribes, because the ILCA specifically provides that its operation does not require Tribal participation or affect Tribal sovereignty. *See* § 2213(c)(2).

The Congressional intent to avoid any conflicts with other federal laws affecting lands allotted to Indians, such as 25 § 357, is made exceptionally clear in the ILCA § 2218(a)(3) Definition of Allotted Land, which expressly states as follows:

> In this section, *the term "allotted land" includes* <u>*any land held in trust or*</u>

restricted status by the Secretary on behalf of one or more Indians.

25 U.S.C. § 2218(a)(3), Definition (emphasis added).

It is beyond dispute that Kiowa 84, which is the focal point of this dispute, is "allotted land" that is "held in trust or restricted status by the Secretary on behalf of one or more Indians." *Id.* There are 38 individual allottee owners who are named plaintiffs in the trespass case, who own – in aggregate – 98.9% of all of the rights in Kiowa 84. There can be no doubt that Kiowa 84 remains "allotted land" within the clear definition of § 2218(a)(3). The 1.1% interest which has inured to the Kiowa Tribe arose from the operation of the ILCA, which expressly states that its operation does not implicate the sovereign status of Indian Tribes. While naysayers will undoubtedly attempt to argue that this quoted definition of "allotted land" includes only "individual" Indians - not Tribes, this argument is contrary to § 2218(d)(2), which expressly states that a Tribe is not regarded as being a party to any lease or agreement which the Secretary enters into regarding "allotted land" subject to the ILCA. Since the operation of the ILCA is *the* statutory mechanism by which Tribes acquire fractional interests in "allotted land,"there is no basis to contend that Congress did not mean to include fractional interests acquired by Tribes under the ILCA in its definition of "allotted land". "We cannot attribute to Congress the intention to promulgate a rule which would open the door to such obvious incongruities and undesirable possibilities." *See United States v. Dow*, 357 U.S. 17, 25 (1958)(condemnation case reconciling the Taking Act and the Assignment of Claims Act); *Accord, Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)("[W]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is

not absurd—is to enforce it according to its terms."); *Oklahoma Dept. of Securities v. Wilcox*, 691 F.3d 1171, 1174-75 (10th Cir. 2012), quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, NA*, 530 U.S. 1 (2000) ("[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says .... [W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the test is not absurd – is to enforce it according to its terms.").

By expressly exempting Tribes from being considered as parties to any leases or agreements approved by the Secretary for "allotted land," Congress deliberately chose *not* to create fodder for new legal arguments inhibiting the operation of previously enacted federal laws. In fact, it is abundantly clear by the plain language of the ILCA that Congress in its passage of the Act expressly preserved all waivers of sovereign immunity previously enacted by Congress in § 2218(g) of the ILCA, which states:

> (g) Other laws
>
> *Nothing in this chapter shall be construed to supersede, repeal, or modify any general or specific statute authorizing the grant or approval of any type of land use transaction* involving fractional interests in trust or restricted land.
>
> § 2218(g)(emphasis added).

This statement of law found in § 2218(g) expressly preserves all previously granted Congressional authority enacted through federal statutes "authorizing the grant or approval of any type of land use transaction involving fractional interests in trust or restricted land." It cannot be disputed that the acquisition of an easement for the use of real property is a land use transaction involving interests in land. *See e.g., Restatement (Third) of Property: Servitudes*,

§ 1.1(1)(in part, "A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land."). Thus, the long acknowledged waiver of sovereign immunity for the condemnation of lands allotted to Indians, pursuant to § 357, is not altered or disturbed by the enactment of the ILCA. The interpretation and statutory construction of the terms of § 357 and the ILCA begins and ends with the plain language of the statutes themselves. In the absence of an irreconcilable conflict, there is no need for further interpretation. "Where two statutes are involved, legislative intent to repeal an earlier statute must be clear and manifest. In the absence of such intent, apparently conflicting statutes must be read to give effect to each if such can be done by preserving their sense and purpose." *See Blackfeet Indian Tribe v. Montana Power Co.,* 838 F.2d 1055, 1058 (9th Cir.1988), *cert denied*, 488 U.S. 828, 109 S. Ct. 79 (1988).

As the 10th Circuit has long held, 25 U.S.C. § 357 is a special statute authorizing the condemnation of "allotted land," which does not yield to a general statute passed much later by Congress for some other purpose. *Okemah*, 140 F.2d at 966 (the presumption is that the special statute (§357) remains in effect and the later enacted general statute does not amend it). "Judges are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *See County of Yakima c. Confederated Tribes and Bands of the Yakima Indian Nation et al.,* 502 U.S. 251, 264 (1992)(internal citations omitted). The operations of § 357 and the ILCA are harmonized by interpreting the plain language of each. Both statutes speak in terms of "lands allotted" to

Indians and held in trust by the United States. Both statutes contemplate that interests in "lands allotted" may be transferred, so long as compensation is paid for the "lands allotted."

The *Davilla* plaintiffs' argument that the existence of a 1.1% interest in allotment land, which inured to the Kiowa Tribe under the ILCA long after the pipeline was in place, precludes the condemnation of an easement by Enable pursuant to 25 U.S.C. § 357 ignores the plain meaning of each statute and must be rejected.

4. The Department of the Interior regulations do not supplant the statute.

The Plaintiffs suggest that there are other methods for obtaining easements across Indian land under 25 U.S.C. §§323-328 (sometimes known as the "Tribal Consent Act" or "TCA"), and grudgingly admit that condemnation is available in a proper case under 25 U.S.C. §357. *Mot. to Dismiss*, pp. 3-4 [Doc. 14]. They deride Enable, however, for running "roughshod over the property owners" while admitting that Enable attempted – but failed – to obtain extensions of its easements under the TCA. *Id.*, pp. 1-2.

The implication, apparently, is that Enable's *only* recourse is under the TCA and the regulations of the Department of the Interior. The United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") has rejected the notion that other statutes have amended or repealed §357 in *Yellowfish v. City of Stillwater*, 691 F.2d 926, 930-31 (10th Cir. 1982), *cert. denied* 461 U.S. 927 (1983) ("The long history of condemnation of rights-of-way over allotted lands without Secretarial consent, the various cases upholding the practice, and the disfavor with which courts view repeal by implication support this conclusion. We have considered Yellowfish's other arguments that §357 has been partially repealed and find them to be

without merit.").

Even if the regulations – found at 25 C.F.R., Part 169 – require an application and negotiations, they cannot override statutory law. Administrative agencies must "faithfully execute" the laws of the United States but may not revise them. As the Supreme Court of the United States found in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. 837, 842-43 (1984) (footnote omitted). Delegation of authority to an administrative agency like the Department of the Interior "is not a roving license to ignore the statutory text" and is "but a direction to exercise discretion within defined statutory limits." *Massachusetts v. E.P.A.*, 549 U.S. 497, 533 (2007). "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' ..., we typically greet its announcement with a measure of skepticism." *Utility Air Regulatory Group v. E.P.A.*, ___ U.S. ___, 134 S.Ct. 2427, 2444 (2014).

As explained above, Congress has directly spoken to the issues in this case in making condemnation available under §357 when applications and negotiations fail. If this were not so, the sovereign power of the United States to authorize condemnations for needful public purposes would be diminished. *See generally, Southern Kansas Railway Co.,* 135 U.S. at 656 (the United States may exercise the right of eminent domain notwithstanding the rights of territories, states, or Indian Nations, because it is "essential to the independent existence and

perpetuity of the United States, ….").

Conclusion

For the aforementioned reasons, the United States' Motion to Dismiss [doc.47] should be denied because: (1) this Court may exercise subject matter jurisdiction over this condemnation suit pursuant to 25 U.S.C. § 357 (hereinafter "§ 357"), which was originally enacted by Congress on March 3, 1901 and has never been amended, as it permits the condemnation of lands allotted to Indians (pp.5-12 *supra*), and; (2) in an *in rem* action such as this condemnation suit, the United States – in its capacity as Trustee – fully and fairly represents the interests of the individual allottees and the Kiowa Tribe, so they are not indispensable parties who much be joined under Fed. R. Civ. P. 19 (pp.12-18). The ILCA does not change the legal analysis long recognized by federal courts in *Okemah* and *Cheyenne River, infra*.(pp.18-24), as the lands in question remain "lands allotted" to Indians within the meaning of § 357 and the ILCA. Accordingly, the United States' Motion to Dismiss should be denied.

Respectfully submitted,

s/CLINT RUSSELL
STRATTON TAYLOR, OBA # 10142
staylor@soonerlaw.com
TONEY D. FOSTER, OBA # 16063
tfoster@soonerlaw.com
CLINT RUSSELL, OBA # 19209
crussell@soonerlaw.com
KASSIE N. MCCOY, OBA # 31405
kmccoy@soonerlaw.com
TAYLOR, FOSTER, MALLETT, DOWNS RAMSEY & RUSSELL
400 West Fourth Street P.O. Box 309
Claremore, OK 74018
918-343-4100; 918-343-4900 fax
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following March registrants:

AREA DIRECTOR, Anadarko Area Office, Bureau of Indian Affairs, U. S. Department of the Interior, Anadarko, Oklahoma, for and on behalf of the respective heirs and successors in interest of: EMAUGOBAH, Caddo Allotment #84, deceased P.O. Box 368 Anadarko, OK 73005-0368	U.S. Attorney General Eric H. Holder, Jr. Robert F. Kennedy Bldg. 10th Street and Constitution Ave. Ste. 5137 NW Washington, DC 20530	U.S. Attorney for the Western District Sanford C. Coats 210 Park Ave. Ste. 400 Oklahoma City, OK 73107
Betty Lou Ware 110 Moran Dr Anadarko, OK 73005-2225	Benjamin Blackstar 615 E. Texas Dr. Anadarko, OK 73005-5240	Patricia Ware 9080 County Road 1370 Fort Cobb, OK 73038-2134
Jean Ann Carter Ware PO Box 153, Fort Cobb OK 73038-0153	Patricia Ann Carter PO Box 252 Fort Cobb, OK 73038-0252	Marcia W. Davilla 216 W Kentucky Ave Anadarko, OK 73005-4017
Mayredean Mammedaty Palmer 1021 SW 97th Street Oklahoma City, OK 73139-2826	Ernie Clay Keahbone Rt 3 Box 171 Anadarko, OK 73005	Katina Sherie Smith Lipton 916 Coy St. Tahlequah, OK 74464-6802
Wesley Ware III 12740 NE Keeney Rd Elgin, OK 73538-3777	Angela Rae Ware Silverhorn 220 E 1st Street PO Box 825 Carnegie, OK 73015	Samuel Martin Ware 332 Washita Cir. Anadarko, OK 73005-9669
Thomas Blackstar III 2404 Farris Pl. Chickasha, OK 73018-7645		

C. Steve Hager, OBA # 12315
Colline Wahkinney-Keely, OBA # 12405
Oklahoma Indian Legal Services
4200 Perimeter Center Dr., Ste. 222
Oklahoma City, OK 73112
405-943-6457; 405-917-7060 fax
keely@oilsonline.org
hager@oilsonline.org

And

David C. Smith, DC #99892
Catherine F. Munson, DC #985717
Admitted Pro Hac Vice
Kilpatrick Townsend & Stockton, LLP
607 14th Street, N.W., Ste. 900
Washington, DC 20005
202-508-5800; 202-508-5858 fax
DCSmith@kilpatricktownsend.com
CMunson@kilpatricktownsend.com
Attorneys for Plaintiffs

s/ CLINT RUSSELL