CASE NO. NO. 16-2050
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation,
Plaintiff - Appellant,

vs.

LORRAINE BARBOAN, also known as, LARENE H. BARBOAN, et al.,
Defendants - Appellees,

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

On Interlocutory Appeal from the United States District Court
For the District of New Mexico
The Honorable Senior District Judge James A. Parker
D.C. No. 1:15-cv-00501

BRIEF OF *AMICI CURIAE* THE NATIONAL CONGRESS OF AMERICAN INDIANS, PUEBLO OF LAGUNA, THE UTE MOUNTAIN UTE TRIBE, AND THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF DEFENDANTS AND AFFIRMANCE OF THE DISTRICT COURT

Jennifer H. Weddle
Troy A. Eid
Harriet McConnell
Laura E. Jones
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6500
Counsel for Amicus Curiae Ute Mountain Ute Tribe

John Dossett
National Congress of American Indians
Embassy of Tribal Nations
1516 P Street NW
Washington, DC 20005
(202) 466-7767
Counsel for National Congress of American Indians

Dan Rey-Bear
Rey-Bear McLaughlin, LLP
421 W. Riverside Ave., Suite 1004
Spokane, WA 99201
(509) 747-2502
Counsel for Pueblo of Laguna

Naomi Stacy
Dan Hester
Confederated Tribes of the Umatilla Indian Reservation
4611 Timine Way
Pendleton, OR 97801
(541) 429-7400
Counsel for Amicus Confederated Tribes of the Umatilla Indian Reservation

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae make the following disclosure: Amici Curiae the National Congress of American Indians, Pueblo of Laguna, the Ute Mountain Ute Tribe, and the Confederated Tribes of the Umatilla Indian Reservation are not publically traded corporations, have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

_____

Jennifer H. Weddle

Counsel of Record for *Amici Curiae*

Dated: October 10, 2016

STATEMENT OF THE IDENTITIES AND INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* are the National Congress of American Indians ("NCAI"), the Pueblo of Laguna ("Laguna"), the Ute Mountain Ute Tribe ("Ute Mountain"), and the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"). *Amici* respectfully file this unopposed brief in support of the Navajo Nation because this appeal raises critical issues regarding tribal sovereignty, American Indian tribes' ability to engage in government-to-government agreements, and sovereign land use rights.[1]

NCAI is the oldest and largest national organization representing the interests of American Indians and Alaska Natives, with hundreds of tribal governments comprising its membership. NCAI was established in 1944 to protect the rights of Indian tribes and to improve the welfare of American Indians. Since 1944, NCAI has advised tribal, state and federal governments on a range of Indian issues, including issues related to the problems of allotment and fractionation.

Ute Mountain, Laguna and CTUIR (collectively, the "*amici* Tribes") are federally recognized Indian tribes that own partial interests in fractionated allotments and that routinely work with federal agencies and state and county

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief.

governments, as well as energy, transportation and utilities companies, to negotiate rights of way across their lands. Ute Mountain and Laguna are within the Tenth Circuit. CTUIR is within the Ninth Circuit.

Ute Mountain also has a strong interest in this litigation because the tribe was literally founded on opposition to allotment. The Weemuniche band of Ute Indians split from two other bands of Ute Indians to become Ute Mountain when the other bands agreed to accept allotment. For that reason, the Ute Mountain Ute Indian Reservation is less heavily allotted than many reservations, but does have 8,499 acres of allotments in the White Mesa Region and Allen Canyon, Utah, including heavily fractionated allotments, which create economic and jurisdictional headaches for Ute Mountain. Ute Mountain Ute Indian Reservation, Reservation Overview, Bureau of Indian Affairs at 1, available at http://www.bia.gov/cs/groups/xieed/documents/document/idc1-022550.pdf. Ute Mountain has acquired interests in several of these allotments and is currently in negotiations with San Juan County, Utah, regarding rights of way over county roads in the region where these allotments are located.

Laguna is located 45 miles from Albuquerque, where archaeologists believe their ancestors have been living and farming since at least 1300 A.D. National Park Service, available at https://www.nps.gov/nr/travel/route66/pueblo_laguna.html. Laguna's ownership

of its lands was recognized first by the King of Spain, and then subsequently by Mexico and then the United States in the Treaty of Guadalupe-Hidalgo. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985). In 1926, Congress passed a statute that provided "[t]hat lands of the Pueblo Indians of New Mexico, the Indian title to which has not been extinguished, may be condemned for any public purpose and for any purpose for which lands may be condemned under the laws of the State of New Mexico." *Plains Elec. Generation & Transmission Co-op., Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1376 (10th Cir. 1976), quoting Act of May 10, 1926, 44 Stat. 498. This condemnation statute was repealed by the Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. § 322. *Id*. Because of this history, Laguna has first-hand experience with the problems that are caused when private companies are allowed to condemn tribal lands. Laguna also has more than 42 miles of rights of way for Public Service Company of New Mexico ("PNM") that were renewed in 2009; more than 30 miles of rights of way for Transwestern Pipeline Company renewed in 2002; and 3,384 acres of allotments, most of which are partly owned by the United States in trust for Laguna.

Although this Court's decision will not be binding precedent on the CTUIR because CTUIR is not in the Tenth Circuit, CTUIR has a strong interest in the outcome of this case because the Umatilla Indian Reservation is heavily allotted (determined by the U.S. Department of the Interior to be the 28th most fractionated

of allotted tribes in the United States, *see* https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/upload/Updated-Implementation-Plan.pdf) and because of the number of energy, utility and transportation rights of way that cross the Umatilla Indian Reservation. The Umatilla Indian Reservation was established by the Treaty Between the Cayuse, Umatilla and Walla Walla Tribes, in Confederation, and the United States, June 9, 1855, 12 Stat. 945 ("CTUIR Treaty of 1855"), which states, at Art. I, that the Umatilla Indian Reservation "…shall be set apart as a residence for said Indians . . . and marked out for their exclusive use …" After the CTUIR Treaty of 1855, the Umatilla Indian Reservation was allotted pursuant to the Umatilla Allotment Act of 1885, 23 Stat. 340 (Mar. 3, 1885). During allotment, the Umatilla Indian Reservation was reduced from 245,699 acres to 158,000 acres. Comprehensive Plan, The Confederated Tribes of the Umatilla Indian Reservation at 33 ("CTUIR Comprehensive Plan"), available at http://Umatilla.org/system/files/Comprehensive%20Plan.pdf. Approximately half of the Umatilla Indian Reservation is now owned in fee by non-CTUIR members. In addition, a significant number of landowners of allotted trust lands within the Umatilla Indian Reservation are non-CTUIR members.

CTUIR has been actively acquiring interests in allotted lands in an effort to restore its Reservation land base. In 1973, "49 percent (85,433 acres) of the land

within the Reservation boundaries was in Indian ownership in the form of Tribal Trust, Tribal fee or individual allotments." CTUIR Comprehensive Plan at 50. That has since been increased to 62.5 percent (116,021 acres), *id.,* with the help of the Cobell Land Buy-Back Program, the Secretarially-approved CTUIR Inheritance Code (pursuant to which CTUIR can prevent the transfer or devise of trust lands within the Umatilla Indian Reservation to non-CTUIR members) and the CTUIR Land Acquisition Program. Fractionation is a significant problem on many of these allotments, and CTUIR has been purchasing both fee lands and interests in allotted trust lands in an effort to reestablish its tribal land base. *Id*. at 65. These allotments are arranged in an erratic checkerboard, see *id*. at 70 (a map of the Umatilla Indian Reservation showing land status), with large areas of the Reservation either entirely made up of allotments or alternating between allotments and other types of land status. The outcome of this case (if subsequently adopted by, or otherwise made applicable in, the Ninth Circuit) could affect the extent to which the CTUIR can manage the use of these lands and the ultimate effectiveness of CTUIR's consolidation efforts.

SUMMARY OF ARGUMENT

This case is an attempt by PNM to condemn an interest in land owned by a federally recognized Indian Tribe and held in trust by the United States, in this case an easement over the Navajo Nation's ("Nation's") interest in a fractionated

allotment. PNM argues that there is an implied power to condemn this tribal land, and an implied abrogation of sovereign immunity, that may be found in the interrelationship between a series of federal statutes. But nothing in the relevant statutes authorizes such a taking – yet another in a long line of takings of Indian land – and it is contrary to express Congressional policy.

The District Court correctly dismissed PNM's condemnation action with regard to the parcels, finding "PNM could not condemn the Two Allotments under § 357 because the Nation owns a fractional interest in the Two Allotments" and, "alternatively . . . that as a partial owner of the Two Allotments, the Nation is an indispensable party that cannot be joined due to sovereign immunity." Memorandum Opinion and Order Granting in Part and Denying in Part Motion to Alter or Amend Order Dismissing Navajo Nation and Allotment Numbers 1160 and 1392 ("Decision Below") at 6.

The allotment of Indian lands was a disastrous federal policy that has been formally abandoned since 1934. *Cty. of Yakima*, 502 U.S. at 255. It has left a legacy of severe economic and governance problems for Indian tribes generally, and for amici Tribes in particular, as Indian lands have become increasingly fractionated and unusable. Tribes are slowly working to reclaim these fractionated properties, with the assistance of Congress. *See e.g.*, Indian Land Consolidation Act, 25 U.S.C § 2201, *et seq*. and Land Buy-Back Program (LBBP)), Section 101

of the Claims Resolution Act of 2010, Pub. L. 111-291, 124 Stat. 3064, 3066-3067. These tribal interests should be treated as tribal lands for the purpose of eminent domain, not as individual allotments.

Similarly, the protections that tribal lands enjoy from condemnation by state governments and utility companies are an important component of the tribes' actual ability to govern and manage their own lands, as well as a source of revenue. Moreover, tribes generally exercise their powers responsibly and are willing to consent on reasonable terms.

ARGUMENT

I. It is Well-Established, by Federal Statutory and Case Law that Regardless of a Tribe's Percentage of Interest in Property, Tribal Land Cannot be Condemned.

The General Allotment Act provides for condemnation of *individually* held Indian allotments. Specifically, 25 U.S.C. § 357 states that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located." Section 357 does not apply to lands held by tribes themselves, which cannot be condemned without the tribe's consent, 25 U.S.C. § 324. Nor does Section 357 contemplate a situation where a tribe acquires an allotment or an undivided interest in an allotment. Because it does not apply to

tribal land, Section 357 makes no mention of the protections of tribal sovereign immunity. *Id*.[2]

There is no question that tribal land is not subject to condemnation, as demonstrated by legislation that requires a tribe's consent for the use of tribal land. "No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. Similarly, the Nonintercourse Act strictly prohibits the conveyance or termination of Indian title without the consent of the United States. 25 U.S.C. § 177; *see also Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 229, (1985). Interpreting Section 357 to impliedly allow the condemnation of tribal land would abrogate tribes' sovereign land interests, in violation of these important statutory protections.

In enacting Section 357, Congress expressly subjected certain Indian lands to condemnation, as it also did for Pueblo Indian lands in the Act of May 10, 1926, 44 Stat. 498. But "Lands allotted in severalty to Indians," 25 U.S.C. § 357, means just that: Property divided into allotments and provided to individual Indians. Once an Indian tribe acquires interest in that parcel of land, the nature of the land's ownership changes; it is no longer solely held by individuals. "Tribal land" is

[2]"To abrogate tribal immunity, Congress must unequivocally express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (quotation omitted). Amici agree with the reasoning of the Nation and the court below.

defined as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status." 25 C.F.R. § 169.2. Allotments are not the same as tribal land and are treated differently by federal statute and federal regulations. *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cty. of Thurston, Hiram Grant*, 719 F.2d 956, 961 (8th Cir. 1983); *see also* 25 U.S.C. § 324 (providing that rights of way over "lands belonging to a tribe" shall not be granted "without the consent of the proper tribal officials," but rights of way over individual Indian owners' land may be granted without consent in certain circumstances). While Congress knows how to subject tribal lands to condemnation in explicit terms, as in the Pueblo Lands Act, 44 Stat. 498, Congress chose not to do so in Section 357.

The Nation owns an undivided interest in Allotment 1160 and Allotment 1392. As recently explained by an Oklahoma district court in a similar case, "[b]ecause the [Tribe] owns an undivided . . . interest in the tract that is held in trust, the Court finds that the tract is tribal land and cannot be condemned pursuant to 25 U.S.C. § 357." *Enable Oklahoma Intrastate Transmission, LLC v. 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061, at *3 (W.D. Okla. Aug. 18, 2016). Therefore, the Nation's interest in the allotments as a federally recognized Indian tribe precludes their condemnation under 25 U.S.C. § 357.

As recently as 2007, Congress considered and rejected proposals to expand the right-of-way condemnation power on tribal lands. The Section 1813 Indian Land Rights-of-Way Study Report submitted to Congress in 2007 demonstrates that Congress is well aware that tribal lands cannot be condemned and has chosen to leave this longstanding principle in place. Instead, Congress repeatedly cut back on condemnation powers previously granted, such as when it repealed the authority to condemn Pueblo land for rights of way "to provide them with the same protection given the lands of other Indians." *Plains Electric*, 542 F.2d at 1381. The Section 1813 Report to Congress stated that

> "the eminent domain authority . . . cannot be used by a permit holder to acquire 'property owned by the United States or a State' [1221(e)(1)]. This exclusion includes tribal lands, which are lands owned by the United States in trust for the beneficial use of the tribes. Accordingly, neither Section 7 of the Natural Gas Act nor Section 1221(a) of the EPAct give FERC the authority to grant the right of eminent domain to acquire energy ROWs on tribal lands."

Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study Report, § 2.2.2. As a remedy to this perceived issue, the agencies recommended that Congress "[a]uthorize condemnation of tribal lands for public necessity on a case-by-case basis," and noted that if Congress chose to allow condemnation of tribal lands then it would have to clearly express its intent in accordance with federal law. *Id*. at § 7.5. Congress chose not to act and continues to acknowledge tribal sovereignty by not authorizing condemnation proceedings on tribal lands.

II. The Long-Abandoned Policy of Allotting Land Had Disastrous Effects on American Indian Tribes and Tribal Members and Should Not Be Reinforced by This Court.

25 U.S.C. § 357 was enacted in 1901 – at the height of a disastrous period of federal Indian policy known as the Allotment Era. *See* Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton, et al. eds Lexis Nexis 2012) ("Allotment and Assimilation"). This case turns on the question of whether Section 357 should be extended to a category of land that is not covered by its clear language and whether this extension is coupled with an implied waiver of sovereign immunity. Applying Section 357 to interests held by tribes is the wrong reading of the statute. It contravenes the anti-allotment policies adopted by Congress in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 ("On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."); the Claims Resolution Act of 2010, Pub. L. 111-291, § 101, 124 Stat. 3064, 3066-3067 (establishing a fund for the purchase of allotted lands within reservation boundaries to restore them to tribal ownership); and other Congressional statutes and programs.

Congress included that the allotment of tribal lands was a catastrophic mistake, and for many of these lands, can only be reversed by returning fractionated allotments back to the tribes. "The objectives of allotment were

simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). "This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society,' and in part a result of pressure to free new lands for further white settlement." *Hodel v. Irving*, 481 U.S. 704, 706 (1987) (quoting *Solem v. Bartlett*, 465 U.S. 463, 466 (1984)). The General Allotment Act "empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved." *Cty. of Yakima*, 502 U.S. at 254.

"The policy of allotment of Indian lands quickly proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987). "In 1887, when the Dawes Act provided for allotting tribal lands to individual Indians, the American Indian's heritage in land totaled 138 million acres, [and] [l]ess than 50 years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands." Cohen's Handbook of Federal Indian Law § 1.04. "By 1934, approximately 27 million acres, or two-thirds of all the land allotted to tribal members, had passed by sale or involuntary transfer from the Indian fee owner into non-Indian ownership." *Id*. at § 16.03. "The failure of the allotment program became even clearer as successive generations came to hold the allotted lands." *Hodel*, 481 U.S. at 707.

The parcels became highly fractionated, "splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners." *Id*. Section 357 was adopted during the height of this era, when tribes and Indian allottees were losing land at an alarming rate. Applying Section 357 to lands now owned by the tribe would only serve to further purposes that have long since been repudiated. A specific policy embodied in a later federal statute should control construction of an earlier one, even though the earlier statute has not been expressly amended. *United States v. Estate of Romani*, 523 U.S. 517, 530-32 (1998).

"The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act," *Cty. of Yakima*, 502 U.S. at 255, but many allotted lands remain. "Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands . . . [but] [e]xcept by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands." *Id*.

Tribes have slowly been repurchasing and otherwise reacquiring interests in these allotments, such as the allotment interests at issue in this case. Congress has

made several efforts to assist in this effort and prevent further fractionation, and *amici* continue to work closely with lawmakers and others to encourage further reforms.[3] Most recently, Congress has set up a $1.9 billion fund as part of the Cobell Settlement to finance the Land Buy-Back Program for Tribal Nations, which purchases fractional interests from willing sellers to return the interests to the tribes. Claims Resolution Act of 2010, Pub. L. 111-291, 124 Stat. 3064, 3066-3067. "The Program has paid landowners nearly $715 million since its inception, has created or increased tribal ownership in more than 26,400 tracts of land – with more than 1,060 of those tracts reaching 100 percent tribal trust ownership." Bureau of Indian Affairs, Tribal Nations Land Buy-Back Program 2015 Status Report (2015) at 1, available at https://www.doi.gov/sites/doi.gov/files /uploads/Buy-Back_Program_2015_Status_Report.pdf.[4]

The U.S. Department of the Interior developed an Implementation Plan for the *Cobell* Land Buy-Back Program. The Implementation Plan identifies the

[3] *See, e.g.*, *The American Indian Probate Reform Act: Empowering Indian Land Owners: Hearing Before United States Senate Committee on Indian Affairs*, S. HRG. 112–431 (2011) (Statement of David Gipp, Vice President, Great Plains Region, NCAI), available at https://www.gpo.gov/fdsys/pkg/CHRG-112shrg72762/pdf/CHRG-112shrg72762.pdf.

[4] The Cobell Land Buy-Back Program has been fully implemented on the Umatilla Indian Reservation, resulting in the purchase of individual Indian owned undivided interests in 547 allotments for 10,172 "equivalent acres" at a cost of $12,329,337. Title in these undivided interests was transferred into tribal trust.

objectives of the *Cobell* Land Buy-Back Program, one of which is directly at issue in this appeal. According to the Implementation Plan:

> Tribal acquisition priorities are vitally important to achieving a foundational goal of the Program, which is to strengthen tribal sovereignty and promote consolidated trust land bases for conservation, stewardship, and beneficial use by sovereign tribal nations.

https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/upload/Updated-Implementation-Plan.pdf at 23. Permitting the condemnation of these recently reacquired tribal trust fractionated interests defeats the policy and purpose of the *Cobell* Settlement and its Land Buy-Back Program.

Furthermore, in the American Indian Probate Reform Act, P.L. 108-374, October 27, 2004, Congress amended the Indian Land Consolidation Act and reaffirmed that tribes have the right to enact Inheritance Codes that determine eligible heirs. CTUIR has enacted, and the Secretary of the Interior has approved, an Inheritance Code that prevents the transfer or devise of allotted trust lands to non-CTUIR members to honor the CTUIR Treaty of 1855's establishment of the Umatilla Indian Reservation for the exclusive use of members of the CTUIR and restore the Reservation land base. It would defeat the purpose of well-established policy to permit these lands, which have been carefully reacquired by tribes, to be subject to condemnation by private interests.

Allowing these reacquired tribal interests to be condemned for "any public purpose," 25 U.S.C. § 357, disregards the legal effect of tribal acquisition, forecloses the ongoing consolidation process, and further complicates the patchwork of ownership and jurisdiction on checkerboard reservations.[5] These condemnation actions only serve to transfer more tribal lands, and interests in land, into non-Indian hands just as the tribes are beginning to reclaim them. A consensual easement, by contrast, properly respects and reflects the tribe's interests both as a landowner and as a sovereign government. Allotted lands held (in full or in part) by a tribe, within the boundaries of its reservation, should not be subject to the eminent domain powers of a utility company. The practice of taking tribal lands and handing them out has been rightly abandoned, and it will do PNM and other utility companies no harm to be required to work with tribal governments and to obtain their consent while building and maintaining utilities on the reservation.

III. Rights of Way Are Interests in Real Property That Are Important to Tribal Governments and Economies, Their Relationships with State Governments, and Their Sovereign Interests in Governing Their Lands.

An easement is an interest in real property, *Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclamation*, 599 F.3d 1165, 1182 (10th Cir. 2010), and often a very important one on Indian reservations. Amici Tribes, like

[5]Although this case deals with a utility line, there is nothing in the statute that would prevent the condemnation of larger parcels for "any public purpose." *See* 25 U.S.C. § 357. Such public purposes might include "redevelopment." *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

most tribes, use their authority to grant or refuse easements not only to obtain fair market value for the easements, but also to protect fundamentally governmental interests: to ensure that easement holders obey tribal laws regarding environmental protection and employment; that easement holders do not unnecessarily disturb sacred sites and ancestral graves; and that they properly maintain their easements.

For example, rather than requesting an upfront payment based on the market value of the property, Ute Mountain has a policy of conditioning grants of rights of way for roads on arrangements for the proper maintenance of those roads. The Ute Mountain-CDOT Road Maintenance Agreement was negotiated between Ute Mountain and the Colorado Department of Transportation to delineate road construction and maintenance issues on state highway right of ways on the Ute Mountain Ute Indian Reservation. The mutual understanding was established through consultations and the recognition of both sovereigns' interests in maintaining these easements. Likewise, Laguna and the State of New Mexico have amended and restated existing New Mexico Department of Transportation rights of way on Laguna lands to protect Laguna's jurisdiction and authority.

CTUIR has successfully negotiated or renewed rights of way agreements with governmental agencies, private utilities, and energy pipeline companies in recent years. Located in a geographically concentrated corridor, these rights of way impact a wide spectrum of tribal governance and sovereign interests. In each

of these cases, these agreements were reached consensually pursuant to the regulations at 25 C.F.R. Part 169. The rights of way included allotted trust lands owned by individual Indians as well as wholly owned tribal trust parcels and allotments with undivided tribal trust interests. These agreements permit CTUIR to address issues such as the retention of tribal jurisdiction over the rights of way, cultural resource concerns, and emergency response obligations, in addition to fair compensation.

The protection of tribal lands from condemnation for utility rights-of-way properly preserves sovereign tribal prerogatives. Because the jurisdiction of tribes over non-Indians can be complex and subject to dispute, *see e.g.*, *Montana v. United States*, 450 U.S. 544 (1981), a negotiated easement is often the best or only mechanism for the tribe to protect its sovereign interests. Furthermore, without the power to negotiate terms for the grant of an easement, a tribe can easily lose all authority over non-Indians that access those easements or, at the very least, find themselves embroiled in years of litigation over jurisdictional issues. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

For example, the New Mexico General Assembly made findings that "due to the United States supreme court decision in *Strate v. A-1 Contractors*, there is uncertainty in the allocation of jurisdiction between the state and a tribe within rights of way granted to the state by a tribe, and all future road projects through

tribal land are put in jeopardy of being postponed, delayed or left unresolved." Rights of Way Agreements with Navajo Nation, N.M.S. § 11-17-1(A). To resolve this problem, New Mexico found that it "has traditionally negotiated right-of-way agreements for either a definite term or for the life of the highway," N.M.S. § 11-17-1(C), and required all "agencies of the state that are involved in constructing highways, providing law enforcement or providing emergency services along the state highways that cross over Navajo Nation" to initiate negotiations to promote coordination of law enforcement and to delineate jurisdictional boundaries. N.M.S.A. § 11-17-2. Requiring the utility company to comply with tribal law is a standard provision that *amici* tribes include in their agreements.

Sovereign-to-Sovereign relationships between tribes and surrounding counties and states should not be subject to disturbance by private actors. Just as private companies are not generally permitted to condemn interests in land held by states, *see Town of Parker v. Colorado Div. of Parks & Outdoor Recreation*, 860 P.2d 584, 587-89 (Colo. App. 1993), they should not be allowed to condemn interests held by tribes. Allowing eminent domain to condemn government land "impose[s] an undue burden on the state's resources and lands," *id*. at 588. This is also true with tribes. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton). "This is the general sense, and the general

practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." *Id*.

Finally, the fact that a condemnation action is *in rem* should make no difference here. Certainly, the United States does not recognize any such distinction when its own interests are at stake. *State of Minnesota v. United States*, 305 U.S. 382, 386 (1939). Nor do states customarily allow private companies to condemn their own lands. *See, e.g.*, *Town of Parker*, 860 P.2d at 587-89. The New Mexico Supreme Court has recently rejected the distinction altogether when considering a declaratory judgment action concerning fee land owned by a tribe: "in the context of tribal sovereign immunity there exists no meaningful distinction between in rem and in personam claims." *Hamaatsa, Inc. v. Pueblo of San Felipe*, No. S-1-SC-34287, 2016 WL 3382082, at *7 (N.M. June 16, 2016).

The Nation's interest in this litigation is not merely based upon the Nation's ownership interest in the property. The United States' stance makes the same mistake as PNM by failing to acknowledge the principal crux of the Nation's assertions: that allowing a condemnation proceeding to move forward in its absence would be an affront on the Nation's sovereignty. The United States claims that it is the true indispensable defendant in this action and that it alone "will ensure that the compensation is distributed to the beneficial owners even if they do not participate in the proceedings." Response Brief of the United States' at 47.

This suggestion ignores other prejudices that will occur if the action proceeds in the Nation's absence; primarily, that proceeding without the Nation will prevent it from protecting our governmental interests. *See Tick v. Cohen*, 787 F.2d 1490, 1495 (11th Cir. 1986) (Rule 19(b) factors weighed in favor of dismissal because trust beneficiaries' interests will be affected by judgment in their absence); *see also Mudarri v. State*, 196 P.3d 153, 163 (2008), *as corrected* (Jan. 21, 2009) (Tribe was indispensable party under Rule 19(b) due to the nature of plaintiffs' case against Tribe's trust land); and *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (affirming lower court's decision that Tribe was indispensable party because the action could deplete the Tribe's land interests and "the United States could not properly represent the interests of the [Tribe]").

CONCLUSION

This Court should affirm the District Court.

Respectfully submitted,

s/ *Jennifer H. Weddle*

Jennifer H. Weddle
Troy A. Eid
Harriet McConnell
Laura E. Jones
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6500
Counsel for Amicus Curiae Ute Mountain Ute Tribe

John Dossett
National Congress of American Indians
Embassy of Tribal Nations
1516 P Street NW
Washington, DC 20005
(202) 466-7767
Counsel for National Congress of American Indians

Dan Rey-Bear
Rey-Bear McLaughlin, LLP
421 W. Riverside Ave., Suite 1004
Spokane, WA 99201
(509) 747-2502
Counsel for Pueblo of Laguna

Naomi Stacy
Dan Hester
Confederated Tribes of the Umatilla Indian Reservation
4611 Timine Way
Pendleton, OR 97801
(541) 429-7400
Counsel for Amicus Confederated Tribes of the Umatilla Indian Reservation

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief complies with the type-volume limitation. The brief is proportionately spaced, in 14-point, Times New Roman font in accordance with Fed. R. App. P. 32(a)(5). The brief contains 4,967 words, excluding sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the count, and it is MS Word 2010.

In accordance with Fed. R. App. P. 29, all parties have consented to the filing of this Amicus brief. No party's counsel has authored the brief in whole or in part. No party's counsel has contributed money that was intended to fund preparing or submitting the brief.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ *Jennifer H. Weddle*

Jennifer H. Weddle
Counsel of Record for *Amici Curiae*

Dated: October 10, 2016

ADDITIONAL CERTIFICATION

The undersigned hereby certifies the following:

1. All required privacy redactions have been made.

2. The hard copies of the foregoing brief to be submitted to the clerk's office are exact copies of this ECF filing.

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s/ *Jennifer H. Weddle*

Jennifer H. Weddle
Counsel of Record for *Amici Curiae*

Dated: October 10, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of October 2016, the foregoing BRIEF OF AMICI CURIAE THE NATIONAL CONGRESS OF AMERICAN INDIANS, PUEBLO OF LAGUNA, THE UTE MOUNTAIN UTE TRIBE, AND THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF DEFENDANTS AND AFFIRMANCE OF THE DISTRICT COURT was served on the following in the manner indicated:

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Elisabeth A. Shumaker, Clerk
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, Colorado 80257

Electronic service:

Kirk R Allen
Miller Stratvert
500 Marquette NW, Suite 1100
Albuquerque, NM 87102
Email: kallen@mstlaw.com

Jeffrey Steven Beelaert
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 7415
L'Enfant Plaza Station
Washington, DC 20044
Email: Jeffrey.Beelaert@usdoj.gov

Deana M. Bennett
Modrall Sperling Roehl Harris & Sisk
500 Fourth Street, NW, Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168
Email: deanab@modrall.com

Zackeree S. Kelin
Davis Kelin Law Firm
111 Tulane Dr. SE
Albuquerque, NM 87106
Email: zkelin@daviskelin.com

Emil John Kiehne
Modrall Sperling Roehl Harris & Sisk
500 Fourth Street, NW, Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168

Manuel Lucero
Office of the United States Attorney
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

Email: ekiehne@modrall.com

Email: manny.lucero@usdoj.gov

Michael M. Mulder
Law Office of Michael M. Mulder
1603 Orrington Avenue, Suite 600
Evanston, IL 60201
Email: mmmulder@mmulderlaw.com

Clinton D. Russell
Taylor Foster Mallett Downs Ramsey & Russell
400 West Fourth Street
P.O. Box 309
Claremore, OK 74018
Email: crussell@soonerlaw.com

Lynn H. Slade
Modrall Sperling Roehl Harris & Sisk
500 Fourth Street, NW, Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168
Email: Lynn.Slade@Modrall.com

Mary Gabrielle Sprague
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 7415
L'Enfant Plaza Station
Washington, DC 20044
Email: mary.gay.sprague@usdoj.gov

Paul Spruhan
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515
Email: pspruhan@nndoj.org

Stephen B. Waller
Miller Stratvert
1100
500 Marquette NW, Suite 1100
Albuquerque, NM 87102
Email: swaller@mstlaw.com

By U.S. Mail:

James C. Kilbourne
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795
Email: jim.kilbourne@usdoj.gov

William B. Lazarus
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795
Email: william.lazarus@usdoj.gov

Thomas Meites
Law Office of Thomas R. Meites
321 South Plymouth Couort, Suite 1250
Chicago, IL 60604

Stratton Taylor
Taylor Foster Mallett Downs Ramsey & Russell
400 West Fourth Street

Email: tmeites@ameritech.net

P.O. Box 309
Claremore, OK 74018
Email: staylor@soonerlaw.com

Linda C. Williams
P.O. Box 835
Church Rock, NM 87311-0835

s/ *Jennifer H. Weddle*