CASE NO. 16-2050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO,	)
Plaintiff – Appellant,	)
v.	)
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

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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Oral Argument is requested.

NATIVE PDF FORMAT ATTACHMENTS ARE INCLUDED

June 27, 2016

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Plaintiff – Appellant Public Service Company of New Mexico ("PNM") furnishes these statements in compliance with Fed. R. App. P. 26.1:

PNM Resources, Inc. is the sole parent corporation of PNM.

PNM Resources, Inc. owns ten percent or more of the stock of PNM.

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ATTACHMENTS

PNM v. 15.49 Acres of Land, 1:15-cv-00501-JAP-CG,
Memorandum Opinion and Order Granting Motion to Dismiss the Navajo Nation and Allotment Numbers 1160 and 1392, filed December 1, 2015 [Doc. 101]

PNM v. 15.49 Acres of Land, 1:15-cv-00501-JAP-CG,
Order of Dismissal Without Prejudice, filed December 1, 2015 [Doc. 102]

PNM v. 15.49 Acres of Land, 1:15-cv-00501-JAP-CG,
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TABLE OF AUTHORITIES

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PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

On June 13, 2015, PNM filed its Complaint for Condemnation ("Complaint") in the United States District Court for the District of New Mexico in Case No. 1:15-cv-00501 ("Condemnation Action"), seeking to condemn easements on five non-contiguous parcels of individually-owned Indian land, known as allotments. Aplt. App. at 16-41. The District Court had jurisdiction over the Condemnation Action under 25 U.S.C. § 357, which authorizes state-law condemnation actions against allotments.

On September 4, 2015, Defendant Navajo Nation ("Nation") filed its motion to dismiss the Condemnation Action as to two allotments. Aplt. App. at 76-84. Twenty-two individual defendants (collectively, the "Barboan Parties") joined the Nation's motion. Aplt. App. at 85-86. On December 1, 2015, the District Court entered its Memorandum Opinion and Order [Doc. 101] and accompanying Order of Dismissal Without Prejudice [Doc. 102] (collectively, "December 1 Decision") granting the motion to dismiss. Aplt. App. at 124-155, 156-158.

PNM subsequently moved for alteration or amendment of the December 1 Decision. Aplt. App. at 162-203. On March 2, 2016, the District Court entered its Order [Doc. 127] denying PNM's request to alter or amend the December 1 Decision, but certifying four questions for interlocutory appeal under 28 U.S.C. § 1292. Aplt. App. at 292-326.

On March 15, 2016, PNM timely filed its Petition for Permission to Appeal. On March 31, 2016, in Case No. 16-700, this Court entered its Order granting PNM's Petition for Permission to Appeal. This Court's appellate jurisdiction derives from 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES

The following are the four questions that the District Court certified for interlocutory appeal in its Order entered on March 2, 2016 (*see* Aplt. App. at 324):

Question I: Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the parcel?

Question II: Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?

Question III: Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?

Question IV: If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in, a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

STATEMENT OF THE CASE

On June 13, 2015, PNM filed the Complaint seeking to condemn easements on the five allotments. The Complaint seeks fifty-foot-wide easements beneath a PNM-owned electric transmission line that has been in operation since the 1960s. The total area of the easements sought by the Complaint is approximately 15.49 acres.

For this interlocutory appeal, the parties agree that (a) the allotments are all within the exterior boundaries of McKinley County, New Mexico; (b) the allotments are also within the exterior boundaries of the Navajo Nation; and (c) the Nation holds fractional interests in two allotments, numbered 1160 and 1392 ("Two Allotments"). Aside from the undisputed facts establishing the District Court's jurisdiction over the Two Allotments and the Nation's interest in the Two Allotments, there are no facts specific to the physical characteristics of the Two Allotments that bear on this interlocutory appeal. Instead, the four questions certified by the District Court are questions of law applicable to allotments in general.

The December 1 Decision held that (a) 25 U.S.C. § 357 ("Section 357") does not authorize condemnation of any allotment in which an Indian tribe has acquired a fractional beneficial interest (*see* Aplt. App. at 138, 140, 143-145, 147-148), and (b) even if Section 357 authorized such a condemnation action, the Condemnation Action against the Two Allotments must still be dismissed under Fed. R. Civ. P. 19 because the Nation is a required party that cannot be joined due to its sovereign immunity, and the Condemnation Action cannot proceed absent the Nation (*see* Aplt. App. at 148-155).

On March 2, 2016, the District Court entered its Order (Aplt. App. at 292-326) denying PNM's request to alter or amend the December 1 Decision, but certifying the questions (Aplt. App. at 324) for interlocutory appeal under 28 U.S.C. 1292. Question I addresses whether Section 357 authorizes condemnation of an allotment in which an Indian tribe acquires a fractional beneficial interest, while Questions II, III, and IV address the three steps of a Rule 19 analysis.

SUMMARY OF ARGUMENT

Section 357 authorizes a condemnation action against an allotment in which an Indian tribe owns a fractional interest. Since its enactment in 1901, Section 357 has authorized the condemnation of "lands allotted in severalty to Indians"—a term of art that means allotments. The Nation's acquisition of fractional interests did not convert the Two Allotments into any other recognized form of Indian land and

the Two Allotments remain "lands allotted in severalty to Indians." PNM may therefore condemn the Two Allotments under the authority of Section 357.

Under a Rule 19 analysis, an Indian tribe that holds a fractional interest in an allotment is not a required or indispensable party to a Section 357 condemnation action. There are multiple, independent reasons why an Indian tribe's ownership of fractional interests in allotments does not bar a Section 357 condemnation action from proceeding even in the tribe's absence. First, given the inherent *in rem* nature of a Section 357 condemnation action, an Indian tribe or any other holder of fractional interests is not a required party to such action. Second, if an Indian tribe might claim sovereign immunity against such action, any such sovereign immunity has been waived or abrogated by Congress or inherently waived by the Indian tribe itself—or such sovereign immunity is not implicated by a Section 357 condemnation action, which again is an *in rem* action only. Third, even if such an Indian tribe is a required party immune from a Section 357 condemnation action, policy considerations merit a finding that a Section 357 condemnation action may proceed even absent such Indian tribe.

BACKGROUND REGARDING ALLOTMENT LAW AND THE CONDEMNATION ACTION

Allotments, which are also referred to as 'land allotted in severalty to Indians' or 'allotted lands,' are the result of a "century-old allotment policy" that began with the 1887 enactment of the Indian General Allotment Act (also known as the Dawes Act) and ended in 1934. *See Babbitt v. Youpee*, 519 U.S. 234, 237-38 (1997) (summarizing history); *Hodel v. Irving*, 481 U.S. 704, 706-07 (1987) (same); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2][b]-[c] (Nell Jessup Newton ed., 2012) ("COHEN'S HANDBOOK"). The United States owns each allotment in trust for the benefit of the owners of fractional beneficial interests ("fractional interests" or "beneficial interests").

In the Act of March 3, 1901, Congress enacted Section 357, which reads in its entirety: "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." Congress has never amended Section 357.

In the Act of February 5, 1948 (the "1948 Act"), Congress authorized the Secretary of the Interior ("Secretary") to grant consensual rights-of-way. The 1948 Act, codified as 25 U.S.C. §§ 323-328 ("Sections 323-328"), applies to allotments and Indian reservations. Section 328 expressly provides that the Secretary may prescribe regulations to administer Sections 323-328. *See* 25 U.S.C. § 328. Such

regulations of the Bureau of Indian Affairs ("BIA"), as amended effective April 21, 2016, are set forth in 25 C.F.R. §§ 169.1 to 169.415 ("Part 169 Regulations"). *See* 25 C.F.R. § 169.6 (2016) (referencing Sections 323-328 as statutory authority).

This Court has held that Sections 323-328 and Section 357 provide alternative procedures under which a state-authorized condemnor may obtain a right of way on an allotment. *See Yellowfish v. City of Stillwater*, 691 F.2d 926, 930-31 (10th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). *Yellowfish* rejected the argument that the 1948 Act constituted an implied partial repeal of Section 357. *See id.*

The United States Supreme Court has explained that allotment policy, coupled with passing time and generations, led to the increasing "fractionation" of individual Indian interests in allotted lands. The Court described a single 40-acre allotment with 439 fractional-interest owners and noted that many such fractional interests "generate only pennies a year in rent." *See Hodel*, 481 U.S. at 712-713. To ameliorate these issues, Congress enacted the Indian Land Consolidation Act, P.L. 97-459, 96 Stat. 2515 ("ILCA") on January 12, 1983. The ILCA, which as amended is codified as 25 U.S.C. §§ 2201–2221, created mechanisms by which a tribe could acquire fractional interests through fair-market purchases, limitations on devise or descent of fractional interests to non-members of the tribe, and escheat (to the tribe) of certain fractional interests. *See* 25 U.S.C. §§ 2204-2206.

Congress amended the ILCA in 2000 to authorize the Secretary of the Interior to purchase fractional interests in allotted lands and hold such interests in trust for the tribal government with jurisdiction over the allotted lands. *See* 25 U.S.C. §§ 2212(a)(1), -(a)(3), and -(d) (appropriating hundreds of millions of dollars to purchase fractional interests). The ILCA specifies that a tribe "receiving a fractional interest" under Section 2212 of the ILCA is a "tenant in common with the other owners" of such lands. *See* 25 U.S.C. § 2213(a).

In April 1960, PNM obtained a 50-year right-of-way ("ROW") from the BIA to construct, operate, and maintain a 115-kilovolt electric transmission line (the "AY Line") that is approximately sixty miles long and crosses 57 allotments. Aplt. App. at 25, ¶¶ 27-28.

On November 3, 2009, and in anticipation of the approaching expiration of the original 50-year ROW, PNM applied for a 20-year ROW renewal under Sections 323-328 and the Part 169 Regulations. Aplt. App. at 26, ¶¶ 32-33. PNM's application included documentation of consent from the requisite percentage of the interest-holders for each of the allotments including the Two Allotments. However, subsequent to the submission of PNM's application, the Barboan Parties revoked their previously-granted consent. The Barboan Parties collectively hold 50% or more of the fractional interests in five allotments, so their revocation and continued withholding of consent precluded the BIA from

approving PNM's application on those five allotments. Aplt. App. at 26, ¶¶ 34-35.

For the three allotments numbered 1204, 1340, and 1877, BIA records indicate that all of the fractional interests are held by individual Indians. However, for the Two Allotments, the records indicate that (a) the Nation holds an undivided 13.6% fractional interest in Allotment 1160, (b) the Nation holds an undivided 0.14% fractional interest in Allotment 1392, and (c) all remaining fractional interests in the Two Allotments are held by individual Indians.

Under Section 357 and applicable New Mexico eminent domain law, PNM filed the Complaint seeking a perpetual fifty-foot-wide easement through and on the five allotments for the construction, operation and maintenance of the AY Line and related facilities. Under Fed. R. Civ. P. 71.1(c)(3), the Complaint named as defendants all individuals and entities (including the Nation) whom BIA records identified as holders of fractional interests or other interests of record relating to the five allotments.

STANDARD OF REVIEW

This interlocutory appeal turns on questions of statutory interpretation. This Court conducts *de novo* review over the District Court's statutory interpretation. *United States v. Martinez*, 812 F.3d 1200, 1202 (10th Cir. 2015).

ARGUMENT

I. [Question I] 25 U.S.C. § 357 authorizes a condemnation action against an allotment irrespective of whether an Indian tribe holds a fractional beneficial interest in such allotment.

Congress enacted Section 357 on March 3, 1901, and has never amended that statute. Section 357 states:

> 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.

For more than a century, the plain meaning of Section 357 has been that if a particular parcel is allotted land, that parcel may be condemned regardless of which persons or entities own fractional interests in such parcel. *See United States v. Clarke*, 445 U.S. 253, 254 (1980) (applying the "admittedly old-fashioned but nonetheless still entirely appropriate 'plain meaning' canon of statutory construction" to interpret Section 357); *S. California Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (noting that "[w]ith 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" and that "Congress placed Indian allottees in the same position as any other private landowner vis-a-vis condemnation actions").

Therefore, PNM may condemn the Two Allotments under Section 357 notwithstanding the Nation's fractional interests in the Two Allotments.

A. The Two Allotments remain "land allotted in severalty to Indians" as a matter of law and are within Section 357's condemnation authority.

The term "lands allotted in severalty to Indians" has been synonymous with the term "allotment" for nearly 130 years. As the United States Supreme Court explained in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992), Congress enacted "the Indian General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388, . . .which empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved." The formal name of the Dawes Act was "An act to provide for the *allotment of lands in severalty to Indians* . . . ." *See* Aplt. App. at 191-194, copy of Dawes Act (emphasis added); *see also* Aplt. App. at 197-198 (Public Law 61-313, enacted in 1910, referencing the full name of Dawes Act and again referring to such lands as "allotments").

Both before and after Section 357 was enacted in 1901, Congress did not contemplate—and did not then have reason to contemplate—that allotted lands or any fractional beneficial interests would ever be transferred to the very tribe from whose reservation the lands had been removed by allotment. *See, e.g.*, 25 U.S.C. § 349 (enacted in 1887, amended in 1906, and providing for State or Territory laws to apply to allottees "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee"). Congress's use of the term "lands

allotted in severalty to Indians" in its 1901 enactment of 25 U.S.C. § 357 was in substance a general reference to allotted lands—using a term found in the Dawes Act itself—rather than any attempt to distinguish between allotments in which the beneficial interests were held entirely by individual Indians and the then-unforeseen possibility of allotments in which a tribe itself acquired beneficial interests.

In addition, the "allotment" of each of the Two Allotments was a one-time historical event that permanently changed the legal nature of these parcels from a common-holding of reservation land (held by the United States in trust for a tribe itself) to lands owned by the United States in trust for the benefit of the holders of fractional beneficial interests. There was no allotment of Indian land after 1934, but rather "interests in lands *already allotted* continued to splinter with each generation." *See Babbit*, 519 U.S. at 238; *Hodel*, 481 U.S. at 708 (noting that 1934 brought "the end of future allotment"); *see also* COHEN'S HANDBOOK at § 16.03[2][c] (noting that 25 U.S.C. § 462, enacted in 1934, provided that "[A]llotments then held in trust would continue in trust until Congress provided otherwise"). While the current beneficial owners of the Two Allotments are sometimes referred to as "allottees," as a matter of law they are only holders of fractions of the beneficial interests transferred to the original "allottee" or "allottees" prior to 1934. *See Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153

(10th Cir. 1977) (holding that Section 357 authorizes condemnation of both "the interests of original allottees" and "the interest of heirs of allottees"). Put another way, no interest in the Two Allotments was ever "allotted" to the Nation, nor could any such interest ever be "allotted" to the Nation under the ILCA or otherwise. Instead, these parcels were originally created as allotments, and they remain allotments irrespective of the division of beneficial interests and the Nation's eventual acquisition of a fraction of those beneficial interests.

While the District Court held that the Two Allotments are now "tribal land" and immune from condemnation (*see* Aplt. App. at 148), the District Court did not explain what the term "tribal land" means or why any such label would contravene the continued treatment of the Two Allotments as "allotments." The District Court also identified no recognized legal classification or categorization that the Two Allotments could possess (other than "allotments") while there remains continued beneficial-interest ownership by individual Indians. Both the Nation and the United States have admitted that the parcels are "allotments"—*see* Aplt. App. at 43, ¶ 1; *id.* at 47, ¶¶ 8, 16—and no party to this matter has ever contended that the Two Allotments are now "tribal trust land" or "reservation land" that is held in trust by the United States entirely for the benefit of the Nation itself. The definitions of "tribal trust land" and "allotted land" are established in case law, but there is no recognized legal mechanism by which any particular allotment could be

some percentage allotted land and some percentage "tribal land" (or "tribal trust land").

There is no recognized legal classification for the Two Allotments other than their continuing character as "allotments," which are also known in Indian law as "lands allotted in severalty to Indians." The Two Allotments therefore remain subject to Section 357's condemnation authority.

B. BIA's Part 169 Regulations provide no valid basis for a finding that Section 357 does not authorize condemnation of the Two Allotments.

In 1982, this Court recognized that Sections 323-328 and Section 357 provide independent, alternative methods for a state-authorized condemnor to obtain a right of way over allotted lands. This Court also recognized that Section 357 had not been impliedly repealed by the enactment of Sections 323-328. *See Yellowfish*, 691 F.2d at 930-31. Later that year, the Ninth Circuit reached the same conclusion. *See S. California Edison*, 685 F.2d at 357 (rejecting the argument that Sections 323-328 are the exclusive means for obtaining a right-of-way across allotted lands, and holding that Section 357 "is an alternative method for the acquisition of an easement across allotted Indian land").

Because Section 357 and Sections 323-328 are independent, alternative statutory authorities under which a state-authorized condemnor may obtain a right-of-way across allotted lands, the Part 169 Regulations promulgated under the

authority of Sections 323-328 do not affect the interpretation of Section 357. Unlike Sections 323-328 and their express delegation of authority to the Department of the Interior (*see* 25 U.S.C. § 328), Section 357 has delegated no authority to any federal agency. Congress simply never granted the Department of the Interior, the BIA, or any other agency any authority at all to interpret Section 357 and its scope.

Not only is there a lack of any expressly-delegated authority regarding Section 357, but Congress's express delegation of authority under Sections 323-328 also cannot be construed to provide any delegated authority relating to Section 357. *See Michigan v. E.P.A.*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) ("Agency authority may not be lightly presumed."); *Texas v. United States*, 497 F.3d 491, 503 (5th Cir. 2007) ("It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio*."). The Part 169 Regulations simply do not affect the interpretation of Section 357. *See WBI Energy Transmission, Inc. v. Easement & Right-of-Way Across in Big Horn & Yellowstone Ctys.*, No. CV 14-130-BLG-SPW, 2015 WL 4216841, at *4 (D. Mont. July 10, 2015) (analyzing whether a condemned easement is perpetual or limited to the 20-year period in the Part 169 Regulations, and finding that "condemnation provides an alternative method to acquire the easement" and therefore the condemnor "is not confined by the

perimeters of" 25 U.S.C. § 323).

Even if this Court were to consider examining the text of the Part 169 Regulations to aid interpretation of Section 357, such examination of the currently-effective Part 169 Regulations and accompanying BIA statements would only further support PNM's position.

First, the BIA has stated that the Part 169 Regulations do not interpret Section 357. In its recent Response to a commenter requesting a definition for "eminent domain," the BIA stated: "The final rule does not include the term 'eminent domain' or address eminent domain, so this definition was not added. Statutory authority exists in 25 U.S.C. 357 for condemnation under certain circumstances, but *these regulations do not address or implement that authority*." *See* Rights-of-Way on Indian Land; Final Rule, 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015) (emphasis added). *See also id.* at 72,517 (noting the "[t]he current [pre-2016] rule does not provide guidance for condemnation of Indian land. The statutory provisions at 25 U.S.C. 357 govern this process.")

Second, the terms "tribal land" and "individually owned land" are not mutually exclusive as used in the Part 169 Regulations. In response to a commenter who "asked whether a tract in which both a tribe and an individual own interests would be considered 'individually owned Indian land' or 'tribal land,'" the BIA stated: "A tract in which both a tribe and an individual own interests

would be *considered 'tribal land' for the purposes of requirements applicable to tribal land* and would be *considered 'individually owned Indian land' for the purposes of the interests owned by individuals*.'" *See* 80 Fed. Reg. at 72,496 (emphasis added). Stated differently, the Part 169 Regulations use the term "tribal land" only to determine which BIA right-of-way application and approval *procedures* apply to a particular parcel for which a voluntary easement is sought under Sections 323-328. Even under the Part 169 Regulations as recently amended, a tribe's fractional beneficial interest in a particular allotment may trigger the applicability of certain "tribal land" procedural requirements specific to voluntary easements but that does not mean that the land ceases to be "individually owned Indian land" as that term is defined and used in the Part 169 Regulations. Instead, if an allotment has individual Indian owners at first, but a tribe acquires some fractional beneficial interest, then the Part 169 Regulations impose certain additional requirements specific to voluntary easements but do not modify the legal classification of the land as an allotment. The Part 169 Regulations, including the defined term "tribal land," provide no basis for a holding that the Two Allotments are no longer "land allotted in severalty to Indians" under Section 357.

The pre-amendment version of the Part 169 Regulations (repealed effective April 21, 2016) also does not contradict PNM's position. 25 C.F.R. § 169.1 (2015) expressly states that the Part 169 Regulations' defined terms, including "tribal

land," are only "[a]s used in this Part 169[.]" Neither Sections 323-328 nor the pre-amendment Part 169 Regulations mention Section 357 or condemnation, other than referencing a 1902 condemnation statute specific to railroads (*see* 25 C.F.R. § 169.24(c) (2015)) and requiring that BIA officials promptly report pending condemnation actions "so that action may be taken to safeguard the interests of the Indians" (*see* 25 C.F.R. § 169.21 (2015)).

Given the BIA's own recent, express statement that the Part 169 Regulations "do[] not provide guidance for condemnation of Indian land," this Court should find that the Part 169 Regulations (both old and new) specifically implementing Sections 323-328 do not affect the interpretation of the "independent alternative" statutory authority of Section 357.

C. The Eighth Circuit's holding in Part II of *Nebraska Public Power*, which relied on the Part 169 Regulations, provides no valid basis for a finding that Section 357 does not authorize condemnation of the Two Allotments.

In the briefing on the Nation's motion to dismiss, and in the District Court's own orders regarding that motion, the parties and the District Court identified only one prior decision involving a Section 357 condemnation action against an allotment in which an Indian tribe held a fractional beneficial interest. In that decision, *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County, Hiram Grant*, 719 F.2d 956 (8th Cir. 1983) ("*NPPD*"), the Eighth Circuit addressed two questions.

The first question in *NPPD* was whether Section 357 had been impliedly repealed by the 1948 Act. Following the then-recent decisions by this Court in *Yellowfish* and the Ninth Circuit in *Southern California Edison*, Part I of *NPPD* correctly concluded there was no such implied repeal. *See NPPD*, 719 F.2d at 961 (stating that "[w]e agree with the other circuits that have considered the issue that section 357 and the 1948 Act [Sections 323-328] can be reconciled" and that "Section 357 authorizes the condemnation of land while the 1948 Act provides for the granting of consent for rights-of-way").

The second question in *NPPD* concerned the situation where before the condemnation action was filed, "several individual Indians deeded fractional undivided interests in certain of the tracts of land to the United States, in trust for the tribe, reserving life estates in the lands." *See id.* In Part II of *NPPD*, the Eighth Circuit looked to the definition of "tribal land" in the then-effective version of 25 C.F.R. 169.1(d) and reasoned that "[i]f the deeded land is now considered tribal land, as opposed to allotted land, it cannot be condemned pursuant to 25 U.S.C. § 357." *See id.* at 961-62; *id.* at 962 (stating that "[w]e believe *this regulation* makes clear that it is the fact of tribal ownership which establishes the existence of tribal land" (emphasis added)).

The holding of *NPPD* Part II was incorrect. First, it was incorrect for the Eighth Circuit to look to the Part 169 Regulations when interpreting Section 357,

as Congress delegated no express or implied authority for BIA or any other agency to interpret Section 357 by regulations or otherwise. Second, the Eighth Circuit's apparent perception of "tribal land" and "allotted land" as mutually exclusive terms is contradicted by the BIA's own recently-published commentary.

The Eighth Circuit's *NPPD* decision does not mention the ILCA, and it appears the appellate briefing in *NPPD* was completed prior to or shortly after the January 1983 enactment of the ILCA. Even if this Court finds that *NPPD* Part II was correct at the time of decision, this Court should not construe *NPPD* Part II as precedent or persuasive authority regarding fractional interests acquired by a tribe subsequent to the enactment of the ILCA.

D. Considerations of public policy further support a holding that a Section 357 action may proceed against allotments irrespective of any tribally-owned fractional beneficial interests.

In 1987, the United States Supreme Court recognized "the problem of extreme fractionation of" allotted lands and described one reservation where "[f]orty-acre tracts . . . leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent." *See Hodel*, 481 U.S. at 712. The Court also noted that for one particular allotment, "[t]he smallest heir receives $.01 every 177 years" and "[i]f the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418." *See id.* at 713.

If this Court were to find, as a matter of law, that an allotment cannot be condemned under Section 357 if a tribe owns a fractional beneficial interest in that allotment, it would mean that a tribe's acquisition of a fractional interest with an economic value measured in pennies (or fractions thereof) would wholly bar the use of Section 357 to condemn any portion of the allotment for a public purpose. Such an outcome would run counter to this Court's own observation in *Yellowfish* that "[i]f condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines." *See Yellowfish*, 691 F.2d at 931; *see also Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, ¶ 24, 643 N.W.2d 685, 694-95 (finding, in a state-law condemnation action against non-allotment land, that barring condemnation of parcels owned in part by a tribe "would have far-reaching effects on the eminent domain authority of states and all other political subdivisions" because "Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project").

Not only would that be an absurd and illogical result, but the ramifications of such a holding would be further amplified by the BIA having already commenced efforts to spend $1.9 billion to purchase fractional interests from individual allottees, on a willing-seller basis, so such fractional interests can be

held in trust by the United States for the benefit of Indian tribes. If a tribe's acquisition of any fractional interest, however small, will defeat the authority of Section 357, it would mean that an ever-increasing number of allotments would be exempted from Section 357. The existing patchwork of tribal trust lands, allotted lands, and privately-owned lands in Indian Country would be further complicated by an ever-shifting distinction between allotments that remain subject to Section 357 (because no tribe yet holds a fractional interest) and allotments for which a Section 357 condemnation action is barred by a tribe's fractional interest, however small. As a result, portions of Indian Country would become a 'checkerboard within a checkerboard.'

In such a scenario, the potential for abuse and injustice is extraordinary. An individual beneficial-interest owner opposed to a requested easement could preclude condemnation simply by transferring to an Indian tribe a fractional interest as small as, or even smaller than, the Nation's existing 0.14% (or 1/720th) interest in Allotment 1392. *See Cass County*, 2002 ND 83, ¶ 3, 643 N.W.2d at 688 (describing how a property owner opposed to flood-control dam construction transferred to a tribe, in exchange for $500, the 1.43 acres that a water resource district had sought to acquire for the project). Even if the Indian tribe that holds a fractional interest does not itself oppose a particular easement request, other fractional-interest holders could thwart any condemnation by asserting that the

allotment is "tribal land" that is not subject to condemnation under Section 357.

This Court recognized in *Yellowfish* that "condemnation of rights-of-way on allotted land interspersed with non-Indian land is needed to effectively carry out public purposes such as construction of water pipelines." *See* 691 F.2d at 930. However, if as a matter of law a Section 357 condemnation action cannot be initiated and maintained against any allotment in which a tribe holds a fractional interest (however small), then public utilities and other state-authorized condemnors would be incentivized to avoid constructing, maintaining, or relying upon any long-lasting infrastructure that crosses allotments. Even if an electric utility could obtain a voluntary easement (under Sections 323-328 and the Part 169 Regulations) for a twenty-year period, the utility could have no assurance that another such voluntary easement would be negotiated upon the expiration of that twenty-year period. Rather, if the utility invested substantial funds to construct or maintain facilities (such as electric transmission lines) utilizing that easement, the utility's "stranded" investment in those facilities would only open the door to a tribe refusing to provide consent for easement-renewal unless a significant premium is paid. Likewise, individual beneficial-interest owners (like the Barboan Parties) could act in concert to withhold or revoke consent and deprive the BIA of authority to approve an easement.

A finding that allotments in which a tribe holds any fractional interest are automatically exempt from condemnation would also have the negative effect of discouraging public utilities from even attempting to obtain voluntary easements (under the Part 169 Regulations), because attempts to obtain consent would inform beneficial-interest owners of the location of proposed investments, and one or more such owners could then transfer a small interest to a tribe simply to preclude condemnation. Such exemption of allotments from condemnation would have the practical effect of partially repealing Section 357—but Congress cannot have intended that Section 357 would be rendered moot by ILCA provisions intended to consolidate small fractional interests in allotments.

There is no valid basis for a finding that an Indian tribe's acquisition of a fractional beneficial interest in an allotment somehow converts the allotment to land that is exempt from Section 357's condemnation authority. This Court should find that the Two Allotments may be condemned under the authority of Section 357.

II. [Question II] An Indian tribe that holds a fractional beneficial interest in a parcel of allotted land is not a required party to a condemnation action brought under 25 U.S.C. § 357.

For the first step of the Rule 19 analysis, a person is "necessary" or "required" if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the

subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of that interest. *See N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012), *quoting* Fed. R. Civ. P. 19(a). Under this analysis, the Nation is not a required party because the Nation satisfies none of the prongs of the Rule 19(a) analysis.

It is well-established that condemnation is an *in rem* proceeding against property, rather than against persons or entities. *See United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946) ("Condemnation proceedings are in rem, and compensation is made for the value of the rights which are taken.") (citations omitted). The Fifth Circuit has explained that "[a] condemnation proceeding is an action in rem. It is *not the taking of rights of designated persons*, but the taking of the property itself. When property is condemned, the amount paid for it stands in the place of the property and represents all interests in the property acquired." *Eagle Lake Imp. Co. v. United States*, 160 F.2d 182, 184 (5th Cir. 1947) (emphasis added) (citations omitted). The property to be taken is valued as a whole; the condemnor pays only that single amount, and that amount is then apportioned among the persons claiming an interest in the property taken. *See id.* In the

Condemnation Action, the amount to be paid by PNM for easements on the Two Allotments may be determined by the Court irrespective of whether the Nation or any other interest-holders are participants in the proceeding—and the Nation, as a fractional-interest holder, would still receive a share of that amount in proportion to the Nation's fractional interest.

The Supreme Court of North Dakota analyzed the *in rem* nature of a state-law condemnation proceeding and the potential effects of a tribe's fractional interest in particular real property (albeit not an allotment). In *Cass County*, 2002 ND 83, 643 N.W. 2d 685, a water district sought to condemn a 1.43-acre tract for the construction of a dam to provide flood control. The 1.43-acre tract was part of a larger parcel owned by a non-Indian individual (Shea) who was opposed to the construction of the dam and deeded the 1.43-acre tract to a federally-recognized Indian tribe for $500. *See id.* at ¶ 3. On appeal, the North Dakota Supreme Court noted that "[i]t is well settled that a condemnation action is strictly in rem" and that "[a] proceeding in rem is an action against the property itself, and in personam jurisdiction is not required." *See id.* ¶ 8 (citing cases); *id.* ¶ 20 (noting that "[i]n the words of the United States Supreme Court, the power to condemn 'does not depend upon the consent or suability of the owner'" (quoting *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 482 (1923)); 59 AM. JUR. 2D *Parties* § 1 (2016) (noting that "[i]n an in rem proceeding, there are no parties in the sense of

opposing litigants" (citing *Mathieson v. Hubler*, 1978-NMCA-119, ¶ 29, 92 N.M. 381, 588 P.2d 1056)).

The above-cited case of *State of Georgia v. City of Chattanooga* further supports PNM's position that the Nation's status as a sovereign does not limit PNM's authority under Section 357 to condemn easements on the Two Allotments. The State of Georgia owned certain land in the City of Chattanooga, Tennessee. Georgia opposed the City's attempt to condemn the land in Tennessee court. The United States Supreme Court held that "[t]he proprietary right of the owning state does not restrict or modify the power of eminent domain of the state wherein the land is situated." *See id.*, 284 U.S. at 480. The Court found it unnecessary to decide whether Georgia could be sued in Tennessee state court, because "Georgia has been given notice and has the right voluntarily to appear" and "if it so elects, Georgia has a plain, adequate, and complete remedy in the condemnation proceedings instituted by the city." *See id.* at 483. *State of Georgia* therefore supports PNM's contention that the Nation's sovereign immunity does not make the Nation a required party to a condemnation action affecting the Two Allotments, let alone a party without whom the action cannot proceed. *State of Georgia* also points to a resolution that gives effect to both Section 357 and the Nation's claim of immunity: The Nation may choose whether to voluntarily appear in the

condemnation proceeding—but if the Nation chooses not to appear, then the Section 357 condemnation proceeding will continue in the Nation's absence.

The preceding authorities and analysis confirm that the *in rem* nature of a Section 357 condemnation action makes no Indian tribe a required party to that Section 357 condemnation action. Any absence by the Indian tribe does not preclude complete relief among those already parties, and the disposition of the condemnation action in the Indian tribe's absence will neither impair the tribe's ability to protect that interest nor leave any existing parties subject to a substantial risk of multiple or inconsistent obligations. Whether or not an Indian tribe elects to participate in the proceedings, the conclusion of a Section 357 condemnation action would provide complete relief comprising the District Court's grant of the requested easements to the condemnor, and the condemnor's payment of the entire condemnation award to the United States for further distribution to all beneficial owners of the condemned allotments.

An Indian tribe is not a required party because it satisfies none of the prongs of the Rule 19(a) analysis. If this Court holds that a tribe is not a required party, then the Rule 19 analysis is complete and the Court need not decide whether an Indian tribe has sovereign immunity against such a condemnation action. *See Cassidy v. United States*, 875 F. Supp. 1438, 1445-46 (E.D. Wash. 1994) (denying tribes' motion to dismiss for failure to join indispensable parties because "[h]aving

concluded that the [t]ribes are not 'necessary' parties under Rule 19(a), they cannot be indispensable parties under Rule 19(b)").

III. [Question III] An Indian tribe that holds a fractional beneficial interest in a parcel of allotted land does not have sovereign immunity against a Section 357 condemnation action.

If the Court answers Question II in the affirmative and finds that the Navajo Nation is a required party to PNM's condemnation action against the Two Allotments, the Court should also find that the Nation *can* be joined because it has no sovereign immunity against a Section 357 condemnation action.

A. Congress has abrogated any otherwise-applicable tribal sovereign immunity against a Section 357 condemnation action.

First, the United States Supreme Court held that Section 357 implicitly waived the sovereign immunity of the United States against condemnation of allotted lands in federal court. *See, e.g.*, *State of Minnesota v. United States,* 305 U.S. 382, 388-89 (1939); *Alaska Dep't of Nat. Res. v. United States*, 816 F.3d 580, 586 (9th Cir. 2016) ("By authorizing condemnation actions under § 357, Congress waived the United States' immunity with respect to such claims."). Such implicit waiver or abrogation, which applies to the United States as fee owner and trustee for the beneficial owners, would also extend to the sovereign immunity of any tribe that later became only a *beneficial* owner (not fee owner) through its acquisition of fractional interests in allotted lands.

Second, the continuing lack of any amendment to Section 357 for more than a century also indicates that Congress intended Section 357 to constitute an abrogation of tribal sovereign immunity.

Third, the 2000 amendments to the ILCA describe a tribe as a "tenant in common with the other owners of" allotted lands and include provisions recognizing that if the Secretary of the Interior approves a particular transaction (affecting an allotment in which a tribe holds a fractional interest) but the tribe does not consent to that transaction, then the tribe would "not be treated as being a party to the lease or agreement" and that "[n]othing in this section (or in the lease or agreement) shall be construed to affect the sovereignty of the Indian tribe." *See* 25 U.S.C. §§ 2213(a) and –(c)(2); *see also* 25 U.S.C. § 2218(d)(2)(B). By these provisions, Congress recognized in the ILCA that a tribe's acquisition of a fractional interest in a particular allotment would not give the tribe a veto over the proposed use of that allotment or any influence disproportionate to the tribe's percentage of interest in that allotment. By enacting those ILCA amendments while leaving Section 357 untouched, Congress apparently understood that Section 357 already operated as a waiver or abrogation of tribal sovereign immunity against condemnation of allotted lands, or a tribe's acquisition of fractional interests under the ILCA would constitute the tribe's own waiver of any sovereign immunity against condemnation of allotted lands. *Cf. United States v. Pend*

Oreille Cnty. Pub. Util. Dist. No. 1, No. CIV 80-116 RMB, 1995 WL 17198637, at *6 (E.D. Wash. July 24, 1995) ("The fact that Congress had not amended or repealed section 357 establishes its intent to allow condemnation actions to proceed against allotted lands."), *aff'd*, 135 F.3d 602 (9th Cir. 1998).

Third, this Court explained over seventy years ago that Section 357 is "a special statute applying only to condemnation proceedings" and that "[w]here 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." *Town of Okemah, Okl. v. United States*, 140 F.2d 963, 965 (10th Cir. 1944). Under this analysis, Section 357's special authorization to condemn allotted lands in federal court remains in full force as an exception to any sovereign-immunity claims that might arise because of the enactment of the ILCA and a tribe's acquisition of fractional interests in allotted lands under the ILCA.

B. An Indian tribe that acquires a fractional beneficial interest in an allotment has inherently waived any sovereign immunity against a Section 357 condemnation action.

Even if this Court finds that Congress has not abrogated any otherwise-existing tribal sovereign immunity against condemnation of allotted lands, the Court should find that an Indian tribe that acquires any fractional interest in

allotted lands has inherently waived any otherwise-applicable sovereign immunity against a Section 357 condemnation action.

First, Section 357 has been in effect since 1901 without amendment, and Section 357 was long-established law when the Nation acquired its fractional interests in the Two Allotments. The Nation therefore had constructive notice that (a) allotted lands were subject to condemnation under Section 357 and (b) no statute, regulation, or decision controlling in the Tenth Circuit had ever stated that Section 357 could not be used to condemn allotted lands in which a tribe held a fractional interest. By the Nation's act of acquiring fractional interests in the Two Allotments, the Nation itself waived any otherwise-applicable sovereign immunity against a Section 357 action to condemn such allotted land.

Second, under the ILCA, a tribe's fractional interests in allotments are acquired voluntarily. A tribe therefore impliedly waives its sovereign immunity against a Section 357 condemnation action by electing or agreeing to acquire such fractional interests. *See State of Georgia*, 264 U.S. at 480 ("The terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings.").

Third, when Congress enacted and later amended the ILCA while leaving Section 357 untouched, Congress understood that (a) Section 357 already operated

as a waiver or abrogation of any tribal sovereign immunity against condemnation of allotted lands, or (b) a tribe's acquisition of fractional interests under the ICLA would constitute the tribe's own waiver of any sovereign immunity against condemnation of allotted lands.

C. A Section 357 condemnation action does not implicate the sovereign immunity of an Indian tribe that holds a fractional beneficial interest in an allotment.

Because condemnation is an *in rem* proceeding—an action against property itself, not against the tribe as a sovereign—a Section 357 condemnation action against an allotment does not implicate a tribe's sovereign immunity. *See Cass County*, 2002 ND 83, ¶ 21, 643 N.W.2d at 694 (noting that "the State may exercise territorial jurisdiction over the land, including an in rem condemnation action, and the Tribe's sovereign immunity is not implicated"); *Miccosukee Tribe of Indians of Florida v. Dep't of Envtl. Prot. ex rel. Bd. of Trustees of Internal Imp. Trust Fund*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (applying the reasoning of *Cass County* in a state-court condemnation action against tribally-owned property, and holding that "the Tribe's sovereign immunity is not implicated and does not bar this eminent domain action"); *Smale v. Noretep*, 150 Wash. App. 476, 484, 208 P.3d 1180, 1184 (Ct. App. 2009) (following *Cass County* and holding that "exercising jurisdiction over in rem proceedings does not implicate sovereign[] immunity"). Although these decisions concern condemnation actions brought in state courts

rather than a federal District Court, this Court should adopt the same reasoning and find that an Indian tribe's sovereign immunity is simply not implicated by a Section 357 condemnation action.

If the Court finds that an Indian tribe is a required party to a Section 357 condemnation action against allotments in which the tribe holds a fractional beneficial interest, the Court should further find that such Indian tribe can be joined to the action because its sovereign immunity is not implicated or does not bar a Section 357 condemnation action.

IV. [Question IV] If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in, a condemnation action brought under 25 U.S.C. § 357, the condemnation action should still be allowed to proceed absent that Indian tribe.

If this Court finds that an Indian tribe having a fractional interest in an allotment is a required party to a Section 357 action but cannot be joined because of sovereign immunity, it is then necessary for the Court to examine the Rule 19(b) factors to determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. *See* Fed. R. Civ. P. 19(b); *see also, e.g.*, *Harnsberger*, 697 F.3d at 1278-79.

This Court has previously explained that sovereign immunity "do[es] not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases." *See Davis v. United States*, 192 F.3d 951, 960 (10th

Cir. 1999) (*Davis I*). Even if the Court finds the Nation immune from suit, the Court should proceed with a full Rule 19(b) analysis and find that the Nation is not indispensable to this litigation.

A. A judgment of condemnation in the Indian tribe's absence would not be prejudicial to the Indian tribe or to any existing parties.

This Court has explained that "[t]his prejudice test" set forth in Rule 19(b)(1) is "essentially the same as the inquiry under Rule 19(a)(2)(i) into whether continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject of the lawsuit." *Harnsberger*, 697 F.3d at 1282. Here, there would be no prejudice to the Nation because condemnation would result in the United States, as trustee, receiving the full condemnation award and distributing it proportionally to all beneficial owners, including the Nation, whether or not any beneficial owners elect to appear.

While a judgment of condemnation would grant PNM its requested easements and provide just compensation for taking those easements, a judgment of condemnation would not affect the Nation's or any other beneficial owners' continuing fractional interest in either of the Two Allotments. The Nation would fully retain its approximately 13.6% undivided interest in Allotment 1160 and its approximately 0.14% undivided interest in Allotment 1392. The interests of the Nation in the Two Allotments would not be prejudiced by the Nation's absence from these proceedings.

B. Any purported prejudice to the Indian tribe or any other party can be avoided.

The District Court's judgment of condemnation could include provisions specifying that the Nation is to be awarded its proportionate share of any condemnation award—that is, approximately 13.6% of the overall condemnation award for Allotment 1160 and approximately 0.14% of the overall condemnation award for Allotment 1392—to ensure that the Nation's status as a non-party does not cause the Nation to receive its proportionate shares any later than other beneficial owners who remain parties to this matter.

C. A judgment of condemnation in the Indian tribe's absence would be adequate.

The Tenth Circuit has explained this third factor of the Rule 19(b) analysis "is intended to address the adequacy of the dispute's resolution" and that "[t]he concern underlying this factor is not the plaintiff's interest 'but that of the courts and the public in complete, consistent, and efficient settlement of controversies,' that is, the 'public stake in settling disputes by wholes, whenever possible.'" *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (*Davis II*), *quoting Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). Permitting this litigation to proceed to a judgment of condemnation would wholly settle PNM's request for easements on the Two Allotments (and also on three allotments in which the Nation holds no fractional interest) under the

authority of Section 357. This factor therefore supports a finding that the Nation is not indispensable to this litigation.

D. A state-authorized condemnor would have no adequate remedy if its Section 357 condemnation action is dismissed for nonjoinder of the Indian tribe.

Because it is long-settled that the United States is an indispensable party a condemnation action brought under Section 357, *see Town of Okemah*, 140 F.2d at 965, this action can be brought only in federal court, rather than in tribal court or state court. Dismissal of PNM's Complaint for Condemnation as to the Two Allotments would leave PNM with no adequate remedy to exercise the rights provided by Section 357 and its incorporated eminent domain law of New Mexico. This factor therefore supports not dismissing the Complaint for Condemnation.

E. The Court may consider factors beyond the four factors enumerated in Rule 19(b)(1)–(4), and as a matter of equity and good conscience a Section 357 condemnation action should proceed among the existing parties even if the Indian tribe is absent.

This Court has recognized that the four factors in Rule 19(b) are not exclusive. *See Davis II*, 343 F.3d at 1289. Because of the policy considerations discussed in Part I.D above, the Court should find that a Section 357 condemnation action may proceed "in equity and good conscience" notwithstanding any holding that an Indian tribe (as holder of a fractional beneficial interest) is a required party that cannot be joined to the action. As the

United States Supreme Court explained in *Hodel*, 481 U.S. at 712, the economic value of some fractional beneficial interests in allotments can only be measured in fractions of a cent. Allowing a Section 357 condemnation action to proceed absent an Indian tribe will still allow all of the fractional-interest holders to receive just compensation as determined by the District Court, and an Indian tribe will not be prejudiced by its absence from the proceeding if the tribe elects not to participate.

CONCLUSION

The Court should rule that (a) Section 357 authorizes condemnation actions against allotments irrespective of whether an Indian tribe holds any fractional interests in such allotments, and (b) such a condemnation action may proceed irrespective of whether such Indian tribe can be joined to that action.

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel respectfully submits that oral argument may be helpful to the Court's understanding and analysis of this interlocutory appeal. This appeal involves matters of statutory interpretation including the interpretation of Section 357, which is a century-old federal statute, and a range of Indian law terms not always consistently interpreted in prior case law. This appeal also involves matters specific to allotments, as opposed to matters pertinent to some other forms of

Indian land. Further, terms or concepts specific to one body of Indian law are not necessarily applicable to other areas of Indian law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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i. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,881 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

ii. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman.

/s/ Kirk R. Allen

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that a copy of the foregoing Opening Brief of Plaintiff – Appellant Public Service Company of New Mexico, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with AVG AntiVirus Business Edition, version 3556, as updated through June 27, 2016 and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Opening Brief of Plaintiff – Appellant Public Service Company of New Mexico was furnished through (ECF) electronic service to the following on this 27th day of June, 2016:

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,
Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND
IN MCKINLEY COUNTY, NEW MEXICO;
NAVAJO NATION;
NAVAJO TRIBAL UTILITY AUTHORITY;
CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.;
TRANSWESTERN PIPELINE COMPANY, LLC;
CITICORP NORTH AMERICA, INC.;
CHEVRON USA INC., as successor in interest to Gulf Oil Corp.;
HARRY HOUSE, Deceased;
LORRAINE BARBOAN, also known as, LARENE H. BARBOAN;
PAULINE H. BROOKS;
BENJAMIN HOUSE, also known as, BENNIE HOUSE;
ANNIE H. SORRELL, also known as, ANNA H. SORRELL;
MARY ROSE HOUSE, also known as, MARY R. HOUSE;
DOROTHY HOUSE, also known as, DOROTHY W. HOUSE;
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MARY GRAY CHARLEY, also known as, MARY B. CHARLEY;
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SPENCER KIMBALL CHARLESTON, JR., Deceased;
EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON;
CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON;
SAM MARIANO; JORGE ADRIAN ORTEGA-GALLEGOS;
Unknown owners, Claimants and Heirs of the Property Involved,
JORGE ADRIAN ORTEGA-GALLEGOS, Unknown Heirs of Harry House, Deceased,
JORGE ADRIAN ORTEGA-GALLEGOS, Unknown Heirs of Bob Gray (Bob Grey), Deceased, Unknown Heirs of Betty James, Deceased, Unknown Heirs of Rosie C. Yazzie, Deceased, Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased,
ESTATE OF ROSIE C. YAZZIE, Deceased,
ESTATE OF SPENCER K. CHARLESTON, Deceased,
UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants.

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392

On June 13, 2015, Public Service Company of New Mexico (PNM) filed a COMPLAINT FOR CONDEMNATION (Doc. No. 1) seeking a perpetual easement for electrical transmission lines. (*See* Complaint Exs. 2-6; ¶ 37.) PNM brought this action to condemn a perpetual easement over five parcels of land owned by members of the Navajo Nation (Nation): (1) Allotment 1160, (2) Allotment 1204, (3) Allotment 1340, (4) Allotment 1392, and (5) Allotment 1877 (together, the Five Allotments). (*Id.*) The Nation owns an undivided 13.6 % interest in Allotment 1160 and an undivided .14 % interest in Allotment 1392 (together, the Two Allotments). (*Id.*)

In the MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 32) (the Motion), the Nation argues that this Court lacks subject matter jurisdiction and asks the Court to dismiss it as a defendant because, as a sovereign nation, it is immune from suit. In addition, the Nation asks the Court to dismiss the Two Allotments because under Fed. R. Civ. P. 19, the Nation is an indispensable party that cannot be joined. Defendants Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, Dorothy W. House,[1] Jones Dehiya,[2] Kalvin Charley, Mary B. Charley, Melvin L. Charley, Marla L. Charley, Christine G. Begay, Jimmie Gray, Thompson Grey, Bob Grey,[3] Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, Shawn Stevens,[4] Glen C. Charleston, and Glenda G. Charleston[5] (together, the 22 Defendants) have joined the Motion.[6]

[1] Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, and Dorothy W. House are owners of fractional interests in Allotment 1160.
[2] Jones Dehiya is an owner of a fractional interest in Allotment 1204.
[3] Kalvin Charley, Mary B. Charley, Melvin L. Charley, Marla L. Charley, Christine G. Begay, Jimmie Gray, Thompson Grey, and Bob Grey are owners of fractional interests in Allotment 1340.
[4] Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, and Shawn Stevens are owners of fractional interests in Allotment 1392.
[5] Glen C. Charleston and Glenda G. Charleston are owners of fractional interests in Allotment 1877.
[6] Despite the joinder of the 22 Defendants in the Motion, the other three allotments will not be dismissed.

See NOTICE OF DEFENDANTS' JOINDER IN NAVAJO NATION'S MOTION TO DISMISS (Doc. No. 33) (Notice of Joinder). The United States also agrees that the Nation and the Two Allotments should be dismissed from this action. *See* ANSWER OF THE UNITED STATES (Doc. No. 25); and RESPONSE TO THE NAVAJO NATIONS [SIC] MOTION TO DISMISS (Doc. No. 44).

PNM opposes the Motion. *See* PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S RESPONSE IN OPPOSITION TO DEFENDANT NAVAJO NATION AND 22 DEFENDANTS' MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 39) (the Response), and the Nation has filed a Reply brief. *See* REPLY IN RESPONSE IN OPPOSITION TO MOTION TO DISMISS (Doc. No. 45) (the Reply).

After the Motion was fully briefed, PNM filed its FIRST AMENDED COMPLAINT FOR CONDEMNATION (Doc. No. 49) (FAC) adding the United States Department of Health and Human Services (HHS) and the United States Department of the Interior (DOI) as defendants because "records of the United States of America, Department of the Interior, Bureau of Indian Affairs ("BIA") relating to the Property indicate that the United States, HHS, and DOI, including, but not limited to, their respective constituent agencies the United States Public Health Service and the BIA, may have other interests in or encumbrances affecting the Property."[7] (FAC ¶ 23.)[8] Even though the Motion was filed prior to the FAC, the Court will rule on the Motion as though it applies to the FAC. On October 27, 2015, the 22 Defendants filed their ANSWER TO

[7] Under Rule 71.1, a plaintiff seeking to condemn property may amend its complaint without leave of the court and at any time before the trial on compensation. Fed. R. Civ. P. 71.1 (f).
[8] In its answer, the United States Department of Health and Human Services asserts that it has sovereign immunity from this suit. *See* ANSWER OF HEALTH AND HUMAN SERVICE TO THE AMENDED COMPLAINT (Doc. No. 97) at 7.

FIRST AMENDED COMPLAINT FOR CONDEMNATION (Doc. No. 95) asserting a counterclaim against PNM for trespass.[9]

I. BACKGROUND

A. ORIGINAL EASEMENT

On April 8, 1960, the BIA granted to PNM a fifty-year right of way easement (the Original Easement) authorizing PNM to construct, maintain, and operate an electric transmission line in northwestern New Mexico. (FAC ¶¶ 27-28.) During the 1960's, PNM constructed a 115-Kilovolt electric transmission line that connected PNM's Ambrosia substation, located north of Grants, New Mexico, to PNM's Ya-Ta-Hey substation, located west of Gallup, New Mexico. The transmission line, known as the "AY Line," is a crucial component of PNM's system for the transmission of electricity to this area of New Mexico. (FAC ¶ 30.) The Navajo Nation and its members benefit from the support that the AY Line provides to PNM's electricity distribution system. (*Id*.)

In 2009, in anticipation of the April 2010 expiration of the Original Easement, PNM sought the consent of the Allotment owners to a renewal of the Original Easement. (FAC ¶ 31.) On November 3, 2009, PNM, having obtained written consent from the requisite percentage of Allotment owners, submitted its renewal application to the BIA. (FAC ¶¶ 32-33.) In June 2014, however, counsel for some of the owners notified the BIA and PNM that the owners had revoked their earlier written consents. (FAC ¶ 34.) In January 2015, the BIA notified PNM that the revocations of consent precluded the BIA from approving the application. (FAC ¶ 35.) During

[9] On September 18, 2015, the 22 Defendants filed a trespass suit against PNM and the United States, as a nominal defendant, in the United States District Court for the District of New Mexico. *See Barboan et al. v. Public Service Co. of N.M.*, Case No. 15 CV 826 LF/KK. The United States has moved to dismiss the case. *Id.* (Doc. No. 14).

the ensuing months, PNM attempted in good faith, though unsuccessfully, to obtain the necessary consents to renew the Original Easement.[10] (FAC ¶ 36.)

B. HISTORY OF ALLOTTED LANDS

In the late nineteenth century, Congress initiated a program allowing the division of communal Indian property into individually-owned property. *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997). Under the Indian General Allotment Act of 1887 (the General Allotment Act), ch. 119, 24 Stat. 388, portions of Indian reservation land were transferred, or allotted, to individual tribal members. *Id.* Land not allotted to individual tribal members was opened to non-Indians for settlement. *Babbitt*, 519 U.S. at 237. However, the United States continued to hold fee title to allotted lands in trust for the individual Indian allottees or the individual allottees owned the land subject to restrictions on alienation. *Id.*; *State of Minnesota v. United States*, 305 U.S. 382, 386 (1939). On the death of the allottee, the land descended according to the laws of the State or Territory where the land was located. 24 Stat. 389. In 1910, Congress provided that allottees could devise their interests in allotted land. Act of June 25, 1910, ch. 431, § 2, 36 Stat. 856, codified as amended, 25 U.S.C. § 373.

Over time, the division of title to individual allottees "proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (describing how parcels became splintered with multiple owners, some parcels having hundreds of owners). In 1934, Congress passed the Indian Reorganization Act of 1934, 25 U.S.C. §§ 450 et seq., which ended further allotment of Indian land. However, interests in lands already allotted continued to be divided over the generations. *Babbitt*, 519 U.S. at 238.

[10] The FAC 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.

C. CONDEMNATION OF ALLOTTED LANDS

As part of the General Allotment Act, Congress also allowed condemnation of allotted lands. *See* 25 U.S.C. § 357. The United States Supreme Court has held that, as fee owner of allotted lands, the United States is an indispensable party to condemnation proceedings under § 357. *State of Minnesota*, 305 U.S. at 386–388. *See also Town of Okemah, Okla. v. United States*, 140 F.2d 963, 965 (10th Cir. 1944). The Supreme Court reasoned that in authorizing the condemnation of allotted lands, Congress "conferred by implication permission to sue the United States." *State of Minnesota*, 305 U.S. at 388. Consequently, a condemnation action under § 357 must be filed in federal court, where the United States has consented to be sued. *Id.* at 388–89.

D. GRANTS OF RIGHTS OF WAY

In the Indian Right of Way Act of February 5, 1948, (the 1948 Act), Congress authorized the Secretary of the Interior (Secretary) to grant rights of way across allotted lands with the consent of allottees holding a majority of the ownership interests. 25 U.S.C. §§ 323–328. The Secretary could also grant rights of way across land held in trust for Indian tribes with the "consent of the proper tribal officials." 25 U.S.C. § 324. In exchange, the allottees and the tribes must be paid compensation in an amount the Secretary finds to be just. 25 U.S.C. § 325. Section 328 provides that the Secretary may promulgate regulations to administer §§ 323–328. The regulations are codified in 25 C.F.R. §§ 169.1–169.28.[11]

The Tenth Circuit has held that 25 U.S.C. §357 and §§ 323–328 provide independent, alternative methods for a state-authorized condemnor to obtain a right of way over allotted lands. *Yellowfish v. City of Stillwater, Okla.*, 691 F.2d 926, 930–31 (10th Cir. 1982), *cert. denied*, 461

[11] *See generally* Todd Miller, Easements on Tribal Sovereignty, 26 Am. Indian L. Rev. 105, 121–25 (2002) (hereinafter Miller). "The only way to obtain these easements [over tribal lands] is by the procedures set out in [§§ 323–328] and detailed in the regulations. This requires approval from the Secretary of Interior and written consent from the appropriate tribal officials." *Id.*

U.S. 927 (1983) (rejecting the argument that the 1948 Act impliedly repealed Section 357). *See also Nebraska Public Power Dist. v. 100.95 Acres of Land in Thurston County, Hiram Grant,* 719 F.2d 956, 961 (8th Cir. 1983) (hereinafter, *NPPD*) (holding that federal law provides for the option of condemnation of an individual allottee's interest under 25 U.S.C. § 357 if the condemning authority is unable to obtain a voluntary easement).

E. THE INDIAN LAND CONSOLIDATION ACT

On January 12, 1983, Congress passed the Indian Land Consolidation Act (ILCA), P.L. 97-459, 96 Stat. 2515, codified as amended in 25 U.S.C. §§ 2201–2221, in an attempt to further ameliorate the problem of "fractionated ownership of Indian lands." *Hodel*, 481 U.S. at 709. Under the ILCA, "any tribe, acting through its governing body, is authorized, with the approval of the Secretary to adopt a land consolidation plan providing for the sale or exchange of any tribal lands or interest in lands for the purpose of eliminating undivided fractional interests in Indian trust or restricted lands or consolidating its tribal landholdings . . ." 25 U.S.C. § 2203. The Secretary was authorized to acquire fractional interests from allotment owners and hold those interests in trust for the tribe. 25 U.S.C. §§ 2209; 2212. In the amendments to ILCA enacted in 2000, Congress provided,

> Subject to the conditions described in subsection (b)(1) of this section, an Indian tribe receiving a fractional interest . . . may, as a tenant in common with the other owners of the trust or restricted lands, lease the interest, sell the resources, consent to the granting of rights-of-way, or engage in any other transaction affecting the trust or restricted land authorized by law.

25 U.S.C. § 2213(a). Section 2213(b)(1) states that, as to allotted land which the Secretary has purchased in trust for a tribe, the Secretary has a lien on any revenue accruing to the interest of a tribe in allotted land, "until the Secretary provides for the removal of the lien . . ." 25 U.S.C.

2213(b)(1).[12] And, "until the Secretary removes a lien from an interest in land . . . the Secretary may approve a transaction covered under this section on behalf of an Indian tribe." 25 U.S.C. § 2213(b)(2)(B). Under § 2213(c), if a tribe does not consent to a lease or other agreement affecting its interest in allotted land, the Secretary may enter into the lease or agreement, but "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)(1) and (2).

II. STANDARD OF REVIEW

A. SOVEREIGN IMMUNITY OF INDIAN TRIBES

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . .; they are 'a separate people' possessing 'the power of regulating their internal and social relations. . . .' " *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citations omitted). The Tenth Circuit Court of Appeals described Indian sovereign immunity:

> It is well-established that "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 . . . (1978) (citations and quotations omitted). As sovereign powers, Indian tribes are immune from suit absent congressional abrogation or clear waiver by the tribe. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753 . . . (1998).

Somerlott v. Cherokee Nation Distributors, Inc., 686 F.3d 1144, 1148 (10th Cir. 2012).

Tribal sovereign immunity is subject to the superior and plenary control of Congress. *Santa Clara Pueblo*, 436 U.S. at 57. Congress may abrogate tribal immunity, but Congress must

[12] Under § 2213, the Secretary may remove a lien if the Secretary finds that (1) the costs of administering the interest equal or exceed the revenue; (2) it will take an unreasonable period of time for the parcel to generate revenue that equals the purchase price; (3) a subsequent decrease in value of the parcel makes it unlikely to generate revenue that equals the purchase price in a reasonable time; or (4) payment of the purchase price has been tendered into the Acquisition Fund created under § 2215.

clearly express its intent to do so. *Michigan v. Bay Hills Indian Community*, 134 S.Ct. 2024, 2031 (2014). And courts will not lightly assume Congress "in fact intends to undermine Indian self-government." *Id.* at 2031–32. Alternatively, a tribe may waive sovereign immunity, but "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) *and United States v. King*, 395 U.S. 1, 4, (1969)).

B. FEDERAL CONDEMNATION LAW

Indian lands are generally governed by federal law. *NPPD*, 719 F.2d at 961. PNM asserts authority to condemn under Section 3 of the Act of March 3, 1901, 25 U.S.C. § 357:

> 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.

An "allotment" is a parcel of land awarded to an individual tribal member from a common holding. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) (citation omitted) (noting that "allotment" is a term of art in Indian law).

C. FEDERAL PROCEDURAL LAW

Even though § 357 allows condemnation of allotted lands under the laws of the State where the lands are located, the Court must follow federal procedural law. *Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less*, 746 F.3d 362, 367 (8th Cir. 2014) (stating that federal rules displace state procedural law in all federal condemnation proceedings."). Federal Rule of Civil Procedure 71.1 provides, "[t]hese rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." Fed. R. Civ. P. 71.1(a). Rule 71.1 requires that, "[w]hen an action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known.

But before any hearing on compensation, the plaintiff *must add as defendants* all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, . . .” Fed. R. Civ. P. 71.1(c)(1) (emphasis added). Thus, all persons having any interest in the property to be condemned must be joined as defendants. 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Fed. Prac. & Proc. § 3045 (2d ed. 1997). As the owner of fee title to the Five Allotments, the United States must be joined in a condemnation action as well.[13] Rule 71.1 further provides, “[a]t any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property.” Fed. R. Civ. P. 71.1(i)(1)(C).[14] “The court may at any time dismiss a defendant who was unnecessary or improperly joined.” Fed. R. Civ. P. 71.1(i)(2).

D. SUBJECT MATTER JURISDICTION

The Nation argues that the Court lacks subject matter jurisdiction over this action because the Nation is immune from suit in this Court. *See* Fed. R. Civ. P. 12(b)(1).[15] In ruling on the Motion to dismiss for lack of subject matter jurisdiction, the Court must accept the allegations in the FAC as true and construe the allegations in favor of PNM. *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (citing *Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990)). The Nation asserts that since it is immune from suit, this Court also lacks jurisdiction over the Two Allotments in which the Nation owns fractional interests and, therefore, the Two Allotments should be dismissed as well. The Nation contends that Rule 19 on

[13] *See* ANSWER OF THE UNITED STATES (Doc. No. 25) ¶ 23 (admitting that the United States holds in trust the Five Allotments for the benefit of the individual allottees and for the Nation).
[14] Because the Court will dismiss the Two Allotments on the basis of a legal issue after full briefing, there is no need for a hearing.
[15] “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . lack of subject-matter jurisdiction[.]” Fed. R. Civ. P. 12(b)(1).

joinder of parties should guide the Court's analysis in determining whether to dismiss the Two Allotments.

E. JOINDER OF PARTIES

Rule 19 provides,

> **(a) Persons Required to Be Joined if Feasible.**
> **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligation because of the interest.
> . . .
> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions of the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19(a) and (b).

To summarize, the Nation contends that since it is immune from suit, the Court should find "in equity and good conscience" that the action should not proceed against the Two Allotments. PNM counters that the Nation is not immune from this action; however, if the Court dismisses the Nation, the action should proceed as to the Two Allotments because the Nation is not an indispensable party under Rule 19.

III. ANALYSIS

A. PLAIN LANGUAGE OF § 357

In its Response, PNM, citing *United States v. Clarke*, 445 U.S. 253 (1980) and *NPPD*, argues that the plain language of 25 U.S.C. § 357 shows a Congressional intent to abrogate tribal sovereign immunity from condemnation suits. (Resp. at 7.) In *Clarke*, the Supreme Court determined that the plain meaning of the term "condemnation" in § 357 was "a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it," and not an action against a state or local government for inverse condemnation. *Id.* at 258. Section 357 did not allow condemnation of allotted land by physical occupation. *Id.* In *NPPD*, the Eighth Circuit Court of Appeals concluded that § 357 allowed condemnation of allotted land whether located inside or outside reservation borders, noting "[w]e cannot ignore the plain meaning of the statute, which provides simply for condemnation of 'allotted land' without regard to its location." 719 F.2d at 961.

PNM contends that following the lead of *Clarke* and *NPPD*, this Court should find that the plain meaning of "lands allotted," as used in § 357, includes all allotted land, "without regard to its" ownership. In essence, PNM asserts that "allotted lands" in § 357 means lands previously allotted to individual Indians "regardless of which persons or entities own fractional interests" at the time of the condemnation. (Resp. at 7.) However, the court in *Clarke* did not take an expansive view of the term "condemnation," and the court in *NPPD* expressly refused to hold that allotted lands owned by tribes, which it determined were "tribal lands," were subject to condemnation under § 357. 719 F.2d at 962 (holding that under § 357 a public utility could not

condemn allotted land in which individual allottees had a life estate but a tribe held a reversionary interest).[16]

Despite PNM's contention that § 357's plain language allows condemnation against allotments owned by tribes, the Court concludes that the wording "[l]ands allotted *in severalty to Indians* may be condemned" illustrates a singular Congressional focus on allotted land owned by individual tribal members. 25 U.S.C. § 357 (emphasis added). *Cf. Carcieri v. Salazar*, 555 U.S. 379, 387–88 (2009) (noting that the term "Indian" in 25 U.S.C. § 465 means an individual member of a recognized Indian tribe).[17] The Nation cannot be considered as an owner of "lands allotted in severalty to Indians."

In *Eastern Band of Cherokee Indians v. Griffin*, the court dealt with a different right of way statute, 25 U.S.C. § 311, which allowed the Secretary to grant rights of way for highways over individually allotted lands and over reservations, without tribal consent. 502 F. Supp. 924, 929 (W.D. N.C. 1980). In response to tribal members' argument that instead of a consensual right of way, the land had been condemned without just compensation, the court commented,

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[16] In its Response, PNM argues that the court in *NPPD* incorrectly determined that any portion of allotted land transferred from individual allottees to a tribe became "tribal land." The court in *NPPD* used the definition of "tribal land" in the regulations promulgated under the 1948 Act, 25 U.S.C. §§ 323–328, codified in 25 C.F.R. §§ 169.1-169.28. "Tribal land" is defined as "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). PNM argues that the regulations should be applicable only to the subject of the 1948 Act, which is "rights-of-way over and across tribal land, individually owned land and Government owned land." 25 C.F.R. § 169.2. PNM maintains that these regulations should not apply to condemnation actions. However, other courts have followed the holding in *NPPD*. *See, e.g., United States v. Pend Oreille Public Util. Dist. No. 1*, 28 F.3d 1544, 1552 (9th Cir. 1994) (citing case and noting that § 357 "does not apply to land held in trust for the Tribe."); *Bear v. United States*, 611 F. Supp. 589, 599 (D. Nebr. 1985) (citing case and noting that treaty lands cannot be condemned under § 357); and *Houle v. Central Power Elec. Co-op, Inc.*, No. 4:09–cv–021, 2011 WL 1464918, *6 (D. N.D. Mar. 24, 2011) (unreported) (citing case and stating that § 357 condemnation claims may be brought against individual allotment owners). Moreover, the Court agrees with the reasoning in *NPPD* that § 357 does not allow condemnation of lands owned by tribes, and the Court also relies on the plain language of § 357 and its distinct application to lands "allotted in severalty to Indians."

[17] Under the General Allotment Act, the word "Indian" is used to denote an individual, who is referred to as an "allottee" or as "he" or "she." *See, e.g.*, 25 U.S.C. §§ 334 (allotment to Indians not residing on reservations), 336 (allotments to Indians making settlement), 348 (patents to be held in trust), 349 (fee patents issued by Secretary "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs.").

"Congress provided for condemnation proceedings under . . . Section 357, but limited such proceedings to lands which have been allotted to individual Indians. This section does not apply . . . because the lands in question . . . have never been allotted to individual Indians as that term is defined by Congress and the courts." 502 F. Supp. at 930. The Court concludes that under its plain language, § 357 only allows condemnation of allotted lands owned by individual tribal members, and § 357 does not expressly apply to allotted lands acquired by Indian tribes.

B. LACK OF AMENDMENT TO § 357

PNM further contends that Congress' enactment of the ILCA, which allows tribes to obtain interests in allotted land, without any modification of § 357, evidences Congressional intent to allow condemnation actions against allotted land owned by tribes. PNM presents several arguments concerning the history of § 357 and the ILCA in support of its contention.

1. Extending Supreme Court's implied abrogation of the United States' sovereign immunity in § 357

PNM first points to the holding in *State of Minnesota*, in which the Supreme Court commented that § 357 implicitly waived the sovereign immunity of the United States for condemnation actions in federal court. In that case, Minnesota sued for condemnation in state court under § 357 to build a highway over nine individually-owned allotments located on the Grand Portage Indian Reservation. 305 U.S. at 383. The United States specially appeared, removed the case to federal court, and moved to dismiss for lack of jurisdiction due to sovereign immunity. *Id.* The district court denied the motion reasoning that the United States was not a necessary party, "since consent . . . to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 [U.S.C.] Section 357[.]" *Id.* at 384. The Eighth Circuit Court of Appeals reversed the district court's holding. *United States v. State of Minnesota*, 95 F.2d 468 (8th Cir. 1938).

The Supreme Court determined that the United States was an indispensable party to the condemnation proceedings because it holds fee title to the allotments. 305 U.S. at 388. In response to the argument that § 357 authorized state court suits against the United States, the Supreme Court commented, "[i]t is true that authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts." *Id.* Because this suit was in state court, the Court upheld the dismissal. *Id.* at 389. The Supreme Court noted that if the action had been initiated in federal court, "it would have had jurisdiction." *Id.*

Courts have cited *State of Minnesota* as recognizing Congress' implicit abrogation of federal sovereign immunity from § 357 suits in federal court. *See, e.g.*, *Town of Okemah*, 140 F.2d at 965 (citing *State of Minnesota* and concluding that "Section 357, *supra*, by authorizing condemnation, conferred by implication permission to sue the United States."). According to PNM, this same reasoning should apply to find that Congress impliedly abrogated the Nation's sovereign immunity in § 357. As the Nation points out, however, no court has concluded this, and subsequent cases citing *State of Minnesota* do so without further analysis. *See Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011) (citing *State of Minnesota* and stating, "[b]ecause § 357 permits condemnation actions that cannot effectively proceed absent the United States, § 357 waives the government's sovereign immunity."); and *Prince*, *infra* (noting the holding as to § 357, but declining to find implied permission to sue the United States under another provision of the General Allotment Act).

By contrast, the Tenth Circuit has suggested that the Supreme Court's implied waiver in *State of Minnesota* conflicts with the requirement that federal immunity must be unequivocally waived. In *Prince v. United States*, the Tenth Circuit upheld the dismissal of a partition action

against the United States and individual Indian allottees. 7 F.3d 968, 970 (10th Cir. 1993). The plaintiff, a non-Indian, owned an undivided 23/378th fee interest in the land, and the remaining percentage of the allotted land was owned by the United States in trust for individual members of the Comanche Indian tribe. *Id.* The plaintiff sued in state court for partition of the land in kind under 25 U.S.C. § 348. *Id.* at 969. The United States removed the action to federal court, and moved to dismiss for lack of jurisdiction due to sovereign immunity. *Id.* The plaintiff asked the court to follow the holding in *State of Minnesota* and find that § 348, applying state partition laws to allotments, also impliedly waived United States' immunity from state court partition actions. However, the Tenth Circuit distinguished *State of Minnesota*, and held that "because [25 U.S.C.] § 348 does not provide jurisdiction to the state court to entertain this partition action, a waiver of sovereign immunity cannot be implied from this provision." *Id.* at 970.

As these cases illustrate, the holding in *State of Minnesota* has been narrowly applied to allow suits under § 357 against the United States in federal court that involve individual allotments. In addition, the Tenth Circuit refused to expand the holding to allow suits against the United States in state court under § 348. Hence, this Court will not expand *State of Minnesota* to find an implied abrogation of the Nation's sovereign immunity in § 357. It bears repeating that the Nation's sovereign immunity must be abrogated by unequivocal statutory language.

2. The ILCA's effect on § 357

Next PNM argues that the Congress' failure to amend § 357, after enacting the ILCA, indicates that Congress intended to allow condemnation actions to proceed even though tribes obtained allotments. In particular, PNM points to amendments to ILCA in 2000 in which Congress limited tribal power over some transactions involving allotted lands by allowing the Secretary to approve transactions without a tribe's consent. 25 U.S.C. § 2213 (b)(2)(B) and (c).

Congress treated non-consenting tribes as non-parties to those transactions, and Congress explicitly provided that neither the statute nor the transaction agreement could "affect the sovereignty of any Indian tribe." 25 U.S.C. § 2213(c)(2). PNM contends that this limitation of tribal power in the ILCA and the reinstatement of sovereign immunity in non-consensual transactions, without an amendment to § 357, shows "Congress apparently understood that (a) Section 357 already operated as a waiver or abrogation of tribal sovereign immunity against condemnation of allotted lands, or (b) a tribe's acquisition of fractional interests pursuant to ICLA [sic] would necessarily constitute the tribe's own waiver of any sovereign immunity against condemnation of allotted lands." (Resp. at 8.) The Court does not find either of these arguments persuasive.

There is no mention of condemnation in the ILCA and there is no basis on which to conclude that Congress understood that the ILCA would open up tribes to condemnation actions under § 357 after tribes acquired allotted lands. PNM asks the Court to consider the language in 25 U.S.C. § 2213(c)(2) as an admission by Congress that tribal sovereignty could be affected by allowing the Secretary to approve a transaction without the consent of a tribe. Although it is not clear in the Response, PNM seems to assert that Congress must have thought the sovereign immunity language in § 2213(c)(2) was necessary because courts might find that Congress abrogated a non-consenting tribe's immunity by allowing a transaction without a tribe's consent. The Court does not accept the premise that Congress found it necessary to reinstate the sovereign immunity of non-consenting tribes in transactions involving allotments. Nor does the ILCA statutory scheme reveal that Congress knew it had waived tribal sovereign immunity in the condemnation statute.

PNM cites *United States v. Pend Oreille Cnty. Pub. Util. Dist. No. 1*, No. CIV 80-116 RMB, 1995 WL 17198637, *6 (E.D. Wash. July 24, 1995). The controversy in that case stemmed from the construction of the Box Canyon dam built decades earlier on a location downstream from the Kalispel Indian Reservation. *Id.* The dam caused certain reservation lands and allotted lands to flood year around. *Id.* The United States, on behalf of the Kalispel Tribe and the individual allottees, sued the Utility for trespass. *Id.* At trial, the district court determined that the Utility had trespassed and awarded damages, but not injunctive relief against future flooding. *Id.* *2. The district court denied injunctive relief because it concluded the Tribe would be fully compensated in the condemnation proceeding filed by the Utility. *Id.*

The Ninth Circuit reversed the denial of injunctive relief finding that the Utility could not condemn land held in trust by the United States for the Tribe under § 357. *United States v. Pend Oreille Public Utility Dist. No. 1*, 28 F.3d 1544, 1551 (9th Cir. 1994) (citing *NPPD*). The Ninth Circuit further ruled that the Utility could not condemn the land under the Federal Power Act (FPA), but had to obtain a license, which required the Secretary to find "that the Utility's power project will not interfere with the purpose for which the Kalispel Reservation was created or acquired." *Id.* at 1548. However, the Ninth Circuit left to the district court the issue of whether the Utility could nevertheless condemn lands of individual Indian allottees under § 357. *Id.* at 1552.

On remand, the United States argued that § 357 was impliedly repealed by the FPA. 1995 WL 17198637, *5. The district court held that "the FPA and § 357 . . . are alternative methods for obtaining allotted Indian lands for a power project." *Id.* Citing an earlier Ninth Circuit decision, the district court stated, "Congress [in § 357] explicitly afforded no special protection to *allotted lands* beyond that which land owned in fee already received under the state laws of

eminent domain." *Id.* *6 (emphasis added) (citing *Southern California Edison Co. v. Rice*, 685 F.2d 354 (9th Cir. 1982)). The district court also noted that Congress did not amend § 357 after implementing its policy of allotting lands in severalty to Indians, and said this "establishes [Congress'] intent to allow condemnation actions to proceed against allotted lands." *Id.* (citing *Rice*, 685 F.2d at 356). However, the district court found that the Utility could not condemn the land under § 357 because condemnation under that section required the United States' consent, which the Utility had not obtained. *Id.*, *aff'd* 135 F.3d 602, 614 (9th Cir. 1998).

PNM asks the Court to extend the reasoning in *Pend Oreille* and hold that Congress, by not amending § 357 after allowing tribal acquisition of allotted lands in the ILCA, intended to allow condemnation of *allotted lands* even after those lands were acquired by tribes under the ILCA. However, PNM ignores the Ninth Circuit's holding in *Pend Oreille*, 28 F.3d at 1552, that condemnation under § 357 could be prosecuted only against individually allotted lands. In sum, although Congress has continuously allowed the condemnation of allotted lands after enacting the ILCA, this Court, along with other courts, cannot discern a Congressional intent to abrogate tribal sovereign immunity as to condemnation actions against allotted lands acquired by tribes. *See, e.g.*, *NPPD*, 719 F.2d at 961 (distinguishing between allotted land, subject to § 357, and "tribal land," not subject to § 357).

3. Special statute versus general statute

PNM argues that a well-recognized doctrine of statutory construction applies to allow this condemnation action against the Nation. PNM asserts that § 357 is a "special statute applying only to condemnation proceedings" and that "[w]here 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." *Town of Okemah*, 140 F.2d at 965. According to PNM, § 357's special authorization to condemn allotted lands in federal court remains in full force as an exception to any sovereign immunity claims that might arise when tribes acquired allotted lands under the general ILCA.

PNM asks the Court to apply the reasoning of the Tenth Circuit in *Town of Okemah*. In that case, the Tenth Circuit determined that § 357 required the joinder of the United States in a condemnation proceeding, which meant that the suit must be brought in federal court. Moreover, the court determined that § 357 was not repealed by the later general statute, the Act of April 12, 1926, 44 Stat. 239. The Act of April 12, 1926 permitted suits affecting title to lands owned by members of the Five Civilized Tribes in Oklahoma to be brought in state courts and made judgments binding on the United States if notice was served on the Superintendent of the Five Civilized Tribes. *Id.* The court upheld the dismissal of a state court condemnation proceeding against allotments owned by individual members of one of the Five Civilized Tribes because § 357 was in full force and effect despite the later statute allowing state court suits involving land of the Five Civilized Tribes. *Id.*

In order for PNM's argument to persuade, § 357 must be interpreted to allow condemnation of allotted lands owned by individual Indians and allotted lands acquired by tribes under the ILCA. By its express language, however, § 357 allows condemnation against lands allotted in severalty to Indians, not tribes. Moreover, § 357 allows condemnation of allotted lands, but the ILCA allows voluntary acquisition of allotted lands, and the ILCA regulates transactions involving those allotted lands, which include consensual, not condemned, rights of way. Unlike the statutes governing suits against allotted land in *Town of Okemah*, § 357 and the ILCA are not "statutes upon the same subject." *Id.* at 965. Hence, § 357, a specialized

condemnation statute, does not allow condemnation of previously allotted lands acquired by Indian tribes under the ILCA, a general Indian land consolidation statute.

However, even if the Court were to accept PNM's argument that §357 allows condemnation of allotted lands despite ownership by a tribe, which the Court does not, that conclusion alone would not expose the Nation to condemnation suits. Section 357 must not only authorize condemnation of allotted lands owned by tribes, it must also authorize condemnation suits against tribes. Congress can direct a statute to govern actions of Indian tribes, but Congress must also expressly abrogate an Indian tribe's sovereign immunity for enforcement suits. *Santa Clara Pueblo*, 436 U.S. at 59 (holding that even though federal statute (ICRA) provided, "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws[,]" the statute did not expressly authorize civil actions against the tribe to enforce this provision in federal court). Consequently, although Congress has not amended the language of § 357 that allows condemnation of allotted lands, this Court declines to say that this means Congress intended to abrogate tribal sovereign immunity so as to allow condemnation of allotments acquired by tribes. *Cf. Kiowa Tribe of Okla.*, 523 U.S. at 755 (noting that "a State may have authority to tax or regulate tribal activities occurring within the State, . . . however, [that] is not to say that a tribe no longer enjoys immunity from suit.") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (holding that power to tax does not mean state has power to enforce tax laws in state court)).

4. Application of *Oneida* case

Finally, PNM points to a case allowing condemnation against land owned by an Indian tribe located outside the boundaries of a reservation. *Oneida Tribe of Indians of Wisconsin v.*

Village of Hobart, Wisconsin, 542 F. Supp. 2d 908 (E.D. Wis. 2008) involved land that had originally been part of the Oneida reservation. One hundred years prior to the lawsuit, the United States transferred the land by fee patent to individual tribal members. *Id.* at 909. The tribal members then transferred fee title to non-Indians, and much later the tribe repurchased the land on the open market. *Id.* at 912. The tribe sought declaratory relief in federal court that it was immune from a condemnation suit pending in state court. *Id.* Noting that "[l]and is either exempt from state law, or it is not[,]" *id.* at 921, the district court held that the United States' transfer of the land by fee patents to the individual tribal members removed all federal protections for the land and the land was subject to condemnation under state law, despite its later acquisition by a tribe with sovereign immunity. *Id.* at 922–23. The tribe argued that when it acquired title to the land, the land became "tribal land" as defined in 25 C.F.R. § 169.1(d). The court rejected the argument because § 169.1(d) defines tribal land as "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. . . ." *Id.* at 922. The *Oneida* court reasoned that the land was not "tribal land" because fee patents had been issued, and "all restrictions as to the sale, taxation and alienation of the lands" had been removed. *Id.* Once federal protection was removed from these allotted lands, "a tribe may not unilaterally restore it by purchasing the land on the open market." *Id.* at 923.

PNM contends that under the *Oneida* court's reasoning, since the Two Allotments were subject to condemnation when owned by individual tribal members, the Nation's acquisition of fractional interests in the Two Allotments could not reinstate immunity protection over them, just as the Oneida tribe could not restore federal protection over the land purchased on the open market. *Id.* However, PNM fails to account for the elemental difference between the land

acquired by the Oneida tribe and the Two Allotments. The Oneida tribe acquired fee simple title to the land from individual fee owners. The Nation does not have fee title to the Two Allotments.

The court in *Oneida* recognized this very important distinction when it rejected the argument that the land had become "tribal land," as defined by 25 C.F.R. § 169.1(d):

> [T]itle to the land at issue in this case is not held by the United States in trust for the Tribe; nor is it held by the Tribe subject to federal restrictions against alienation or encumbrance. The Tribe holds it in fee simple. Having purchased the land on the open market, the Tribe is free, subject to the limitations of its own constitution and by-laws, to sell it to whomever it chooses.

Id. at 922 (citing *NPPD*). The *Oneida* court also rejected the tribe's attempt to equate its ownership interest with that of the allotment owners in *NPPD*:

> Although the land in [*NPPD*] . . . had been allotted in severalty to individual Indians during the allotment era, the trust period for those allotments had never expired. . . . That is not the case here. Fee-patents issued for all of the land that the Village seeks to condemn nearly 100 years ago. . . .[U]pon issuance of fee-patents by the United States, all federal protection for the land in question, including exemption from state laws authorizing condemnation of land for public purposes, was removed.

Id. In this case, however, the Nation did not acquire fee title to the Two Allotments. It was the acquisition of the fee title that removed the federal protection from the land in *Oneida*. Here, federal protection was continuously available for all trust land beneficially owned by the Nation, including all allotted land acquired from individual allottees.

The Nation's sovereign immunity must be unequivocally abrogated by Congress, and Congress' allowance of transfer of allotted lands to tribes in the ILCA is not an unequivocal abrogation. Nor can the Nation be held to have waived its immunity merely by acquiring a fractional interest in the Two Allotments. As the Nation asserts in its Reply, it is up to Congress to solve the issues related to tribal immunity from § 357 condemnation actions involving allotted land that would otherwise be subject to condemnation if owned by individual tribal members. If

Congress deems it appropriate to abrogate tribal immunity in order to facilitate condemnation of rights of way through tribal trust lands, Congress must unequivocally do so. *Cf. Kiowa Tribe of Okla.*, 523 U.S. at 758 (declining to limit sovereign immunity to reservation activities or to non-commercial activities, "we defer to the role Congress may wish to exercise in this important judgment.").

C. DISMISSAL OF THE TWO ALLOTMENTS

The Nation argues that as an owner of a fractional interest in the Two Allotments, the Nation must be a party in this condemnation action. However, as a sovereign, the Nation is immune from suit. Hence, the Nation asks the Court to dismiss it as a defendant. In addition, the Nation asks the Court to dismiss the Two Allotments because the Nation is a required party that cannot be joined. PNM asserts that the Nation is not a required party under Rule 19(a), but if it is, the Court need not dismiss under Rule 19(b) because the Court can accord complete relief among the existing parties while protecting the Nation's interests.

In relying on Rule 19, both PNM and the Nation ignore the basic premise that PNM lacks the authority to condemn the Two Allotments 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. *NPPD*, 719 F.2d at 961. As the court in *NPPD* recognized, when a tribe acquires an interest in allotted land, the land is no longer land "allotted in severalty to Indians," and § 357 authorizes a condemnation authority to condemn only individually allotted land. *See NPPD*, 719 F.2d at 962.

However, the Court will address the Rule 19 arguments. The Court must first determine whether as a fractional interest owner in the Two Allotments, the Nation is a required party under Rule 19(a). If a required party cannot be joined, under Rule 19(b), the Court next considers

whether the case should be dismissed if "in equity and good conscience" the action cannot proceed in that party's absence. The four factors to consider under Rule 19(b) are

> first, to what extent a judgment rendered in the person's absence might be prejudicial to [the person] or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989).

1. Under Rule 19(a), the Nation is a required party.

The Nation argues that *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012) is instructive. The Northern Arapaho Tribe (NAT) sought to enjoin state and county officials from imposing vehicle excise taxes on Indians living on the Wind River Indian Reservation (the Reservation) because, as inhabitants of "Indian Country," they were exempt from taxes. The NAT argued that the Reservation's status as Indian Country was not altered by a 1905 Agreement under which some of the Reservation land was ceded to the United States. *Id.* at 1276. The NAT and the Eastern Shoshone Tribe each owned an undivided one-half interest in the Reservation lands.

The defendants moved to dismiss under Rule 12(b)(7) for failure to join the Eastern Shoshone Tribe and the United States as defendants. The district court denied the motion to dismiss but ordered the Eastern Shoshone Tribe and the United States joined as third party defendants. The Eastern Shoshone Tribe and the United States then moved to dismiss under Rule 12(b)(1) on the grounds of sovereign immunity. In response, the defendants renewed their contention under Rule 19 that the Eastern Shoshone Tribe and the United States were

indispensable parties and the case "in equity and good conscience" should be dismissed. The district court agreed and dismissed the case.

The Tenth Circuit affirmed and concluded that the Eastern Shoshone Tribe was an indispensable party because it had an "interest relating to the subject of the action," namely the "Indian Country" status of the land, and a determination of that status in its absence would impair its ability to protect its one-half interest in the land. *Id.* at 1279. Also, the disposition of the case in the absence of the Eastern Shoshone Tribe "may . . . leave an existing party—namely the State of Wyoming—subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations." *Id.* (citing Rule 19(a)(1)(B)(ii)).

The Nation argues that, like the Eastern Shoshone Tribe, it is a required party under Rule 19(a)(1)(B)(i) because it owns a fractional interest in the Two Allotments and its governance of the Two Allotments will be affected by the perpetual easement PNM seeks. PNM contends that the Nation is not a required party because complete relief can be accorded to the fractional interest owners of the Two Allotments even in the Nation's absence. According to PNM, the award of just compensation for the easement in this proceeding will be distributed among the allotment owners, including the Nation, according to their percentage ownership.

PNM also recognizes that a condemnation proceeding has two stages. During the first stage, the Court determines whether PNM has the authority to condemn the easements under § 357. If the answer is yes, then the Court determines the amount of just compensation. In its argument, however, PNM skips the first half of the analysis and focuses on the allocation of the condemnation proceeds. PNM fails to address its authority to bring this action, which derives from § 357, and the Court has just concluded that PNM has no authority to condemn the Nation's interest in the Two Allotments under § 357.

PNM illustrates its point regarding fair distribution of the condemnation award by comparing this action to a consensual easement. If PNM had obtained a consensual easement from the Secretary under 25 U.S.C. § 2213, without the Nation's consent, then PNM would pay the Secretary for that easement, and the Nation would be entitled to a portion of that payment. PNM maintains that if this condemnation case went forward as to the Two Allotments, the Nation would likewise be entitled to its portion of the just compensation award. PNM fails to acknowledge that under the consensual easement provisions, if the Nation did not consent but the Secretary approved the easement, the Nation would not be considered a party to the easement agreement, and its sovereignty would not be affected. 25 U.S.C. § 2213(c)(2). Moreover, PNM equates the Nation's lack of consent to an easement under this section, with the Nation's absence from a lawsuit under which the Two Allotments would be involuntarily taken and the Court would determine an amount of just compensation. *See* Fed. R. Civ. P. 71.1(h) (involving trial of the issues).

The Nation counters that it is a required party under Rule 19(a) because if this action continues without the Nation, its interest in not having its property involuntarily taken by eminent domain would certainly be "impaired or impeded." Fed. R. Civ. P. 19(a)(1)(b)(ii). The Court agrees. As a sovereign, the Nation has an independent interest to be free from involuntary condemnation of the Two Allotments. The Nation's interest in being immune from condemnation actions and even its interest in adequate compensation cannot be adequately protected. This conclusion is supported by Rule 71.1(c)(3) that the plaintiff "must add as defendants all those persons who have or claim an interest" in the property. This requirement is tied to the due process rights of property owners in condemnation actions. *See Leyba v. Armijo,*

11 N.M. 437, 68 P. 939, 940–41 (1902) (noting that property may not be condemned without due process which means adherence to statutory requirements and notice to the owner of property).

PNM asserts that the Nation's interest will not be impaired or impeded because the United States, as trustee with a fiduciary duty to protect the Nation, will sufficiently safeguard the interests of the Nation. As recognized by the court in *Pend Oreille*, "the interest of the United States continues throughout the condemnation proceedings and extends to what shall be done with the proceeds." 1995 WL 17198637, *6. However, the United States cannot protect the Nation's primary interest in maintaining its immunity from suit. Finally, Rule 71.1 requires joinder of both the holders of beneficial title and the holders of legal title to property. As a fractional interest owner of the Two Allotments, the Nation is a required party to this condemnation action.

2. Under Rule 19(b), the Two Allotments must be dismissed.

The Court considers four factors in this analysis: (1) whether existing and absent parties will be prejudiced; (2) whether that prejudice can be lessened or avoided; (3) whether the judgment would be adequate in the party's absence; and (4) whether the plaintiff would have an adequate remedy if the case is dismissed.

(a) <u>whether the judgment, in the party's absence, will be prejudicial to the party or to existing parties</u>

The Nation argues that its vital sovereignty interests would be prejudiced if condemnation of the Two Allotments is allowed in its absence. PNM argues that the Nation's interests in the Two Allotments will not be prejudiced. PNM again points to the statutory scheme in the ILCA that allows the Secretary to enter into transactions affecting the Two Allotments—and to compensate the Nation in proportion to its fractional interest—even if the Nation does not consent to the transaction. 25 U.S.C. § 2213. In addition, PNM contends that the condemnation

of an easement will not affect the Nation's title to its undivided fractional interests in the Two Allotments. However, the Nation is asserting prejudice as to its sovereignty, and not to its pocketbook or ownership interest. PNM dismisses the fundamental difference between the consensual grants of rights of way and condemnation actions. The former is an administrative process under which the Secretary determines whether a transaction is in the best interests of allotment owners. The latter is an involuntary taking of property in an adversarial proceeding, an assault on the Nation's sovereignty. This factor weighs in favor of dismissing the Two Allotments.

(b) whether the prejudice can be lessened or avoided by protective provisions in the judgment or by the shaping of relief

PNM asserts that the Nation's interests could be protected if the Court provided for proportionate distribution of the award to the Nation in the condemnation judgment. However, this assumes the only interest negatively affected is the Nation's right of compensation. The involuntary imposition of a right of way on the Two Allotments prejudices the Nation's sovereignty interests. The finding of just compensation cannot be tailored to lessen that effect.

(c) whether a judgment rendered in the party's absence will be adequate

The Tenth Circuit explained that "[t]he concern underlying this factor is not the plaintiff's interest 'but that of the courts and the public in complete, consistent, and efficient settlement of controversies,' that is, 'the public stake in settling disputes by wholes, whenever possible.'" *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1291–92 (10th Cir. 2003) (quoting, *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1967)). PNM contends that permitting this litigation to proceed to judgment would wholly settle the matter involving PNM's easement on the Two Allotments; thus, this factor weighs against dismissal.

The Nation states it is unclear what effect a condemnation, without the Nation's presence, would have on PNM's right of way to maintain its electrical transmission line. A condemnation must bind all owners of property, and an incomplete condemnation judgment may be unenforceable. *Martin v. Wilkes*, 490 U.S. 755, 761–62 (1989) (stating as a general matter, judgments do not bind non-parties); *see also Jachetta*, 653 F.3d at 907 ("If the United States is not a party to the action, any judicial decision condemning the land 'has no binding effect,' so "the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto."). This factor does not weigh in PNM's favor.

(d) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

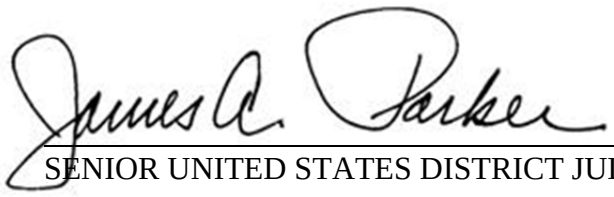
PNM contends that dismissal of this action as to the Two Allotments would leave PNM without a way to exercise its right of eminent domain. PNM asserts that because the United States Supreme Court has held in *State of Minnesota* that the United States is an indispensable party to all actions brought under § 357, all condemnation actions must be brought in federal court. Hence, PNM must bring this action in federal court where the Nation cannot be sued. And, PNM has no other forum in which to condemn its easement on the Two Allotments. In other words, PNM contends that without the authority to condemn the Two Allotments under § 357, it has no means by which it can acquire its easement. The Nation admits this, but argues that sovereign immunity necessarily results in a lack of remedy against a sovereign and that its sovereignty interests outweigh PNM's eminent domain rights.

The Court finds that PNM is not completely without a remedy. PNM can acquire a voluntary easement under 25 U.S.C. §§ 323–328. As stated *supra*, this statutory scheme and administrative procedure is an alternative to § 357's condemnation of allotted land in federal court. *See generally* Miller, 26 Am. Indian L. Rev. at 121–25 (recognizing that the only way to

obtain easements over tribal lands is by the procedures set out in §§ 323–328 and detailed in the regulations, which requires approval from the Secretary of Interior and written consent from the appropriate tribal officials).

The Court concludes that 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.

IT IS ORDERED that the MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 32) is granted and the claims against the Nation and the Two Allotments will be dismissed without prejudice for lack of subject matter jurisdiction.



SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,
Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND
IN MCKINLEY COUNTY, NEW MEXICO;
NAVAJO NATION;
NAVAJO TRIBAL UTILITY AUTHORITY;
CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.;
TRANSWESTERN PIPELINE COMPANY, LLC;
CITICORP NORTH AMERICA, INC.;
CHEVRON USA INC., as successor in interest to Gulf Oil Corp.;
HARRY HOUSE, Deceased;
LORRAINE BARBOAN, also known as, LARENE H. BARBOAN;
PAULINE H. BROOKS;
BENJAMIN HOUSE, also known as, BENNIE HOUSE;
ANNIE H. SORRELL, also known as, ANNA H. SORRELL;
MARY ROSE HOUSE, also known as, MARY R. HOUSE;
DOROTHY HOUSE, also known as, DOROTHY W. HOUSE;
LAURA H. LAWRENCE, also known as, LAURA H. CHACO;
LEO HOUSE, JR.; JONES DEHIYA; NANCY DEHEVA ESKEETS;
JIMMY A. CHARLEY, also known as, JIM A. CHARLEY;
MARY GRAY CHARLEY, also known as, MARY B. CHARLEY;
BOB GRAY, Deceased, also known as, BOB GREY;
CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY;
THOMAS THOMPSON GRAY, also known as, THOMAS GREY;
JIMMIE GREY, also known as, JIMMIE GRAY;
LORRAINE SPENCER;
MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY;
MARLA L. CHARLEY, also known as, MARLA CHARLEY;
KALVIN A. CHARLEY; LAURA A. CHARLEY;
HELEN M. CHARLEY; MARILYN RAMONE; WYNEMA GIBERSON;
IRENE WILLIE, also known as, IRENE JAMES WILLIE;
EDDIE MCCRAY, also known as, EDDIE R. MCCRAE;
ETHEL DAVIS, also known as, ETHEL B. DAVIS;
CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON;
WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY;
ELOUISE J. SMITH;
ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as,
ELOISE ANN JAMES, also known as, ELOUISE WOODS;

LEONARD WILLIE;
ALTA JAMES DAVIS, also known as, ALTA JAMES;
ALICE DAVIS, also known as, ALICE D. CHUYATE;
PHOEBE CRAIG, also known as, PHOEBE C. COWBOY;
NANCY JAMES, also known as, NANCY JOHNSON;
BETTY JAMES, Deceased;
LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS;
GENEVIEVE V. KING; LESTER CRAIG; SHAWN STEVENS;
FABIAN JAMES;
DAISY YAZZIE CHARLES, also known as,
DAISY YAZZIE, also known as, DAISY J. CHARLES;
ROSIE YAZZIE, Deceased;
KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES;
VERNA M. CRAIG;
JUANITA SMITH, also known as, JUANITA R. ELOTE;
ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.;
BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY;
VELMA YAZZIE; GERALDINE DAVIS;
LARRISON DAVIS, also known as, LARRISON P. DAVIS;
ADAM MCCRAY; MICHELLE MCCRAY;
EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS;
CELENA DAVIS, also known as, CELENA BRATCHER;
FRANKIE DAVIS;
GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON;
VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON;
VERN CHARLESTON;
GLENDA BENALLY, also known as, GLENDA G. CHARLESTON;
KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON;
SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON;
SPENCER KIMBALL CHARLESTON, JR., Deceased;
EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON;
CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON;
SAM MARIANO; JORGE ADRIAN ORTEGA-GALLEGOS;
Unknown owners, Claimants and Heirs of the Property Involved,
JORGE ADRIAN ORTEGA-GALLEGOS, Unknown Heirs of Harry House, Deceased,
JORGE ADRIAN ORTEGA-GALLEGOS, Unknown Heirs of Bob Gray (Bob Grey), Deceased, Unknown Heirs of Betty James, Deceased, Unknown Heirs of Rosie C. Yazzie, Deceased, Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased,
ESTATE OF ROSIE C. YAZZIE, Deceased,
ESTATE OF SPENCER K. CHARLESTON, Deceased,
UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants.

ORDER OF DISMISSAL WITHOUT PREJUDICE

In accordance with the MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 entered herewith, the Court dismisses without prejudice Plaintiff's claims against the Navajo Nation and against Allotment Numbers 1160 and 1392.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,
Plaintiff,

vs. **No. 15 CV 501 JAP/CG**

APPROXIMATELY 15.49 ACRES OF LAND
IN MCKINLEY COUNTY, NEW MEXICO;
NAVAJO NATION;
NAVAJO TRIBAL UTILITY AUTHORITY;
CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC.;
TRANSWESTERN PIPELINE COMPANY, LLC;
CITICORP NORTH AMERICA, INC.;
CHEVRON USA INC., as successor in interest to Gulf Oil Corp.;
HARRY HOUSE, Deceased;
LORRAINE BARBOAN, also known as, LARENE H. BARBOAN;
PAULINE H. BROOKS;
BENJAMIN HOUSE, also known as, BENNIE HOUSE;
ANNIE H. SORRELL, also known as, ANNA H. SORRELL;
MARY ROSE HOUSE, also known as, MARY R. HOUSE;
DOROTHY HOUSE, also known as, DOROTHY W. HOUSE;
LAURA H. LAWRENCE, also known as, LAURA H. CHACO;
LEO HOUSE, JR.; JONES DEHIYA; NANCY DEHEVA ESKEETS;
JIMMY A. CHARLEY, also known as, JIM A. CHARLEY;
MARY GRAY CHARLEY, also known as, MARY B. CHARLEY;
BOB GRAY, Deceased, also known as, BOB GREY;
CHRISTINE GRAY BEGAY, also known as, CHRISTINE G. BEGAY;
THOMAS THOMPSON GRAY, also known as, THOMAS GREY;
JIMMIE GREY, also known as, JIMMIE GRAY;
LORRAINE SPENCER;
MELVIN L. CHARLES, also known as, MELVIN L. CHARLEY;
MARLA L. CHARLEY, also known as, MARLA CHARLEY;
KALVIN A. CHARLEY; LAURA A. CHARLEY;
MARILYN RAMONE; WYNEMA GIBERSON;
IRENE WILLIE, also known as, IRENE JAMES WILLIE;
EDDIE MCCRAY, also known as, EDDIE R. MCCRAE;
ETHEL DAVIS, also known as, ETHEL B. DAVIS;
CHARLEY JOE JOHNSON, also known as, CHARLEY J. JOHNSON;
WESLEY E. CRAIG; HYSON CRAIG; NOREEN A. KELLY;
ELOUISE J. SMITH;
ELOUISE ANN JAMES, also known as, ELOUISE JAMES WOOD, also known as,
ELOISE ANN JAMES, also known as, ELOUISE WOODS;

LEONARD WILLIE;
ALTA JAMES DAVIS, also known as, ALTA JAMES;
ALICE DAVIS, also known as, ALICE D. CHUYATE;
PHOEBE CRAIG, also known as, PHOEBE C. COWBOY;
NANCY JAMES, also known as, NANCY JOHNSON;
BETTY JAMES, Deceased;
LINDA C. WILLIAMS, also known as, LINDA CRAIG-WILLIAMS;
GENEVIEVE V. KING; LESTER CRAIG; SHAWN STEVENS;
FABIAN JAMES;
DAISY YAZZIE CHARLES, also known as,
DAISY YAZZIE, also known as, DAISY J. CHARLES;
ROSIE YAZZIE, Deceased;
KATHLEEN YAZZIE JAMES, also known as, CATHERINE R. JAMES;
VERNA M. CRAIG;
JUANITA SMITH, also known as, JUANITA R. ELOTE;
ALETHEA CRAIG, SARAH NELSON, LARRY DAVIS, JR.;
BERDINA DAVIS; MICHELLE DAVIS; STEVEN MCCRAY;
VELMA YAZZIE; GERALDINE DAVIS;
LARRISON DAVIS, also known as, LARRISON P. DAVIS;
ADAM MCCRAY; MICHELLE MCCRAY;
EUGENIO TY JAMES; LARSON DAVIS; CORNELIA A. DAVIS;
CELENA DAVIS, also known as, CELENA BRATCHER;
FRANKIE DAVIS;
GLEN CHARLES CHARLESTON, also known as, GLEN C. CHARLESTON;
VERNA LEE BERGEN CHARLESTON, also known as, VERNA L. CHARLESTON;
VERN CHARLESTON;
GLENDA BENALLY, also known as, GLENDA G. CHARLESTON;
KELLY ANN CHARLESTON, also known as, KELLY A. CHARLESTON;
SHERYL LYNN CHARLESTON, also known as, SHERYL L. CHARLESTON;
SPENCER KIMBALL CHARLESTON, JR., Deceased;
EDWIN ALLEN CHARLESTON, also known as, EDWIN A. CHARLESTON;
CHARLES BAKER CHARLESTON, also known as, CHARLES B. CHARLESTON;
SAM MARIANO; HARRY HOUSE, JR.; MATILDA JAMES; DARLENE YAZZIE;
Unknown owners, Claimants and Heirs of the Property Involved,
Unknown Heirs of Harry House, Deceased;
Unknown Heirs of Bob Gray (Bob Grey), Deceased;
Unknown Heirs of Betty James, Deceased;
Unknown Heirs of Rosie C. Yazzie, Deceased;
Unknown Heirs of Spencer Kimball Charleston, Jr. (Spencer K. Charleston), Deceased;
Unknown Heirs of Helen M. Charley, Deceased;
ESTATE OF ROSIE C. YAZZIE, Deceased;
ESTATE OF SPENCER K. CHARLESTON, Deceased;
UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and
UNITED STATES DEPARTMENT OF THE INTERIOR;
Defendants.

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

Plaintiff Public Service Company of New Mexico (PNM) asks the Court to alter or amend its MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Doc. No. 101) (Memorandum Opinion) and set aside its ORDER OF DISMISSAL WITHOUT PREJUDICE (Doc. No. 102) (Order of Dismissal). *See* PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Doc. No. 107) (Motion).[1] Because PNM has failed to meet the requirements for granting motions to reconsider, the Court will deny the Motion in part. However, the Court will grant the Motion in part and certify for interlocutory appeal the controlling questions of law presented in this case.

[1] On January 12, 2016, the Navajo Nation (Nation) filed its RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Doc. No. 110) (Nation's Response). On January 12, 2016, the United States filed UNITED STATES' RESPONSE IN OPPOSITION TO PLAINTIFF'S DECEMBER 29, 2015 MOTION TO ALTER OR AMEND ORDER OF DECEMBER 1, 2015 (Doc. No. 114) (the United States' Response). On January 25, 2016, 22 of the individual allotment owner defendants filed INDIVIDUAL DEFENDANTS' RESPONSE TO PNM'S MOTION TO ALTER OR AMEND (Doc. No. 116) (22 Defendants' Response) adopting the arguments in the Nation's Response and the United States' Response. On January 26, 2016, PNM filed PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S REPLY TO THE NAVAJO NATION'S RESPONSE IN OPPOSITION TO 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. No. 117) (Reply to Nation's Response). On February 5, 2016, PNM filed PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S REPLY TO THE UNITED STATES' RESPONSE IN OPPOSITION TO 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 (Reply to United States' Response). And on February 8, 2016, PNM filed PNM filed PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S REPLY TO 22 DEFENDANTS' RESPONSE IN OPPOSITION TO 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 (Reply to 22 Defendants' Response) . The Court has carefully considered all arguments presented in these briefs.

I. BACKGROUND

This case involves a utility easement granted to PNM in the 1960s for a fifty-year term (the Original Easement). On the easement PNM constructed and maintains a 115-Kilovolt electric transmission line, known as the "AY Line." The AY Line is a crucial component of PNM's electricity transmission system in northwestern New Mexico and crosses five allotments owned by members of the Navajo Nation (Nation). The allotments, located in McKinley County, New Mexico, will be referred to as (1) Allotment 1160, (2) Allotment 1204, (3) Allotment 1340, (4) Allotment 1392, and (5) Allotment 1877 (together, the Five Allotments). The United States owns fee title to the Five Allotments in trust for the beneficial interest owners. The Nation owns an undivided 13.6 % beneficial interest in Allotment 1160 and an undivided .14 % beneficial interest in Allotment 1392 (together, the Two Allotments).

In April 2009, prior to the expiration of the Original Easement, PNM acquired written consent from a sufficient number of the individual owners of beneficial interests and submitted a renewal application to the Department of the Interior's Bureau of Indian Affairs (BIA). In June 2014, counsel for the 22 Defendants, who own a majority of the beneficial interests in the Five Allotments, notified the BIA and PNM that they had revoked their consent. In the ensuing months, PNM attempted in good faith, though unsuccessfully, to obtain the necessary consents to renew the Original Easement.[2] In January 2015, the BIA notified PNM that the revocations precluded the BIA from approving PNM's renewal application.

On June 13, 2015, PNM initiated this action under 25 U.S.C. § 357 to condemn a perpetual easement on the Five Allotments. Asserting sovereign immunity, the Nation moved to dismiss the condemnation claims against it and against the Two Allotments arguing that the Nation is an indispensable party. The Court granted the Nation's MOTION TO DISMISS THE

[2] The FAC does not allege whether PNM sought the Nation's consent to renew the Original Easement.

NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 (Motion to Dismiss) and dismissed the condemnation claims against the Nation without prejudice.

In the Motion, PNM asks the Court to set aside the Memorandum Opinion and the Order of Dismissal. In the alternative, PNM asks the Court to apply its ruling prospectively and allow PNM to condemn easements required for PNM's existing infrastructure. If the Court denies both of these requests, PNM asks the Court to (1) certify for interlocutory appeal the controlling questions of law presented in this case or (2) sever PNM's claims against the Two Allotments from this case and enter a final appealable judgment. Because an interlocutory appeal will promote judicial economy and will help determine questions of law vital to PNM's authority to condemn property in Indian Country, the Court will grant PNM's request to certify issues for interlocutory appeal.

II. STANDARD OF REVIEW

PNM's Motion asks the Court to alter or amend the Memorandum Opinion under Rule 59(e). Technically, Rule 59(e) does not apply here because the Memorandum Opinion is not a final order or judgment. *Guttman v. New Mexico,* 325 F. App'x 687, 690 (10th Cir. 2009) ("Rule 59(e) does not apply because the court's order was not a final judgment . . ."). Properly speaking, PNM's Motion is a motion to revise an interim order under Fed. R. Civ. P. 54(b), which provides, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." However, the standard for reviewing a Rule 54(b) motion for reconsideration is the same as the standard for reviewing a Rule 59(e) motion to alter or amend a judgment. *Ankeney v. Zavaras,* 524 F. App'x 454, 458 (10th Cir. 2013) (unpublished); *see also Pia v. Supernova*

Media, Inc., No 2:09-cv-00840, 2014 WL 7261014, *1–2 (D. Utah Dec. 18, 2014) (unpublished). Hence, the Court can grant the Motion if PNM shows: (1) there has been an intervening change in the controlling law; (2) there is new evidence previously unavailable; or (3) the Court needs to correct clear error or prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). In other words, the Court may grant the Motion if it has "misapprehended the facts, a party's position, or the controlling law." *Id.* As with a Rule 59(e) motion, PNM may not ask the court to revisit issues already considered. *Id.* And PNM may not "rehash previously rejected arguments." *Achey v. Linn County Bank*, 174 F.R.D. 489, 490 (D. Kan. 1997). In addition, PNM may not present arguments that it could have raised in the initial briefing. *Van Skiver v. United States*, 953 F.2d 1241, 1243 (10th Cir. 1991).

III. ANALYSIS

A. DISMISSAL WAS NOT *SUA SPONTE*

Section 3 of the Act of March 3, 1901 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." 25 U.S.C. § 357. The Court concluded PNM could not condemn the Two Allotments under § 357 because the Nation owns a fractional interest in the Two Allotments. Thus, the Court determined that the Two Allotments are no longer "lands allotted in severalty to Indians" as provided in § 357. Alternatively, the Court held that as a partial owner of the Two Allotments, the Nation is an indispensable party that cannot be joined due to sovereign immunity. Therefore, the Court determined that, under Rule 19(b), "in equity and good conscience," the claims against the Two Allotments should be dismissed.

PNM contends that since the Nation only argued for dismissal under Rule 19 and did not argue that PNM lacked authority to condemn the Two Allotments under § 357, "PNM 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." (Mot. at 5.) According to PNM, the Court reached its key holding *sua sponte* in the absence of any party advocating for such holding. (*Id.*) In response, the Nation contends that the Court's ruling on this issue was not essential to the decision because the alternative reason for dismissal of the Nation as an indispensable party with sovereign immunity is sufficient to uphold the decision to dismiss the Two Allotments.

In the first part of its Memorandum Opinion, the Court concluded that under the plain language of § 357 and under the scant case law interpreting § 357 in this context, PNM could not condemn the Two Allotments. In addition to considering the language of § 357 and the statutory history of Indian land allotment, the Court followed the holding in in *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant*, 719 F.2d 956, 961 (8th Cir. 1983) (*NPPD*).

NPPD was a § 357 condemnation action brought against several tracts of land within the Winnebago Reservation. *Id.* at 957. The tracts had been allotted to individual tribal members under the General Allotment Act, 25 U.S.C. § 331 *et seq*., or under a treaty between the tribe and the United States. *Id.* at 958. Shortly before the condemnation action was filed, several individual allotment owners transferred undivided future interests in their tracts to the United States in trust for the tribe, and the owners retained life estates. *Id.* In Part I of its opinion, the Eighth Circuit Court of Appeals reversed the district court's holding that none of the tracts could be condemned because § 357 had been impliedly repealed by the 1948 Act (25 U.S.C. §§ 323–328) authorizing

the Interior Secretary to grant rights of way across Indian lands. *Id.* at 958. The Eighth Circuit concluded that both statutes were enforceable. *Id.* at 961.

In Part II of its opinion, the Eighth Circuit used the definition of tribal lands in 25 C.F.R. § 169.1(d), a regulation governing consensual grants of rights of way on Indian lands. Section 169.1(d) defines tribal land as "land or *any interest therein*, title to which is held by the United States in trust for a tribe." *Id.* (emphasis added). The Eighth Circuit concluded that under this definition, tracts partially owned by the tribe had become "tribal land" that could not be condemned under § 357. *Id.* at 962.

PNM correctly asserts that in the Nation's Motion to Dismiss, the Nation did not argue that the Two Allotments were "tribal land." However, in its Response to the Motion to Dismiss (Doc. No. 39), PNM asserted that the Indian Land Consolidation Act (ILCA), the statute under which many tribes acquired title to previously allotted lands, did not "change the legal character of any parcel from allotted land to any other type of land (such as tribal trust land) as a result of an Indian tribe's acquisition of a fractional interest." (Resp. (Doc. No. 39) at 6.) PNM also asserted an "Indian tribe that acquires a fractional interest is, in substance, only stepping into the shoes of an allottee." (*Id.*)[3] Although these contentions were in the background section of PNM's Response to the Motion to Dismiss, PNM clearly presented its belief that the statutes, particularly the ILCA, which were intended to reverse the disastrous allotment policy, had no effect on § 357's general applicability to allotted lands. And, in its argument section, PNM asserted that in § 357, Congress specifically allowed condemnation of allotted land without regard to "which persons or entities own fractional interests in such parcel." (*Id.* at 7.) PNM further argued that Congress enacted and amended the ILCA without modifying § 357, thereby

[3] This argument was rejected by the *NPPD* court: "[i]t is the fact of tribal ownership which establishes the existence of tribal land, not the identity of the grantor." *NPPD*, 719 F.2d at 962.

demonstrating a congressional intent to abrogate tribal sovereign immunity against condemnation actions involving allotted lands. (*Id.*)

In its Response to the Motion to Dismiss, PNM asked the Court to focus on Part I of the *NPPD* opinion in which the Eighth Circuit found that the location of allotted lands, on or off of a reservation, did not alter their status as condemnable allotted lands:

> The appellees urge that we distinguish the previous courts of appeals decisions because they involved allotted land outside an Indian reservation. In contrast, the allotted land in this case is located within an Indian reservation. It may well be good policy to treat allotted land within a reservation, in which a tribe has a greater interest, differently from allotted land outside the reservation. Congress, however, has drawn no such distinction in the statute. We cannot ignore the plain meaning of the statute, which provides simply for condemnation of "allotted land" without regard to its location.

Id. at 961. PNM contended that if location did not alter the lands' status, neither should tribal ownership of the Two Allotments. PNM stressed that it was relying only on Part I of *NPPD*, that it expressly disagreed with the conclusion in Part II of *NPPD*, and that it would request to file a surreply brief if the Nation presented the *NPPD* Part I argument in its Reply brief. However, no surreply was necessary because the Nation, in both its Motion to Dismiss and in the Reply, only argued that the Nation should be dismissed because it had sovereign immunity, that it had not waived its immunity, and that its immunity had not been abrogated by Congress.[4]

In sum, the Court declined to follow PNM's argument that in § 357 Congress intended to abrogate tribal immunity by allowing the condemnation of allotted lands even if partially owned by tribes. The Court ruled that tribal ownership of the Two Allotments removed them from the reach of § 357 and that despite Congress's implied abrogation of the United States' sovereign immunity, the implied abrogation did not extend to the Nation. In its Memorandum Opinion, the

[4] However, PNM recognized that the Nation and the United States had already cited and quoted Part II of the *NPPD* opinion in their answers and argued that the Two Allotments were "tribal lands" as defined in the Part 169 regulations. *See* ANSWER TO CONDEMNATION COMPLAINT (Doc. No. 23) at 2; ANSWER OF THE UNITED STATES (Doc. No. 25) at 6.

Court agreed, "with the reasoning in *NPPD* that § 357 does not allow condemnation of lands owned by tribes[.]" However, the Court primarily relied "on the plain language of § 357 and its distinct application to lands 'allotted in severalty to Indians[,]'" which illustrated "a singular Congressional focus on allotted land owned by individual tribal members." (Mem Op. at 14 and note 16.) Therefore, the Court did not rule *sua sponte* that the Two Allotments were "tribal lands" as defined in the regulations related to consensual easements. Nevertheless, in the interest of clarity and completeness, the Court will address all of the contentions in the Motion, including the arguments related to *NPPD* Part II and the definition of "tribal land" found in the Part 169 regulations. More importantly, as the Nation contends, the Court's conclusion that PNM lacked statutory authority to condemn the Two Allotments, if erroneous, does not mean that the decision to dismiss the Nation and the Two Allotments must be set aside. The Court correctly determined that under Rule 19, the Nation was an indispensable party to this condemnation action that could not be feasibly joined due to sovereign immunity. Therefore, the case had to be dismissed because "in equity and good conscience," the action could not proceed against the Two Allotments in the Nation's absence.

B. ONCE AN ALLOTMENT NOT ALWAYS AN ALLOTMENT

PNM maintains that for 130 years land "allotted in severalty to Indians" has been synonymous with the term "allotment." According to PNM, the allotment of land was a one-time historical event that permanently changed reservation lands into allotments subject to condemnation under § 357. However, Congress's changing policy toward Indian land and its abandonment of the allotment policy proves otherwise. As described in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,*

> In the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. 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.

502 U.S. 251, 254 (1991). In the Indian General Allotment Act of 1887, also known as the Dawes Act,[5] Congress

> empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. The Dawes Act restricted immediate alienation or encumbrance by providing that each allotted parcel would be held by the United States in trust for a period of 25 years or longer; only then would a fee patent issue to the Indian.

Id. As described in the Memorandum Opinion, Congress's allotment policy changed within a few decades because allotment proved disastrous for the Indians. *Hodel*, 481 U.S. 704, 706–07 (1987).[6]

PNM persuasively asserts that when the General Allotment Act was enacted, Congress did not contemplate, or have reason to contemplate, that allotted lands or fractional interests in allotted lands, would ever be transferred back to the tribe. In fact, Congress intended that allotted lands would eventually be freed from the trust and patented in fee to the owners. *See* 25 U.S.C. §349 (enacted in 1887, amended in 1906) (providing that state and territory laws applied to lands "[a]t the end of the trust period and when the lands have been conveyed to the Indians by patent in fee[.]").

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[5] PNM attached to its Motion a copy of the Dawes Act, which was titled "An act to provide for the allotment of lands in severalty to Indians . . ." (Mot. Ex. 1.) PNM also attached a 1910 statute on descent and distribution of allotments, which referenced the Dawes Act and the lands as "allotments." (Mot. Ex. 2.)

[6] The Supreme Court in *Hodel* outlined the unintended consequences of the General Allotment Act:

> Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. . . . The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40–, 80–, and 160–acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.

Id. at 707 (citations omitted).

As noted by the Supreme Court in *Babbitt v. Youpee*, Congress ended further allotment in the 1934 Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.* and allowed the Secretary of the Interior to acquire "any interest in lands . . . within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians." 519 U.S. 234, 237 (1997) (quoting 25 U.S.C. § 465). In repudiation of federal allotment policies, the IRA ended allotment and made possible the organization of tribal governments and tribal corporations. The passage of the IRA ended "the erosion of Indian land and resources and reaffirmed the inherent powers of tribal governments." AMENDING THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES, S. Rep. No. 112–166 (2012).

In 1983, Congress enacted the Indian Land Consolidation Act (ILCA), 25 U.S.C. §§ 2201–2221, which "contains a handful of provisions designed to ameliorate, over time, fractionated ownership." American Indian Law Deskbook, § 3.15 (4th ed. 2008). Under the ILCA, a tribe may purchase, at fair market value, all the interests in a tract so long as the owners of over fifty per cent of the undivided interests consent. The 2000 amendments to ILCA allowed the Secretary of the Interior to acquire fractional interests and hold them in trust for the tribe with jurisdiction over the property. 25 U.S.C. § 2212. Despite Congress's efforts, "interests in lands already allotted continued to splinter with each generation." 519 U.S. at 238.

PNM maintains, and the Court agrees, that at the time § 357 was enacted in 1901, Congress intended for all allotted land to be subject to condemnation for public purposes, even before the trust period ended and the land was patented in fee to the individual allottees. However, PNM asks the Court to go a step further and find that once Congress allotted land to

individual tribal members, the land remained subject to condemnation even after the land was reacquired in trust for a tribe under subsequent statutes. But PNM goes a step too far. PNM has not cited, and the Court has not located, a case holding that a parcel of land previously "allotted in severalty to" an individual Indian, but later transferred to the United States in trust for a tribe, is subject to condemnation under § 357 because the parcel is identified as an "allotment." And, PNM criticizes the one decision, *NPPD*, which held that such a parcel of land is not subject to condemnation under § 357.[7] Therefore, the Court did not clearly err in concluding that an interest in a previously allotted parcel of land later acquired in trust for a tribe was not condemnable under § 357.

PNM claims that the Court failed to define what it meant by "tribal lands," and the Court failed to explain how the Two Allotments became "tribal land" and ceased being "allotments." The Court followed the reasoning in *NPPD*, but to elaborate, the Court restates its conclusion: When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; that land becomes "tribal land" not subject to condemnation under § 357. PNM correctly points out that there is no legal mechanism by which land can be characterized as partially allotted land and partially tribal land, and that is not what the Court has concluded. But, PNM's "once an allotment always an allotment" rule is not supported by any case law authority or the plain language of § 357 and its historical context.

As an alternative, PNM argues that "[t]he Court also has not identified any recognized legal classification or categorization that the Two Allotments could possess (other than "Allotments") in light of their continued majority beneficial-interest ownership by individual

[7] In *NPPD* Part II, the utility district argued that the future interests in an allotment conveyed to the Winnebago tribe should not constitute "tribal land." 719 F.2d at 961. However, relying on the definition of "tribal land" in the Part 169 regulations related to consensual easements, the Eighth Circuit stated, "by defining tribal land as 'any interest' in land, [tribal land] includes the undivided future interests or expectancies conveyed in this case." *Id.* at 962.

Indians." PNM would characterize the Two Allotments as condemnable "allotments" due to their majority ownership by individuals. By implication, the Two Allotments would not be condemnable only when a tribe acquires a majority beneficial interest in the land. Again, PNM cites no statutory authority or case law to support this alternative. According to PNM, the Court's ruling has created a new category of "tribal land," and may have adverse effects on the interests of individual fractional owners of the Two Allotments. In this case, however, the 22 Defendants, who constitute a majority of individual ownership interests in the Five Allotments, are aligned with the Nation and the United States in opposition to the Motion as they previously opposed condemnation. *See* 22 Defendants' Response (Doc. No. 116) (adopting Nations' Response and the United States' Response).

PNM's contention that once land was allotted, it could never regain its status as tribal land, is not persuasive in light of the shift in congressional policy in favor of tribal sovereign ownership. Upon review of the statutory history of allotted lands, the Court concludes that Congress facilitated the transfer of beneficial interests from individual land owners to tribes not only to reduce the fractionation of allotted lands among individuals but also to restore lands to protected tribal status.

C. APPLYING THE PART 169 REGULATIONS

PNM next asserts, as it did in its Response to the Motion to Dismiss, that the Court should not follow *NPPD* because the Eighth Circuit incorrectly used the definition of "tribal land" set forth in the regulations governing consensual easements under 25 U.S.C. §§ 323–328. PNM cites *WBI Energy Transmission, Inc. v. Easement & Right-of-Way Across in Big Hom & Yellowstone Ctys., Montana*. WBI Energy Transmission, Inc. (WBI) held a 20 year consensual pipeline easement across several allotments owned by a single individual. No. CV 14-130-BLG-

SPW, 2015 WL 4216841, *1 (D. Mont. July 10, 2015). After failing to obtain the landowner's consent to a renewal of the easement, WBI brought a condemnation action under 25 U.S.C. § 357 and under the Natural Gas Act, 15 U.S.C. §§ 717–717z. *Id.* The landowner filed a motion *in limine* to preclude WBI "from arguing that its condemnation can be for more than 20 year term." *Id.* at * 4. The landowner relied on 25 U.S.C. §§ 321 and 323 governing consensual easements, and WBI argued that §§ 321 and 323 and the accompanying regulations were inapplicable to condemnation.[8] The district court agreed with WBI and found that "condemnation provides an alternative method to acquire the easement, WBI is not confined by the perimeters of § 321 or § 323." *Id.*

PNM asks the Court to follow the *WBI* court's reasoning and find that in this § 357 condemnation proceeding, PNM is not confined by the definition of "tribal land" from the Part 169 regulations. First, PNM mischaracterizes the Court's decision, which was not based solely on the regulatory definition of "tribal land." Second, the holding in *WBI* does not convince the Court to change its conclusion that due to the Nation's ownership interest, the Two Allotments are no longer "lands allotted in severalty to Indians" as provided in § 357. Moreover, even if the Two Allotments were condemnable under § 357, Court would dismiss this action against the Nation because it is an indispensable party that cannot be joined due to sovereign immunity. Thus, the outcome would be the same.

Next, PNM takes issue with the Court's footnote discussion of cases that cited *NPPD* with approval. (Mem. Op. at 14 n.16.) PNM argues that none of those courts directly approved of Part II of the *NPPD* opinion and the use of the regulatory definition of "tribal lands." However,

[8] Section 321 authorizes the Interior Secretary to grant easements across Indian allotments for the construction of pipelines provided that the easement "shall not extend beyond a period of twenty years." Section 323 authorizes the Secretary to grant rights of way "subject to such conditions he may prescribe." Under the applicable regulations, a new easement for a gas pipeline can be permanent, but easement renewals can be granted "for a like term of years." 25 C.F.R. §§ 169.18–169.19.

the first case cited by the Court did just that: "The Utility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees under 25 U.S.C. § 357, but this statute does not apply to land held in trust for the Tribe." *United States v. Pend Oreille Public Util. Dist. No. 1*, 28 F.3d 1544, 1552 (9th Cir. 1994) (citing *NPPD* 719 F.2d at 961). That subject was only discussed in Part II of the *NPPD* opinion. 719 F.2d at 961–62.

Nevertheless, PNM correctly maintains that the *Pend Orielle* court and the other cases cited in footnote 16 did not answer the question presented here as to whether land in which a tribe owns a fractional beneficial interest is exempt from § 357 condemnation. PNM correctly asserts that no court, other than the *NPPD* court and now this Court, have held that tracts of land that are jointly owned by individuals and a tribe may not be condemned under § 357. By the same token, however, no court has held that such land is condemnable under § 357. In sum, the Court, relying on the only Circuit Court of Appeals case that had decided this issue, did not commit clear error in holding that PNM cannot condemn the Two Allotments under the plain language of § 357.

D. THE AMENDED PART 169 REGULATIONS

PNM contends that if the Court affirms its use of the definition of tribal lands from 25 C.F.R. § 169.1(d), the Court should reevaluate its findings in light of the amendments to the Part 169 regulations (Amended Part 169), which will become effective on March, 21 2016. As already mentioned, the Court did not decide that the Two Allotments were exempt from condemnation solely because they are tribal lands as defined in the Part 169 regulations. However, if the Court were to consider the Amended Part 169 regulations, the Court would not change its decision.

In June 2014, the BIA promulgated the amendments to "comprehensively update and streamline the process for obtaining BIA grants of rights-of-way on Indian land," and the BIA invited comments. *See* 79 Fed. Reg. 34,455-01 (June 17, 2014). PNM contends that the Amended Part 169 regulations, as amplified by the comments and the BIA's responses to the comments, support either of two conclusions: (1) that these regulations are not applicable to condemnation proceedings; or (2) that allotments jointly owned by a tribe and individuals should not be considered "tribal land" exempt from condemnation.

PNM's first argument is correct. The new regulations and the comments reaffirm that the Amended Part 169 regulations do not govern condemnation actions under § 357. For example, the old version of 25 C.F.R. § 169.21 stated:

> The facts relating to any condemnation action to obtain a right-of-way over individually owned lands shall be reported immediately by officials of the Bureau of Indian Affairs having knowledge of such facts to appropriate officials of the Interior Department so that action may be taken to safeguard the interests of the Indians.

The Amended Part 169 regulations omit this section apparently to remove any confusion about whether these regulations apply to § 357 condemnations.

In addition, one commenter asked the BIA why the term "eminent domain" was not defined in the amendments. The BIA responded: "the final rule does not include the term 'eminent domain' or address eminent domain, so this definition is not added. Statutory authority exists in 25 U.S.C. § 357 for condemnation under certain circumstances, but these regulations do not address or implement that authority." *See* Rights-of-Way on Indian Land; Final Rule, 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015). The BIA further commented: "The current rule does not provide guidance for condemnation of Indian land. The statutory provisions at 25 U.S.C. § 357 govern this process." 80 Fed. Reg. at 72,517.

PNM contends these comments show that the BIA has discouraged the use of the regulatory definition of "tribal land" to interpret § 357. The Court, however, agrees with the United States' argument that although the Amended Part 169 regulations do not govern condemnation actions, the BIA's analysis and treatment of fractionated Indian lands is useful to interpret other Indian land statutes, particularly § 357.[9]

Alternatively, PNM argues that several of the Amended Part 169 regulations support a finding that the Two Allotments should not be considered "tribal land." For example, in Amended Part 169.2, the term "tribal land" is 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 (effective Mar. 21, 2016) (emphasis added). Conversely, the United States asserts that this new definition reveals that the Two Allotments would be considered tribal land. But, PNM points out that even though a fractional interest in land can be considered tribal land in § 169.2, the BIA does not treat "tribal land" and "individually owned land" as mutually exclusive legal classifications. For example, the BIA responded to a commenter who asked whether a tract in which both a tribe and an individual own interests would be considered "individually owned Indian land" or "tribal land:

> A tract in which both a tribe and an individual own interests would be considered "tribal land" for the purposes of requirements applicable to tribal land and would be considered "individually owned Indian land" for the purposes of the interests owned by individuals.

[9] In its Reply to the United States' Response, PNM argues that the United States should have explained the BIA's commentary on Amended Part 169, but instead, by remaining silent, the United States has essentially conceded PNM's position. (Reply (Doc. No. 118) at 4.) However, the United States made no concession. In its Response, the United States points to the definition of "tribal lands" in the Amended Part 169 regulations which include "an undivided interest in the surface estate." And the United States points to comments related to the definition of "tribal land" which included fractional interests in land owned by both individuals and tribes. (*Id.* 9–10.) The United States maintains that the new regulations and comments do not support a finding that the Court erred in its conclusion that lands jointly owned by a tribe are not eligible for condemnation.

Id. at 72,496. While BIA clearly recognizes the rights of both tribal and individual owners with regard to grants of easements, the BIA's treatment of jointly owned land does not convince the Court to change its decision. The Nation's joint ownership interest has an attendant right to possession of the entire tract, and the BIA recognizes that right:

> 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 include only land that is not individually owned. A commenter suggested limiting tribal land to those tracts in which the tribe holds a majority interest.
>
> Response: Under the proposed definition and final definition, a tract is considered "tribal land" if any interest, fractional or whole, is owned by the 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.*

Id. at 72,497 (emphasis added). Also on that subject, some commenters opposed the BIA's requirement that an applicant get a tribe's consent to a right of way when a tribe owns a fractional interest "because a tribe could unilaterally stop other individual Indian landowners who have a majority interest from granting the right-of-way." *Id.* The BIA responded, "tribal consent is required for any tract in which the tribe owns an interest, regardless of whether the tribal interest is less than a majority. *Requiring tribal consent restores a measure of tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy.*" 80 Fed. Reg. at 72509 (emphasis added). The emphasized language exhibits the BIA's deference toward tribal ownership and tribal governance of land even when a tribe owns a small interest in the land. Given this deference to fractional tribal ownership, it is entirely reasonable to conclude in other contexts, like condemnation, that tribes who own a fractional interests in land should be treated with the equal deference.

In conclusion, the Court followed *NPPD* and its reliance on the Part 169 definition of "tribal land" only to amplify the Court's conclusion that the plain meaning of "lands allotted in severalty to Indians" excludes lands partially owned in trust for tribes. And, after examining the Amended Part 169 regulations and BIA commentary, particularly the BIA's deferential treatment of those lands, the Court stands by its interpretation of § 357. In view of the absence of case law authority in this circuit, the Court can appropriately borrow from the BIA's regulatory policy on Indian lands, to interpret the statute governing the condemnation of land.[10]

E. DISMISSAL FOR FAILURE TO JOIN AN INDISPENSABLE PARTY UNDER RULE 19; THE COURT'S USE OF RULE 71.1; and *IN REM* PROCEEDINGS

If the Court sets aside its ruling and finds that PNM has the authority to condemn the Two Allotments, PNM still faces the Court's alternative ruling that the Two Allotments must be dismissed because the Nation is an indispensable party. In its Memorandum Opinion, the Court determined that under Rule 71.1(c)(1), all persons having an interest in property to be condemned must be joined as parties. (Mem. Op. at 11.) The Court cited Wright & Miller in support of this conclusion. *Id.* (citing 12 Fed. Prac. & Proc. § 3045). According to PNM, the Court should not have construed Rule 71.1's requirement that a plaintiff "must add as defendants all those persons who have or claim an interest" as a limitation on § 357's authorization of condemnation actions. In other words, PNM argues that the dismissal of indispensable parties

[10] PNM correctly points out that in § 357 Congress provided no statutory authority for a federal agency to interpret or limit its scope. (Resp. (Doc. No. 118) at 6). *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (discussing deference to an agency's construction of statute which agency administers and stating "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). In contrast, the consensual easement statutes specifically authorize the Secretary to "prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title." 25 U.S.C. § 328. However, the statutory scheme allowing consensual easements is relevant to the overall analysis of this case not only as to the reach of § 357 but also in determining under Rule 19 that PNM has an adequate remedy apart from condemnation.

under Rule 19 and as persons with an interest in the property under Rule 71.1 does not mean that the Two Allotments must be dismissed.

PNM also contends that the Court should have cited a subsequent statement in the same section of Wright & Miller: "[S]ince the [condemnation] proceeding is in rem, there are no indispensable parties; the failure to join a party does not defeat the condemnor's title to the land, though the party will retain his or her right to compensation. . . ." *Id.* According to PNM since condemnation proceedings are strictly *in rem*, the dismissal of the Nation cannot deprive PNM of its authority to condemn an easement on the Two Allotments despite the strictures of Rule 19 and Rule 71.1.

In response, the Nation and the United States argue that this contention could have been raised earlier; therefore, it is an inappropriate basis for granting the Motion. However, in the interest of clarity, the Court will address PNM's *in rem* argument.

To begin with, the Court recognizes that a condemnation action generally is considered an *in rem* proceeding against property. *United States v. Petty*, 327 U.S. 372, 376 (1946) (stating in condemnation suit brought by United States that "[c]ondemnation proceedings are in rem."). However, the United States Supreme Court held that in § 357 condemnation proceedings against allotted Indian trust land, the United States is an indispensable party. *Minnesota*, 305 U.S. at 386. The Supreme Court further determined Congress had implicitly waived the United States' sovereign immunity by allowing suits against the United States to be brought in federal court. *Id.* at 388. Therefore, under § 357 a condemning authority cannot proceed against allotted land without joining the United States. *Id. See also Town of Okemah v. United States*, 140 F.2d at 965 (citing *Minnesota* and holding that United States was an indispensable party in a condemnation suit against individual allottees who owned land with restrictions on alienation). Consequently, a

federal condemnation proceeding under § 357 is not purely an *in rem* proceeding in which there are no indispensable parties.

In support of its contention, PNM cites two cases involving issues of sovereign immunity and condemnation under state law. First, *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 N.D. 83, 643 N.W. 2d 685 (2002), was a case in which an individual transferred fee title to the subject land to an Indian tribe in order to thwart a public works project. The North Dakota Supreme Court recognized an issue of first impression: "May a state condemn land within its territorial boundaries which has been purchased in fee by an Indian tribe, but which is not reservation land, aboriginal land, allotted land, or trust land?" *Id.* at 688. The court started with the premise that a condemnation proceeding under North Dakota law is strictly *in rem* and as such, *in personam* jurisdiction over a party is not required. *Id.* at 689. After determining that the proceeding met the due process requirements: (1) there were minimum contacts between the party and the forum state, and (2) all property owners had been given notice as required under state law, *id.* at 690, the Court allowed the condemnation to go forward:

> The State, and the District acting on behalf of the State, has broad authority to acquire property located within its territorial jurisdiction to be used for public purposes. A condemnation action is purely in rem, and does not require acquisition of in personam jurisdiction over the owners of the land. . . .
>
> The land at issue in this case is essentially private land which has been purchased in fee by an Indian tribe. It is not located on a reservation, is not allotted land, is not part of the Tribe's aboriginal land, is not trust land, and the federal government exercises no superintendence over the land. Under these circumstances, the State may exercise territorial jurisdiction over the land, including an in rem condemnation action, and the Tribe's sovereign immunity is not implicated.

643 N.W.2d at 693.

The *Cass County* ruling is distinguishable in key ways. First, the power to condemn under § 357 does depend on *in personam* jurisdiction as the Supreme Court held in *Minnesota*. In

addition, the Two Allotments are allotted trust land and the federal government and the Nation, exercise "superintendence over the land." *Id.* And since the Nation's sovereign immunity has not been abrogated, the Court cannot go forward without *in personam* jurisdiction over the Nation.

The second case is *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 482 (1923). In that case, the City of Chattanooga, Tennessee filed a condemnation action against property within the City that was owned by the State of Georgia and operated as a railroad yard. Georgia argued that the City could not sue for condemnation due to Georgia's sovereign immunity. The Supreme Court disagreed:

> Having divested itself of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee . . ., [Georgia's] property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owner. Moreover, the acceptance by Georgia of the permission given it to acquire the railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land and precludes a claim that it is not subject to taking for the use of the public, and amounts to a consent that it may be condemned as may like property of others.

Id. at 482–83 (citations omitted). The Supreme Court further noted that Georgia had been given notice and could voluntarily appear, but otherwise Georgia "had a plain, adequate, and complete remedy in the condemnation proceedings. . . ." *Id.* at 483.

PNM argues that the Court should follow the reasoning in these cases and find this action is an *in rem* proceeding that may proceed despite the absence of the Nation as a party. However, in *Cass* the land was subject to state condemnation proceedings because the tribe owned unrestricted land in fee that was not part of a reservation or an allotment. Land owned by a tribe in fee is subject to condemnation and taxation under state law. *See* 25 U.S.C. § 349; *and County of Yakima*, 502 U.S. at 267 (concluding that fee patented land on a reservation was subject to state ad valorem tax). In *Georgia*, the Supreme Court was considering land owned by a

sovereign state in its proprietary capacity, not in its sovereign capacity. And, the Supreme Court held that in its proprietary capacity, Georgia had consented to be sued as any other private land owner. Here, the Nation owns the Two Allotments in a sovereign capacity, and did not implicitly consent to suit by acquiring an interest in the property. Thus, neither case persuades the Court that this proceeding can continue as an *in rem* proceeding against the Two Allotments despite the Nation's absence.

F. NATION'S SOVEREIGN IMMUNITY CAN BE DISTINCT FROM THAT OF THE UNITED STATES

PNM points to the Tenth Circuit's opinion in *Somerlott v. Cherokee Nation Distr., Inc.*, where the Tenth Circuit recognized that tribal sovereign immunity is co-extensive with the United States' sovereign immunity 686 F.3d 1144, 1149–50 n.3 (10th Cir. 2012). PNM admits, however, that despite this general rule, a congressional waiver of the United States' sovereign immunity does not *per se* result in a waiver of tribal sovereign immunity. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 n.14 (10th Cir. 1982) (noting that United States' and tribal immunity are generally coextensive, and stating, "[o]f course, this is not to say that where Congress waives the United States' immunity it implicitly waives the immunity of Indian tribes also."). PNM asks the Court to consider the holding in *Wagoner County Rural Water Dist. No. 2 v. United States*, No. 07 CV 0642-CVE-PJC, 2008 WL 559437, *2 (N.D. Okla. Feb. 26, 2008). In *Wagoner County*, four water districts, a nonprofit corporation, and a private nursery brought an action against the Grand River Dam Authority, the United States, and the Cherokee Nation seeking a declaration of the parties' rights to water impounded in a reservoir. *Id.* The plaintiffs asked the court to find that both the United States' and the Cherokee Nation's sovereign immunity had been waived in the McCarran Amendment. *Id.* In the McCarran Amendment, 43

U.S.C. § 666(a), Congress permitted parties to join the United States as a defendant in an adjudication of certain water rights. *Id.* The district court held

> [T]he United States Supreme Court has held that the McCarran Amendment "did not waive the sovereign immunity of [American-]Indians as *parties* " to lawsuits brought under the Amendment. The McCarran Amendment waived sovereign immunity only with respect to the reserved water rights of the United States, which include those *rights* reserved on behalf of certain American-Indian tribes. Here, the United States waiver of immunity under the Amendment does not automatically extend to the Cherokee Nation simply because both entities possess coextensive sovereignty.

Id. (emphasis in original) (citations omitted). PNM argues that, unlike *Wagoner County*, Congress expressly authorized condemnation of "lands allotted in severalty to Indians," which should be interpreted as an authorization of *in rem* actions against allotments. PNM asserts that, as a result, the implicit waiver of United States' sovereign immunity recognized by the Supreme Court in *Minnesota* should extend to the Nation. According to PNM, a holding otherwise would place more importance on the Nation's sovereign immunity above that of the United States with respect to allotted lands.

However, the Supreme Court in *Minnesota* did not seem to consider the *in rem* nature of a condemnation proceeding. The State of Minnesota had argued that it had power to condemn the allotted lands under § 357 without making the United States a party based on the state's authority given by a treaty and its sovereign capacity to exercise its governmental functions. *Id.* at 385. The Supreme Court responded with a two-part analysis. First, the Supreme Court concluded that "[t]he United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States." 305 U.S. at 386. Second, the Supreme Court found that under § 357 the "authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts. . . . This suit was begun in state

court." *Id.* at 388. The Supreme Court upheld the dismissal of the action removed from state court "although in a like suit originally brought in a federal court it would have had jurisdiction." *Id.* at 389. The Court cannot find support within *Minnesota* or its progeny for a finding that Congress's authorization to condemn allotted lands conferred by implication permission to sue a tribe. In addition, no court has held that a congressional waiver of the United States' immunity for certain suits in federal court can be applied with equal force to a tribe.

Hence, PNM's argument that this *in rem* condemnation action can proceed against the Two Allotments despite the absence of the Nation directly contradicts the Supreme Court's ruling in *Minnesota*. If the Supreme Court viewed § 357 condemnations as purely *in rem* proceedings, it would not have considered the United States an indispensable party. Moreover, no court has held that even though the United States is an indispensable party to a § 357 action, a tribe, as a joint owner, is not a required or indispensable party. And, more importantly, although the Supreme Court in *Minnesota* found that Congress had waived the United States' sovereign immunity, no court has applied the same implicit waiver to a tribe under § 357.[11] In fact, it is doubtful that Congress intended, even implicitly, to waive tribal sovereign immunity in § 357 because at the time § 357 was enacted, Congress intended to parcel out all tribal reservation and communal property to individuals. On a related note, PNM has cited no authority holding that a tribe with beneficial title to land need not be joined in a condemnation action if the fee owner, the United States, is properly joined.

[11] In the Memorandum Opinion, the Court recognized that the holding in *Minnesota* on the implicit waiver of the United States' sovereign immunity has been criticized and that the Tenth Circuit has refused to apply the same reasoning in a partition action against Indian lands. (*See* Mem. Op. at 16–17, citing *Prince v. United States*, 7 F.3d 968, 970 (10th Cir. 1993)).

G. NO MANIFEST INJUSTICE AND PNM HAS AN ADEQUATE REMEDY APART FROM CONDEMNATION

PNM contends that if the Court's holding "were to become controlling law in the Tenth Circuit, such a decision would result in manifest injustice to PNM and its customers, and would also have far reaching, negative effects throughout Indian Country." (Mot. at 17.) PNM asserts that a tribe could acquire a miniscule ownership interest in allotted lands and block all condemnations for public purposes. PNM quotes the North Dakota Supreme Court:

> The decision of the district court (that there was no jurisdiction of a condemnation as to fee patented lands) would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project.

Cass County 643 N.W.2d at 694. PNM also contends that the effects of this Court's ruling are even more pronounced in light of the Amended Part 169 regulations requiring an easement applicant to get the consent of a tribe who holds even a small fractional interest in a parcel of land. *See* 25 C.F.R. § 169.3 (effective Mar. 21, 2016). PNM maintains that if the requisite consent from both the tribe and a majority of individual owners is not attainable, then it will have no alternative remedy under the condemnation statute. PNM contends that this Court's ruling opens up an avenue for abuse if a tribe wishes to block a project or if a tribe requests unreasonable payment in compensation. PNM asserts that in light of that possibility, utility companies and governmental entities will avoid building public works projects on Indian lands. PNM submits that the Court's holding will stand in the way of the BIA's stated policy of attracting economic development to Indian lands because increased project costs will impede a tribe's ability to attract non-Indian investment to Indian lands. *See generally*, 80 Fed. Reg. 72,505–72,506 (Nov. 19, 2015).

The Court recognizes and has certain sympathy with the policy arguments that PNM makes. However, it cannot have escaped notice by tribal officials and allotment land owners that they must cooperate in the granting of access to tribal lands to encourage investment in those lands. More importantly, this is the incorrect forum to address PNM's concerns. *County of Yakima*, 502 U.S. at 265 (noting the Yakima Nation's arguments about the implications of the court's rulings were more appropriately made to Congress). It is Congress's job to consider and correct the negative effects of its laws.

In a related argument, PNM maintains that it cannot acquire a consensual easement because the 22 Defendants have informed PNM and this Court in a filing in a related trespass case that they "refuse to provide consent to the required easements." *See Barboan et al. v. PNM*, No. 15 CV 826 WPJ/KK, Plaintiffs' Response to Nominal Defendant United States of America's Motion to Dismiss This Action in Its Entirety (Doc. No. 23) at p. 5. PNM argues that the Court should not have found that PNM has an adequate remedy in the Court's Rule 19 analysis.

The Nation responds that PNM ignores the possibility that it can negotiate with the owners of the Two Allotments for a higher compensation or other consideration for its easement. (Nation's Resp. To Mot. at 8.) Alternatively, the Nation argues that PNM's inability to sue for condemnation is a recognized consequence in cases against sovereigns. Moreover, the lack of a remedy, as in this situation, should be given less weight in a Rule 19 analysis involving sovereigns. As a general rule, dismissal due to an absent sovereign even in the absence of a remedy "is contemplated by the doctrine of sovereign immunity." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 872 (2008). In essence, the Nation asserts that the lack of a remedy is a natural result of the sovereign immunity doctrine and should not be dispositive in the Rule 19 analysis.

The United States counters that PNM's conclusion that it has no adequate remedy is premature because PNM has not presented evidence that a negotiated easement is absolutely impossible. PNM has presented no evidence that it has contacted counsel for the Nation or the 22 Defendants in an effort to negotiate a consensual easement.

The Court recognizes that the legal situation faced by PNM is not of its own making. In fact, Congress created this situation by allowing lands previously allotted to individuals to be reacquired in trust for tribes without amending § 357. It is up to Congress, not this Court, to open up the condemnation avenue over trust lands fractionally owned by tribes.

H. PROSPECTIVE APPLICATION

PNM asks the Court to apply the ruling prospectively due to the significant injustice to PNM and its rate payers. Generally speaking, the law announced in a court's decision controls the case at bar. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987). However, courts have restricted rulings to prospective application in specific circumstances that go beyond the particular hardship incurred when a party does not prevail. *Chevron Oil. Co. v. Huson*, 404 U.S. 97, 106–07 (1971). Three factors guide the Court in determining whether to apply a ruling prospectively. First the Court examines whether the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* Second, the Court determines whether, given the history, purpose and effect of the decision, retroactive application will further or retard its operation. Third, the Court analyzes whether retroactive application of the new rule "could produce substantial inequitable results." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1494 (10th Cir. 1991).

1. New Principle of Law

PNM maintains that at the time it obtained the Original Easement in the 1960s, it was "well-settled federal law that PNM could, if necessary, condemn easements on the affected Allotments if PNM was unable to successfully negotiate right-of-way renewals." (Mot. at 23.) According to PNM, Congress, in 1983 and later in 2000, did not send a signal, "that § 357 condemnation rights were in any way affected by the ILCA or any ILCA-authorized tribal acquisitions of fractional beneficial interests." (*Id.*) PNM maintains that in 2009, when it began seeking a renewal of its Original Easement, "PNM reasonably relied on long-settled federal law and made substantial investment-backed expectations based on that reliance." (*Id.*) However, the Eighth Circuit's ruling in *NPPD* occurred in 1983, and the primary treatise on Indian law recognized that ruling. In Cohen's Handbook on Federal Indian Law, condemnation is only discussed in the chapter on "individual Indian property." And Cohen's Handbook states that § 357 "authorizes condemnation of '[l]ands allotted in severalty to Indians,' but does not authorize condemnation of any tribal interests in allotments[.]" Cohen, § 16.03[4][d] n.170. And as discussed above, no court, prior to or after *NPPD*, has held that a condemning authority has the right under § 357 to condemn land owned by the United States in trust for both individuals and tribes. Courts have only allowed condemnation of lands owned by tribes in fee under state law. As argued by the Nation, sovereign immunity is a long-settled doctrine, and PNM could not have been surprised to learn that the Nation would oppose this action against it on those grounds. The first factor does not weigh in PNM's favor.

2. Retroactive Application Will Further the Purpose of the Law.

The second factor requires an examination of the purpose behind the decision at issue and whether prospective application will "unduly undermin[e] the 'purpose and effect' of the new

rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94–95 (1993). If this decision applies prospectively, that is, only to new public works projects as PNM requests, then the purpose and effect of this decision will certainly be undermined.

3. Retroactive Application Would Not Produce Substantial Inequitable Results.

PNM asserts that under this ruling it will be required to pay substantial sums to either remove or reroute the AY Line or to satisfy the individual owners and the Nation. In any event, PNM will be required to incur and pass along to its rate payers the costs of this easement acquisition that "Congress never intended public utilities or their ratepayers to bear." (*Id.* at 24.)

The Court agrees with the Nation's and the United States' counter arguments. The Nation argues that PNM fails to explain how in the pursuit of a renewed easement, PNM "reasonably relied on long-settled federal law and made substantial investment-backed expectations based on that reliance." The United States asserts that the easements involved in this case cover a small part of the AY Line. PNM has worked with the Nation on access rights related to the entire AY Line, and PNM has agreed to pay adequate consideration. The United States contends that fractional interests and what to do with them has been an issue for over seventy years and is nothing new; therefore, PNM should not claim surprise at this situation. The Nation has the power to deal with its land as it sees fit, and PNM's request for prospective application is contrary to the history of legal precedent and of precedent regarding tribal sovereign immunity. PNM has not presented a persuasive argument to this Court that the ruling here should be made prospective.

I. CERTIFICATION FOR INTERLOCUTORY APPEAL

To certify a question for interlocutory appeal, the Court must determine that the Memorandum Opinion and 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. . . .” 28 U.S.C. § 1292(b). The Court of Appeals may, in its discretion, “permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]” *Id.* However, an application for an appeal does not stay proceedings in the district court “unless the district judge or the Court of Appeals or a judge thereof shall so order.” *Id.* PNM contends that if the Court does not amend or set aside its Memorandum Opinion, the Court should certify the ruling for interlocutory appeal.

PNM states that there are “controlling issues of law” concerning “whether Section 357 authorizes a condemnation action against an Allotment in which a tribe holds a fraction of the beneficial interest.” (Mot. at 25.) The Court agrees that this case involves controlling issues of law that present “substantial ground for difference of opinion.” Even though the Court followed the Eighth Circuit’s lead in *NPPD*, the only case on the interpretation of § 357 in this context, there are no cases within this circuit on this issue. Moreover, cases involving statutory interpretation are well suited for interlocutory appeal. The phrase “question of law” as used in 28 U.S.C. § 1292(b) “has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine.” *Branzan Alternative Investment Fund, LLLP v. The Bank of New York Mellon Trust Company, N.A.*, No. 14-cv-02513-REB-MJW, 2015 WL 6859996, *1 (D. Colo. Nov. 9, 2015) (unreported). Such questions typically involve law that is unsettled. *Id.* Consequently, for the purposes of 28 U.S.C. § 1292(b), district courts should certify questions when they are unsure what the law is, not when there is merely a dispute as to how the law applies to the facts of a particular situation. *Id.* Hence, the Court finds that there are controlling questions of law as to which there is substantial ground for difference of opinion, and there is no clear precedent on which to rely.

In addition, an interlocutory appeal will materially advance the ultimate termination of this proceeding. If interlocutory appeal is denied, PNM will have to condemn the other three Allotments; and if PNM then successfully appeals this ruling, it will have to repeat the condemnation process for the Two Allotments. If, however, PNM loses the appeal, it may have to change the location of its transmission line to bypass the Two Allotments. It is more efficient, therefore, to allow appeal at this time. The Court will certify for interlocutory appeal the following questions:

I. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian tribe, which has a fractional beneficial interest in the parcel.

II. Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?

III. Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?

IV. If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in, a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

J. SEVERANCE AND FINAL JUDGMENT

Under Rule 21, "[t]he court may . . . sever any claim against any party." Fed. R. Civ. P. 21. "[W]here certain claims in an action are properly severed under Fed. R. Civ. P. 21, two separate actions result." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519 (10th Cir. 1991). A court may sever claims under Rule 21, if the two claims are "discrete and separate," i.e., one claim must be capable of resolution despite the outcome of the other claim. After severance, a court may render a final, appealable judgment in one of the two severed actions notwithstanding the continued existence of unresolved claims in the other. *Gaffney v.*

Riverboat Servs. Of Indiana, 451 F.3d 424, 441–42 (7th Cir. 2006) (holding that the plaintiffs' severed claims against one defendant reached final decision, thereby vesting jurisdiction in circuit court).

As an alternative to interlocutory appeal, PNM asks the Court to sever its claims against the Two Allotments and enter a final judgment so that PNM may appeal the Court's Memorandum Opinion. In addition to the Nation, Defendants Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, and Dorothy W. House are owners of fractional beneficial interests in Allotment 1160. Defendants Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, and Shawn Stevens are owners of fractional beneficial interests in Allotment 1392 along with the Nation. Thus, PNM asks the Court to sever its condemnation claims against the Nation and 11 of the individual defendants. Other than PNM's desire to appeal the Court's dismissal, there is no reason to sever the claims against the Two Allotments. Even though a severance would allow this condemnation action to go forward as to the other three allotments, the Court has concluded it is better to stay those claims pending the resolution of PNM's interlocutory appeal. Since the Court is granting PNM's request for certification of an interlocutory appeal, the Court will deny without prejudice PNM's request for severance.

IT IS ORDERED that:

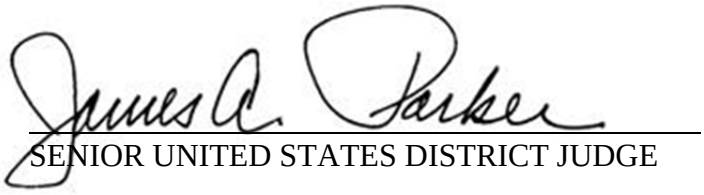
1. PLAINTIFF PUBLIC SERVICE COMPANY OF NEW MEXICO'S MOTION TO ALTER OR AMEND ORDER DISMISSING THE NAVAJO NATION AND ALLOTMENT NUMBERS 1160 AND 1392 OR IN THE ALTERNATIVE MOTION FOR INTERLOCUTORY CERTIFICATION OR SEVERANCE OF CASE (Doc. No. 107)

a. is denied in part, and the Court will not alter or amend the Memorandum Opinion or set aside the Order of Dismissal;

b. is denied in part, and the Court will not sever PNM's claims against the Two Allotments;

c. is granted in part, and the Court certifies for interlocutory appeal the controlling issues of law outlined above; and

2. All claims in this case are stayed pending the resolution of the interlocutory appeal.



SENIOR UNITED STATES DISTRICT JUDGE