IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, Plaintiff-Appellant, v. APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO, et al., Defendants-Appellees,	)	CASE NO. 16-2050

On Appeal from the United States District Court,
District of New Mexico, No. 15-cv-00501-JAP-CG,
Honorable James A. Parker

BRIEF OF INTERVENOR-APPELLANT TRANSWESTERN PIPELINE COMPANY, LLC

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Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

Transwestern Pipeline Company, LLC, a Delaware limited liability company, is an indirectly, wholly-owned subsidiary of Energy Transfer Partners, L.P, a Delaware limited partnership that is publicly traded. Energy Transfer Partners, L.P.'s general partner is owned by Energy Transfer Equity, L.P., a Delaware master limited partnership that is publicly traded.

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STATEMENT OF RELATED CASES

There are no related appeals.

JURISDICTIONAL STATEMENT

Transwestern Pipeline Company, LLC ("Transwestern") incorporates by reference the Jurisdictional Statement in Appellant's Opening Brief. Apnt. Br. at 1 [Doc. 01019646415]. In addition, Transwestern states that this Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(b), Fed. R. App. P. 5(b), and the district court's 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 (Aplt. App. 295-329), which certified four questions for interlocutory appeal ("Reconsideration/Certification Opinion").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The district court certified 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?

STATEMENT OF THE CASE

This appeal will resolve whether States, municipalities, and companies engaged in a public purpose may invoke the condemnation authority over "lands allotted in severalty to Indians" Congress granted in 25 U.S.C. § 357 ("Section 357") to obtain or renew rights-of-way when a Native American tribal nation ("Tribe") has acquired a fractional, undivided interest in an allotment.[1]

The district court's conclusion that Section 357 condemnation actions cannot go forward when a Tribe holds even a minute fractional interest in an allotment[2] threatens to render Section 357 a practical nullity. That holding upsets more than a century of reliance on Section 357 to support infrastructure development in areas where solid, contiguous reservation lands were "opened" for allotment and settlement under "allotment acts." In the "allotment era" of the late nineteenth and early twentieth centuries, with the goal of breaking up the large tribal reservations, Congress provided for tribal lands to be "allotted" to individual tribal member "allottees" and remaining "unallotted" lands to be "opened" for settlement and entry to non-Indians. That often resulted in a "checker-boarded" landholding pattern, with allotted lands interspersed with non-Indian lands and communities. Section 357 was one of a series of statutes enacted to authorize transportation and public utilities in the large areas of tribal lands that were, first, allotted

[1] Transwestern Pipeline Company, LLC ("Transwestern") submits this Appellant's Brief provisionally, pursuant to the Court's order dated June 16, 2016 [Doc 0109639430]. In the event the Court ultimately denies Transwestern's motion to intervene in this appeal, Transwestern requests this brief be received as a brief amicus curiae.

[2] An allotment is a parcel of land held in trust by the United States or subject to federal restrictions on alienation ('restricted" status) for the benefit of one or more Indians.

to individual Indians, and, then, "opened" to settlement and entry. It provided "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State . . . where located in the same manner as land owned in fee may be condemned . . . ." It would provide access on reasonable terms—including reasonable eminent domain compensation—across allotted land for utilities and others serving State-authorized public uses. In a stroke, the district court's opinions would allow a Tribe with even a small fractional interest to defeat that intention.

More than a century has passed since Section 357 was enacted, but the landholding patterns that required it persist in many areas, including in the non-reservation area involved here. Congress has rightly revisited, revised, and rejected several allotment-era policies, including terminating allotment and acting to stem the cascading fractionation of allotted lands. However, it has never expressly or impliedly repudiated or revised Section 357. The statute remains unchanged and essential because important portions of formerly solid tribal lands remain in the checkerboard pattern, with many "lands allotted in severalty to Indians" still in trust or restricted status, interspersed with non-Indian residents and communities. The ability to extend or maintain transportation access and delivery of utility services to such communities, tribal member and nonmember alike, as needed for public purposes and at reasonable compensation, depends on the outcome of this case.

This case exemplifies the barriers to development and transmission of resources the holding below erects. In 1960, the Bureau of Indian Affairs ("BIA"), pursuant to the General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328 ("1948 Act"), granted a 50

year right-of-way to Public Service Company of New Mexico ("PNM"), a New Mexico electric utility, across five Navajo Indian allotments. First Amended Complaint ("FAC") ¶ 28 (Transwestern Supp. App. 012). The right-of-way is for a 115-kv line (the "AY Line"), a critical component of PNM's transmission system that provides electricity to several cities, including Gallup and Albuquerque, New Mexico. *Id.* ¶¶ 27, 29-30 (Transwestern Supp. App. 012-13). The AY Line is approximately 60 miles long, though the portions of it that traverse the two allotments at issue in this appeal, Allotment Nos. 1160 and 1392, cover less than 3.5 acres of each of the 160 acre allotments. *Id.* ¶ 27 (Transwestern Supp. App. 012); Survey of Allotment No. 1160 (Aplt. App. 32-33); Survey of Allotment No. 1392 (Aplt. App. 36-37). The United States holds both allotments in trust for the benefit of multiple individual landowners (41 in the case of Allotment No. 1392 (Transwestern Supp. App. 017)) and, recently, the Navajo Nation ("Nation"). After trying unsuccessfully to negotiate for consent to renewal of the right-of-way, PNM brought this condemnation action in the district court, seeking to confirm its continued ability to operate. *See* FAC ¶¶ 27, 30 (Transwestern Supp. App. 012-13).

PNM initially obtained majority landowner consent as required by the 1948 Act, 25 U.S.C. § 324. However, in 2014, five years after PNM submitted its renewal application, certain individual landowners in the five allotments revoked their consents. FAC ¶ 34 (Transwestern Supp. App. 013). Based on those revocations, the BIA notified PNM in 2015 that it could not approve the renewals across the five allotments. *Id.* ¶ 35 (Transwestern Supp. App. 013). Aware that a Section 357 action is a recognized alternative to the 1948 Act for obtaining a right-of-way across allotted lands, *see*

Yellowfish v. City of Stillwater, 691 F.2d 926, 930 (10th Cir. 1982), PNM then filed this condemnation action. PNM named Transwestern as a defendant because Transwestern also has a BIA-approved right-of-way across Allotment No. 1392, but Transwestern determined that its interest in that allotment was not affected by the easement PNM sought to condemn, and therefore disclaimed its interest. *See* Disclaimer and Waiver of Notice (Supp. App. 001-02); FAC ¶ 25 (Transwestern Supp. App. 012).

The Nation filed a motion to dismiss the claims against the Nation and the two allotments in which it claims an interest, Allotments Nos. 1392 and 1169, arguing that the Nation's immunity from suit required dismissal.[3] Motion to Dismiss the Navajo Nation and Allotments 1160 and 1392 (Aplt. App. 76-84). The district court granted the Nation's motion in December 2015. Memorandum Opinion and Order Granting Navajo Nation's Motion to Dismiss ("December 1 Opinion") (Aplt. App. 124-155). The December 1 Opinion concluded, erroneously, that tribal ownership of even a minute fractional interest in an allotment precludes condemnation under Section 357 either because the land becomes "tribal land" or because the acquiring Tribe is immune from suit. (Aplt. App. 136-155).

In response to the December 1 Opinion, and to address the district court's *sua sponte* ruling that tribal ownership of a fractional interest wholly converts an allotment into "tribal land," PNM filed a motion to alter or amend the district court's order. Motion

[3] This conflicts with Article IX, 6th, of the August 12, 1868 Treaty with the Navajo Tribe, in which the Tribe covenanted it "will not oppose works of . . . utility or necessity which may be ordered or permitted by the laws of the United States, ..." Treaty with the Navajo Indians, 15 Stat. 667 (June 1, 1868; proclaimed Aug. 12, 1868).

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 (Aplt. App. 165-206). The district court's Reconsideration/Certification Opinion denied PNM's motion, but granted its request to certify this case for interlocutory review. 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 (Aplt. App. 295-329). This Court accepted interlocutory review [Doc. 01019595506].

Subsequent rulings by the district court, not part of this appeal, highlight the prejudice the decisions on appeal portend to parties relying on long-term rights-of-way. After PNM filed the Condemnation Action, the 22 Individual Defendants filed a separate trespass action, which Judge Parker consolidated with the Condemnation Action. Memorandum Opinion and Order Granting Motion to Consolidate and for Reassignment ("Consolidation Opinion") (Aplt. App. 332-341). The United States moved to dismiss the Individual Defendants' trespass action, however, the district court's April 4, 2016 Memorandum Opinion and Order Denying the United States Motion to Dismiss ("Trespass Opinion") held the claims could proceed (Transwestern Supp. App. 029, 044). That decision fully confirms the potential prejudice the district court's rulings portend, refusing to dismiss the Trespass Action, despite the United States' urging that PNM was not in trespass, concluding that PNM was in trespass as of the date its right-of-way expired. Trespass Opinion at 6-11 (Transwestern Supp. App. 034-39). The district court's Consolidation and Trespass Opinions, while not on appeal here, demonstrate the very real prejudice that companies like PNM and Transwestern, who have sited and operated

facilities on rights-of-way crossing these and thousands of other allotments for many decades, will now face: the specter of demands for compensation significantly higher than the fair market value standard applicable to utility use under the State condemnation laws invoked by Section 357, trespass damages from the time the right-of-way expired, and the threat of having to remove facilities that undisputedly serve the public good.

SUMMARY OF ARGUMENT

The December 1 Opinion, and the Reconsideration/Certification Opinion (collectively, "Dismissal Opinions"), conflict with the purpose of Section 357, to make "lands allotted in severalty to Indians" subject to condemnation for uses authorized by State law. The Dismissal Opinions ruled that this statutory purpose may be defeated whenever a Tribe acquires a fractional interest in lands undisputedly allotted in severalty, and in which all other interests are held by individual Indians. In the century since enactment of Section 357, Congress has not repealed or impliedly repudiated Section 357's grant of condemnation authority over "lands allotted in severalty," whether based on acquisition of ownership by allottees' tribal or other successors or on any other factors. The district court was simply wrong to infer such an intent from more recently enacted statutes, including the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.* ("IRA"), and the Indian Lands Consolidation Act, 25 U.S.C. §§ 2201-2221 ("ILCA"), that in no way address Section 357. *See infra* Point I.A.

Congress enacted Section 357 recognizing that large portions of the former tribal lands would be "allotted in severalty" to individuals Indians, and that access across those lands would be required for public roads, other forms of transportation, and utilities,

including for the delivery of services to the tribal members residing on the allotments. The district court's supposition that Congress, without directly addressing the subject, would substantially impair the continued, reliable transmission, upon payment of just compensation, of necessary commodities, such as electricity, natural gas, and water, and transportation, via roads and highways, defies logic as a matter of public policy and the trust responsibility of the United States to holders of interests in individual allotted lands. States, municipalities, and companies like PNM and Transwestern, require recourse to condemnation authority to ensure long term public transportation and delivery of public goods—and to justify the substantial investments required. Congress could not have intended that they would be required, on the innumerable parcels of allotted lands scattered across the West, to rely on property interests that can be denied, not renewed, or subject to demands for compensation many multiples that available in condemnation actions, at the whim of landowning parties, including Tribes with tiny fractional interests. *See infra* Point I.B.

The district court's largely *sua sponte* analysis of recent statutes disregards this Congressional intent, as well as specific statutory provisions limiting tribal powers over allotment lands in which a tribe acquires a fractional interest. Its reliance on changes in policy it detected in the IRA was error, because this Court already has held that statute is inapposite to Section 357. The district court's reliance on the ILCA was also error. The only arguably pertinent provisions of that statute impliedly contradict the holdings below by prescribing that allottees' leasing and right-of-way decisions bind tribal fractional interests. *See infra* Point I.C.

The district court's alternative holding, that the action must be dismissed "in equity and good conscience" because the Navajo Nation is a necessary party under Fed. R. Civ. P. 19 ("Rule 19") but cannot be joined, is manifestly wrong. First, the action is *in rem* and joinder of all parties with an interest in the property that is the subject of the action is not required for the district court to have jurisdiction over an action to affect title to the property. *See infra* Point II. Second, even if tribal joinder were required, the Nation's immunity is waived. The district court reasoned illogically from the holding of *Minnesota v. United States*, 305 U.S. 382, 386-88 (1939), that Section 357 waives the United States' immunity when its joinder is necessary—but not that of a Tribe with a beneficial interest in the allotment if it needs to be joined. *Minnesota* does not state or imply that limitation. *See infra* Point III. Third, even if a Tribe cannot be joined, the action can proceed because the Nation will not be prejudiced: the United States, a party, is trust duty-bound to protect the Nation's interest in receiving its proportional share of the compensation allottees receive from transfers of their interest, while PNM and the public interest will be prejudiced severely by the inability to secure needed utility access upon reasonable terms. *See infra* Point IV. This Court should confirm that Congress' intent in enacting Section 357 is unaffected by a Tribe's acquisition of undivided interests in allotted lands, and that tribal sovereign immunity does not bar condemnation actions under Section 357.

ARGUMENT

PNM's Condemnation Action presents the unsettled issue of whether a Tribe's acquisition of even a minute fractional interest in an allotment precludes a

congressionally authorized condemnation under Section 357. The district court erred, first, by holding that whenever a Tribe acquires a fractional interest in an allotment, the allotment is converted to Tribal land beyond Section 357's reach, and, second, in the alternative, that a Tribe's sovereign immunity bars a condemnation action.

The Certification Order presents four certified questions, each of which is discussed in turn.

I. Certified 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?

The district court incorrectly concluded that a Tribe's acquisition of even a minute undivided fractional interest transforms an allotment from "lands allotted in severalty to Indians" into "tribal land," putting it beyond Section 357's reach. Reconsideration/Certification Opinion at 6 (Aplt. App. 300). In reaching this conclusion, the district court relied, not on specific provisions of any federal statute but on what amount to penumbral emanations it detected in "Congress' changing policy toward Indian land and its abandonment of the allotment policy." *Id.* at 10 (Aplt. App. 304). This led the district court to conclude that an allotment in which a Tribe has any fractional interest is no longer "lands allotted in severalty," but, rather, "tribal lands." Reconsideration/Certification Opinion at 10 (Aplt. App. 304). The court recited the effects of the allotment-era policies, and the steps that Congress has taken to ameliorate those effects, including the passage of the IRA and the ILCA. Reconsideration/Certification Opinion at 12 (Aplt. App. 306). Without a single reference

to specific statutory provisions directly addressing Section 357 or condemnation of allotments, the district court concluded Congressional intent reflected in the IRA and the ILCA precluded condemnation under Section 357. Reconsideration/Certification Opinion at 10-14 (Aplt. App. 305-08). This conclusion disregards that implied repeals or amendments are disfavored.

Contrary to the district court's conclusion, the mere fact that a Tribe acquires a fractional, undivided interest in "lands allotted in severalty" does not compel the conclusion that the parcel is no longer "lands allotted in severalty to Indians" subject to Section 357. The district court concluded that the Nation's acquisition of fractional interests in allotment forecloses condemnation and renders PNM's ability to continue use of the right-of-way, and the compensation it must pay for the right-of-way, subject to the Nation's unfettered discretion.[4] But that holding is not a reasonable interpretation to the statutory text, and disregards the evident purpose of the statute reflected by contemporaneous understandings.

Section 357 must be read against the backdrop of the United States' contemporaneous policy of dividing tribal reservation lands into scattered allotments interspersed with non-Indian lands. Congress understood that States would need access across the millions of acres of allotted lands for purposes authorized by State condemnation laws, including for the provision of transportation access and utility services to allotted and interspersed non-Indian communities. For that reason, Congress

[4] The BIA considers itself foreclosed from granting a right-of-way across tribal lands without the consent of the applicable Tribe. 25 C.F.R. § 169.107(a).

provided Section 357 would make allotted lands subject to State law condemnation just as would be the non-Indian lands in the former tribal areas. That purpose remains crucial today. A Tribe's acquisition of a minority interest cannot be employed to defeat that purpose.

A. Section 357 unambiguously grants eminent domain authority as to "lands allotted in severalty to Indians."

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."[5] There is no dispute here that Allotments 1160 and 1392 were, in fact, allotted in severalty to individual members of the then Navajo Tribe of Indians, Aplt. Br. 9,[6] that 99.84% of the ownership interest in Allotment No. 1392, in which Transwestern holds an interest, continues to be held by individual Indians, and that the Nation holds only a 13.6% interest in Allotment No. 1160. *Id.* There is also no dispute that PNM, a New Mexico electric utility, seeks to renew its easements in support of a public purpose. Section 357's unambiguous terms authorize condemnation with respect to the "lands" allotted, requiring only that they be "allotted in severalty to Indians." Although Congress intended the *initial* individual owners of allotments subject to

[5] Although not presented in this appeal, Transwestern has eminent domain authority for its facilities under New Mexico law, *see* N.M. Stat. Ann. § 70-3-5 (1953), and its certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission pursuant to Section 7 of the Natural Gas Act, 5 U.S.C. § 717f(h). The rationale of the Dismissal Opinions would present further, specific issues if applied to Transwestern as condemnor.

[6] The Navajo Tribe of Indians changed its name to "Navajo Nation" in 1969.

condemnation to be allottees, Section 357 made the "lands" subject to condemnation; it contains no text restricting the identities of the persons or entities who might acquire interests in such lands after issuance of the original allotment patent. Allotment-era Congresses doubtless would have been shocked to learn that a Tribe's acquisition of a small fractional interest could prevent condemnation, defeating the statutory purpose and potentially precluding use of allotted lands for public purposes.

Congress enacted Section 357 as part of the Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1084, which also authorized rights-of-way across tribal and allotted lands for the opening of highways, 25 U.S.C. § 311,[7] and for telephone and telegraph lines, 25 U.S.C. § 319.[8] The purpose of the bill in which Section 357 was included was to authorize use of both tribal and allotted lands for public purposes. The district court's ruling undermined this Congressional intent by permitting a single holder of a fractional interest to prevent a right-of-way.

The district court similarly ignored history in concluding that authority to condemn "lands allotted in severalty to Indians" is defeated whenever a Tribe, not an individual, becomes a fractional owner. More importantly, the district court apparently failed to recognize that the term "allotted" was frequently employed as a verb, as it plainly is in section 357, signifying Congress policy of allotting lands to individuals and the Department of the Interior's act of issuing an allotment. *See, e.g., DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 442 (1975) (Presidential Proclamation of April 11, 1892

[7] Act of March 3, 1901, ch. 832, § 4.

[8] *Id.* § 3.

declaring open for settlement all "lands . . . excepting the lands reserved for and allotted to said Indians."). Here it plainly signified the category of land that would be subject to Section 357 by virtue of the fact the lands were "allotted to individual Indians," not the identities of all persons who must own interests in the land at the time a condemnation action is filed. Even so, the term "Indians" can, and, in allotment-era statutes, frequently does reference both Tribes and individual Indians. For example, in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, the Supreme Court applied Section 6 of the General Allotment Act ("GAA"), 25 U.S.C. § 349, which provides that state taxes apply to both tribal and allotted lands "when the lands have been conveyed to the Indians by patent in fee." 502 U.S. 251, 258 n.1 (1992). Significantly, Section 357 does not employ the term "individual Indians," as did certain other allotment-era statutes. *See, e.g.*, 25 U.S.C. §§ 311, 312, 319, 965.

Section 357 must be read against the backdrop of the allotment-era's policy of dividing tribal reservation lands into multiple allotments scattered across former reservation lands and interspersed with non-Indian fee lands. The need for allotted lands to be subject to the same access for public purposes as the surrounding fee lands is further evidenced by Section 357's text authorizing condemnation of allotted lands "under the *laws of the State*" and "in the same manner *as land owned in fee* . . . ." (emphasis added); *see Southern Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) ("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."). The district court's

decision overrides that congressional policy choice whenever a tribe acquires a fractional interest.

1. The district court erred in relying on authority that either was incorrectly analyzed or simply inapposite because it failed to analyze the intent of Section 357 with respect to lands allotted in severalty.

Recognizing a paucity of direct authority, the district court erred in relying uncritically on a circuit court opinion that failed to analyze Section 357's legislative intent and cases addressing tribal lands that never were allotted. Though the district court did review allotment-era history, it then shifted its focus to later statutes rather than the 1901 Congress' intent regarding condemnation of "lands allotted in severalty to Indians."

Repeatedly, the district court acknowledged it "followed the holding in" *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County*, 719 F.2d 956, 961 (8th Cir. 1983) ("*NPPD*"), "the only Circuit Court of Appeals case" that had decided whether Section 357 applies to allotted lands in which a Tribe holds an interest. Reconsideration/Certification Opinion at 7, 16 (Aplt. App. 301, 310). *NPPD* simply failed to perform even a rudimentary statutory analysis, relied upon regulations that are inapposite, and never addressed the intent of Section 357. It is not useful authority in this case.

In *NPPD*, an electric utility planned to construct an electric transmission line across lands that had been allotted to individual Indians. But shortly before the utility filed its condemnation action under Section 357, several individual allottees deeded certain undivided future interests in the lands to the Winnebago Tribe, while reserving

life estates for themselves. The Eighth Circuit held that the transfers to the Tribe meant that the lands could no longer be condemned under Section 357. 719 F.2d at 958;, *See also Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty.*, 540 F. Supp. 592, 595 (D. Neb. 1982). However, the entirety of *NPPD*'s analysis is premised upon the inapplicable provisions of the 1948 Act and its regulations. *NPPD* never undertook to evaluate the intent of the 1901 Congress with respect to the effect of the pre-condemnation transfers, that is, that the lands "allotted" remain subject to condemnation notwithstanding subsequent transfers, including transfers to Tribes.

The *NPPD* court first concluded that "consent of the Secretary and the proper tribal officials must be obtained pursuant to the 1948 Act." 719 F.2d at 961. The only other authority *NPPD* analyzed was the definition of "tribal lands" in the regulations *of the 1948 Act. Id.* at 961-62. However, as this Court has determined, those regulations pertain only to how the Secretary may grant consensual rights-of-way, *Yellowfish*, 691 F.2d at 929-30, not to separately authorized condemnation actions brought under Section 357. *NPPD*'s fundamental error was to ignore that distinction and fail to analyze Section 357 under accepted principles of statutory construction. The district court erred in accepting *NPPD*, an opinion that applied an erroneous legal analysis, as persuasive authority on this important question.

The district court's other source of authority regarding Section 357 was cases addressing lands that, like those in *Eastern Band of Cherokee Indians v. Griffin*, 502 F. Supp. 924, 930 (W.D. N.C. 1980), December 1 Opinion at 14-15 (Aplt. App. 137-38), were never allotted. *Eastern Band* held Section 357 inapplicable because the tribal trust

lands involved in that highway project, as the district court recognized, "have never been allotted to individual Indians . . ." Such lands are, by definition, not, and never have been, "lands allotted in severalty to Indians." *Eastern Band* is not instructive on the meaning of Section 357. Equally inapposite is *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1551-52 (9th Cir. 1994), cited December 1 Opinion 19-20 (Aplt. App. 142-43), which interpreted a Federal Power Commission license for dam construction and operation in the context of the United States' claims that the dam operation would trespass on rights of the Kalispell Indian Tribe. The Ninth Circuit held, that, although 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, . . . this statute does not apply to lands held in trust for the Tribe." 28 F.3d at 1551-52. *Pend Oreille* gives no indication it considers a tribal fractional interest in "lands allotted in severalty to Indians." Accordingly, this Court is situated to first interpret the intent of Section 357 with respect to tribal fractional interest in lands allotted in severalty to Indians.

2. The district court failed to consider the *in rem* character of Section 357.

The district court ignored the Supreme Court's recognition that allotment-era statutes may establish the legal status of lands allotted, and did not define the rights of individual owners of allotted lands. *County of Yakima* should be dispositive on the issue of the applicability of Section 357 here: it interpreted a statute concerning conveyances of unallotted land *to Indians* and concluded that Congress' intent to allow taxation turned on the fact that the lands were originally allotted in severalty, not on the identity of the

holders of title at the time of the taxation in question. *Cnty. of Yakima*, 502 U.S. at 263. It addressed a challenge by the Confederated Yakima Tribes to the County's real property taxes, "contending that federal law prohibited these taxes on fee-patented lands *held by the Tribe or its members*." *Cnty. of Yakima*, 502 U.S. at 256 (emphasis added). The County relied on Section 6 of the GAA, 25 U.S.C. § 349, which provides: "That at the expiration of the trust period *and when the lands have been conveyed to the Indians by patent in fee*, . . . all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . ." *Cnty. of Yakima*, 502 U.S. at 258 (emphasis added). In holding the GAA subjected both tribal and individual Indians' fee lands to State property taxes, the Court rejected contentions, similar to those made by the Nation and the United States below, that intervening federal policies precluded continued application of the tax exemption. *Id.* at 262-66.

In upholding property taxes while invalidating taxes on land sales, *County of Yakima* stressed that, with respect to the property tax at issue there, "jurisdiction is *in rem* rather than *in personam*." *Id.* at 265. Significantly, the Supreme Court held the determination whether the exemption applies to a particular parcel turns, not on whether the *current* ownership of the parcel is held in fee by the Yakima Tribes or by allottees, *see id.* at 264 n.4, but on "whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act." *Id.* at 270. Although the district court recognized that *County of Yakima* held "[l]and owned by a tribe in fee is subject to condemnation and taxation under state law," citing GAA Section 349 and *County of Yakima*, 502 U.S. at 267,

Reconsideration/Certification Opinion at 25 (Aplt App. 317), it failed to recognize the Court's analysis that led to that conclusion.

Like Section 6 of the GAA at issue in *County of Yakima*, Section 357 addressed prospectively the legal character of "lands allotted in severalty" and provided that state law condemnation applied to such lands. Just as *County of Yakima* held the lands allotted under the GAA would be subject to State taxes regardless of whether, following patent in fee, the lands are "*held by the Tribe or its members*," 502 U.S. at 256, so Section 357 subjects "lands allotted in severalty to Indians" to condemnation under State law regardless of whether interests are owned by individual Indians or Tribes. No statute has expressly or impliedly repealed or amended Section 357. It cannot be given its intended statutory effect if the fact of recent tribal acquisition of ownership may defeat condemnation of "[l]ands allotted in severalty to Indians . . . under the laws of the State . . . in the same manner as land owned in fee may be condemned." 25 U.S.C. § 357.

B. The District Court failed to interpret Section 357 in light of allotment era goals and policies arising from the diminishment of Tribal land base and creation of allotted and non-Indian communities.

Section 357 was a necessary element of allotment era policies, facilitating transportation and delivery of essential services across and to the lands "allotted in severalty." The GAA authorized conveyances of tribal lands to individual tribal members in allotments generally of 80 or 160 acres. Allotments were issued to individual Indians with an initial trust or restricted term of 25 years, after which the allotment would become alienable. Consistent with Congressional policy when the GAA was enacted, "[t]he objectives of allotment were simple and clear cut: to extinguish tribal sovereignty,

erase reservation boundaries, and force assimilation of Indians into the society at large." *Cnty. of Yakima*, 502 U.S. at 254.

Significantly, the GAA and other allotment-era acts created a checkerboard pattern of land tenure. *See Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1159 (10th Cir. 2010). When large, contiguous, communally held tribal landholdings were substantially reduced, with many Tribes retaining small portions of former reservation lands, such statutes provided that the lands Tribes gave up were either allotted to individual tribal members or, after all tribal members' lands were "allotted," the remaining "surplus lands," were frequently "restored" to the public domain and "opened" for entry or sale. The "opened" lands generally were available for homestead, townsites, mining claims, or religious or educational uses. S. Rep. No. 98-632, at 9 (1984). Consequently, the millions of acres of allotment lands were interspersed with thousands of non-Indian settlers' lands and communities. Even today, "[a]s a result of the allotment process, almost 11 million acres of lands are now held in trust or restricted status by the United States for individual Indians." H.R. Rep. No. 108-656, at 1-2 (2004).

Eminent domain authority was necessary to ensure that access for public transportation and utilities could be "condemned for any public purpose under the laws of the State" under Section 357. Section 357 and related statutes supported transportation access to and across such areas and the delivery of essential services to the tribal member and non-Indian communities the allotment-era statutes contemplated. The landholding pattern that compelled enactment of Section 357 continues to exist in many areas. That continuing need perhaps explains why Congress, while enacting legislation relied upon

by the district court that undid allotment-era policies in many respects, did not modify Section 357 in any respect.

Focusing narrowly on later developments and more recent federal Indian policies, the district court improperly ignored the important historic context of Section 357: to permit condemnation of allotments to assist in the development of rural areas that previously were Indian Reservations. The district court failed to recognize Congress' intent to subject the lands so allotted to state law condemnation without regard to future ownership. The decisions below contravene that intent with respect to lands in which Tribes acquire interests.

C. The district court erred in concluding later statutes or "policies" impliedly amend Section 357.

The district court concluded, despite Section 357 not having been repealed in any respect in its over 100-year existence, that subsequent Congressional enactments embody policies directing that Section 357 cannot be applied whenever a fractional interest in an allotment is acquired by a Tribe. The district court's fundamental error is to read changes in broad federal policies as implicit amendments to Section 357, a federal statute enacted under a different policy. Transwestern does not dispute that, in the years since passage of Section 357, Congress has enacted other statutes relating to allotted lands reflecting a broad policy change. Subsequent enactment of the IRA and the ILCA reflect policies strikingly different from those animating allotment-era statutes, including Section 357, but they do not expressly or impliedly address Section 357—and with good reason, since Section 357 still serves the same important purpose in ensuring the ability to create or

maintain transportation routes and deliver utilities to and across allotted lands and interspersed non-Indian lands. The district court erred in interpreting the penumbral policies emanating from more recent statutes to amend Section 357.

1. The IRA did not impliedly amend Section 357.

Amendments of statutes by implication are not favored. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("'[R]epeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'") (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). This Court has expressly rejected the rationale on which the district court based its ruling, Reconsideration/Certification Opinion at 11-14 (Aplt. App. 302-05), that the IRA impliedly limited Section 357's eminent domain authority. *See Yellowfish*, 691 F.2d at 930 ("We find it persuasive that in 1976 Congress still viewed section 357 as a valid condemnation statute.").[9] *Yellowfish* quoted the Supreme Court's opinion in *United States v. Oklahoma Gas & Electric*:

[9] Fractionation, pertinent here, was already a recognized concern in 1934, when Congress enacted IRA, halting further allotment of tribal lands and indefinitely continuing the trust status of existing allotments:

> On allotted reservations . . . one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all though of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.

78 Cong. Rec. 11,724, 11,728 (June 15, 1934).

> Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear.

Id. (quoting 318 U.S. 206, 211 (1943)). *Yellowfish* held that *Oklahoma Gas & Electric*'s reasoning applied to the condemnation of rights-of-way because "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." *Id.* Although this Court did not face the issue of tribal ownership of fractional interests in allotted lands, *Yellowfish*'s rationale holds true: The need for condemnation of rights-of-way on allotted lands, even when a Tribe holds a fractional undivided interest, remains great to enable companies, utilities, and States and municipalities to effectively carry out public purposes.[10]

The district court pointed to no express provision of the IRA that expressly or impliedly modifies Section 357's grant of eminent domain authority when a Tribe acquires a fractional interest. It erred in concluding the IRA impliedly modified Section 357.

[10] The intent of the 1948 Act was to provide a uniform format to facilitate voluntary right-of-way transactions. S. Rep. No. 80-823, at 1033 (1948). This Court has confirmed that the 1948 Act did not repeal or otherwise nullify Section 357; rather, the 1948 Act and Section 357 provide alternative, congressionally approved, methods to obtain a right-of-way across allotted lands. *See Yellowfish*, 691 F.2d at 930.

2. The ILCA does not amend Section 357 or require the exclusion of lands in which Tribes hold interests from Section 357 condemnations.

The district court made a similar error in elevating the ILCA provisions, which were intended to address the problem of fractionated allotment ownership and facilitate tribal ownership of small interests in allotments rather than allow further fractionation, into a power to prevent condemnation of "lands allotted in severalty" under legislation effective for over a century. Reconsideration/Certification Opinion at 13-14 (Aplt. App. 306-08). Congress enacted the ILCA to limit further fractionation of allotted lands, consolidate fractional interests and their ownership into usable parcels, and consolidate interests in a manner that enhances tribal sovereignty and reverses the effects of the allotment policy on tribes. Committee on Resources, H.R. Rep. No. 108-656, at 3 ;*see also* Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, 114 Stat. 1992 (2000). To meet the ILCA's goals of decreasing fractionalization and retaining trust status of allotted lands, Congress provided, among other devices, both for transfers of small interests to other tribal member beneficiaries *and* also authorized Tribes to acquire fractional interests in allotments either by gift or purchase under the ILCA or by operation of law under the American Indian Probate Reform Act's ("AIPRA") 2004 amendment to the ILCA. *See* American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1774 (Oct. 27, 2004), amending 25 U.S.C. §§ 2201-2218.

The ILCA directly contradicts the district court's conclusion that tribal acquisition transforms an allotment into tribal land in two significant respects. First, Congress used the term "allotted land" in the ILCA when discussing the process for approval of a lease

or right-of-way of allotted lands *after* a Tribe has received an undivided interest in the allotment. For example, 25 U.S.C. § 2213(c) speaks in terms of the Secretary's authority "with respect to any undivided interest *in allotted land held by the Secretary in trust for a tribe*." (Emphasis added.) In 25 U.S.C. § 2218(d)(2)(A), Congress stated that Section 2218's authority applies to "any undivided interest in *allotted land held by the Secretary in trust for a tribe*. . . even though the Indian tribe did not consent to the lease or agreement." (Emphasis added.) Congress clearly intended an allotment to remain "allotted land" not be converted into "tribal land," when a Tribe acquires an interest in an allotment under the ILCA.

Second, Congress's intent that tribal acquisition of an interest in an allotment does not change the nature of the land is further illustrated by the ILCA's providing that, with respect to leasing and right-of-way decisions after tribal acquisition of an interest pursuant to section 2212 of the ILCA, a Tribe "*may*, as a tenant in common with the other owners of the trust or restricted lands, lease the interest [or] consent to the granting of rights-of-way." *See* 25 U.S.C. § 2213(a) (emphasis added).[11] Significantly, however, Congress did *not* accord a Tribe a veto power, but rather specified that BIA can approve a

[11] In a contemporaneous statute, the Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1992 (2000), Congress referred to tribal ownership of a fractional interest in a Navajo allotment as an "owner of a portion of an undivided interest in *Navajo Indian allotted land*" and confirmed that Navajo Indian allotted land can be leased for oil and gas purposes, so long as the applicable co-owner interest consent has been met, "even though the Indian tribe did not consent to the lease or agreement." *Id.* § 201(b)(4) (emphasis added). Congress' specific decision to treat allotted Navajo lands as "Navajo Indian Allotted land," even when a tribe acquires an interest in the allotment, *id.* § 201(b)(4)(B)(i)(ii), contradicts the district court's conclusions that the ILCA supports a tribal veto and that such lands become "tribal lands."

lease across an allotment, when a Tribe has a fractional interest, based on the consent of the allotted owners "even though the Indian tribe did not consent to the lease or agreement." *Id.* § 2213(c)(1); *id.* § 2218(d)(2)(A). Congress stipulated that any approved lease or other agreement "shall apply to the [Tribe's] portion of the undivided interest in allotted land," and entitles the "tribe to payment under the lease or agreement," although the Tribe is not treated as a party to the lease or agreement, and the Tribe's sovereignty is not affected. *Id.* § 2213(c)(2); *id.* § 2218(d)(2)(B).[12]

Congress' decision to deny a Tribe a veto power over its allottee-cotenants' leasing and right-of-way decisions is consistent with the ILCA's goal of making allotted lands more productive by streamlining the process of securing leases and rights-of-way across allotted lands. Nothing in the ILCA indicates Congress wanted to make allotted land transactions more onerous. The district court's decisions exacerbate, rather than advance, a solution to the fractionation problems the ILCA was intended to address and will only lead to further administrative inefficiencies and impediments to economic development of allotted lands.

[12] Assistant Secretary Indian Affairs Kevin Gover testified that the purpose of Senate Bill 1586, which ultimately became ILCA Sections 2213 and 2218, was to "authorize the Secretary to approve such a transaction if it is supported by the owners of a majority of the interests in a parcel of land." *Indian Lands Oil and Gas Leasing Before the Senate Committee on Indian Affairs*, 1999 WL 1022946 (1999) (statement of Kevin Gover, Assistant Secretary-Indian Affairs) (no page number in original). These statements, made against the backdrop of issues of escheat of fractional interests to a Tribe, reflect the ILCA's policy not to allow tribal fractional ownership to override existing consent requirements for leases and rights-of-way on allotted lands.

. After twice being held unconstitutional by the Supreme Court,[13] in the 2004 ILCA amendments that became the AIPRA , Congress revised Section 207 to "address[] the alarming rate of fractionation of Indian lands." H.R. Rep. No. 108-656, at 4. Section 207, now codified at 25 U.S.C. § 2206, and called the "single heir rule," provides for this "escheat" of small interests to a Tribe. H.R. Rep. No. 108-656, at 4 (single heir rule "is intended to place a 'floor' on fractionation resulting from intestate succession"). Under current Section 207, a Tribe may obtain interests smaller than 5% by operation of law, if the Indian landowner dies intestate and there are no eligible heirs under AIPRA guidelines. Such a transfer prevents any further fractionation of that interest and ensures that the interest will not lose its trust status. Given the intent reflected in the full ILCA text, those uncontroversial purposes do not support the conclusion that an allotment is converted into tribal lands by virtue of tribal acquisition of fractional interests.

Rather, AIPRA's legislative history reflects an intent to stem the cascading subdivision of allotted interests, and attendant management and accounting complications It does not reflect an intention for the transfer of a fractional interest to a Tribe to over-ride allottees' intentions, render Section 357 inapplicable, or convert the land to "tribal land." Directly to the contrary, the ILCA, as amended by AIPRA, provides, "Nothing in this Act shall be construed to supersede, repeal, or modify any general or specific statute authorizing the grant or approval of any type of land use transactions involving fractional interests in trust or restricted lands." 25 U.S.C. § 2218(g). The district court erred in

[13] *See Hodel v. Irving*, 481 U.S. 704, 718 (1987) (1983 version of "escheat" provision held unconstitutional); *Babbitt v. Youpee*, 519 U.S. 234, 245 (1997) (1984 version unconstitutional).

ruling that the ILCA impliedly amended or partially repealed Section 357 by transmuting "land allotted in severalty" into "tribal land" beyond Section 357's reach.

3. The Part 169 regulations do not support implied repeal of Section 357.

The district court erred in placing weight on comments in the Preamble to the recently promulgated Part 169 regulations under the 1948 Act, *see* 25 C.F.R. Part 169, which the court considered reflect "deference to tribal ownership and tribal governance of land." Reconsideration/Certification Opinion at 19 (Aplt. App. 313). According weight to those comments was erroneous for three reasons. First, as this Court determined in *Yellowfish,* regulations under the 1948 Act are not pertinent because a Section 357 condemnation is an alternative method of right-of-way acquisition to consensual grants of rights-of-way under the 1948 Act. 691 F.2d at 930. Second, the comments cited are even less persuasive because they are not part of the final rule, but only stated in the Preamble.[14] Third, although the comments are directly contrary to the ILCA's clear statutory directive regarding a Tribe's role in leasing and right of way decisions, the BIA purported to support them under the 1948 Act. *See* 80 Fed. Reg. 72492, 72494 (Nov. 19, 2015). However, directly contrary to the BIA guidance, the ILCA requires that (1) BIA

[14] An agency's "newfound opinion," particularly one expressed in a preamble, "does not merit deference . . . ." *Wyeth v. Levine*, 555 U.S. 555, 580 (2009); *see also Christopher v. SmithKline Beecham Corp.*, ___ U.S. ___, ___, 132 S. Ct. 2156, 2167 (2012) (deference to newly announced guidance limited; to do otherwise "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." (internal quotation marks and citations omitted) (alteration in original)); *Young v. United Parcel Serv., Inc.*, ___ U.S. ___, ___, 135 S. Ct. 1338, 1352 (2015) (whether an agency pronouncement is entitled to deference turns on the "timing, consistency, and thoroughness of consideration.") (quotation marks omitted)).

approve a lease or right-of-way across an allotment when a Tribe has a fractional interest, based on the consent of the allotted owners "even though the Indian tribe did not consent to the lease or agreement," and (2) any BIA-approved lease or other agreement "shall apply to the [Tribe's] portion of the undivided interest in allotted land," and (3) entitles the "tribe to payment under the lease or agreement," although the Tribe is not treated as a party to the lease or agreement. 25 U.S.C. § 2218(d)(2); 25 U.S.C. § 2213(c); Pub. L. No. 106-462, 114 Stat. 1992. *See supra* Point I.B.2. The Court should disregard purported guidance that implements the consent-based provisions of the 1948 Act and directly conflicts with the ILCA. Emanations of current policy from other statutory schemes should not trump the clear directive of Section 357.

Finally, "[e]ven assuming, *arguendo,* that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous." *Kingdomware Techs., Inc. v. United States*, ___ U.S. ___, 136 S. Ct. 1969, 1979 (2016). Section 357 unambiguously authorizes condemnation of lands allotted in severalty and remarks in the Preamble to revised 1948 Act regulations are simply not material guidance to the contrary.

D. The district court's ruling upends longstanding reliance on the availability of condemnation to ensure availability of rights-of-way for public uses on reasonable terms.

Rights-of-way across allotment lands, like those elsewhere, typically are intended for long-term public use. They may include roads, highways, water pipelines, as reflected by current litigation, *see supra* Point IV.B, public utility facilities, such as the PNM electric transmission lines, and pipelines and other assets installed at great expense with

the contemplation that reasonable renewal could be negotiated or, if negotiation fails, condemnation under State law would be available. The district court's reading of Section 357 may confound such settled expectations by allowing Tribes, and allottees whom Tribes may choose to support, to demand compensation far exceeding standards available under State law condemnation—or by simply refusing to consent to continued use of the lands.

In other contexts, this Court has recognized the importance of long-term reliance interests in matters affecting property. Given that this and other courts have recognized for many years that allotted lands may be condemned under State law, parties invested with eminent domain authority have reasonably relied on the continued availability of condemnation in siting facilities needed for long term use. *See Minnesota*, 305 U.S. at 389; *Southern Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982); *Town of Okemah v. United States*, 140 F.2d 963, 965-66 (10th Cir. 1944). "A rule established by judicial decisions construing statutes regulating the descent and distribution of land is a rule of property." *Dunn v. Micco*, 106 F.2d 356, 359 (10th Cir. 1939).

In *Dunn*, the court explained:

> Property is acquired and sold in reliance on such rules. Legislative changes operate prospectively; judicial decisions are retrospective. A departure from an established rule of property may destroy important rights or titles acquired on the faith thereof. Men may adapt themselves to rules lacking in technical correctness, but shifting rules afford them neither protection nor safety.

Id.; *see also Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) ("Where questions arise which affect titles to land it is of great importance to the public that when they are

once decided they should no longer be considered open.") (quoting *Minnesota Co. v. National Co.*, 70 U.S. 332 (1865)). The district court erred in failing to take into account such long-term reliance by entities serving public purposes in its interpretation of Section 357.

II. Certified 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?

While district court determinations under Rule 19 ordinarily are reviewed for abuse of discretion, that standard is inapplicable here, where disputed legal conclusions regarding sovereign immunity underlie the district court's Rule 19 decision. *See Northern Arapahoe Tribe v. Harnsberger*, 697 F.3d 1272, 1277 (10th Cir. 2012); *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d. 1150, 1151 (10th Cir. 2011). The district court's Rule 19 decisions rest upon a fundamental misinterpretation of the effect of Section 357 regarding tribal fractional interests. That misreading led the district court, first, to consider the Nation a required party notwithstanding the *in rem* character of a Section 357 action. In addressing Questions III and IV, below, Transwestern will argue, respectively, that, to whatever degree the Nation needs to be a party, Section 357, which does not mention the United States' immunity or party status, waives tribal immunity, but that, even assuming the Nation's immunity were relevant, and has not been waived, the Condemnation Action can go forward in the Nation's absence in equity and good conscience because the Nation's interests will be represented by the United States and will not be injured.

A. The Nation is not a required party under Rule 19(a). Its immunity from suit cannot bar a Section 357 condemnation.

The Nation, or any other Tribe with a fractional interest in an allotment, should not be considered a required party for purposes of Rule 19(a). The Nation's immunity from suit is irrelevant because a condemnation proceeding is an *in rem* proceeding. Consequently, Rule 19(a)(1)(A) is satisfied because complete relief can be accorded among all parties because the United States, holder of legal title for the Nation, is a party. Given the United States' participation and the compensation focus of a condemnation action, there is no Rule 19(a)(1)(B)(i) concern; the Nation will not be prejudiced by the action proceeding in which its interests are protected by the United States in determining the proper compensation under New Mexico law, in which the Nation will share. Further, Rule 19(a)(1)(B)(ii) presents no concerns because a judgment against the United States will be res judicata of claims the Nation might otherwise file in other litigation. *See Nevada v. United States*, 463 U.S. at 135.

As PNM correctly argues, "[c]ondemnation proceedings are *in rem*, and compensation is made for the value of the rights which are taken." *United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946). (Aplt. Br. 25). "As its name suggests, *the condemnation power does not 'compel' anyone* to do anything. It acts *in rem*, against the property that is condemned, and is effective with or without a transfer of title from the former owner." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, ___ U.S. ___, 132 S. Ct. 2566, 2649 n.3 (2012) (Scalia, J., dissenting) (emphasis added). Just as the "exercise of *in rem* jurisdiction to discharge a debt does not infringe on state sovereignty," *see Tenn. Student*

Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004), its exercise pursuant to Section 357 does not affect the Nation's sovereignty.

Section 357, however, does not present issues of general state condemnation authority, but Congressionally mandated condemnation of "lands allotted in severalty." The district court recognized the *in rem* nature of eminent domain, and that *Minnesota v. United States*, 305 U.S. 382, 386-88 (1939), held that Section 357 actions are not "purely *in rem* proceedings in which there are no indispensable parties." Reconsideration/Certification Opinion at 22 (Aplt. App. 316). However, *Minnesota*'s "somewhat perfunctory" analysis, *see Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008), never expressly addressed the *in rem* jurisdiction issue. Though *Minnesota* held joinder of the United States was required for a Section 357 action, it did so because "[a]s the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party." 305 U.S. at 386. *Minnesota* did not mention *in rem* jurisdiction, and the decision appears to rest upon the unique nature of federal trust ownership. Its only other holding, that the action must be in federal court, is of no consequence in this federal court action.

The *in rem* nature of Section 357 actions is on a par with that of the tax immunity effected by the textually parallel allotment-era act in *County of Yakima.*[15] The United States is properly joined as a defendant, and stands in trust relationship to the Nation, as

[15] The district court recognized that condemnation actions give rise to *in rem* jurisdiction. *See Cass Cnty. Joint Water Resource Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 688 (N.D. 2002) (condemnation involving tribal fee parcel is "strictly in rem"); *see also Georgia v. City of Chattanooga*, 264 U.S. 472, 482 (1924) (condemnation is *in rem* proceeding).

well as to all allotted owners. *Minnesota* is satisfied here, and, just as no allottee owner would be a required party, joinder of the Nation is not required. The Nation is not a required party under Rule 19(a)(1) because complete relief can be accorded all parties without joinder of interest owners in this *in rem* action.

B. The joinder and trust responsibilities of the United States protect against prejudice to the Nation and other parties that might arise from non-joinder.

1. The Nation is not a required party under Rule 19(a)(1)(B)(I).

The premise underlying *Minnesota*, that the United States is a required party in a Section 357 action, and the joinder of the United States here, reinforce that the Nation's sovereignty is not affected by a Section 357 condemnation *and* will receive appropriate compensation under standards prescribed by New Mexico law, precludes prejudice to the Nation. The district court erred in concluding that *Harnsberger*, in which no federal statute supported judicial resolution of the Eastern Shoshone claims, supported requiring the Nation's presence. December 1 Opinion at 26-27 (Aplt. App. 149-50). The Nation is not a required party under Rule 19(a)(1)(B)(i).

2. The United States' trust-based representation of the Nation ensures against risk of inconsistent obligations under Rule 19(a)(1)(B)(ii).

There is no risk of any party or non-party being subject to inconsistent obligations because a judgment rendered in an action involving the United States will be binding upon the Nation. The judgment involving the United States here will bar the "parties or their privies" from relitigating issues litigated in the prior action. *See Arizona v. California*, 460 U.S. 605, 615 (1983) ("[T]he United States' action as their representative

will bind the Tribes to any judgment."); *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002); *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) ("Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication."). Under *Minnesota,* the United States appears as representative with respect to the interests of its trust beneficiaries. Neither the Nation nor PNM, nor any other party of their privies can assert an obligation inconsistent with the judgment in a Section 357 proceeding. *See Nevada v. United States*, 463 U.S. at 129 n.10 ("The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water."). There is no risk of inconsistent obligations under Rule 19(a)(B)(ii).

III. Certified 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?

Even if the Nation, however, were a required party under Rule 19(a)(1), there is no impediment to joinder under Rule 19(a)(2) because Section 357 waives its immunity from suit to the same degree it waives immunity of the United States. The district court completely misread *Minnesota* in concluding the Nation is immune from suit under Section 357. The district court overlooked that neither Section 357 nor *Minnesota* addresses the basis for waiver of the federal Government's immunity. Section 357 does not mention the United States or its immunity, and *Minnesota* never discusses it. Consequently, it is plain that the United States is suable under Section 357 because its joinder is necessary to effectuate the statute's purpose, to implement *in rem* jurisdiction

in the unique tribal trust context and allow condemnation of "lands allotted in severalty to Indians." Congress undoubtedly has the authority to waive the Nation's immunity, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). It logically follows, then, if joinder of the Nation were required, Section 357 is just as effective to waive the Nation's immunity as it was to waive the United States' immunity, which is at least equally protected. Because the condemnation power does not compel the Nation to do anything, and because it is effective with or without a transfer of title, the Nation's immunity from suit simply is not implicated or, if applicable, is plainly waived by Section 357. The district court erred in rejecting the argument. *See* Reconsideration/Certification Opinion at 19-24 (Aplt. App. 313-18).

Michigan v. Bay Mills Indian Community, ___U.S. ___, 134 S. Ct. 2024 (2014), *cited* December 1 Opinion at 10 (Aplt. App. 133), and similar cases do not undermine these principles. The question here is not whether the Nation's immunity is waived based solely on the *in rem* nature of a condemnation action, but whether Congress' direction that "lands allotted in severalty" are subject to condemnation supplies all the needed Congressional intent to waive immunity given the *in rem* nature of condemnation. Because the Court in *Minnesota* held Section 357 was effective to waive the United States' immunity for the condemnation actions it authorizes, the necessary corollary is that it also waives any tribal immunity necessary to effectuate its purpose.[16]

[16] Equally off point are other cases holding *in rem* concepts do not waive sovereign immunity, where there is no federal statute directing that *in rem* remedies apply. *See, e.g., Hamaatsa, Inc. v. Pueblo of San Felipe*, ___ P.3d. ___, 2016 WL 3382082, at *6 (N.M.

The effect of the district court's conclusion, that a Tribe enjoys immunity from a federally authorized condemnation action, while a state does not, is inconsistent with the recognition that tribal sovereignty is limited to that consistent with Tribes' status as dependent domestic nations. *See United States v. Carmack*, 329 U.S. 230, 240-42 (1946) (State consent to federal eminent domain not necessary so long as condemnation is for a public purpose and just compensation paid); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 426 (1989) ("A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's external relations." (quoted authority omitted)).

IV. Certified 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?

A. Even if it were a necessary party, and its immunity not waived, the Nation is not indispensable because the action can proceed in equity and good conscience without joinder of the Nation.

The district court's conclusion that the Nation is an indispensable party does not withstand analysis under Rule 19. First, under Rule 19(a)(1)(B), the Nation is not a required party because it will incur no injury to either the sovereign or its pecuniary interests, and neither it nor others risk inconsistent obligations, given the United States' representation of the Nation. *See Pimentel*, 553 U.S. at 867 ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered *where there is a potential for injury to the interests of the absent*

June 16, 2016) ("neither [tribal] waiver nor [congressional] abrogation exists in this case").

sovereign." (Emphasis added.)). However, even if the Nation were a required party under Rule 19(a), it is not indispensable under Rule 19(b) because the Nation's interest, as fractional beneficial interest owner of an allotment, is not threatened with injury because the fee owner, the United States, is a required party to the condemnation action, with a duty to ensure that condemnation compensation is adequate.[17] *See, e.g.*, *Minnesota*, 305 U.S. at 386-88. Representation by the United States constitutes an "other measure" that protects against prejudice to the Nation under Rule 19(b)(2)(C). Consequently, there is no need for protective measures in the judgment. Rule 19(b)(1) and (2) do not suggest indispensability.

The district court erred in failing to recognize the significance of the ILCA, as providing context for the interest of the Nation, in the Rule 19(b) analysis. The ILCA's text supports that a Tribe's interests are not injured by a condemnation under Section 357, because Congress authorized the Secretary to approve transfers of allotted lands in which a Tribe holds an interest without tribal consent subject to specific conditions: Although the Tribe is not treated as a party to the lease or agreement, it remains entitled pro rata to "payment under the lease or agreement." 25 U.S.C. § 2218(d)(2)(B), *see also* Pub. L. No. 106-462, 114 Stat. 1992, § 201(b)(4)(B). Consistent with the intended nature of a Tribe's interest acquired under the ILCA, Congress stipulated that nothing in Section 2218 "shall be construed to affect the sovereignty of the Indian tribe." *Id.* So too, under

[17] Fair market value for the easements is susceptible of judicial determination under New Mexico law, which provides a reasonable and objectively ascertainable compensation standard, and does not depend on whether the Nation or any other beneficial interest holders participate in the proceeding. N.M. Stat. Ann., § 42A-1-26 (1981).

Section 357, a Tribe's sovereignty is not affected; rather, Congress authorized condemnation of allotted lands with pro rata payment to the beneficial interest owners, one of which is now the Navajo Nation.

Similarly, applying Rule 19(B)(3), a judgment rendered without joinder of the Nation would be adequate to all parties, because it would bind the United States and all trust beneficiaries and just compensation would be determined under New Mexico eminent domain standards, as required by Section 357. The participation of the United States on the Nation's behalf insures that the Nation, like other trust beneficiaries, would receive its pro rata share of appropriate compensation.

In addition, the national interest in continued effectuation of the policies underlying Section 357, still important today, counsel against a ruling that prevents all such condemnation. *Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (effectuation of NEPA policies counsels against holding the Nation indispensable). *See also Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 n.6 (9th Cir. 1990).

Rule 19(b)(4), by contrast, tips the balance heavily in favor of not dismissing, even if the Nation were a "required-but-not-feasibly joined party," *Harnsberger*, 697 F.3d 1278, because PNM would have no reasonable remedy. The district court's justification that PNM has an available remedy, negotiated consent, has been rejected by the Supreme Court in a case reflecting the law upon which the drafters of Section 357 would have drawn. *Kohl v. United States*, 91 U.S. 367 (1875). In that case, the Supreme Court reasoned that the purposes of condemnation, *i.e.*, ensuring that lands are available for public purposes, could not be "preserved if the obstinacy of a private person, or if any

other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed." *Id.* at 371. With respect to taking lands within a State, the Court noted:

> If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, *or by the action of a State* prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, *and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.*

Id. (emphasis added); *accord Yellowfish*, 691 F.2d at 931 ("If 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*. Moreover, Indian allottees benefit as much from public projects as do those non-Indian property owners whose land is interspersed with the allottees' land." (emphasis added)). If the December 1 Opinion is not reversed, the public purposes served by a company like PNM, with undisputed right to condemn, would be dependent upon the will of a Tribe holding a mere fractional interest in an allotment. That result conflicts with Section 357's purpose and the ILCA's text and legislative history, refuting any claimed tribal veto.

B. The district court's determination has far reaching implications that support proceeding in the Nation's absence.

The district court concedes the consequence of the rulings may be to significantly prejudice PNM by requiring removal of public utility facilities and payment of trespass damages. After PNM filed the Condemnation Action, the 22 Individual Defendants[18]

[18] PNM and Transwestern have faced challenges to rights-of-way crossing these and other allotments from many of these individual Indian landowners, beginning in 2009,

filed a separate trespass action, which Judge Parker recently consolidated with the Condemnation Action. Consolidation Opinion at 11 (Aplt. App. 332-41). As Judge Parker noted: "As for the remaining three allotments, however, PNM clearly has the right to condemn an easement; thus, the owners will recover condemnation damages." *Id.* at 10 (Aplt. App. 339). In other words, PNM's condemnation authority being undisputed, the only remaining issue should have been the amount of compensation. As Judge Parker acknowledged, *id.* at 10 (Aplt. App. 339), if PNM cannot obtain the easement by condemnation, PNM will face a trespass claim, and the possibility of having to remove its lines from Allotment Nos. 1160 and 1392—the very evils that Congress sought to prevent by authorizing condemnation under Section 357. As the district court recognized, if PNM is authorized by Section 357 to condemn an easement across the Two Allotments, then the Condemnation Action will proceed as to all five allotments, and the Trespass Action would likely be dismissed. Consolidation Opinion at 9-11 (Aplt. App. 338-40). The district court's decision denying the United States' motion to dismiss the Individual Defendants' trespass claims makes plain that grantees of rights-of-way who cannot secure tribal consent to a renewal face trespass damages and being ordered to remove

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with a federal court action that was dismissed for failure to exhaust, *see Begay v. Pub. Serv. Co. of New Mexico*, 710 F. Supp. 2d 1161 (D.N.M. 2010), and appeals to the BIA and IBIA, *see, e.g.*, *One Hundred and Ninety-One Navajo Landowners v. Navajo Reg'l Dir., Bureau of Indian Affairs*, 57 IBIA 271 (2013) (dismissed for failure to perfect appeals); *Forty-Two Navajo Landowners v. Navajo Reg'l Dir., Bureau of Indian Affairs*, 58 IBIA 234 (2014) (voluntarily dismissed with prejudice). This long and tortuous history reflects the very real difficulty that companies like PNM and Transwestern face when seeking rights-of-way across allotted lands, difficulties which will only be exacerbated if companies are denied the ability to exercise eminent domain authority.

facilities that serve public purposes. Trespass Opinion at 6-11 (Transwestern Supp. App. 034-39).

If PNM is not so authorized, then the Condemnation Action will proceed as to three allotments, and the Trespass Action could continue as to the Two Allotments. PNM's ability to secure its rights to continued use of the AY Line across *all five allotments* is needed at this time because a condemnation award as to three out of five allotments may not be a feasible basis for continued operation of the AY Line and, consequently, not an efficient use of judicial and litigant resources.

Not only does the December 1 Opinion adversely affect grantees' ability to renew existing rights-of-way, it may result in states, municipalities, utilities, and other companies choosing to forego future development or expansion of facilities on allotted lands, thereby inhibiting the delivery of utility services, impairing the economic benefit of allotted lands to the interest holders, and putting allotted lands at even greater competitive disadvantage to private lands. It also could adversely affect non-Indians in lands interspersed with allotted lands. This is contrary to the public interest and the goals of Section 357 and related legislation.

Two similar challenges to authority to condemn under Section 357 are currently pending in the United States District Court for the Western District of Oklahoma, with dismissal motions pending, relying, in part, on the Dismissal Opinions. *Enable Oklahoma Intrastate Transmission, LLC v. 25 Foot Wide Easement*, Case No. 5:15-cv-01250-M (W.D. Okla. filed Nov. 11, 2015); and, *City of Oklahoma City v. A 100 Foot Wide Permanent Easement*, Case No. 5:15-cv-00274-M (W.D. Okla. filed Mar. 8, 2015) (City,

unable to reach agreement with Tribe and allotted landowners, seeks to condemn an approximate 4.4 mile portion of a 100 mile pipeline easement which the City has relied upon for municipal water supplies for more than 60 years). In both cases, condemnation opponents cite the district court's opinions. Thus, the district court's misguided analysis may have far-reaching prejudicial consequences if this Court does not clarify the correct approach. Indeed, the December 1 Opinion has been advanced as a strategy to enhance compensation by defeating condemnation. Advocates for individual Indian landowners, relying on the decision below, are encouraging transfer of fractional interests to Tribes to "insulate" the land from condemnation. *See* "Dealing with Expired Rights-of-Way in Indian Country," attached as Exhibit A to Transwestern's Answer and/or Cross-Petition [Doc. 01019593997] ("It may be possible, and worthwhile, for an individual Native American landowner with a potentially significant trespass claim to consider transferring an interest in the land to a tribe to insulate it from condemnation." (citing *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty*., 719 F.2d 956, 961-62 (8th Cir. 1983), and the December 1 Opinion).

The Reconsideration/Certification Opinion's suggestion that PNM may have an adequate remedy through negotiation for the Nation's consent is precatory at best. A negotiation between a party faced with the threat of removing and rerouting major electric transmission lines, on the one hand, and a party having free rein to deny consent for any reason, or no reason, can hardly be contemplated to yield the fair market value-based compensation Congress intended would pertain in State law condemnation proceedings under Section 357.

This prejudice to PNM, Transwestern, and others requiring rights-of-way for public purposes, and the public interest in secure transportation and utility service obtainable at reasonable cost, require this Court to reverse the district court's erroneous decisions. Even if the Nation were a required party, and could not be joined, contrary to the arguments above, the action can and should proceed in equity and good conscience without joinder of the Nation.

CONCLUSION

The negative implications of the district court's decisions for existing rights-of-ways are potentially severe. Utilities, energy transmission companies, States, and municipalities facing expiration of rights of way for energy transportation or transmission lines, roads, highways, and other essential facilities now face the specter of trespass claims for, and of being ordered to remove their facilities from, rights-of-way across allotments upon which they may have had operations and facilities for decades. In PNM's case, this would disrupt a service provided for over 60 years. Such a result "cannot be." *Kohl*, 91 U.S. at 371. The Court should reverse the Dismissal Opinions to preserve the intent of Section 357 to allow "lands allotted in severalty" be available at the reasonable costs the statute contemplated would apply in state condemnation proceedings.

Date: July 5, 2016

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7) and Section II(I) of this Court's CM-ECF User's Manual, I hereby certify that:

1. This brief contains 12,665 words, exclusive of the items identified in Fed. R. App. P. 32(a)(7)(B)(iii). This figure was calculated through the word count function of Microsoft Word 2010, which was used to prepare this brief;

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CERTIFICATE OF SERVICE

I, Deana M. Bennett, hereby certify that on the 5th day of July, 2016, the foregoing was filed through the CM/ECF system, which will send notification of this filing to all parties who have registered to receive service under this system. I, Deana M. Bennett, also hereby certify that on July 5, 2016, copies of the foregoing were sent first class mail to the following:

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