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, et al.,
Defendants-Appellees.

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

RESPONSE BRIEF OF APPELLEE NAVAJO NATION

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Oral Argument Requested.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellee Navajo Nation is a sovereign Indian nation, and not a corporation.

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There are no prior or related appeals.

SUPPLEMENTAL STATEMENT OF THE CASE

This appeal concerns the claimed authority of private utility companies to unilaterally force an easement over allotments that include a sovereign Indian nation among its owners. The four certified questions before the Court implicate congressional policy concerning allotments as well as the sovereign interests of the Navajo Nation ("Nation").

Appellants PNM and Transwestern assert that 25 U.S.C. § 357 (Section 357) applies beyond allotments wholly owned by individual allottees to also allow condemnation of the allotment interests of sovereign tribal nations. However, as discussed below, the application of Section 357 to a tribal nation's property would unduly impair a tribal sovereign's property interests and its immunity from suit. Absent clear congressional intent to harm either, Section 357 cannot apply.

The repudiated federal allotment policy led to the legal issues before the Court. Through the 1887 General Allotment Act, Congress sought to end communal ownership of tribal land by authorizing allotments to individual tribal members. Act of February 8, 1887, codified as 25 U.S.C. § 334, 336-337; *see also* S. REP. NO. 108–264, at 1952. The stated intent behind the allotment policy "was to forcibly assimilate Indians by breaking up their reservations." H.R. REP. NO. 108–656, at 1. As such, it is "widely regarded as the most concerted Federal assault on tribal authority and the tribal land base." *Id.* at 2.

Section 357 was enacted during that same era, and provides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose . . . in the same manner as land owned in fee may be condemned." 25 U.S.C. § 357. Through this provision, private actors can file a condemnation action in federal court and force easements across allotments as authorized by the laws of the state where the allotment is located. *Id.*

Importantly, there is no equivalent provision for condemning land owned by a tribal nation and held in trust by the United States. Easements over such tribal land must be approved by the Indian nation's government, and Section 357 does not apply. *See* 25 U.S.C. § 324.

Further, Congress subjected allotments to state or tribal intestacy laws, which generally require when there is no will that each heir receive an undivided interest in the allotments when the interest-holder passes away. *See* 25 U.S.C. § 348; *see also* Cohen's Handbook of Federal Indian Law, § 16.05[2][c] (2005 ed.). The result has been the increasing fractionation of interests in allotments, where as many as several hundred individuals hold property interests in a single allotment. *See* H.R. REP. NO. 108–656, at 2; Cohen's Handbook, § 16.05[2][c][iii].

Recognizing the disastrous effect of allotment on Indian nations, Congress repudiated the allotment policy, and passed legislation to reverse its effect. In the Indian Reorganization Act of 1934, Congress ended allotment of tribal lands, and

indefinitely extended the trust period for most allotments previously issued. *See* 25 U.S.C. §§ 461, 462. Congress applied the indefinite extension to all allotments in 1990. *See* 25 U.S.C. § 478-1.

Congress specifically addressed the problem of allotment fractionation in the Indian Land Consolidation Act (ILCA), passed in 1983 and amended several times since then. H.R. REP. NO. 108-656, at 5; Pub. L. No. 97–459, codified as 25 U.S.C. §§ 2201 et seq. (2004). Through ILCA, Congress has implemented its current policy to "prevent further fractionation of Indian trust allotments" and to "consolidate those [fractionated] interests *in a manner that enhances tribal sovereignty*." H.R. REP. NO. 108–656, at 1 (emphasis added).

Several provisions of ILCA implement this policy. One section of the act authorizes the purchase of fractionated interests by tribal nations with the consent of individual allottees. 25 U.S.C. § 2204(a). Another section authorizes a "fractional interest acquisition program," under which the Secretary of Interior can purchase allottee interests on behalf of tribal nations to hold in trust for a tribe. 25 U.S.C. § 2212(a). In another section, a tribe acquires an allotment interest if the deceased allottee has no surviving spouse or eligible heir. 25 U.S.C. § 2206(a)(2)(B)(v); *see also* 25 U.S.C. § 373a (allotment interest of deceased Indian with no heirs passes to tribe). Further, for property interests of less than five present of the total allotment, a tribe acquires that interest if the surviving spouse

does not live on the allotment and there are no eligible heirs. 25 U.S.C. § 2206(a)(2)(D)(iii)(IV).

Another mechanism the federal government is using to address fractionation is the Land Buy-Back Program for Tribal Nations. That program arises out of the United States' settlement of *Cobell v. Salazar*, United States District Court, District of Columbia, No. 96-1285, which concerned federal mismanagement of income arising from allotments. *See* Land Buy Back Program for Tribal Nations, https://www.doi.gov/buybackprogram/about (accessed September 26, 2016). As part of the settlement, the federal government set aside $1.9 billion to purchase allottee interests on behalf of tribal nations. *Id.* Allotment owners can voluntarily sell their interests back to the federal government to be taken into trust for a tribe. *Id.* Congress approved the program and created the Trust Land Consolidation Fund in the Claims Resolution Act of 2010. Pub. L. No. 111-291, § 101(e)(1). Under this program, the Nation will receive additional ownership interests in allotments.

Through these congressionally sanctioned methods, Indian nations have consolidated allotment interests to reverse the devastating land loss caused by allotment.

PNM and Transwestern's broad reading of Section 357 disrupts these remedial programs, as they believe that provision subjects the sovereign Indian nation to condemnation without its consent, regardless of that nation's sovereign

immunity. According to PNM and Transwestern, Congress intended in 1901 to allow private entities to force easements across allotments even when a tribal nation is an owner. However, as Section 357 is a relic of the allotment era, and given the stark shift in federal policy, it should be narrowly construed to only apply to allotments without tribal nation ownership. To interpret it otherwise would impair the significant sovereign interests of tribal nations to be immune from involuntary divestment of their property.

SUMMARY OF THE ARGUMENT

The Federal District Court for the District of New Mexico (District Court) did not err.

First, the District Court correctly held that Section 357 by its language does not apply to allotments that include tribal ownership interests. Such allotments are not "lands allotted in severalty to Indians."

Second, the District Court did not abuse its discretion when it held the Nation is a required party when it owns an interest in an allotment. Condemnation would impair or impede its ability to protect that interest and its interest in its sovereign immunity. Both Rule 19(a)(1)(B)(i) and Rule 71.1 support the Nation's required party status.

Third, the District Court correctly held that the Nation has sovereign immunity from a condemnation action under Section 357. Nothing in the language

of Section 357 unequivocally waives the Nation's immunity. Further, the "implied" waiver recognized by the U.S. Supreme Court in *Minnesota v. United States*, 305 U.S. 382 (1939), does not apply. Also, even if properly raised by PNM for the first time on appeal, the alleged *in rem* nature of a condemnation action does not mean that the Nation can be sued in a Section 357 action.

Fourth, the District Court did not abuse its discretion in concluding that in "equity and good conscience" the condemnation action against the two allotments the Nation has a property interest in should not continue in its absence. The District Court properly weighed the Rule 19(b) factors and ruled the action cannot continue against the two allotments.

ARGUMENT

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 INTEREST IN THE PARCEL?

The Nation concurs with the arguments of the individual allottees in their Response Brief, and adopts those arguments as its own on this question. As discussed by the allottees, the District Court correctly read Section 357 to not apply to allotments with tribal property interests, as once an Indian nation acquires a property interest they are not properly "lands allotted in severalty to Indians."

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?

Rule 19 decisions are generally reviewed under an abuse of discretion standard. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1277 (10th Cir. 2012). A district court's specific decision whether a party is "required" under Rule 19(a) is reviewed under that same discretionary standard. *Id*.[1]

[1] Both PNM and Transwestern misstate the appropriate standard of review for Rule 19 cases. PNM claims the standard of review is *de novo*, allegedly because "[t]his interlocutory appeal turns on questions of statutory interpretation." PNM Op. Br. at 9. Transwestern claims that the abuse of discretion standard is inapplicable, apparently even to whether a party is "required," where "disputed legal conclusions regarding sovereign immunity underlie the district court's Rule 19 decision." Trans. Op. Br. at 12. Neither is correct. *See Northern Arapaho Tribe*, 697 F.3d at 1277.

PNM and Transwestern argue that the District Court erred when it concluded that the Nation is a required party under Rule 19(a)(1)(B)(i). They argue that the alleged *in rem* nature of a Section 357 condemnation proceeding means no party is indispensable. PNM Op. Br. at 24-29; Trans. Op. Br. at 32, 33-34. Transwestern further argues that the joinder of the United States as trustee means that the Nation's interests will not be injured under Rule 19(a)(1)(B)(i). Trans. Op. Br. at 35. However, under Rules 19 and 71.1 of the Federal Rules of Civil Procedure the Nation is clearly required, and the District Court did not abuse its discretion.

A. The Nation is a required party under Rule 71.1(c)(3).

Neither PNM nor Transwestern mentions in their argument Rule 71.1(c)(3) of the Federal Rules of Civil Procedure, which states:

> When the action commences, the plaintiff *need join* as defendants . . . *those persons who have* or claim *an interest in the property* and whose names are then known.

(emphasis added). Under the rule, a plaintiff seeking to condemn property in federal court must name any "person" known to the plaintiff who has "an interest" in the property. There is no ambiguity in this requirement. The District Court correctly read Rule 71.1(c)(3) as requiring joinder of the tribal owners. Mem. Op., December 1, 2015, Aplt. App. at 133-44. The phrase "an interest" clearly encompasses the Nation's beneficial interest in the property, in addition to the federal trust interest, and therefore simply joining the United States is insufficient

to comply with the rule. This is consistent with general common law principles of joinder for cases affecting trust property. *See* Joseph Story, Commentaries on Equity Pleading, § 207 (1844) (beneficiaries are necessary parties along with trustee in cases involving trust property). Therefore, independent of any Rule 19 concerns, the specific rules applicable to condemnation actions required the Nation's joinder.

This is consistent with PNM's actual actions in the case. The Nation did not intervene; PNM named it, along with the allottees, and all other entities that held an interest in the property. PNM itself acknowledges in its Opening Brief that Rule 71.1(c)(3) mandated joining the Nation. PNM Op. Br. at 9. Any assertion that naming the Nation, and by implication, the numerous individual allottees, was unnecessary is patently inconsistent with Rule 71.1 and PNM's own statements and actions in the case.

B. The Nation is a required party under Rule 19(a)(1)(B)(i).

Rule 71.1's requirement is consistent with Rule 19(a)(1)(B)(i). That rule requires joinder of a "required party." *Id.* A "required party" is one that has

> an interest in the subject matter 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.

Id. The Nation's property interest in the allotments fulfills this requirement.

1. The Nation has an interest that will be impaired or impeded in its absence.

There can be no question that the Nation has an interest in the condemnation action. It is an owner, along with the allottees and the United States, of the two allotments. It has not consented to this easement. It was nonetheless named in a condemnation action as an involuntary defendant seeking to force an easement across the property, despite its lack of consent and its immunity from involuntary lawsuits. The Nation then has the interest of a property owner, whose land will be involuntarily condemned, and the interest of a sovereign government, whose immunity from involuntary actions is being breached.

Further, the Nation's ability to protect those interests is clearly impaired or impeded if the condemnation action continues in its absence. As condemnation applies to the entire property, not just individual property interests, the Nation cannot protect its property interest from an involuntary easement if it is not a party to the case. Similarly, the Nation cannot protect its immunity interest if a party can simply condemn the entire property without having to name the Nation as a defendant. Under either interest, the Nation is required; otherwise, an easement will be imposed on the Nation's property without its consent or participation.

2. The alleged *in rem* nature of a Section 357 condemnation does not negate the need to join the Nation in this action.

The principle that condemnation actions are generally *in rem*, and therefore there are no indispensable parties, does not apply here. Whether that principle is correct as a general matter is irrelevant because the specific language of Rule 71.1 and Rule 19(a) make the Nation a required party in this matter. The authorities cited by PNM and Transwestern do not involve the same situation here, and do not even discuss indispensability under the federal rules. *See State of Georgia v. City of Chattanooga*, 264 U.S. 472 (1923) (holding fee land owned in proprietary capacity by state and located in different state could be condemned); *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685 (N.D. 2002) (holding fee land with tribal interest could be condemned).

Further, the U.S. Supreme Court in *Minnesota v. United States*, 305 U.S. 382 (1939), clearly applied the concept of indispensability to a Section 357 condemnation. Though the case did not concern a tribal nation, the reason the United States was indispensable, because it had a property interest in the allotment, applies equally to the Nation's interests here. *Id.* at 386-87. Despite any general principles concerning *in rem* proceedings, Section 357 condemnations have indispensable parties that must be joined, or the allotments may not be condemned.

C. The Nation is required even if the United States is joined.

Contrary to Transwestern's assertion, joinder of the United States does not negate the harm to the Nation. *See* Trans. Op. Br. at 33. This view reflects an antiquated notion that tribal interests are subsumed under the all-encompassing protection of a federal trustee. The United States' presence in the case cannot protect the Nation's interest to be free from condemnation of its property without its consent or participation, particularly if the Nation's property can be condemned simply by naming the United States. Further, the United States cannot protect the Nation's sovereign interest in its immunity if, as a practical matter, the easement will be condemned despite the Nation's absence. The United States does not adequately represent the Nation's interests, and the Nation is a separate, required party.

Under the deferential standard applicable to Rule 19 decisions, the District Court did not abuse its discretion in concluding that the Nation is a required party in this action.

QUESTION III: DOES A TRIBE HAVE SOVEREIGN IMMUNITY?

While generally Rule 19 decisions are reviewed for an abuse of discretion, whether a required party has sovereign immunity is a legal question this Court reviews *de novo*. *Northern Arapaho Tribe*, 697 F.3d at 1277.

PNM and Transwestern argue the Nation does not have sovereign immunity from a Section 357 condemnation suit. Though they assert an array of arguments, none negate the basic premise that an Indian nation may not be sued in federal court absent an unequivocal waiver by that nation or Congress. Neither has happened here, and the Nation is immune from the condemnation suit.

A. Section 357 does not unequivocally waive the Nation's immunity.

Fundamental principles of tribal sovereign immunity require Congress or the Nation to "unequivocally" waive immunity. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031 (2014). In either case, a waiver cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotation marks omitted); *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1152 (10th Cir. 2011). When Congress abrogates tribal immunity, its intent to do so must be clear. *Bay Mills*, 134 S.Ct. at 2031. This principle reflects that courts will not lightly assume that Congress "in fact intends to undermine Indian self-government." *Id.* at 2031-32.

Both PNM and Transwestern argue that Section 357 waives the Nation's immunity. PNM Op. Br. at 29-31; Trans. Op. Br. at 36-38. However, Section 357 makes no mention of Indian nations or their immunity, and there is then no unequivocal expression of congressional intent to waive immunity. Congress's

intent to waive the Nation's immunity cannot be shown through silence, or the "unequivocal" requirement is meaningless. Section 357 recognizes a cause of action, nothing more. It does not purport to breach tribal immunity. Under the high standard set for abrogation of sovereign immunity, there must be something more to show an unequivocal waiver. There is not, and therefore the Nation is immune from this condemnation action.

B. *Minnesota v. United States* is inapplicable to tribal immunity.

The waiver of federal immunity recognized by the Supreme Court in *Minnesota* is not binding here. Indeed, tribal immunity was not even an issue in the case; the issue was whether the United States was immune from suit in state court for condemnation of an allotment, and therefore immune in federal court when the case was removed. 305 U.S. at 386-88. It appears from the opinion that the United States did not even contest immunity for direct actions in federal court, *id.*, and therefore the Court's statement was made in the context of a situation where that immunity was not even raised. Further, the sum total of the discussion in *Minnesota* is one conclusory sentence recognizing an *implied* waiver in Section 357. *See id.* at 386 ("It is true that authorization to condemn confers *by implication* permission to sue the United States.") (emphasis added).[2] However,

[2] Transwestern itself recognizes the cursory nature of the Court's analysis. Trans. Op. Br. at 34 (referring to the "somewhat perfunctory analysis") (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (internal quotation marks

the Court in the next sentence went on to state that Congress had generally authorized suits against the United States in federal court, suggesting Section 357 did not, by itself, waive immunity. *Id.* Subsequent lower court cases add no additional analysis or justification for the implicit waiver of federal immunity, but simply adopt *Minnesota's* holding. *See, e.g., Town of Okemah v. United States*, 140 F.2d 963, 965 (10th Cir. 1944); *Jechetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011).

Importantly, the U.S. Supreme Court has generally repudiated the "implicit waiver" rule applied in *Minnesota*. After *Minnesota* the United States Supreme Court affirmatively disclaimed that federal immunity could be waived "implicitly," and instead stated that federal immunity, like tribal immunity, required an unequivocal waiver. *See United States v. King*, 305 U.S. 1, 4 (1969) ("a waiver cannot be implied but must be unequivocally expressed."); *Soriano v. United States*, 352 U.S. 270, 276 (1957) ("[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and *exceptions thereto are not to be implied*." (emphasis added)); *United*

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omitted)). Indeed, it correctly notes that "*Minnesota* [does not] address[] the basis for waiver of the federal government's immunity." Trans. Op. Br. at 36.

States v. Sherwood, 312 U.S. 584, 590-91 (1941) ("[C]onsent of the government to be sued . . . must be strictly construed.").[3]

Consistent with these subsequent cases, this Court has rejected extending *Minnesota*, even for federal immunity. In *Prince v. United States*, the Court (this one?) recognized *Minnesota's* implied waiver reasoning is in conflict with general principles of federal immunity and declined to apply it to another federal statute concerning Indian lands. 7 F.3d 968, 970 (1993) (noting no unequivocal waiver in 25 U.S.C. § 348 and distinguishing *Minnesota* based on language of that statute). As this Court has not expanded *Minnesota* in situations actually involving federal immunity, it has even less reason to do so in the context of tribal immunity.

However, even if *Minnesota* remains effective for federal immunity, federal and tribal immunity are separate and independent of each other. An alleged waiver of one does not automatically result in a waiver of the other; both must be independently waived. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1334, n.14 (10th Cir. 1982) ("Of course, this is not to say where Congress waives the United States' immunity it implicitly waives the immunity of Indian tribes also."). Therefore, even if the Court is bound to follow the Supreme Court's conclusion that immunity of the United States was implicitly waived, nothing compels it to

[3] Indeed, the requirement that a waiver of tribal immunity be unequivocally expressed comes directly out of these later cases involving federal immunity. *See Santa Clara Pueblo*, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *King*, 395 U.S. at 4, and *Soriano*, 352 U.S. at 276)).

find tribal immunity was also waived. *See id.*; *see also*, *White v. University of California*, 765 F.3d 1010, 1024 (9th Cir. 2014) ("Nothing in a Congressional waiver of sovereign immunity on behalf of the United States alters the rule that abrogation of tribal sovereign immunity by Congress must be unequivocally expressed in explicit legislation." (internal quotation marks omitted)). As the current standard clearly requires an unequivocal waiver of tribal immunity, and PNM and Transwestern have identified no such waiver, the Nation is immune from this suit.

C. Mere acceptance of an interest in an allotment is not a waiver of tribal sovereign immunity.

PNM also argues the Nation waived its immunity simply by accepting a fractional interest in an allotment. PNM Op. Br. at 31-33. Similar to its "implied waiver" argument concerning Section 357, it argues the Nation had "constructive notice" that an allotment was subject to condemnation under Section 357. *Id.* at 32. Therefore, it argues, the Nation waived its immunity by mere acquisition of an interest.

Like its prior argument, PNM ignores the high threshold for a waiver of tribal sovereign immunity. Mere acceptance of an interest in an allotment is not an "unequivocal" waiver. Indeed, the Indian Land Consolidation Act (ILCA) itself refutes this argument. Sections 2213 and 2218 of ILCA explicitly recognize the continued sovereign immunity of a tribal nation that acquires an interest in an

allotment. 25 U.S.C. §§ 2213(c); 2218(d)(2) (approval of Secretary does not affect tribal "sovereignty" or "immunity"); *see also* S. Rep. 106-361, 2000 WL 1063269 at *20 ("This section employs very broad language to eliminate any argument that either a tribe's *immunity or its other governmental authority* is altered by a lease that the Secretary approves on behalf of the tribe." (emphasis added)).[4] Therefore, the Nation's immunity is intact absent an explicit, affirmative waiver; mere ownership is wholly insufficient.

D. The alleged *in rem* nature of a Section 357 condemnation action does not negate tribal sovereign immunity.

PNM and Amicus GPA Midstream Association argue that the Nation's immunity is simply not implicated in this case due to the alleged *in rem* nature of a Section 357 condemnation. PNM Op. Br. at 33-34; GPA Am. Br. at 2-6. PNM did not raise this argument in the district court, and therefore cannot raise it now. *See U.S. v. Abdenbi*, 361 F.3d 1282, 1289 (10th Cir. 2004) ("The well-settled law of this circuit is that issues not raised in district court may not be raised for the first time on appeal."); *Tele-Communications, Inc. v. Commissioner of Internal Revenue*, 104 F.3d 1229, 1233 (10th Cir. 1997) (appellate court "should not be considered a second-shot forum . . . where secondary, back-up theories may be

[4] As ILCA recognizes a tribe has immunity when it holds an interest in an allotment, PNM's other argument that Congress "apparently understood" that mere ownership of an allotment was a tribal waiver of its own immunity is also incorrect. *See* PNM Op. Br. at 30-31.

mounted for the first time" (internal quotation marks omitted)). Regardless, there is no *in rem* exception to the Nation's immunity under Section 357.

No federal case has recognized an *in rem* exception to tribal immunity. Indeed, federal courts have rejected arguments that such a distinction exists. *See Cayuga Indian Nation of New York v. Seneca Cty., N.Y.*, 890 F.Supp.2d 240, 247-48 (W.D.N.Y. 2012), *aff'd*, 761 F.3d 218 (2nd Cir. 2014); *Oneida Indian Nation of New York v. Madison County*, 401 F.Supp.2d 219, 230 (N.D.N.Y. 2005), *aff'd,* 605 F.3d 149 (2nd Cir. 2010), *vacated and remanded on other grounds by Madison County, New York v. Oneida Indian Nation of New York*, 131 S.Ct. 704 (2011) (per curiam) ("The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property."). Nonetheless, in support of this assertion, PNM relies on several state cases, all of which involved tribal property interests in fee land. *See 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, 33 (Fla. Dist. Ct. App. 2011); *Smale v. Noretep*, 208 P.3d 1180, 1180 (Wash. Ct. App. 2009); *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685, 688 (N.D. 2002). As such, none of them concerned Section 357 condemnations or allotments. *See Cass County*, 643 N.W.2d at 694 (basing ruling on fact that land "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" (emphasis added)). Such authorities simply do not apply.

Regardless, as Section 357 authorizes condemnation under the laws of the state where the allotment is located, New Mexico state law, if any state law, is relevant to the question. *See* 25 U.S.C. § 357 (stating allotted land "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" (emphasis added)). Importantly, the New Mexico Supreme Court recently rejected any notion that there was an *in rem* exception to tribal immunity, and specifically declined to adopt the reasoning of other state courts referenced by PNM. *Hamaatsa, Inc. v. Pueblo of San Felipe*, ___ P.3d ___, 2016 WL 3382082, at *7 (2016). Indeed, the land in that case was fee land, and the New Mexico Supreme Court declined to recognize an exception for tribal immunity even in that scenario. *Id.* Therefore, under New Mexico state law a tribe is immune from an *in rem* action, whether against its fee land or a trust interest in an allotment. Even if a Section 357 action is then appropriately characterized as *in rem* a condemnation action under New Mexico law cannot be filed against a tribal sovereign.[5]

[5] Transwestern attempts to avoid *Hamaatsa* by contending it is not arguing there is an *in rem* exception to tribal immunity. *See* Trans. Op. Br. at 37, n.16. Instead, its argument appears to be that the *in rem* nature of condemnation affects how the

Even if New Mexico law did not clearly recognize tribal immunity, *Minnesota* itself supports a sovereign property owner's immunity in a Section 357 action, despite the alleged *in rem* nature of condemnation. Though embracing *Minnesota* for the alleged "implicit" waiver of immunity, PNM ignores the threshold conclusion that, as a sovereign, the United States had immunity from the condemnation action in the first place. Indeed, the U.S. Supreme Court concluded that a suit against the property of the United States was a suit against the United States, *id.* at 386, suggesting either a Section 357 is not truly *in rem* or the alleged distinction between *in personam* and *in rem* actions for immunity is not as clear as PNM and GPA suggest. The U.S. Supreme Court also held that the case could not proceed in state court, as there was no waiver of federal immunity for state court proceedings. *Id.* at 388. As discussed above, it ultimately found that the federal government's immunity was waived, but only in federal court. *Id.* at 386. These simple statements refute any assertion that immunity does not apply in a Section 357 action.[6] How the United States, as sovereign owner, has immunity from a

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Court should view whether Section 357 waives tribal immunity. *See id.* at 37. There is even less authority for the proposition, and it should be rejected, as the U.S. Supreme Court is clear that a statutory waiver must be "unequivocally expressed," with no suggestion that an *in rem*/*in personam* distinction has any bearing on the necessary level of clarity. *See Bay Mills*, 134 S.Ct. at 2031.

[6] Unlike the conclusion that immunity may be implicitly waived, *see supra*, at 15-16. No subsequent U.S. Supreme Court case has repudiated this part of *Minnesota*.

Section 357 action unless waived, but the Nation as sovereign owner does not, is not explained.[7]

There is simply no *in rem* exception to tribal immunity generally, and particularly in a Section 357 condemnation. As discussed by the federal courts that have considered the issue, a suit against the property of a sovereign is a suit against the sovereign. *See, e.g.*, *Minnesota*, 305 U.S. at 386; *Oneida Indian Nation*, 401 F.Supp.2d at 230. Any alleged difference is simply illusory. Indeed, in this case, the Nation was named as a defendant, was served with a complaint, and was expected to respond upon pain of default that would have resulted in the confiscation of its property. *See* Fed. R. Civ. P. 71.1(e)(2), (3) (requiring defendant to file answer or waive all defenses). In that respect, there is no practical difference between a condemnation case and an *in personam* case; the Nation was involuntarily named in the case, and had to respond to avoid legal consequences to its interests.

[7] Amicus GPA Midstream additionally argues that the United States is the only sovereign that needs to be joined in a Section 357 action, for reasons similar to those raised by Transwestern in its Rule 19 argument. *Compare* GPA Am. Br. at 2-6 and Trans. Op. Br. at 34-35. As discussed above, such arguments reflect an antiquated view that the United States may subsume tribal interests completely, and a tribal nation has no separate right to be present when its property is being condemned. Rule 71.1(c) by its plain language refutes that assertion.

IV. QUESTION 4: CAN THE MATTER PROCEED IN THE NATION'S ABSENCE?

Even if the Nation has immunity, PNM and Transwestern argue that this Court should reverse the District Court's decision because under Rule 19(b) the condemnation action "in equity and good conscience" should not proceed in the Nation's absence.

Under this Court's standard of review for Rule 19(b) decisions, it can only reverse if the District Court abused its discretion. *Northern Arapaho Tribe*, 697 F.3d at 1277; *Thunder Bay Coal Co. v. Southwestern Public Service Co.*, 104 F.3d 1205, 1201-11 (1997)("Since evaluation of indispensability depends to a large degree on the careful exercise of discretion by the district court, we will only reverse a district court's determination for abuse of that discretion." (internal quotation marks omitted)). A district court abuses its discretion "when it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289-90 (10th Cir. 2003). Under that highly deferential standard of review, the District Court's decision appropriately considered the 19(b) factors, and those additionally raised by PNM, and there is no abuse of its discretion.

Importantly, this Court has interpreted the Rule 19(b) factors in light of the primary importance of tribal sovereign immunity. Indeed, "[w]hen, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for

balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enterprise Management Consultants v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *see also 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 potential for injury to the interests of the absent sovereign."). When viewed in that light, the District Court clearly did not abuse its discretion when it declined to allow the case to move forward in the Nation's absence.

A. The Nation will be prejudiced if the condemnation action against the two allotments continues in its absence.

PNM asserts that the 19(b)(1) factor does not favor the Nation, because the Nation allegedly will be compensated through the United States like the other allottees whether it is present or not, and therefore cannot be prejudiced. PNM Op. Br. at 35.

Under this factor, the district court must consider "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Fed. R. Civ. P. 19(b)(1). The standard is essentially the same as the one for Rule 19(a)(1)(B)(i), whether continuing the case in a party's absence will impair or impede its ability to protect its interest. *Harnsberger*, 697 F.3d at 1282.

The Nation is clearly prejudiced. Contrary to PNM's argument, the Nation's interest is broader than simple compensation. It will be prejudiced by the case moving forward at all, potentially resulting in condemnation and an involuntary easement granted over the allotment in its absence and without its consent. The Nation then is clearly prejudiced, whether or not it is compensated through a proportional share of the condemnation award.

B. Payment of compensation will not lessen or avoid prejudice to the Nation.

Under 19(b)(2), PNM asserts that contemporaneous payment of compensation to the Nation by order of the Court would lessen or avoid prejudice to the Nation. *See* PNM Op. Br. at 36; *see also* Fed. R. Civ. P. 19(b)(2) (considering "the extent to which any prejudice [to the absent party] could be lessened or avoided"). This again assumes the only interest negatively affected is compensation. As discussed above, the very involuntary imposition of an easement prejudices the Nation. That cannot be lessened or avoided if the case goes forward, when the only result is an order of condemnation. There are then no "protective provisions," shaping of relief, or "other measures" that can lessen the Nation's prejudice. *See* Fed. R. Civ. P. 19(b)(2)(A-C).

C. It is unclear whether judgment in the Nation's absence would be adequate.

Under 19(b)(3), PNM argues that an order of condemnation, even in the Nation's absence, would wholly settle the issue, and therefore would be "adequate." Fed. R. Civ. P. 19(b)(3). However, it is unclear what effect a condemnation order would have in the absence of one of the owners. Before the Nation's Motion to Dismiss, PNM clearly believed a condemnation judgment must bind all of the allottees and the United States, as it named and served all owners of the allotments as defendants. Again, this is consistent with Rule 71.1(c)(3). PNM apparently now believes it can receive an easement even without the Nation's presence. As a general matter a party cannot be bound by a judgment it was not a party to, *see Martin v. Wilkes*, 490 U.S. 755, 761-62 (1989), and therefore it is not at all clear that a condemnation judgment with an award of compensation will negate any separate claim by the Nation. At the very least, it is unclear that the matter would be settled, weighing against continuing the case under the 19(b)(3) factor.

D. PNM has no remedy for involuntary condemnation of the two allotments, but may still negotiate a voluntary easement.

Under Rule 19(b)(4), the Nation concedes PNM would have no other court remedy to force an involuntary condemnation of the two allotments if the case could not move forward. However, that "result is contemplated by the doctrine of

sovereign immunity." *Pimentel*, 553 U.S. at 872 (2008). Dismissal of this case, even if PNM has no other condemnation remedy, is warranted because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986); *see also Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir.1991) ("Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity."). As the Nation, a government possessing sovereign immunity from involuntary actions, has a property interest in the allotment, PNM may not involuntarily condemn that allotment.

However, PNM may always negotiate a solution with the Nation and the allottees. Nothing prevents PNM from discussing a voluntary right-of-way with the Nation and the allottees. It has not done so with the Nation, and its claim that it has no other remedy is false unless and until it has exhausted attempts at an out-of-court agreement for a voluntary right-of-way. *See generally* 25 C.F.R. § 169 (setting out procedures for negotiating voluntary rights-of-way with allottees and tribal nations).

E. PNM's additional policy arguments do not justify continuing the condemnation of the two allotments in the Nation's absence.

PNM additionally argues that other factors than those enumerated in Rule 19(b) justify moving forward in the Nation's absence. *See* PNM Op. Br. at 29. It

raises a number of purely policy-based reasons for why it should be able to force an easement without a sovereign tribe's consent. *See id.* at 20-24.

The District Court considered these arguments, and appropriately rejected them. Nothing PNM argues demonstrates an abuse of the District Court's discretion. Further, Congress can consider the policy issues PNM raises, and, if it deems them sufficiently compelling, can resolve them through potential amendments to Section 357 or the Indian Land Consolidation Act. *See Bay Mills*, 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). If Congress deems it appropriate to abrogate tribal immunity to facilitate condemnation of rights-of-way, it may do so. It has not done so, and, as discussed in the Supplemental Statement of the Case, its current policy is to facilitate consolidation of allotment interests into tribal interests. *See supra*, at 3-5. Regardless, questions on how to best balance utility companies' needs with the rights of sovereign Indian nations is for Congress to decide. At the very least, it was not an abuse of the District Court's discretion to conclude the condemnation of the two allotments should not go forward, despite PNM's policy concerns.[8]

[8] Importantly, PNM's stated concern over allottees transferring their interests to Indian nations simply to block condemnation is not implicated in this case. *See* PNM Op. Br. At 22-23. No allottee has done that here, and the Court need not decide whether such transfers affect whether the condemnation action should proceed in an Indian nation's absence.

CONCLUSION

Based on the above, the District Court did not err, and the Court should affirm the dismissal of the condemnation action against the two allotments.

Respectfully submitted,

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ORAL ARGUMENT STATEMENT

The Nation requests oral argument, as the issues in the case are complex and involve many parties. As such, the Nation believes oral argument will benefit the Court in resolving this important case.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

i. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,041 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 2010 in 14-point Times New Roman

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

U.S. Court of Appeals Docket Number(s): 16-2050

I, Paul Spruhan, certify that this brief is identical to the version submitted electronically on September 30, 2016, pursuant to Section II, Plicies and Procedures for Filing Via ECF, Part I(b), in all Tenth Circuit Cases

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that a copy of the foregoing Response Brief of Plaintiff – Appellant the Navajo Nation, 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 Malwarebytes Anti-Malware version v2016.09.30.14, as updated through September 30, 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 Response Brief of Plaintiff – Appellant the Navajo Nation was furnished through (ECF) electronic service to the following on this 30th day of September, 2016:

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